RECONCILING INSOLVENCY EFFICIENCY AND ECOLOGICAL ACCOUNTABILITY: TOWARDS AN ENVIRONMENTALLY RESPONSIVE INTERPRETATION OF ARTICLE 6 OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

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ABSTRACT

This paper explores the conflict between the ‘collective’ (efficiency) goals of cross-border insolvency law and the ‘protective’ (restorative) goals of environmental law and examines specifically Article 6 of the UNCITRAL Model Law on Cross-Border Insolvency, 1997. The public policy exception in Article 6 is generally understood as being a limited exception to be used sparingly to ensure international cooperation in the recognition of insolvency. However, with the environmental liability of multinational companies becoming more cross-border, a question is whether public policy grounds can be raised to challenge the discharge or compromise of environmental remediation obligations that are conducted in a foreign insolvency proceeding. Using a doctrinal and comparative approach, this paper reviews the ways in which Article 6, and its counterparts in other countries, have been interpreted by the courts in the United States, Canada, the United Kingdom, Australia and Singapore, and situates environmental norms like the polluter pays principle, sustainable development and intergenerational equity in the context of shifting understandings of public policy. It holds that environmental protection has become a norm of fundamental public policy, if not one that is now fully implementable, and suggests a framework for proportionality, according to which the recognition of rights might be denied or, at the very least, be denied at least in part where serious and irreversible environmental harm would otherwise remain uncorrected. The paper ends with judicial, legislative and institutional suggestions for reconciling efficiency of the insolvency regime with ecological responsibility.

Keywords: cross-border insolvency; UNCITRAL Model Law; Article 6; public policy exception; environmental law; polluter-pays principle; proportionality.

I. Introduction

A. Background

Over the past three decades, enterprise has been rapidly internationalised and so have also been the number of internationalised insolvencies.[1] Multinational corporate groups regularly maintain assets, creditors, and operations in a number of jurisdictions, meaning that if the company suffers financial failure, it can lead to parallel or sequential financial bankruptcies in a number of jurisdictions.[2] [3] To address these issues, states agreed on harmonised recognition regimes, particularly the UNCITRAL Model Law on Cross-Border Insolvency 1997 ("Model Law")[4] [5] which has been increasingly adopted by jurisdictions either in its original form or with amendments.[6] Meanwhile, industrial globalisation has left a legacy of transboundary environmental damage, including polluted places, abandoned mines and ecological debts, frequently tied to bankrupt companies.[7] [8] [9] If a corporation goes into insolvency in a foreign jurisdiction, the foreign proceeding can attempt to discharge or compromise environmental remediation obligations as ordinary unsecured claims and a question then arises whether the recognising court can object on the basis that it would violate its public policy.[10]

B. Problem Statement

Insolvency law is structured in terms of collective, orderly and effective debt resolution; it is a law that weights creditors as fungible claimants that can be paid according to the pro rata split on a finite estate and it values certainty and speed.[11] Environmental Law, on the other hand, is more focused on ecological healing, avoiding irreversible damage and inter-generational responsibility and more and more holds polluters to non-negotiable, non-dischargeable

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1 United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014).
2 Jay Lawrence Westbrook, A Global Solution to Multinational Default, 98 Mich. L. Rev. 2276, 2277–79 (2000).
3 Ian F. Fletcher, Insolvency in Private International Law 3–8 (2d ed. 2005).
4 UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency, pmbl. (1997).
5 UNCITRAL, Legislative Guide on Insolvency Law, Part Four, U.N. Doc. A/CN.9/WG.V/WP.70 (2004).
6 Bob Wessels, International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law 21–29 (5th ed. 2019).
7 United Nations Environment Programme (UNEP), Global Environment Outlook 6 24–33 (2019).
8 Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity 15–27 (1989).
9 Philippe Sands et al., Principles of International Environmental Law 206–15 (4th ed. 2018).
10 UNCITRAL Model Law on Cross-Border Insolvency art. 6 (1997).
11 Jay Lawrence Westbrook, Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation, 76 Am. Bankr. L.J. 1, 5–12 (2002).

obligations to the public in general.[12] [13] The two normative orders are in collision when a foreign insolvency proceeding is alleged to extinguish or dilute environmental remediation obligations and the public policy exception in Article 6 of the Model Law is the key if at all tool available for a recognising court in deciding whether the insolvency efficiency outweighs ecological protection.[14]

C. Research Questions

The scope and the interpretative standard of the public policy exception under the Model Law (Article 6) are addressed in this paper. (iii) May the fundamental rights and freedoms of the individual be violated if their right to a healthy environment is not protected as a "public policy"? (iii) Can the right to health environment be denied to the individual, when it is not considered as a "public policy"? (iii) What is the position of national courts on public policy issues in cross border insolvency cases involving environmental obligations? (iv) If environmental obligations are given greater protection in the context of Article 6, how?

D. Objectives

This paper seeks to outline the doctrinal features of Article 6; to assess whether environmental norms have developed into public policy; to discuss judicial practice in representative jurisdictions; and to put forward a viable interpretative framework that balances a mandate for cross-border cooperation with an environmental duty to ensure accountability.

E. Methodology and Scope

The paper employs a doctrinal and comparative legal research approach, considering primary sources, such as the Model Law, its Guide to Enactment and Interpretation, the UNCITRAL Legislative Guide on Insolvency Law, national insolvency laws and decisions, as well as secondary literature on cross-border insolvency and international environmental law.[15] [16] The

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[12] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, princ. 16, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

[13] Stockholm Declaration on the Human Environment, princ. 21, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

[14] UNCITRAL, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency ¶¶ 86–89 (2014).

[15] Look Chan Ho, Cross-Border Insolvency: Principles and Practice 145–59 (2016).

[16] Bob Wessels & Iain Fletcher, Global Principles for Cooperation in International Insolvency Cases 17–28 (2015).

comparative analysis is limited to the jurisdictions of the United States, Canada, the United Kingdom, Australia and Singapore as they represent the principal Model Law jurisdictions which have established well-developed case law regarding recognition and public policy. The paper does not do an empirical or economic analysis, nor does it discuss purely domestic, non-cross-border, environmental insolvency regimes, unless it is instructive to make a comparison.

II. Conceptual Framework

A. Cross-Border Insolvency

Cross-border insolvency is insolvency proceedings that have a foreign element, meaning the debtor's assets, creditors or corporate structure is spread across two or more jurisdictions.[17] Its main goal is to avoid the disintegration of a single economic activity into uncoordinated, and jurisdictionally separated, proceedings that result in unequal outcomes, a race for assets and low creditor confidence. The three-fold goals are: procedural coordination of concurrent proceedings, creditors' treatment is fair and predictable, regardless of their location, and maximisation of the value of the insolvency estate based on cooperation, not competition.[18] It was especially pressing as trade liberalisation and multinational corporate structures outstripped the territorial limitations of classical insolvency law which historically only extended a court's jurisdiction and the effects of its orders to assets within the forum.[19] The development of the cross-border insolvency doctrine has shifted from strict territorialism to ad hoc judicial cooperation, to "modified universalism" and now to the harmonisation of the various laws and legal systems through the UNCITRAL framework of treaties and models.

B. The UNCITRAL Model Law

The Model Law was adopted in 1997 by the United Nations Commission on International Trade Law (UNCITRAL) in response to the prevailing dissatisfaction among State parties with the fragmentation of bilateral and common-law solutions to the problem of recognition, and was intended to be used as a model rather than a template for domestic laws, to ensure the interoperability of the laws of States parties while also enabling them to adapt the text to fit their own legal context. It aims to foster cooperation between courts and other competent

[17] UNCITRAL Model Law on Cross-Border Insolvency pmbl. (1997).
[18] Jay Lawrence Westbrook, Universal Priorities, 33 Tex. Int'l L.J. 27, 29–36 (1998).
[19] Ian F. Fletcher, The Law of Insolvency 53–60 (5th ed. 2017).

authorities, to provide certainty for trade and investment, to ensure relief for financially troubled but viable businesses, to protect the debtor's assets and to ensure fair and efficient administration of cross-border insolvencies as reflected in the Preamble. Structurally, the Model Law provides a mechanism whereby a foreign representative can apply for a foreign proceeding to be recognised as a "foreign main proceeding" (where the "Centre of Main Interests" ("COMI") of the debtor is located) or as a "foreign non-main proceeding" (where the debtor has only an establishment in the foreign state).[20] Automatic and discretionary relief, such as a stay of individual creditor actions and entrustment of local assets to the foreign representative, will be triggered by recognition. All of them embody the basic operative rules recognition of foreign proceedings, cooperation between courts, coordination of concurrent proceedings, and COMI-based jurisdiction which are commonly referred to as "modified universalism", which is a single controlling proceeding to manage the debtor's worldwide assets with limited local protection.

C. The Public Policy Exception

Article 6 of the Model Law stipulates that 'Nothing in the Law shall stop a court from refusing to take an action governed by the Law if it would be manifestly contrary to the public policy of the enacting State.[21] That exception is intended to be used only in exceptional and limited circumstances, as the Guide to Enactment and Interpretation expressly states,[22] and the use of the term "manifestly" was also carefully chosen to convey the very limited scope of what is meant by "fundamental notions of morality and justice", which the exception is meant to protect.[23] The Legislative Guide on Insolvency Law also warns against the tendency to broaden the definition of the creditors' voluntary winding up.[24] Comparative private international law sees the concept of "international public policy" (order of public policy as the residual part of the fundamental values of a State invoked when enforcing foreign proceedings), as limited in scope to the narrower concept, akin to the ordre public exception in the continental conflict-of-

[20] UNCITRAL Model Law on Cross-Border Insolvency arts. 2, 15–17, 20–21 (1997).
[21] UNCITRAL Model Law on Cross-Border Insolvency art. 6 (1997).
[22] UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation ¶¶ 86–89 (2014).
[23] Id. ¶ 87.
[24] UNCITRAL, Legislative Guide on Insolvency Law, Part Four, Recommendations 240–243 (2005).

laws doctrine[25] and to similar international arbitration or judgment-recognition statements.[26] [27] [28]

III. Environmental Protection as Public Policy

A. From Environmental Principle to Public Policy Norm

In the last 50 years, environmental protection has also shifted from an administrative regulation to now being a recognised constitutional and public policy value in many jurisdictions. Several principle ideas are interdependent and underlie this change. Sustainable development, which was first popularized by the Brundtland Report and now mainstreamed in a variety of global instruments, means that economic activities such as corporate restructuring cannot be carried out at the expense of future ecological capacity.[29] The polluter-pays principle is a principle that imposes the responsibility of the costs of environmental damage on the party that caused the damage, rather than shifting the costs to the public or the environment, and is directly challenged by the current procedure related to insolvency to discharge remediation obligations as unsecured claims in the ordinary course of the proceedings.[30] [31] The precautionary principle advises against taking protective measures only after scientific evidence regarding the type of harm is incomplete, and this is directly at stake when contamination is not measured at the time it is recognised.[32] Intergenerational equity, based on the principle that current generations have the environment in their trust for future generations, is not prepared to insure an irreversible environmental damage on a dollar-for-dollar basis.[33] Equity and fairness in climate change, or climate justice, encompasses this as well, as the disproportionate impact of environmental harms on vulnerable communities and States who did not cause the harm.[34] These principles have moved, however, from soft-law aspirations to either statutory or quasi-constitutional

[25] Look Chan Ho, Cross-Border Insolvency: Principles and Practice 184–90 (2016).
[26] Bob Wessels, International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law 449–58 (5th ed. 2019).
[27] Ian F. Fletcher, Insolvency in Private International Law 397–402 (2d ed. 2005).
[28] Jay Lawrence Westbrook, Chapter 15 at Last, 79 Am. Bankr. L.J. 713, 724–27 (2005).
[29] World Commission on Environment and Development, Our Common Future 41–65 (Oxford Univ. Press 1987).
[30] Rio Declaration on Environment and Development, princs. 15–16, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).
[31] Organisation for Economic Co-operation and Development (OECD), Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies, OECD Doc. C(72)128 (May 26, 1972).
[32] Philippe Sands et al., Principles of International Environmental Law 228–41 (4th ed. 2018).
[33] Edith Brown Weiss, In Fairness to Future Generations 38–49 (1989).
[34] Alexandre Kiss & Dinah Shelton, International Environmental Law 98–112 (3d ed. 2004).

obligations in many state environmental protection regimes, such as environmental rights in the constitutions of many States, statutory environmental remediation programs, and, more recently, judicial acknowledgment of the importance of environmental protection as a State's fundamental public policy.[35]

B. International Instruments as Evidence of Normative Evolution

This development can be followed on the basis of a series of international instruments. The principle that States have a responsibility to prevent environmental damage caused by activities within their jurisdiction was first expressed in the Stockholm Declaration of 1972, which established the principle normatively.[36] This base has been expanded upon in the Rio Declaration on Environment and Development of 1992 with Principle 16, which affirms the polluter pays principle, and Principle 15, which formalizes the precautionary approach.[37] Although the Paris Agreement of 2015 is a climate action agreement that mainly focuses on climate mitigation and adaptation, it has at the same time strengthened the concept of environment harm creating obligations, which States are supposed to internalise and their legal systems to respond to, instead of externalising them in the form of corporate insolvency.[38] The environmental dimension of the Sustainable Development Goals of the 2030 Agenda for Sustainable Development are explicitly integrated into every other dimension of public policy, with the most specific ones being Goal 12 on responsible consumption and production and Goal 15 on life on land, which equates environmental protection with a central pillar of public policy, alongside the economic and social axis.[39] The instruments called up are not meant to imply that environmental treaties are meant to bind the judgments of insolvency courts, but rather to show the extent and uniformity of international consensus that environmental protection has evolved into a norm with a public, as opposed to merely a private or bilateral, nature a norm that is increasingly recognised by the domestic courts when defining their own ordre public.[40]

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[35] G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015).
[36] Stockholm Declaration on the Human Environment, princs. 1, 21 (1972).
[37] Rio Declaration on Environment and Development, princs. 15–16 (1992).
[38] Paris Agreement art. 2, Dec. 12, 2015.
[39] G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, Goals 12 & 15 (2015).
[40] Philippe Sands et al., Principles of International Environmental Law 195–204 (4th ed. 2018).

C. Implications for Article 6

This normative change has repercussions for environmental protection, the protection of which can no longer be considered as a separate economic or regulatory interest outside the framework of the fundamental values of a State. Article 6 is designed to protect a fundamental value, namely the discharge of environmental remediation obligations through a foreign insolvency proceeding can engage the same category of fundamental value as the public policy exception in Article 6 was designed to protect. This does not mean that all environmental claims are eligible, the exception is still quite limited. It creates the conceptual framework for the argument in Part V which is that serious and irreversible environmental damage can meet the "manifestly contrary to public policy" bar, as long as the invocation is disciplined by a structured, rather than unfettered, test.

IV. Judicial Interpretation of Public Policy in Cross-Border Insolvency

A. United States

The United States adopted the Model Law in 2005 by enacting Chapter 15 of the Bankruptcy Code,[41] which includes the public policy exception in section 1506, which allows a court to deny action under Chapter 15 where the action is "manifestly contrary to United States public policy."[42] The provision has been interpreted narrowly by American courts. The Fourth Circuit agreed in *In re Qimonda AG* that allowing a German insolvency administrator to reject patent licences in a way contrary to section 365(n) of the Bankruptcy Code, which was designed to safeguard American licensees of intellectual property, would be "manifestly contrary to the fundamental American public policy of technological innovation."[43] While *Qimonda* was not about environmental issues, it is telling because it demonstrates how section 1506 can be invoked when foreign insolvency law would otherwise prevent the exercise of a specific (and arguably constitutionally protected) policy goal of the statute, in this case protecting IP rights, and provides a blueprint for environmental claims based on similarly clear and statutory protections. In contrast, *In re Toft* reaffirmed, in the same court, that "the exception does not extend to any issue that merely involves a general policy choice or concerns the outer fringes of the fundamental policies of the United States."[44] To date, no American Chapter 15 decision

[41] 11 U.S.C. §§ 1501–1532 (2024).
[42] 11 U.S.C. § 1506 (2024).
[43] Jaffe v. Samsung Elecs. Co. (In re Qimonda AG), 737 F.3d 14 (4th Cir. 2013).
[44] In re Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011).

has been squarely denied on environmental public policy grounds, either because of the rarity of invoking the exception, or because of the absence of a case to date with sufficiently forceful environmental facts.[45]

B. Canada

While in the United States, the case law surrounding the connection between insolvency and environmental obligations is less developed, Canada has had a more extensive body of case law relating to environmental obligations in the context of domestic restructuring proceedings under the Companies' Creditors Arrangement Act[46] rather than in Model Law recognition proceedings. In *Newfoundland and Labrador v. AbitibiBowater Inc.*, the Supreme Court of Canada said that it is the existence, in substance, of no realistic prospect of enforcement to which performance refers that is important for the application to be allowed in a CCAA situation where the province had a genuine desire to ensure a monetary equivalent, and environmental obligations could be set aside alongside ordinary creditor claims.[47] Seven years later, the Supreme Court reached the opposite conclusion in *Orphan Well Association v. Grant Thornton Ltd.* ("*Redwater*") that a bankruptcy trustee should not be able to disclaim environmentally polluting assets to avoid obligations to clean them up or compensate for their damage, because allowing trustees to disclaim would turn public environmental regulators into involuntary creditors paying private reclamation and abandonment costs.[48] While the background of *Redwater* was domestic, its justification that environmental remediation obligations are not just claims to be compromised but are ongoing regulatory obligations to be fulfilled provides a very solid doctrinal basis for considering similar foreign discharge to be manifestly contrary to the Canadian public policy when a foreign proceeding is presented for recognition.[49] [50]

C. United Kingdom

The United Kingdom's practice is based on the modified universalism doctrine of the common law and the English courts provide assistance to foreign main proceedings courts by

[45] Jay Lawrence Westbrook, Chapter 15 at Last, 79 Am. Bankr. L.J. 713 (2005).
[46] Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (Can.).
[47] Newfoundland & Labrador v. AbitibiBowater Inc., 2012 SCC 67.
[48] Orphan Well Ass'n v. Grant Thornton Ltd., 2019 SCC 5.
[49] Stephanie Ben-Ishai & Virginia Torrie, The Continued Relevance of Redwater, 58 Alta. L. Rev. 1 (2020).
[50] Janis P. Sarra, Creditor Rights and the Public Interest in Insolvency Proceedings, 35 Banking & Fin. L. Rev. 289 (2020).

recognising the foreign main proceedings' representative's power over the assets of the foreign debtor, with certain protections, such as public policy. The Privy Council in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*, had a wide interpretation of the common law assistance to foreign proceedings as one of collective execution rather than adjudication of the rights inter partes.[51] In *Rubin v. Eurofinance SA* the Supreme Court of the UK significantly restricted this doctrine and affirmed that the enforcement principles found in *Cambridge Gas* cannot be applied to enforce foreign in personam avoidance judgments against parties who have not made themselves subject to the jurisdiction of the foreign court; traditional private international law safeguards continued to limit recognition, most prominently public policy.[52] The House of Lords also upheld the principle of cooperative assistance to foreign liquidators in *Re HIH Casualty and General Insurance Ltd.* and held that the English courts still had a residual power to refuse assistance where it would be contrary to English public policy or statutory priorities.[53] None of these leading cases concerns environmental remediation, but all of them have a consistent theme: that recognition and assistance continues to be subject to a public policy backstop to be preserved for cases of true conflict with fundamental domestic norms, and that this is analytically compatible with an environmental public policy objection to recognition and assistance under the Cross-Border Insolvency Regulations 2006, which implement the Model Law in the United Kingdom, including Article 6.[54] [55]

D. Australia and Singapore

The courts in Australia, in line with the legislative intent of the public policy exception,[56] have interpreted such exception narrowly, limiting it to cases of truly exceptional public policy concerns, and, like the courts everywhere, have relied on the principle of comity and the cooperative object of the Model Law to restrict the exercise of the power. Incorporated into Singapore law in 2017 through the Third Schedule of the Insolvency, Restructuring and Dissolution Act,[57] Singapore courts have also demonstrated a strong focus on the recognition facilitating purpose of the framework, and applied COMI and procedural issues with a level of

[51] Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC, [2006] UKPC 26.
[52] Rubin v. Eurofinance SA, [2012] UKSC 46.
[53] HIH Cas. & Gen. Ins. Ltd., Re, [2008] UKHL 21.
[54] Cross-Border Insolvency Regulations 2006, SI 2006/1030 (U.K.).
[55] Ian F. Fletcher, Insolvency in Private International Law 447–61 (2d ed. 2005).
[56] Cross-Border Insolvency Act 2008 (Cth) (Austl.).
[57] Insolvency, Restructuring and Dissolution Act 2018 (Sing.).

seriousness, and a degree of caution towards public policy refusal.[58] Both have never had to deal with an environmental public policy claim in a Model Law recognition proceeding but both have adopted a judicial model similar to that of the United States, Canada and the United Kingdom.[59]

E. A Comparative Synthesis

In each of the five jurisdictions, the courts tend to read the public policy broadly enough to support cooperation, but not sufficiently far to allow the enforcement of a foreign insolvency proceeding to reach into the jurisdiction for environmental remediation obligations.[60] Canada's internal law, however, reveals that environmental rights are already being recognized as a sui generis, non-dischargeable interest and that the gap between the doctrine of environmental insolvency and the recognition of environmental interest in cross-border practice is what Part V seeks to fill.

V. Re-examining Article 6: Towards an Environmentally Responsive Interpretation

The foregoing survey highlights the doctrinal shortcomings: the cross-border recognition regime under Article 6 has not been subjected to scrutiny of, or adaptation to, the new law in the field of domestic insolvency, including in Canada. In this Part, the argument is that Article 6 should be re-interpreted, without losing its textual and historical specificity, as a norm of transnational public policy for environmental protection and a structured proportionality test is advanced to ensure discipline in the use of this norm.

A. Environmental Protection as Transnational Public Policy

Part III shows that the principle of environmental protection is no longer just a preference of domestic law, but an emerging consensus of multiple jurisdictions, as expressed in the polluter-pays principle, the precautionary principle and intergenerational equity, all of which have appeared in the constitutional, regulatory, and international-instrumental practices of many jurisdictions.[61] [62] If a norm can be said to meet this degree of cross-national convergence, then

[58] Look Chan Ho, Cross-Border Insolvency: Principles and Practice 223–39 (2016).
[59] Bob Wessels, International Insolvency Law Part I 471–85 (5th ed. 2019).
[60] UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation ¶¶ 86–89 (2014).
[61] Philippe Sands et al., Principles of International Environmental Law 195–241 (4th ed. 2018).
[62] Edith Brown Weiss, In Fairness to Future Generations 37–55 (1989).

it meets the classical private international law criterion of "international" or "transnational" public policy, as opposed to parochial or purely domestic preference, that was anticipated by Article 6.[63] [64] As norms like anti-corruption principles and fundamental fairness have been increasingly recognized as suitable grounds for exemptions from public policy in similar situations like enforcement of arbitral awards, environmental concerns are equally deserving of being recognized as a suitable exemption from public policy, especially in light of its growing constitutional entrenchment, including in Indian environmental law, which makes environmental protection a part of the right to life.[65]

B. Irreversibility as the Organising Criterion

Not every environmental claim is of such a special nature that it deserves Article 6 protection, and the exception must remain exceptional. This paper introduces a criterion for organising that is based on the idea of irreversibility. The ordinary financial obligations are fungible and compromisable because the creditor can, in principle, be put back in the same position again by monetary compensation. The harm done to the environment is often not reparable by a pro rata dividend: ground water contamination, ecosystem destruction, and irreparable soil degradation are all examples. Where the recognition of the foreign proceeding would prevent the possibility of remediation such as the ability to proceed with the liquidation of the debtor's assets prior to remediation of the contamination; or the ability to treat the remediation order as a discharged monetary claim, rather than as a continuing obligation the public policy interest is qualitatively different from an ordinary priority dispute among creditors.[66] This parallels the rationale in *Redwater*, which denied recognition of environmental remediation as a claim for money because of the ongoing, irreplaceable nature of the claim.[67] [68]

C. Grounds for Refusal

On the basis of this, recognition should be subject to conditions in environmental public policy: where toxic contamination or other serious environmental degradation has not been remediated at the site or resource concerned; where the foreign proceeding would make it impossible in

63 Rio Declaration on Environment and Development, princs. 15–16 (1992).
64 Stockholm Declaration on the Human Environment, princ. 21 (1972).
65 Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 S.C.C. 647.
66 Orphan Well Ass'n v. Grant Thornton Ltd., 2019 SCC 5.
67 Janis P. Sarra, Creditor Rights and the Public Interest in Insolvency Proceedings, 35 Banking & Fin. L. Rev. 289 (2020).
68 Philippe Sands et al., Principles of International Environmental Law 228–41 (4th ed. 2018).

practice or significantly weaken the capacity of the recognising State to compel it, such as by discharging the obligation to remediate the pollution or deliver the security, or by removing the sole solvent entity able to remediate the pollution.[69] [70] Together, these conditions prevent the exception from being invoked on an opportunistic or frivolous basis, while still embodying the paradigm case that was most troubling to the drafters, in their insistence on a narrow, principled exception.

D. A Proportionality Test Rather than an Absolute Bar

Lastly, this paper proposes that the public policy exception should not be a hard, fast rule for non-recognition; rather, it should be applied in a structured proportionality analysis that mirrors the requirement of Article 6 to make recognition the exception and not the norm.[71] A court should only refuse the recognition or only grant qualified or conditional recognition, if: (a) there is serious environmental damage in the relevant site or resource; (b) domestic environmental law would be substantially undermined without granting such recognition; (c) there is no remedy in place to mitigate the harm, including an alternative remedy such as a carve-out, escrow arrangement or conditional relief under the discretionary powers already provided in Article 21 of the Model Law granting the court power to impose conditions;[72] and (d) giving the recognition without imposing such conditions would be disproportionate to the environmental harm, and would not have the mitigation effect provided by the alternative remedies.[73] [74] [75] The proportionality structure does not change the core principle of the Model Law on international cooperation that there is no invitation to the court to relitigate the foreign proceeding or generally review the choices made by the foreign courts but at the same time it does not allow environmental harm to be an external cost that can be shifted by polluting companies without their court's consent.[76] This is also in line with the current trend in *Redwater* and with UNCITRAL's own call for cooperative and conditional relief as opposed to general refusal.

[69] UNCITRAL Model Law on Cross-Border Insolvency art. 6 (1997).
[70] UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation ¶¶ 86–89 (2014).
[71] Bob Wessels, International Insolvency Law Part I 471–85 (5th ed. 2019).
[72] UNCITRAL Model Law on Cross-Border Insolvency art. 21 (1997).
[73] Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 340–73 (2012).
[74] Bank Mellat v. HM Treasury (No. 2), [2013] UKSC 39.
[75] Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 7 S.C.C. 353.
[76] Orphan Well Ass'n v. Grant Thornton Ltd., 2019 SCC 5.

VI. Recommendations

A. Judicial

Courts in applying Article 6 or its domestic equivalent should apply an environment-sensitive interpretive approach that allows for the recognition of serious, irreversible environmental harm to meet the "manifestly contrary to public policy" threshold, and that courts make more use of conditional and qualified recognition powers, such as those provided in Article 21 of the Model Law, to balance cooperation with environmental protection instead of seeing recognition as a choice between cooperation and rejection.[77]

B. Legislative

UNCITRAL should make clear, either in an update to the Guide to Enactment and Interpretation or in a supplementary interpretive note, that where appropriate, environmental protection is a public policy exception, and that this exception should not be narrowed.[78] It is suggested that States consider including the obligation to perform environmental remediation as a type of obligation that should be treated with particular scrutiny at the recognition stage, akin to the specific provisions in some jurisdictions that give special protection to IP licensees.

C. International

UNCITRAL, with the cooperation of the United Nations Environment Programme (UNEP) and relevant multilateral environmental organizations, should consider establishing non-binding principles that incorporate an environmental dimension into insolvency proceedings, including treatment of environmental obligations in cross-border insolvency proceedings, financial mechanisms to protect the environment of hazardous enterprises, and cooperation procedures between cross-border insolvency courts and multijurisdictional environmental authorities, based on the existing cooperation between UNCITRAL, INSOL International and the World Bank on judicial insolvency practice.[79]

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[77] UNCITRAL, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency ¶¶ 86–89 (2014).
[78] UNCITRAL, Legislative Guide on Insolvency Law, Part Four (2005).
[79] INSOL Int'l & World Bank Grp., Global Principles for Multi-Creditor Workouts (2017).

D. Domestic

States should make it clear in legislation implementing the Model Law and complementary environmental legislation that the recognition of environmental remediation obligations under the domestic environmental legislation is a public policy interest to which environmental regulators will be entitled to participate in a cross-border insolvency recognition proceeding involving a contaminated site in domestic jurisdiction.[80]

VII. Conclusion

The purpose of this paper was to consider the possibility, and the extent to which, environmental protection can provide guidance to the public policy exception under Article 6 of the UNCITRAL Model Law on Cross-Border Insolvency. It has been demonstrated, by design and by judicial decisions in the U.S., Canada, the U.K., Australia and Singapore, that Article 6 is a narrow exception limited to fundamental violations of domestic public policy and that there is no jurisdiction that has ever directly tested it against environmental remediation obligations in a cross-border recognition proceeding. It has also, however, revealed that environmental protection, as embodied in the concept of polluter pays, the precautionary principle, inter-generational equity and as incorporated into constitutional and international instruments, is also a norm of sufficient normative strength and cross-jurisdictional convergence to satisfy the criteria for public policy in the relevant sense, as demonstrated by the Canadian domestic jurisprudence of *Redwater*. The paper's main argument is that if there is serious and irreversible environmental harm, domestic environmental law would otherwise be unworkable, no alternative remedy is available, and recognising is proportionate to the harm to be avoided, then recognition might be denied, or only allowed under certain conditions. This framework retains the cooperative and certainty-oriented principles of the Model Law and eliminates the risk that cross-border insolvency will be used as a way for polluting companies to shift the costs of their operations to other countries. Article 6 should be applied exceptionally and yet broadly enough in scope of interpretation to guarantee that recognition of foreign insolvency proceedings does not result in irreversible damage to the environment.

[80] United Nations Environment Programme (UNEP), Global Environment Outlook 6 24–35 (2019).