By Richard J. Mason

Will Recent UNCITRAL Projects Impact U.S. Bankruptcy Practice?

In the 1960s, the United Nations formed the United Nations Commission on International Trade Law (UNCITRAL) to promote the flow of international trade.[1] Currently, UNCITRAL has six "working groups" that formulate conventions, model laws and legislative guides designed to harmonize the commercial laws of different countries. One of the working groups, Working Group V, focuses on bankruptcy and reorganizations.[2]

There are 60 member-states that officially participate in the work of UNCITRAL and Working Group V. Non-member states and non-governmental organizations (such as bar associations) also provide comments as observers. Working Group V typically meets twice a year, once in Vienna, Austria, and again in New York. Meetings usually last four days and involve lively discussions among representatives of member-states and observers. The UNCITRAL secretariat produces and circulates draft summaries of the discussions. Once a project is in final form, it is reviewed and voted on by the full commission.[3]

The first major project of Working Group V was the 1997 adoption of the Model Law on Cross-Border Insolvency (the "Cross-Border Model Law").[4] This model law, subject to country-specific adjustments, has been adopted by more than 40 jurisdictions.[5] In 2005, Congress enacted a version of the Cross-Border Model Law as chapter 15 of the Bankruptcy Code.[6] Since 2005, chapter 15 has been employed in hundreds of cases. During the 12-month period ending June 30, 2019, the Administrative Office of the U.S. Courts reported that 138 chapter 15 cases had been filed.[7]

In the last 13 months, UNCITRAL issued two new model laws. The first, adopted by the commission in July 2018, is the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (the "Model Law on Insolvency Judgments").[8] The second, adopted in July 2019, is the Model Law on Enterprise Group Insolvency (the "Model Law on Groups").[9]

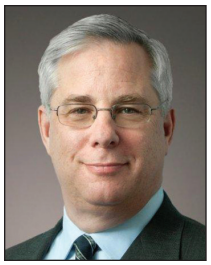
If history is any guide, in the following years the U.S. Congress will study both Model Laws to determine whether to incorporate either or both into the Bankruptcy Code. In the interim, the Model Laws will likely influence bankruptcy judges and professionals in at least cross-border and possibly some domestic cases.

This article provides a brief summary of the issues addressed by the new Model Laws and some of the proposed solutions. As with all summaries of legislation, there is a risk of oversimplification. Thus, the Model Laws need to be examined in their entirety to obtain a full understanding of their provisions.

Recognizing Foreign Judgments

Many U.S. lawyers are surprised to discover that most foreign jurisdictions will not accord "full faith and credit" to final judgments issued by a U.S. court — and bankruptcy-related judgments are no exception. Thus, if a U.S. bankruptcy court issues an order creating a stay, discharging a debt, selling assets free and clear of liens, or confirming a plan, foreign courts will often refuse to enforce it. Similarly, a money judgment issued in connection with a bankruptcy in the U.S. might not be enforceable in another country.[10]

This limitation on final judgments is illustrated by two cases from the U.K. The first, usually referred to as *Gibbs*,[11] held that a discharge of a debt can occur only under the law under which it arose. Thus, the English courts have declined to recognize the discharge of a debt under non-English law. Although *Gibbs* was decided in 1890, it apparently remains a controlling principle in the U.K. courts.[12] In a second recent case, the U.K.'s highest court declined to enforce a U.S. default judgment to recover a fraudulent transfer against a U.K. resident, even though the U.K. resident filed a notice of appearance in the U.S. bankruptcy court,



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1 Other similar organizations that promote consistency among the laws of different jurisdictions include the Hague Convention and UNIDROIT. However, unlike UNCITRAL, these organizations have not produced significant work product in the area of insolvency.
2 *See generally* uncitral.org (the "UNCITRAL Website"; unless otherwise specified, all links in this article were last visited on Sept. 4, 2019). *See specifically* "A Guide to UNCITRAL," UNCITRAL Website (2013) at pp. 3-4 (the "UNCITRAL Guide").
3 UNCITRAL Guide at pp. 5-6.
4 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, which is posted on the UNCITRAL website.
5 The UNCITRAL website has an updated list of jurisdictions.
6 11 U.S.C. § 1501, *et seq.*
7 *See* "Table F-2: Bankruptcy Filings (June 30, 2019)," Administrative Office for U.S. Courts, *available at* uscourts.gov/statistics/Table/f-2/bankruptcy-filings/2019/06/30.
8 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018), posted on the UNCITRAL website.
9 As of the date of this article, UNCITRAL had not yet posted the final version, but it can be accessed as Working Paper A/CN.9/WG.V/WP.165 (2019) on the UNCITRAL website.
10 In contrast, U.S. courts will often enforce non-U.S. money judgments. *See, e.g.*, the Uniform Foreign Money Judgments Recognition Act (1962) and the Uniform Foreign Courts Money Judgment Recognition Act of 2005.
11 *Anthony Gibbs & Sons v. LaSociete Industrielle et Commerciale des Metaux*, [1890] QB 399 at 399-00 (Eng.).
12 *See, e.g., Bakhshiyeva ex. el. Intl. Bank of Azerbijian v. Sberbank of Russia*, [2018] EWCA (Ch) 59 [158(1)] (Eng.).

which found it had personal jurisdiction over the defendant under U.S. law.[13]

The Model Law on Insolvency Judgments can be added to the domestic bankruptcy law of a jurisdiction but probably works best as a complement to a provision like chapter 15 of the Bankruptcy Code. The Model Law creates a procedure by which a foreign insolvency representative or other party with standing can obtain recognition and enforcement in the enacting country of an insolvency-related judgment issued by a foreign court.[14]

In general, the covered judgments are ones that relate to a liquidation or reorganization proceeding, were issued after the commencement of that proceeding, and affect the estate.[15] The court in the enacting jurisdiction must or may refuse recognition under certain circumstances, such as where the judgment (1) is "manifestly contrary" to the public policy of the enacting state; (2) is not enforceable in the issuing state; (3) was entered without granting the defendant proper procedural safeguards; (4) was obtained by fraud; (5) conflicts with another judgment in another jurisdiction; or (6) confirms a plan or out-of-court restructuring agreement, or grants a debt discharge, and the "interests of creditors or other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued."[16]

If widely enacted, the Model Law on Foreign Judgments would go a long way toward making final judgments issued in bankruptcy cases enforceable across country lines. However, because of the broad exceptions, some of which give courts considerable discretion, recognition and enforceability might still be an open question if a dissenting party presents a challenge. For example, a creditor opposing a plan confirmed in a foreign court might be able to defeat enforceability if it can show that its interests were not "adequately provided," however that concept is ultimately interpreted.

Coordinating Group Enterprises

The Model Law on Groups aims to reduce the inefficiency, duplication and lack of coordination that frequently takes place when related entities are liquidated or reorganized in separate proceedings. The Model Law would be of greatest use in cases like *Lehman Brothers*, *Nortel* or *Takata*, where related debtors' operations give rise to substantial insolvency proceedings in more than one country.

The law creates a framework for the appointment of a "group representative" to coordinate the development of an overall strategy known as a "group insolvency solution" in a "planning proceeding" commenced in a jurisdiction where at least one "group member" has its center of main interest.[17] When a "group representative" is appointed, the law promotes cooperation "to the maximum extent possible" among the "group representative," other insolvency representatives and the participating courts.[18] The law also permits a court in the enacting country to conduct a hearing in coordination with another foreign court.[19]

Upon appointment, the "group representative" can apply for recognition in other jurisdictions and receive various forms of provisional and final relief in furtherance of the goals of coordination and efficiency.[20] If the Model Law on Groups were in force in jurisdictions where related debtors were subject to insolvency proceedings, parties would likely find it much easier and less expensive to obtain post-petition financing across borders, adjudicate disputes involving more than one jurisdiction, sell assets in multiple jurisdictions, and formulate and confirm coordinated restructuring plans.

The Model Law on Groups is more complex than the Model Law on Insolvency Judgments and seems to contain more open issues, including how to determine whether debtors are "related" and who will serve as the "group representative." Further, it might not work well if a substantial member of a debtor group is the subject of an insolvency proceeding in a jurisdiction that has not enacted the Model Law.

At its December 2019 meeting in New York, Working Group V plans to conduct colloquia on two subjects under consideration for future model legislation: choice of law and asset-tracing, and recovery in insolvency proceedings. The choice-of-law project is certain to be an ambitious undertaking. In response to requests by the World Bank, Working Group V is also currently working on a legislative guide for the insolvency of micro, small and medium-sized enterprises.

Multi-jurisdictional bankruptcy will undoubtedly be one of the next frontiers for bankruptcy professionals. Even if Congress finds that some of the provisions of UNCITRAL's Model Laws are inconsistent with U.S. policy, these Model Laws provide a good starting point for considering Bankruptcy Code amendments. At a minimum, the Model Laws (and Guides to Enactment) offer thoughtful solutions for bankruptcy judges and professionals confronting difficult questions posed by bankruptcy cases with international features. In general, the Guides provide commentary on the policies underlying the related Model Law. abi

13 *Rubin v. Euvofinance SA*, [2012] UKSC 46 [2013] 1 AC 236 (Eng.).
14 Article 10.
15 Article 2(d).
16 Articles 7 and 13.
17 Articles 2, 13, 14, 15 and 19.
18 Articles 9 and 10.
19 Article 12.
20 Articles 20, 21 and 22.