AMERICAN BANKRUPTCY INSTITUTE

2022 International Insolvency & Restructuring Symposium

Road to Adoption: U.K.'s Consultation on the Implementation of Two UNCITRAL Model Laws

Presented by the International Insolvency Institute (III)

Harold Foo, Moderator
Singapore Ministry of Law | Singapore

Hon. Allan L. Gropper
U.S. Bankruptcy Court (S.D.N.Y.) | New York, U.S.A.

Mark Phillips, KC
South Square | London, U.K.

Prof. Irit Ronen-Mevorach
University of Nottingham Commercial Law Centre | Nottingham, U.K.

2022

GOV.UK

The Insolvency Service (https://www.gov.uk/government/organisations/insolvency-service)

Closed consultation

Implementation of two UNCITRAL Model Laws on Insolvency Consultation

Published 7 July 2022

Applies to England, Scotland and Wales

Contents

This publication is available at https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation

Introduction

Executive Summary

This consultation proposes the implementation into UK law of two "model laws" adopted by the United Nations Commission on International Trade Law ("UNCITRAL), further developing the international framework for the management of cross-border insolvencies. By being amongst the first countries to consider their implementation, the UK will signal its ongoing commitment to mutual cooperation and international best practice.

The Model Law on Recognition and Enforcement of Insolvency-Related Judgments (https://uncitral.un.org/en/texts/insolvency/modellaw/mlij) deals with cross-border recognition of judgments that are associated with insolvency proceedings. The Model Law on Enterprise Group Insolvency (https://uncitral.un.org/en/MLEGI) provides tools to manage and coordinate insolvencies within corporate groups, while respecting that each company within the group remains a separate legal entity. These two model laws would join and complement the Model Law on Cross-Border Insolvency (https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency), which provides a grounding framework for international cooperation in respect of insolvency proceedings, and which the UK implemented in 2006 and 2007.

Cooperation between nations on insolvency related matters is generally mutually beneficial. Avoiding unnecessary insolvency proceedings and the piecemeal destruction of viable businesses helps to preserve value throughout the insolvency, increase returns to creditors and protect employees' jobs. International recognition of insolvency proceedings and related legal decisions makes the different national insolvency regimes accessible to business, allowing them to choose the most appropriate jurisdiction in which to restructure or liquidate based on their needs and the requirements of their creditors.

Implementation of the model laws can be achieved through a power introduced in the Private International Law (Implementation of Agreements) Act 2020. This consultation highlights one issue in particular that affects the Model Law on Recognition and Enforcement of Insolvency-Related Judgments: its interaction with the unique position that contracts governed by the law of England and Wales currently hold. We are proposing that this model law should be partially implemented, in a way that reserves that issue for future consideration. The Model Law on Enterprise Group Insolvency is proposed to be implemented in full.

Glossary

This consultation makes use of a number of uncommon abbreviations, which are introduced at various points throughout the text. For convenience these are also reproduced below:

CBIR

the Cross-Border Insolvency Regulations 2006, and the Cross-Border Insolvency Regulations (Northern Ireland) 2007, which together provide a basis for the recognition of foreign insolvency proceedings in the UK, and for assistance to be provided to foreign insolvency officeholders.

MLCBI

The UNCITRAL Model Law on Cross-Border Insolvency, which has been implemented in the UK through the CBIR.

MLEG

the UNCITRAL Model Law on Enterprise Group Insolvency.

MLIJ

the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

UNCITRAL

the United Nations Commission on International Trade Law.

The UNCITRAL Model Laws on Insolvency

The United Nations Commission on International Trade Law ("UNCITRAL") was established in 1966 to "further the progressive harmonization and modernization of the law of international trade" through the development of legislative and non-legislative instruments in several key areas of commercial law. Its 60 members are drawn from the member states of the United Nations, elected for six year terms by the General Assembly, with membership allocated so as to include representation from various geographical regions and the principal economic and legal systems throughout the world. The UK is actively involved in the Commission's work and was re-elected as a member in 2019. The Commission's work has included insolvency law since 1995: notably publishing the UNCITRAL Model Law on Cross-Border Insolvency in 1997, as well as a legislative guide on insolvency law (https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law) to assist states in implementing international best practice, initially in 2004.

The model law has been implemented in 48 states worldwide and represents a significant step forward in international cooperation on insolvency matters. It provides a template for the implementing states, with their separate legal systems, to subscribe to a common framework for the recognition and enforcement of foreign insolvency proceedings.

Where there is a foreign insolvency, this framework makes the process of handling of assets located within the implementing state more predictable for the foreign insolvency practitioner. This allows the insolvency to proceed as efficiently as possible, reducing costs and so increasing returns to creditors, and promoting trade between nations. Mutually implementing states benefit, as their insolvency professionals can cooperate in dealing with the insolvency of a cross-border or multi-national entity under a set of rules that are understood in both jurisdictions. The original Model Law was implemented in UK through the Cross-Border Insolvency Regulations 2006 (which apply to England, Wales and Scotland); and the Cross-Border Insolvency Regulations (Northern Ireland) 2007. These supplement the other means of obtaining assistance that may be available in respect of foreign insolvencies under the common law, or in England and Wales for example through court to court cooperation under section 426 of the Insolvency Act.

UNCITRAL's work on insolvency has continued, and the Commission has recently adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (in 2018) and the Model Law on Enterprise Group Insolvency (in 2019). These both expand and further develop the framework provided by the original Model Law.

Recognising insolvency-related judgments

A foreign court's involvement with insolvency proceedings does not always end with its opening of the proceedings in its jurisdiction. Further orders or judgments may be necessary in order to manage the insolvency effectively: this occurs most obviously in the event of disputed assets where the ownership or most appropriate disposal is in doubt, but could happen in relation to almost any aspect of the case.

The original Model Law on Cross-Border Insolvency did not explicitly specify the extent to which insolvency-related judgments can be recognised and enforced under its rules. As a result, how this works has depended in part on the implementing jurisdiction. In the UK for example, the Cross-Border Insolvency Regulations have been interpreted as only allowing the court to provide the relief that would be available in domestic insolvency proceedings under UK law [Pan Ocean Co Ltd – also known as Fibria Celulose S/A v Pan Ocean [2014] EWHC 2124 (Ch)]. A foreign insolvency judgment cannot currently be enforced here under the Cross-Border Insolvency Regulations; while more generally, common law holds that foreign judgments cannot be enforced in England and Wales unless the parties were present in or in some sense submitted to the foreign jurisdiction [Rubin v Eurofinance SA [2012] UKSC 46]. The ambiguity in the original Model Law leaves a gap in the coordination of

international insolvency proceedings, with different countries taking different approaches as to what is acceptable, thus making the proceedings less efficient and their outcome less certain.

The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments takes steps towards resolving this situation. It provides a stand-alone framework that, while building in the necessary safeguards against situations that would compromise public policy, allows the implementing state to recognise and enforce foreign insolvency-related judgments in a predictable way. An optional provision excludes judgments that relate to insolvency proceedings that cannot be recognised under the original Model Law: for example, if the judgment does not originate in a jurisdiction where the insolvent debtor has their centre of main interests or an establishment. This balances the efficiency of operating a single global set of insolvency proceedings against the need to ensure that those proceedings are fair and safeguard the interests of local creditors. The judgments Model Law also offers an alternative approach to the recognition of judgments for states that have already implemented the original Model Law, through the explicit clarification that it is possible for the court to recognise and enforce a judgment as part of the assistance available to foreign officeholders under that law.

Insolvency in corporate groups

The UNCITRAL Model Law on Enterprise Group Insolvency expands the system under the original Model Law on Cross-Border Insolvency to deal with situations affecting interlinked groups of enterprises. The original Model Law provides a framework for international cooperation as regards the insolvency of a single entity, and the rules provided by this new Model Law address situations where, for example, several companies share the same owners and are operated as a group, and one or more of those businesses enters insolvency.

The new Model Law aims to promote cooperation and coordination between the courts, insolvency practitioners and other bodies dealing with the insolvency of group members, with a focus on the development of group proposals that will protect, preserve, realise or enhance the overall combined value of the members.

The value of international cooperation to the UK

One of the primary drivers for the development of efficient insolvency proceedings is the preservation of economic value, and its return to the marketplace to spur further growth. In implementing any new rules in this area, it is important to consider the impact on the UK's own commercial environment and any effect on our insolvency sector carrying out that work.

Such an economic analysis is not straightforward. Restructuring can occur within formal insolvency proceedings, which in the UK may be initiated in or out of court with varying levels of judicial oversight and publicity. As the arrangements reached between debtors and their creditors can be commercially sensitive, the detail may not always be made public. At the same time, it is possible for a company to reach an agreement with its creditors against the backdrop of the UK's insolvency framework without entering formal insolvency. In those cases where formal insolvency proceedings are commenced, any cross-border element may not be readily apparent to an outside observer, making the capture of relevant cases for examination a difficult task in its own right. With this in mind, it is not possible to accurately measure the impact of any changes to the insolvency framework in this area in monetary terms.

There is, however, strong reason to suggest that the UK's participation in systems of global cooperation on insolvency matters is widely beneficial, both to the UK and its international partners. Efficient insolvency proceedings mean greater returns to creditors. That strengthens economic activity, both within the UK and abroad. By removing the barriers that prevent insolvencies from being dealt with in a holistic fashion, rather than piecemeal in each jurisdiction, the value that is present in a business as a going concern can be better preserved: direct returns from insolvency are boosted, and jobs and livelihoods maintained; the economic disruption from the business failure is minimised. Cooperation between jurisdictions in this way helps to bolster international trade by setting clear expectations as to how matters will be handled in the event that one of the parties to a contract becomes insolvent.

The UK's insolvency regime is highly respected internationally for its flexibility, efficiency and reliable outcomes, while our courts and legal and insolvency practitioners are valued for their professional expertise and experience. Global cooperation allows international businesses to choose to restructure in the UK, knowing that this will lead to the best result for their creditors, shareholders and management, with confidence that the outcome will be accepted both in their local courts and across the world. As Britain faces outward following its departure from the EU, we remain well-placed to continue to lead the way in this area.

Implementing the new model laws

Together, the two new model laws represent useful additions to the international toolbox for cooperation in respect of insolvency proceedings. By taking a place among the first countries to consider their implementation, the UK continues to signal its commitment to that cooperation and the sponsoring of international best practice.

In making the necessary choices regarding the implementation of the Model Law dealing with insolvency-related judgments, we have taken account of concerns that have been raised regarding its interaction with other UK law. These are discussed briefly below. There is a risk that the full implementation of the Model Law could have as yet unanticipated effects upon domestic contract law. We consider that we should

proceed with caution in its implementation, and preserve flexibility for UK courts to choose to recognise judgments issued in foreign jurisdictions based on the full circumstances of each case.

We have therefore chosen not to implement the system of recognition provided by the full “judgments” Model Law. We instead propose to implement its “article X”. This would introduce the concept of recognition of insolvency-related judgments under the UNCITRAL Model Laws to the UK in a way that minimises the impact on our existing legal framework. In doing this we will draw upon other parts of the Model Law in order to provide guidance to the courts, detailed later in this document.

The Model Law on enterprise group insolvency provides additional options to the UK’s courts and insolvency professionals. As it does not have the same wider implications as the other new judgment Model Law, we propose to implement it in full as soon as possible.

The practical implementation of the model laws is facilitated by the powers under the Private International Law (Implementation of Agreements) Act 2020) [Section 2(13), “Implementation of other agreements on private international law”]. This allows the implementation of international model laws through secondary legislation, rather than requiring a further Act of Parliament. Subject to the outcome of this consultation, we will make use of this power to implement both “article X”of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments and the Model Law on Enterprise Group Insolvency.

We have set out below details of the approach that we propose to take in implementing each of the model laws, and their impact on the UK’s existing legal framework: this consultation will help us to understand the views of the insolvency sector and others who may be affected by the change.

Impact on Devolved Administrations

Insolvency policy is devolved to Northern Ireland, which is not directly affected by the outcome of this consultation.

Insolvency law is part devolved to Scotland, and the consultation touches on a range of reserved and devolved matters. The implementing power that we expect to use requires that the Secretary of State acts with the consent of Scottish Ministers in making regulations that have effect in Scotland.

Insolvency is a reserved area of policy as regards Wales.

Notwithstanding the areas in which insolvency policy is devolved, we consider that it is important to maintain a unified approach to the recognition of foreign insolvency proceedings and judgments throughout the UK. The changes proposed in the consultation will be further discussed with the devolved administrations in Northern Ireland and Scotland in order to facilitate this.

About this Consultation

Who this is for

This consultation is intended to be read by, and seeks responses from, anyone with an interest in the UK's adoption of the two model laws. It may be relevant to anyone affected by the UK's recognition of foreign insolvency proceedings and related judgments; or the management of the insolvency of corporate groups.

This may include:

- Insolvency practitioners
- The legal profession
- Directors
- Creditors
- Business and consumer groups

Responses are particularly sought from individuals and organisations dealing with cross-border insolvency work.

How to respond

Responses to the consultation should be addressed to Andrew Shore at the Insolvency Service. We would encourage all responses to be sent by email rather than physical post, for the attention of Andrew Shore, to Policy.Unit@insolvency.gov.uk.

Physical written correspondence may be sent (please use the full address below):

> FAO Andrew Shore, Policy
> The Insolvency Service
> 16th Floor, 1 Westfield Avenue
> London
> E20 1HZ

Please include, when responding, your background or interest in this area (e.g. if you are an insolvency practitioner and/or a legal professional). If you are responding on behalf of an organisation or group, please indicate this.

Enquiries

Please address all enquiries to Andrew Shore using the above contact details.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential please tell us, but please be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our privacy policy (https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy/about/personal-information-charter).

We will summarise responses and publish this summary on GOV.UK. The summary will include a list of names of organisations that responded, but not people's personal names, addresses or other contact details.

What happens next?

This consultation addresses the requirement for public consultation in the Private International Law (Implementation of Agreements) Act 2020, allowing regulations to implement the model laws to be brought forward under that Act. In order to maintain a unified framework within the UK, such legislation will require further discussion, agreement and coordination with the devolved administrations as highlighted above.

UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

The Government accepts that it is not appropriate to implement the model law on insolvency-related judgments in full at the present time. Implementing "article X", will enable the courts to recognise foreign insolvency-related judgments as relief under the UK UNCITRAL Model Law on Cross-Border Insolvency. We will provide a framework for the courts to use, in deciding whether to recognise an insolvency-related judgment in this way, that reflects elements of the full model law.

Background

The Model Law on Recognition and Enforcement of Insolvency-Related Judgments ("MLIJ") addresses the disparity in the handling of insolvency-related judgments that arises due to the legal differences between different jurisdictions, by providing a simple, straightforward and harmonised procedure to complement and clarify the original Model Law on Cross-Border Insolvency ("MLCBI") and assist with the conduct of cross-border insolvency proceedings. It was developed with reference to the documents published by the "Hague Conference on Private International Law", the principal organisation that sets international best practice on the recognition of non-insolvency foreign judgments. Although the Hague Conference's instruments exclude insolvency proceedings from their scope, maintaining a compatible approach between the two is in the interests of moving towards a consistent international framework for private international law as a whole.

The MLIJ sets out rules under which an implementing country can recognise and enforce foreign insolvency-related judgments in a predictable way. These stand alone and (aside from "article X" which is covered below), separately from the MLCBI's own rules regarding the assistance that can be provided in respect of foreign insolvency proceedings. For the purposes of the model law, insolvency-related judgments are those judgments, issued on or after the commencement of insolvency proceedings, that arise as a consequence of, or are "materially associated" with, the proceedings. The judgment that opened the proceedings is excluded and dealt with under the MLCBI, and together the two model laws provide a comprehensive approach to the recognition and enforcement of both insolvency proceedings and subsequent related judgments.

The MLIJ aims to provide:

- A simple, clear-cut process for the recognition and enforcement of insolvency-related judgments originating from foreign jurisdictions.
- The option for the court to provide interim relief (e.g. ordering steps for the immediate protection of an asset that is affected by the foreign judgment) while it is deciding whether to recognise a judgment, preserving assets and value that might otherwise be lost.
- As much certainty as possible that insolvency-related judgments will be recognised and enforced, where they do not contravene the implementing country's public policy, by mandating that foreign judgments will be accepted unless several specific requirements for refusal are met.
- An option to refuse recognition where the insolvency proceeding to which the judgment in question relates could not be recognised under the MLCBI.

- Severability: where only one element of a multi-part judgment can be recognised and enforced (e.g. as other parts of the judgment relate to matters that fall out of scope) that element will still be recognised and enforced in isolation from the rest of the judgment.

The MLIJ includes one provision, “article X”, that is intended to be added to the MLCBI. Article X states that the recognition of insolvency-related judgments is a form of assistance that can be granted under the MLCBI. It removes the ambiguity previously present in the MLCBI in that area, and confirms a regime for the recognition of insolvency-related judgments through the MLCBI. That system differs in some particulars from that of the “full” MLIJ. Most importantly, relief granted under the MLCBI is always at the discretion of the receiving court, in contrast to the generally mandatory recognition that the MLIJ rules impose.

In our view the differences between the full MLIJ system and the system provided by article X (when it is added to the MLCBI) require states that are considering the implementation of both model laws, and that wish to maintain a single coherent approach, to make choices between the two. These are further explored below.

Further detail regarding the MLIJ and additional resources can be obtained via the UNCITRAL page at:

https://uncitral.un.org/en/texts/insolvency/modellaw/mlij (https://uncitral.un.org/en/texts/insolvency/modellaw/mlij)

Legal impact in the UK

The MLIJ is a free-standing model law focusing only on the recognition and enforcement of insolvency related judgments. Importantly, while it is designed to complement and clarify the MLCBI, it is not dependent on the prior or simultaneous adoption of that earlier model law.

The MLIJ has effect in two areas. Firstly, it addresses the question of whether the recognition and enforcement of an insolvency related judgment is a relief available to assist foreign insolvency representatives under (article 21 of) the MLCBI.

Article X of the MLIJ relates directly to this issue:

“Notwithstanding any prior interpretation to the contrary, the relief available under […article 21 of the UNCITRAL Model Law on Cross-Border Insolvency] includes recognition and enforcement of a judgment.”

With this provision UNCITRAL makes clear that under the MLCBI it is envisaged that the relief available under article 21 does include the recognition and enforcement of a judgment. We expect that the effect would be to set aside the approach taken in the

previous judgment of the Supreme Court in Rubin v Eurofinance in respect of the recognition of foreign insolvency-related judgments, i.e. article 21 of the MLCBI did not encompass their recognition and enforcement.

The MLIJ's main focus though is to make specific freestanding provision for the recognition and enforcement of insolvency related judgments. It sets a framework for the recognition and enforcement of judgments and for the instances when the courts are to be able to refuse recognition and enforcement on jurisdictional or on other grounds.

Crucially it deals only with what is in effect a subset of the reliefs available under article 21 of the MLCBI (because the reliefs available are now known to include the enforcement of insolvency related judgments). In this regard there now seem to be two ways to adopt model laws relating to insolvency-related judgments, and the impact in the UK of implementation of both parts of the Model Law would be the creation of two different systems for the recognition and enforcement of insolvency-related judgments. The system described in the full MLIJ is not a straightforward duplication or restatement of the system that would be created in the MLCBI through the adoption of article X. In our view, therefore, implementing both systems would represent unnecessary and confusing duplication.

The approach adopted by article 14(g) of the MLIJ is different from that taken by the MLCBI in respect of the rules as to jurisdiction of the foreign court. Instead of requiring the debtor to have a centre of main interests or establishment in the jurisdiction of the court of the foreign judgment, the requirements are that one of four criteria are met (for example that the affected party consented, or that they submitted to the proceedings).

Under the MLIJ if a judgment is recognised it must be enforced.

As previously indicated, the MLCBI and MLIJ are designed to be free-standing. There is no "Guide to Enactment" regarding the joint enactment of these model laws together. It is clear however that states wishing to provide a unified framework for the recognition and enforcement of insolvency-related judgments will need to make certain choices.

The "Rule in Gibbs"

One consequence of implementing the full MLIJ would be to undermine the "rule in Gibbs", which was first established in a case brought by Antony Gibbs & Sons [Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399] in 1890. This long-standing caselaw in England and Wales holds that where a contract specifies that it is governed by a particular country's law, it cannot be compromised or discharged by insolvency proceedings under a different law. As many international contracts specify the law of England and Wales as their governing law, in the eyes of the courts of England and Wales a restructuring using insolvency

proceedings in a foreign jurisdiction cannot be effective against the debts owed under those contracts, unless the affected parties have taken part in the proceedings or otherwise submitted to them. Such debts remain outstanding after the foreign insolvency proceeding concludes, and can then be pursued against any assets the insolvent company or individual may hold here.

The Gibbs rule may cause particular difficulty for foreign companies that are seeking to restructure their debts in their native jurisdiction, if they also have interests in the UK and contracts governed by the law of England and Wales. This can lead to convoluted and inefficient results. In proceedings relating to the OJSC International Bank of Azerbaijan [OJSC International Bank of Azerbaijan v Sberbank of Russia [2018] EWCA Civ 2802 (also known as: Bakhshiyeva v Sberbank of Russia)], the courts of England and Wales' refusal to stay the creditors' rights to enforce their debts beyond the end of Azerbaijani restructuring proceedings led to those proceedings remaining open indefinitely. In some cases a separate scheme of arrangement governed by the law of England and Wales might be entered into in order to resolve the issues the rule in Gibbs creates, but with consequent duplication of effort, higher costs and reduced returns to creditors.

In many situations, knowing the law that a contract will be adjudicated under provides greater certainty of outcomes for the contracting parties, and so supports international trade. By contrast, the inefficiency of enforcing this jurisdictional rule in insolvency scenarios, over the more commonly recognised test of where the insolvent's "centre of main interests" is located, could be considered to have the opposite effect. The approach of the law of England and Wales to this issue pre-dates modern thinking on the management of cross-border insolvencies, and its emphasis on the value of cooperation between jurisdictions for the benefit of creditors. The discrepancy has been the subject of negative commentary internationally, including from courts in Singapore [See Pacific Andes Resources Development Ltd and other matters [2016] SGHC 210] and the United States [See In Re Agrokor d.d., 591 B.R. 163 (Bankr. S.D.N.Y. 2018)], which have taken an opposite view to that of the courts of England and Wales.

Implementation of the MLIJ in full in the UK would provide foreign courts with the means to override the rule in Gibbs, through an "insolvency-related" judgment regarding the contracts governed by the law of England and Wales, provided that they are exercising their jurisdiction in a way that is compatible with the law of England and Wales and none of the other grounds for refusing recognition apply.

The addition of article X to the MLCBI clarifies the interpretation of Article 21 of that model law. However, without the implementation of the rest of the MLIJ it will not itself override the rule in Gibbs (see "Proposals", below).

Additional impacts

The MLIJ could have further consequences that are particular to the UK's legal system and the popular use of contracts governed by the law of England and Wales for international business, including financial contracts (such as those governing international swaps and derivatives [As of 2018 ISDA noted that "virtually all" of the ISDA master agreements entered into between counterparties based in the EU or EEA were governed by the law of England and Wales. This position may change, following the UK's exit from the EU and ISDA's issue of French- and Irish- law governed master agreements.]). Contracts governed by the law of England and Wales hold a unique position in their widespread international use combined with the certainty that the rule in Gibbs provides to the contracting parties.

We are not aware of any evidence to demonstrate the extent to which this certainty has played a part in the choice of the law of England and Wales for particular contracts or types of contract; nor the impact that the loss of that certainty might have.. Although the rule in Gibbs was effectively negated as regards European restructurings by the EU's Insolvency Regulation and remains subject to reinterpretation and review by the courts as the caselaw develops, this remains an area of concern.

The long-term economic value of the UK's ongoing participation in international systems of cooperation in this area, and the efficient management of insolvency proceedings have to be balanced against the short-term disruption that the MLIJ would create for our insolvency sector.

There is a tension between the need to develop new ways of cooperating internationally, especially following our departure from the EU, and the need to retain as much as possible of the existing certainty in how insolvencies are managed in the current global economic climate following the pandemic. We need to strike a balance between offering some certainty to the sector whilst at the same time forging new relationships and enhancing our ability to deal with cross border insolvencies.

Proposals

The UK remains committed to the development of international cooperation in insolvency matters. However, in order to maintain some certainty, we do not consider that it would be appropriate to implement the full MLIJ at the present time.

We therefore propose to give effect to "article X" in the Cross-Border Insolvency Regulations 2006, i.e. the UK's implementation of the MLCBI. This will enhance the UK version of the MLCBI by allowing the courts discretionary power to recognise and enforce foreign insolvency-related judgments where it is appropriate to do so.

Implementing this change will require secondary legislation, using the power contained in the Private International Law (Implementation of Agreements) Act 2020.

Article X

This provision of the MLIJ is intended to be added to the MLCBI, to create greater uniformity in interpreting the assistance that can be provided to foreign insolvency proceedings:

Article X. Recognition of an insolvency-related judgment under [the Cross-Border Insolvency Regulations 2006]

Notwithstanding any prior interpretation to the contrary, the relief available under [article 21 of schedule 1 to the Cross-Border Insolvency Regulations 2006] includes recognition and enforcement of a judgment.

Implementing article X will provide a new route for foreign insolvency-related judgments to be recognised in the UK. We expect it will set aside the ruling in Rubin v. Eurofinance to the extent that it was held that article 21 of the Cross-Border Insolvency Regulations 2006 does not extend to the recognition of a judgment, and our intention is that it should be possible for a foreign insolvency-related judgment to be recognised in the UK where this will assist foreign insolvency proceedings that have also been recognised.

Recognition of the judgment in this manner will be at the court's discretion. In applying article X, we expect that UK courts will continue to have regard to other UK law and to apply the safeguards specified in the Cross-Border Insolvency Regulations. For this reason we do not anticipate, and it is not our intention, that the addition of article X will affect the application of the rule in Gibbs to the rights of creditors who have contracted with the insolvent under the law of England and Wales.

In order to give effect to article X in the UK, we will add a reference to it on the list of documents specified in regulation 2(2) of the Cross-Border Insolvency Regulations 2006, which implement MLCBI in Great Britain. Regulation 2(2) lists documents to which the courts in Great Britain may look in ascertaining the meaning of the MLCBI. Currently these documents are specified as the MLCBI itself, UNCITRAL documents relating to the preparation of the MLCBI, and the original Guide to Enactment from 1997.

We will also take the opportunity to update the same regulation to take account of the publication by UNCITRAL of "The Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation" (the updated Guide to Enactment of the MLCBI) in 2014. This incorporates updated guidance on the interpretation of the insolvent's "centre of main interests" and other clarifications to the earlier guidance issued in 1999.

As well as these additions to the list of documents under regulation 2(2), we will insert a new regulation that will provide a list of discretionary, illustrative, and non-exhaustive grounds of refusal, that courts can rely on when deciding whether or not to recognise and enforce a foreign judgment under article 21 of the MLCBI. This list will build on article 14 of the MLIJ (see "Process of recognition", below).

Process of recognition

Under the MLCBI there is an established process for the recognition and enforcement of a foreign insolvency proceeding.

An application will be made by the foreign representative; the court will consider whether interim relief to assist in managing the insolvent's affairs is appropriate while the matter is examined

Article X stipulates that relief can include the recognition of a foreign judgment relating to the insolvency. As article X states that this relief is available under article 21 of the MLCBI, which is the provision that allows relief to be granted following the recognition of a foreign insolvency proceeding, the recognition of judgments is only explicitly available once a related insolvency proceeding has itself been recognised.

Neither the MLCBI nor article X address the question of whether a judgment should, or should not, be recognised. The approach taken in the wider MLIJ is helpful in this regard, and we therefore propose to provide a non-exhaustive list of factors that the court may take into account when deciding whether or not to recognise a judgment. These will be based primarily on article 14 of the MLIJ, which states that recognition may be refused where (in short):

- A defending party was not given sufficient notice to arrange their defence;
- The judgment was obtained by fraud;
- The judgment is inconsistent with a UK court's judgment in respect of the same parties;
- The judgment is inconsistent with an earlier judgment in another foreign jurisdiction that would also be recognised in the UK;
- The enforcement of the judgment would interfere with the administration of the debtor's insolvency proceedings;
- Creditors' rights were not adequately protected; or
- The defending party did not submit to the foreign jurisdiction and the originating court did not otherwise exercise jurisdiction on a basis that is compatible with UK law.

In addition, the court will be required to have regard to public policy in the UK.

In contrast to the system contained in the full MLIJ, the court will retain its discretion as to the relief granted. The court will retain discretion to recognise a judgment even if one of the above factors applies, if that is appropriate, or to apply another relevant factor in deciding not to recognise a judgment.

Further review

In a number of areas, greater clarity may be expected in the coming years. We will continue to monitor the situation in the expectation that, in due course, , it will be right to re-examine the rule in Gibbs and its impact. We will also provide the opportunity for affected parties to assess their risk and make additional representations to us, by returning to this subject in a future call for evidence.

Questions

As explained above, we propose to:

1. Allow the recognition and enforcement of insolvency-related judgments in the UK by adding article X of the MLIJ to the list of documents in regulation 2 of the Cross-Border Insolvency Regulations 2006;
2. Provide the court with a non-prescriptive list of possible grounds for refusal to recognise and enforce an insolvency-related judgment, based primarily on article 14 of the MLIJ; and
3. Update regulation 2 of the Cross-Border Insolvency Regulations 2006 to take account of the clarifying guidance issued by UNCITRAL in 2014.

We will issue a further call for evidence on the rule in Gibbsin due course

We welcome views on the above proposals, and responses to the specific questions below.

Q1. What is your view on the proposal to partially implement the MLIJ in the UK by adopting article X?

Q2. What is your view on the proposal to provide the court with a non-exhaustive list of factors that it may take into account when deciding whether to recognise an insolvency-related judgment?

Q3. In your opinion, what approach is needed to create the legal effect we are seeking?

Q4. What is your view of updating the list of documents to which the court can refer, to take account of the guidance issued by UNCITRAL in 2014?

UNCITRAL Model Law on Enterprise Group Insolvency

The Government recognises the value of the tools provided by the enterprise group model law, and proposes to bring forward legislation to implement it.

Background

The Model Law on Enterprise Group Insolvency ("MLEG") deals with insolvency where it affects two or more of a group of related enterprises, where the financial and business affairs of the group's different members are interlinked. It addresses situations where the best results can be obtained by considering several members together or the group as a whole rather than the individual parts.

In the UK this might be, for example, a business that operates through a group of companies, with different parts of the corporate group being responsible for different aspects of the business. The tools offered by the MLEG complement and expand upon the rules for recognition of insolvency proceedings found in the MLCBI, although they can be applied both in an international context where the participating group members are distributed between two or more jurisdictions, and to wholly domestic groups whose participating members are all present in one country.

The MLEG aims to provide:

- A legal framework to enable cross-border cooperation to manage the insolvency of enterprise groups, providing legal authority for insolvency practitioners, judges and others to work together towards a common outcome.
- The coordination of multiple insolvency proceedings affecting different group members through the development and implementation of an appropriate group plan.
- Cross-border recognition of the group plan within each relevant jurisdiction.
- Avoidance of unnecessary insolvency proceedings through the use of legally enforceable undertakings to creditors.

The concept of the coordinating plan or "group insolvency solution" is central to the approach taken in the MLEG, and many of its provisions are intended to ensure that the group members can cooperate effectively in implementing the plan regardless of where they may be based. While this coordination will be carried out by a "group representative" who must also be authorised to represent insolvency proceedings in respect of one or more of the group members, solvent group members may take part in the plan (and in many cases their participation will be crucial to its success). Such plans are entirely voluntary in nature, with each part of the group independently choosing to be included, and do not themselves interfere with other requirements of national law.

The benefit offered by the MLEG is that the proceedings can be coordinated so as to deal with the business of the group as a whole, so producing a greater return for all of the creditors involved than if each part of the group was handled separately. This can include avoiding insolvency proceedings where practicable, and managing the interdependencies between group members to preserve the greater economic value that is present in the group as a whole.

While the plan will not itself affect the order of payment of creditors, the MLEG's provisions that aim to avoid unnecessary insolvency proceedings allow for a limited modification to the priority of payments where that will be helpful. Those provisions allow the insolvency practitioner responsible for a main insolvency proceeding, with the court's approval, to treat creditors according to the insolvency law of another country – making payment to them as if they had opened an additional local insolvency proceeding but without actually requiring them to do so. As a result, where creditors could recover more money by making their claims in another country against the assets there, this can be accommodated without the expense of opening a second insolvency proceeding. This improves efficiency and returns from the insolvency, and enables it to be coordinated in one place.

A supplemental part of the MLEG allows this concept of synthetic insolvency proceedings to be further extended, allowing insolvency practitioners to give similar undertakings to those mentioned above even where the foreign insolvency proceeding would have been a main proceeding. This makes possible centralised management of the insolvency of a group member in the most convenient jurisdiction for the benefit of the creditors, and assists a single insolvency practitioner to manage the insolvencies of two or more group members based in multiple countries in a single jurisdiction.

The text of the MLEG can be obtained via the UNCITRAL page at:

[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_-advance_pre-published_version-e.pdf] (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi-advance_pre-published_version-_e.pdf)

Legal impact in the UK

The failure of large multinational firms in recent decades has already seen the need for international insolvency regimes to develop methods for handling complex multiple insolvency proceedings simultaneously. The administration of Maxwell Communication Corporation, which commenced in 1991, met this challenge by developing a protocol between English and US courts, which aimed to manage proceedings in both jurisdictions without conflict. The protocol also proposed a common system for of the distribution of assets to avoid creditors having to claim in both jurisdictions. A cross border insolvency protocol was also used in the complex proceedings arising from the collapse of Lehman Brothers in 2008, in which several US Lehman entities agreed on principles of cooperation, communication and data

sharing, to preserve and enhance assets for creditors and to resolve intercompany claims. Both of these protocols were non-legally binding, and were made possible by the flexibility of common law jurisdictions.

The approach of the courts of England and Wales under the Model Law on Cross Border Insolvency and the European Insolvency Regulation to group insolvency has been based on finding the mutual COMI in one jurisdiction, allowing for multiple members to be considered within the same jurisdiction, although each group member still has to be treated as a single entity. That approach has recently been followed in the case of Re Agrokor DD [2017] EWHC 2791 (Ch), in which the Court recognised Croatian group proceedings under the Cross Border Insolvency Regulations 2006 ("CBIR") but only in relation to one of the members of the group, confirming that group proceedings as a whole are out of scope of the CBIR.

The same reasoning was also adopted in case of Leite v Amicorp (UK) Ltd [2020] EWHC 3560 (Ch), where the Court held that the pooling of Brazilian assets from several companies did not preclude the proceedings from being collective proceedings, unlike in case of Re Stanford International Bank [2011] EWCA Civ 137 where assets were pooled for the benefit of only one set of creditors.

None of these cases, however, established a common approach to group proceedings in which the various group members are treated as a whole. The path taken relied either on the group members all having a mutual COMI, or being situated in common law jurisdictions which afford the courts the necessary flexibility to be able to consider pooled assets or to follow a non-binding group process. The MLEG provides a more expansive formal framework, introducing the concept of "planning proceedings" that can be used to coordinate the management of the insolvency between the members of the group, and associated group insolvency solutions.

A planning proceeding originating in the UK will require an application to the UK court under a new process, to initiate the proceeding alongside a qualifying UK insolvency proceeding (under articles 2(g) and 19). The court may then grant appropriate relief in order to facilitate the planning proceeding and the development and execution of a group insolvency solution, under article 20. A foreign planning proceeding which requires assistance from the UK court in order to proceed will first need to seek recognition under article 21 (another new court process), at which point the court may order relief under articles 22 and 24 as appropriate.

The decision to participate in a planning proceeding will be taken by each company's directors, by the affected individual in the case of a sole trader business, or by an appointed insolvency practitioner as appropriate.

Article 26 further provides that the effects of a group insolvency solution must be approved under the law of each state, for each affected group member with its centre of main interests or an establishment in that state. In the UK, where there is a relevant insolvency proceeding, approval must therefore be obtained from creditors; or if there is no insolvency proceeding then from the individual concerned or the company's

directors. Where the centre of main interests is elsewhere and there is no establishment in the UK, the group insolvency solution can be given effect through the court granting relief where necessary (following recognition of the planning proceeding, in the case of a foreign proceeding). The court's involvement will not be required where the plan has the agreement of all the relevant parties, and can simply proceed.

It should be noted that nothing in the Model Law can affect the law of a country that has not implemented it, and it is not intended to do so. The enforcement in a foreign jurisdiction of a group insolvency solution originating in the UK – or the enforcement of a group insolvency solution, originating in one foreign country, in another foreign country – are matters for the receiving jurisdiction rather than the UK courts. We anticipate that in granting relief, in appropriate cases, the UK courts will nevertheless wish to consider whether the group insolvency solution will be effective in other relevant jurisdictions, in order to ensure that their orders meet the requirements of the Model Law.

The relief that the court might order in the UK includes the stay of individual creditors' actions to enforce their debts against an enterprise group member. This is limited by the requirements of article 27, i.e. that the interests of creditors be adequately protected. Where there are insolvency proceedings in the UK, the interests of minority dissenting creditors are protected against unfair prejudice or harm arising from those proceedings (for example, in administration, under paragraph 74 of schedule B1 to the Insolvency Act 1986) and we expect similar consideration would be required as regards the available relief under the Model Law.

If there is no relevant insolvency proceeding in the UK, before agreeing to grant relief the court will need to consider whether the relief sought would prejudice dissenting creditors' other rights (for example the right to enforce a debt under a contract governed by the law of England and Wales, a right which a UK insolvency might curtail).

Proposals

Although much of the MLEG is a standard template, its implementation into UK law requires that various details be amended appropriately to complement our existing legal framework. This section outlines the approach that will be taken, with reference to the relevant parts of the Model Law. Other than where explicit reference is made below, the articles of the Model Law will be implemented as published by UNCITRAL.

Preamble

As with the MLCBI, and in accordance with the usual approach to legislation in the UK, the preamble to the MLEG that sets out the purpose of the law will not be included in the legal text.

Scope (article 1)

The scope will exclude the entities listed in paragraph 2 of schedule 1 to the Cross-Border Insolvency Regulations 2006.

This provides consistency of approach, aligning the MLEG with the MLCBI and ensuring that it does not encompass entities that are excluded from the latter.

Definitions (article 2)

The MLEG does not define “significant ownership”. We are satisfied that it is nevertheless clear what is meant by this phrase, and we expect that “significant ownership” may be demonstrated with reference to the definition of people with significant control found in Schedule 1A to the Companies Act 2006, as well as the definitions of parent and subsidiary undertakings in that Act.

The definition of “insolvency proceeding” contained in the MLEG is:

“‘Insolvency proceeding’ means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;”

We consider that the above definition is wide enough to encompass company and individual voluntary arrangements. The status of Companies Act schemes of arrangement (and restructuring plans introduced by the Corporate Insolvency and Governance Act 2020) may vary from one jurisdiction to another and between specific cases. We do not expect that a scheme of arrangement will fall within the definition of “insolvency proceeding” for these purposes in the UK, and so will not satisfy the requirements necessary for a “planning proceeding” to be initiated under the MLEG; but a scheme of arrangement may nevertheless feature as part of a “group insolvency solution” developed using the MLEG tools. The status of restructuring plans as insolvency proceedings has been the subject of judicial comment and it may be that they will meet the requirements for a planning proceeding to be initiated. We consider that it will be most appropriate for this to be determined by the courts, as the status of restructuring plans is settled, rather than explicitly in the implementation of the MLEG (which could otherwise create a mismatch between the treatment of restructuring plans under the MLEG and more generally).

It is our intention that any “group representative” appointed within the UK should be a qualified insolvency practitioner, who will have the necessary skills and knowledge to undertake this role effectively. We will include explicit provision to this effect within the UK implementation of the MLEG in order to remove any ambiguity regarding what is appropriate. This does not affect the appointment of group representatives in foreign planning proceedings outside of the UK.

The role of a group representative, as defined, is separate to that of insolvency officeholder. Due to the voluntary nature of participation in planning proceedings under the MLEG, it may be possible for a single insolvency practitioner to occupy both roles without creating a conflict of interest. This could be the most expedient approach, but is not required: alternatively, separate independent individuals could undertake each role, especially if there otherwise might be a perception that the single insolvency practitioner was conflicted. Insolvency officeholders will need to carefully consider whether planning proceedings are in the interests of creditors before agreeing to participate, regardless of their origin.

The MLEG does not stipulate a process by which the work of the group representative is to be funded or fees are to be agreed, although fees might be negotiated alongside the group insolvency solution, according to the individual circumstances of each case. Where this involves payments from a UK insolvency that are not to independent third parties (which might be the case in respect of the group representative's fees, for example) the regulatory rules to which insolvency practitioners are subject require the payments to be appropriately approved [See Statement of Insolvency Practice 9; category 2 disbursements should be approved by those responsible for approving remuneration].

Competent court (article 5)

Taking into account the nature of the work that the court will be required to do, including ruling on questions involving large international insolvencies; and taking into account the placement of other similar work; applications under the MLEG should be heard before the High Court of Justice in England and Wales and its equivalent in Scotland.

Cooperation (articles 10 and 15)

We consider that the list of examples provided in articles 10 and 15 that demonstrate how cooperation might be implemented, and the flexibility available to courts and insolvency practitioners in the UK, is sufficient to enable effective cooperation.

Agreements (article 16)

Insolvency practitioners in the UK are already able to enter into agreements where this is necessary to the management of the insolvency, and may seek directions from the court in appropriate cases. We do not consider it necessary to require the court's approval in every case where an agreement is reached under article 16.

Appointment of single representative (article 17)

The appointment of a single insolvency practitioner to manage related insolvencies is already permitted in UK law; this article makes explicit provision for cooperation between courts for that purpose. Any potential conflicts of interest are managed by existing systems, e.g. under the Insolvency Practitioner Code of Ethics.

This does not override the requirements in UK law as to the necessary authorisation, qualifications and experience for an individual to act as an insolvency practitioner.

Participation (article 18)

Any data shared between participating enterprise group members will be subject to the existing regimes of data protection as well as any confidentiality requirements agreed between the members.

Appointment of group representative (article 19)

As noted above (article 2), we consider that only authorised insolvency practitioners can take such appointments and we will make explicit provision to this effect in the UK's implementation of the MLEG.

Provisional relief (article 22)

The notice requirements for relief hearings will be in line with those of schedule 1 of the Cross-Border Insolvency Regulations, which in the first instance require notice to be served upon relevant parties not less than five business days before the date of the hearing; but which allow the court in cases of urgency (as is likely to be the case when dealing with provisional relief) to hear the application immediately either with or without notice, or to authorise a shorter period of notice.

Questions

We welcome views on the above proposals, and responses to the specific questions below:

Q5. What impact do you think the MLEG will have, particularly on our insolvency regime and the insolvency sector, if it is implemented in the UK?

Q6. What are your views on the approach to implementation that we have outlined above?

Q7. The proposal does not prescribe how the work of the group representative is to be funded, leaving that to be discussed in each case between the prospective group representative and the group members who expect to participate. What are your thoughts on this?

Q8. What more, if anything, needs to be done to ensure that the MLEG does not undermine the rights of minority and dissenting creditors, including rights to enforce contracts governed by the law of England and Wales in the UK?

[1] See Statement of Insolvency Practice 9; category 2 disbursements should be approved by those responsible for approving remuneration.

↑ Back to top

UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019)

Date of adoption: 15 July 2019

Purpose

The UNCITRAL Model Law on Enterprise Group Insolvency (the Model Law), focuses on insolvency proceedings relating to multiple debtors that are members of the same enterprise group. It is designed to equip States with modern legislation addressing the domestic and cross-border insolvency of enterprise groups, complementing the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide, part three).

Why is it relevant to international trade?

The increasing globalization of economic activity has led to significant growth in the number of enterprise groups active in international trade and commerce, whether such groups are formed domestically or internationally. When members of an enterprise group experience severe financial distress or insolvency, it is important that a transparent and predictable regime exists to ensure adequate and coordinated approaches to the insolvency of group members and treatment of the group as a whole, and that it facilitates, rather than hinders, the fast and efficient conduct of insolvency proceedings. By providing a comprehensive framework for the conduct of insolvency proceedings affecting two or more enterprise group members, the Model Law protects the value of the assets of such members and the group, and improves prospects for their rescue, thus fostering international economic development and investment, as well as supporting entrepreneurial activity and employment.

Key provisions

The Model Law includes provisions on coordination and cooperation between courts, insolvency representatives and a group representative (where appointed), with respect to multiple insolvency proceedings concerning members of an enterprise group; development of a group insolvency solution for the whole or part of an enterprise group through a single insolvency proceeding commenced at the location where at least one group member has the centre of its main interests (COMI); voluntary participation of multiple group members in that single insolvency proceeding (a planning proceeding) for the purposes of coordinating a group insolvency solution for relevant enterprise group members and access to foreign courts for enterprise group members and representatives; appointment of a representative (a group representative) to coordinate the development of a group insolvency solution through a planning proceeding; approval of post-commencement finance arrangements in the enterprise group insolvency context and authorization of the provision of funding under those arrangements, as required; the cross-border recognition of a

planning proceeding to facilitate the development of the group insolvency solution, as well as measures to support the recognition and formulation of a group insolvency solution; measures designed to minimize the commencement of non-main insolvency proceedings relating to enterprise group members participating in the planning proceeding, including measures to facilitate the treatment of claims of creditors of those enterprise group members, including foreign claims, in a main proceeding; and the formulation and recognition of a group insolvency solution.

Additional information

The Model Law is accompanied by a Guide to Enactment, which provides information to assist States in enacting its provisions and to offer guidance to users of the text.

Additional Resources

Text - Guide to Enactment (2019) (/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf)

UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)

Date of adoption: 2 July 2018

Purpose

Few existing international instruments deal with the recognition and enforcement of judgments generally and those that do exist exclude from their scope matters relating to insolvency and thus recognition and enforcement of insolvency-related judgments. In addition, some uncertainty exists with respect to the interpretation of articles 7 and 21 of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) in terms of providing the necessary authority for such recognition and enforcement as a form of relief available on recognition of a foreign insolvency proceeding. The Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) is designed to address those situations and provide States with a simple, straightforward and harmonized procedure for recognition and enforcement of insolvency-related judgments, thus complementing the MLCBI to further assist the conduct of cross-border insolvency proceedings.

Why is it relevant to international trade?

In a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders, the MLIJ provides a simple regime for recognition and enforcement of insolvency-related judgments that can assist in the recovery of value for financially troubled businesses, thus increasing the potential for successful reorganizations or liquidations to the advantage of all interested parties, including creditors, employees and other stakeholders.

Key provisions

An insolvency-related judgment is defined in the MLIJ as a judgment that arises “as a consequence of or is materially associated with an insolvency proceeding” (whether or not that proceeding has closed), and was issued on or after the commencement of the insolvency proceeding. It does not include a judgment commencing an insolvency proceeding. The MLIJ addresses the relationship between the MLIJ and treaties that might address the same subject matter; the procedure for applying for recognition and enforcement, including the availability of provisional relief; grounds for refusing recognition and enforcement; the effect and enforceability of an insolvency-related judgment; the effect on recognition and enforcement of review of the judgment in the originating State; equivalent effect of a judgment in the recognizing State; and severability of parts of the judgment for purposes of recognition and enforcement. Recognition of a judgment can be sought directly by way of an application under article 11 or as part of a defence to a claim or as incidental to another question already before the court. The MLIJ also address its relationship to the MLCBI.

Additional information

The Model Law is accompanied by a Guide to Enactment, which provides information to assist States in enacting its provisions and to offer guidance to users of the text.

Additional Resources

- Text - Guide to Enactment (2018) (/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf)

Travaux préparatoires

- the 47th to 51st sessions of the Commission (../../../../commission)
- the 46th to 53rd sessions of Working Group V (../../../../working_groups/5/insolvency_law)

GUIDANCE NOTE ON ENACTING TWO OR MORE OF THE UNCITRAL MODEL LAWS ON INSOLVENCY

(Prepared by the UNCITRAL secretariat in consultation with experts)

Background information to this guidance note

At its fifty-fourth session (December 2018), Working Group V (Insolvency Law) unanimously supported[1] the preparation by the UNCITRAL secretariat of materials that would explain to enacting States how the Model Law on Enterprise Group Insolvency (MLEG) could be enacted alongside the Model Law on Cross-Border Insolvency (MLCBI) and the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The Secretariat was requested to prepare such materials in consultation with experts where necessary, noting that the MLEG should be included upon its finalization and adoption.

At its fifty-second session (2019), during which the MLEG was adopted, the Commission requested the secretariat to proceed with the preparation of explanatory materials on the enactment of two or more of the three UNCITRAL model laws on insolvency. The Commission, at its fifty-third session (2020), reiterated its approval that such materials should be prepared and published by the secretariat.[2]

Role of this guidance note

1. The three model laws that are the subject of this note are each accompanied by a companion guide to enactment that contains detailed background and explanatory information on each model law. That information is primarily directed to executive branches of Government and legislators preparing the necessary legislation for the implementation of the respective model law but may also provide guidance for those charged with interpretation and application of the model law. The three relevant guides to enactment are:

   (a) The UNCITRAL MLCBI Guide to Enactment and Interpretation (MLCBI Guide);

   (b) The UNCITRAL MLIJ Guide to Enactment (MLIJ Guide); and

   (c) The UNCITRAL MLEG Guide to Enactment (MLEG Guide).

2. The purpose of this guidance note is not to repeat the detailed information that is found in the existing guides or in other useful UNCITRAL insolvency texts, such as the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide); the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation; the UNCITRAL MLCBI: The Judicial Perspective; or the Digest of Case Law on the MLCBI (the Digest). Instead, the role of this note is to provide additional and technical guidance to States wishing to enact two of more of the model laws on how the MLEG, the MLIJ and the MLCBI could be enacted alongside each other, highlighting areas where legislators must be careful in their drafting of any consolidated approach to ensure that the purpose of each model law continues to be achieved.

3. This guidance note contains a series of technical suggestions regarding how specific provisions of each model law could be combined to create a single consolidated enactment. States wishing to enact only the MLCBI and the MLIJ or only the MLCBI and the MLEG can also use the technical comments and the illustrative text (linked at the bottom of this paragraph) for those purposes. For a more

[1] See A/CN.9/966, para. 109.

[2] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 110 and 222 (b), and *Seventy-fifth Session, Supplement No. 17* (A/75/17) paras. 20(b) and 61.

V.21-04338 (E)

detailed explanation of how the individual provisions are intended to operate or how they might interact with other provisions, reference should be had to the detailed background and article-by-article information in the MLCBI Guide, the MLIJ Guide and the MLEG Guide, as well as to the other UNCITRAL insolvency texts; references that may be particularly useful are indicated at the end of each of the paragraphs that follow. In all respects, attention has been paid in this note to ensure that the original text of each model law is changed as little as possible, but certain editorial adjustments must be made to ensure that a consolidated enactment of the model laws will operate as intended and is appropriately cross-referenced. It should be noted that States considering how best to implement two or more of the model laws may wish to take a more integrated approach to the legislative drafting. Those areas that would lend themselves to greater integration are identified in this note, but the specific drafting of highly integrated provisions has been left to States in order to simplify this note and make it as clear as possible. An illustration of how the MLCBI, the MLIJ and MLEG could be enacted in a single model law by following this technical guidance may be found by clicking this **link**. It also may be useful for readers to follow the illustration in that link as they review this note.

Consolidated enactment of the MLCBI, the MLIJ and the MLEG

General observations

4. The subject matter of the MLIJ and of the MLEG is closely related to that of the MLCBI. In fact, both the MLIJ and the MLEG were drafted in the expectation that each or both of them would be enacted along with the MLCBI and must thus work together in a complementary way. While the MLCBI was designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning single debtors experiencing severe financial distress or insolvency, the MLIJ was designed to assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that would facilitate the conduct of cross-border insolvency proceedings and complement the MLCBI. The MLEG was designed to expand on previously existing UNCITRAL insolvency texts to equip States with modern legislation addressing the domestic and cross-border insolvency of multiple debtors that are members of the same enterprise group, thus complementing both the MLCBI and part three of the Legislative Guide. Unsurprisingly, the three model laws have complementary purposes, use similar terminology and definitions, and rely on similar frameworks to achieve their goals. (See MLCBI Guide paras. 1–4; MLIJ Guide paras. 1, 35–41; and MLEG Guide paras. 1–3 and 14.)

Preamble

5. The preamble of the MLCBI could be included as the first preambular paragraph of a consolidated text, and could include preambular subparagraphs 1(a) to (e) of the MLIJ as subparagraphs 1(f) to (j) in that consolidated text. Preambular subparagraphs (a) to (g) of the MLEG could be inserted as subparagraphs 1(k) to (q) into the first paragraph of the consolidated preamble, with slight editorial adjustments to clarify the phrase "those cases" in MLEG preambular subparagraphs (a) and (b). The chapeau of the MLCBI preamble could be adjusted for the first paragraph by including the phrase "and insolvency affecting the members of an enterprise group" from the chapeau of the MLEG preamble. In addition, should a State wish to do so, MLCBI preambular paragraph (d) ("protection and maximization of the value of the debtor's assets") could be combined into a single paragraph in the consolidated text with MLIJ preambular paragraph (e) and MLEG preambular paragraph (e), all of which express a similar purpose. (See MLCBI Guide paras. 46–52; MLIJ Guide paras. 43–44; and MLEG Guide paras. 33–34.)

6. By indicating what the MLIJ is not intended to do, the second preambular paragraph of the MLIJ clarifies certain issues concerning the relationship of the MLIJ with other national legislation dealing with the recognition of insolvency proceedings

(such as the MLCBI) or of insolvency-related judgments. MLIJ preambular subparagraph 2(c) could be included as the second paragraph of the consolidated preamble, as it remains necessary in the consolidated text. However, MLIJ preambular subparagraphs 2(a) ("to restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment"), 2(b) ("to replace legislation enacting the MLCBI or limit the application of that legislation") and 2(d) ("to apply to the judgment commencing the insolvency proceeding") would be unnecessary in a text consolidated with the MLCBI. (See MLIJ Guide para. 45.)

Scope of application

7. The first paragraph of article 1 ("Scope of application") of each of the model laws could be combined into a single first paragraph, with MLIJ article 1(1) becoming subparagraph 1(1)(e) of the consolidated text, and MLEG article 1(1) becoming subparagraph 1(1)(f) of the consolidated text. (See MLCBI Guide paras. 53–54; MLIJ Guide para. 46; and MLEG Guide para. 35.)

8. The second paragraph of article 1 of each of the model laws could also be combined into a consolidated second paragraph, since their wording is substantially the same. Since the MLIJ does not include a note in square brackets explaining what types of judgment might be excluded from the application of the Law, it may be advisable for clarity to include an explanation in the consolidated text along the following lines: "*[designate any types of judgment that should be excluded from the provisions applicable to insolvency-related judgments]*". (See MLCBI Guide paras. 55–61; MLIJ Guide para. 47; and MLEG Guide paras. 36–38.)

9. For States wishing to prepare a more integrated version of the consolidated text, it would be possible for MLEG article 4 ("Jurisdiction of the enacting State") to be included as subparagraph 3 of article 1 of the consolidated text. In the alternative, it could be incorporated as a separate provision along with many other operative provisions of the MLEG as a separate chapter of the consolidated text focused on "enterprise group insolvency" (included below as Chapter VII). (See MLEG Guide paras. 54–59.)

Definitions

10. The three model laws use similar terminology and definitions, and maintain consistency with other UNCITRAL insolvency texts, such as the Legislative Guide, when additional terms are needed. As a consequence, the definition of "establishment" in MLEG article 2(l) and MLCBI article 2(f) could be combined in a single subparagraph of the consolidated text (subparagraph 2(f)), as could the definitions of "insolvency proceeding" and "insolvency representative" in the MLIJ (subparagraphs 2(a) and (b)) and the MLEG (subparagraphs 2(h) and (i)) be combined to become subparagraphs 2(p) and (q) of the consolidated text. Note that "the enterprise group member debtor" referred to in the MLEG article 2(l) definition of "establishment" may already be included in the MLCBI article 2(f) reference to "the debtor", but inclusion of "the enterprise group member debtor" in the consolidated definition may contribute to greater certainty. Reference to both the "debtor" and the "enterprise group member debtor" in the consolidated definitions of "insolvency proceeding" and "insolvency representative" is also included for greater certainty, but a State may wish to refer only to the "debtor" in these definitions. (See MLCBI Guide paras. 48–52 and 62–90; MLIJ Guide paras. 20–29 and 48–52; and MLEG Guide paras. 15–25 and 39–49.)

11. The definitions in MLIJ subparagraph 2(c) ("judgment") and (d) ("insolvency-related judgment") could be inserted in the consolidated text of article 2 as subparagraphs (g) and (h), respectively. Similarly, MLEG subparagraphs 2(a) ("enterprise"), (b) ("enterprise group"), (c) ("control"), (d) ("enterprise group member"), (e) ("group representative"), (f) ("group insolvency solution"), (g) ("planning proceeding"), (j) ("main proceeding"), and (k) ("non-main proceeding") could be incorporated in article 2 of the consolidated text as

subparagraphs (i) to (o), (r) and (s). Alternatively, the definitions relating to the MLEG could be placed in the separate chapter on "enterprise group insolvency". (See MLIJ Guide paras. 52–62; and MLEG Guide paras. 39–49.)

Remaining general provisions in Chapter I

12. Article 3 of the MLCBI ("International obligations of this State") is identical to MLIJ article 3(1) and MLEG article 3, and could thus be combined. MLIJ article 3(2) (concerning non-applicability of the MLIJ when a treaty that is in force applies to the recognition and enforcement of civil and commercial judgments) could be inserted as a second paragraph of the consolidated article 3, or it could be incorporated as a separate provision along with other operative provisions of the MLIJ in a separate chapter of the consolidated text focused on "recognition and enforcement of insolvency-related judgments" (included below as Chapter VI). Placement of MLIJ article 3(2) as an article in a separate chapter may make it clearer that a bilateral treaty governing recognition and enforcement of judgments, such as a bilateral investment treaty, would not displace the application of the law, except in cases of actual conflict. (See MLCBI Guide paras. 91–93; MLIJ Guide paras. 63–65; and MLEG Guide paras. 50–53.)

13. Article 4 of the MLCBI ("Competent court or authority") is substantially similar to MLEG article 5 and to the first phrase of MLIJ article 4, thus the three provisions could be combined into a single consolidated article 4 with the addition of a few key concepts (domestic "courts", "foreign planning proceeding", "insolvency representatives", and "group representatives"). The second phrase of MLIJ article 4 regarding when the issue of recognition is raised as a defence or as an incidental question could be added as a second sentence to the consolidated text of article 4, or added as a separate provision in the chapter of the consolidated text on "recognition and enforcement of insolvency-related judgments". However, regardless of whether that phrase is included in article 4 of the consolidated text or as a separate provision in the chapter on "recognition and enforcement of insolvency-related judgments", it must include the phrase "in which case recognition pursuant to article 17 shall not be required" to avoid the unintended result that consolidating the three model laws might have in suggesting that prior recognition of the judgment under article 17 is required when the issue is raised as a defence or as an incidental question. (See MLCBI Guide paras. 94–98; MLIJ Guide paras. 66–67; and MLEG Guide paras. 60–61.)

14. Article 5 of the MLCBI ("Authorization to act in a foreign State") is substantially similar to MLIJ article 5, and could be combined into a single consolidated article 5 with the addition of the phrase "or with respect to an insolvency-related judgment issued in this State". (See MLCBI Guide paras. 99–100; and MLIJ Guide paras. 68–69.)

15. Article 6 of the MLCBI ("Public policy exception") and the MLEG are identical and could be included as a consolidated article 6. Article 7 of the MLIJ is also the same, but includes the phrase "including the fundamental principles of procedural fairness". That additional concept could be included as a separate provision in the chapter on "recognition and enforcement of insolvency-related judgments", or included in consolidated article 6 by adding the additional phrase. In either case, care should be taken by legislators that the addition of the phrase would not broaden the narrow construction that has usually been accorded this exception and thus inadvertently impede existing practices in cross-border cooperation. (See MLCBI Guide paras. 101–104; MLIJ Guide paras. 71–74; and MLEG Guide paras. 62–65.)

16. Article 7 of the MLCBI ("Additional assistance under other laws"), MLIJ article 6, and MLEG article 8 are substantially similar, and could be combined in a single consolidated article 7, with the addition of a few phrases specific to the MLEG scenario (i.e. adding the concepts of the "insolvency representative" and a "group representative"). Article 6 of the MLIJ differs slightly from the other two model laws in that it refers to providing "additional assistance under other laws of this State", without specifying to whom that assistance would be provided. Specifying in the

consolidated version of article 7 that additional assistance may be provided "to a foreign representative or a group representative under other laws of this State" is not thought to unduly narrow the wording of MLIJ article 6. (See MLCBI Guide para. 105; MLIJ Guide para. 70; and MLEG Guide para. 68.)

17. Article 8 of the MLCBI and the MLIJ ("Interpretation") are identical to MLEG article 7, and the three provisions could be consolidated into a single article 8. (See MLCBI Guide paras. 106–107; MLIJ Guide paras. 75–76; and MLEG Guide paras. 66–67. It should also be noted that the Digest may also assist in the harmonized interpretation of the MLCBI.)

Chapter II. Access of Foreign Representatives and Creditors to Courts in this State

18. Consolidation of the three model laws into a single enactment does not require any changes to be made to Chapter II of the MLCBI (articles 9 to 14), which could be included as Chapter II in the consolidated text. (See MLCBI Guide paras. 108–126.)

Chapter III. Recognition of a Foreign Proceeding and Relief

19. The title of Chapter III of the consolidated text could delete the phrase "of a foreign proceeding", since the chapter could be broadened to include both recognition of foreign proceedings and of insolvency-related judgments. The title would need further adjustment should States wishing to prepare a more integrated text of the three model laws also include recognition of a foreign planning proceeding in this chapter.

20. Article 15 of the MLCBI ("Application for recognition of a foreign proceeding") is similar to article 11 of the MLIJ ("Procedure for seeking recognition and enforcement of an insolvency-related judgment") and thus may be treated in a single consolidated article 15, with MLCBI article 15 being paragraph 1, and MLIJ article 11 being paragraph 2. That change would also require a change to the title of the article, with the addition of the phrase "or an insolvency-related judgment". Some States may wish to include MLEG article 21 ("Application for recognition of a foreign planning proceeding") as paragraph 3 of consolidated article 15, but it may also be included as a separate provision in the chapter on "enterprise group insolvency". (See MLCBI Guide paras. 127–136; MLIJ Guide paras. 83–92; and MLEG Guide paras. 139–152.)

21. Article 16 of the MLCBI ("Presumptions concerning recognition of a foreign proceeding") includes in paragraph 2 a presumption that documents submitted in support of an application for recognition of a foreign proceeding are authentic regardless of whether they have been legalized. This presumption is the same as that applicable to documents submitted in support of the recognition of an insolvency-related judgment in MLIJ article 11(4) and to those submitted in support of a foreign planning proceeding in MLEG article 21(6), and the three could be consolidated into a single subparagraph. (See MLCBI Guide paras. 137–149; MLIJ Guide paras. 88–91; and MLEG Guide paras. 149–152.)

22. Articles 17 ("Decision to recognize a foreign proceeding"), 18 ("Subsequent information"), 19 ("Relief that may be granted upon application for recognition of a foreign proceeding") and 20 ("Effects of recognition of a foreign main proceeding") of the MLCBI may be included in the consolidated text without change. Both the MLIJ (article 12 on "Provisional relief") and the MLEG (article 22 on "Provisional relief that may be granted upon application for recognition of a foreign planning proceeding") contain provisions in respect of provisional relief which could be included in article 19 of the consolidated text, or as separate provisions in the respective chapters on "recognition and enforcement of insolvency-related judgments" and "enterprise group insolvency". (See MLCBI Guide paras. 150–188; MLIJ Guide paras. 93–95; and MLEG Guide paras. 153–165.)

23. Article 21 of the MLCBI ("Relief that may be granted upon recognition of a foreign proceeding") may be included without change in the consolidated text, except

for States wishing to include expressly MLIJ article X as a head of relief that may be granted under article 21. In that case, States may wish to add as subparagraph 1(g) the phrase "Recognizing and enforcing an insolvency-related judgment", which reflects the content of MLIJ article X; alternatively, enacting States may wish to include MLIJ article X as a separate paragraph of article 21. However, in either case, States enacting MLIJ article X will also enact the MLIJ and the MLEG by way of the consolidation, and thus must consider the relationship between MLIJ article X and the MLEG, as well as the interaction with MLIJ article 14 ("Grounds to refuse recognition and enforcement of an insolvency-related judgment") subparagraphs (f) and (g)(iv). For example, a requirement for protection of the interests of creditors and other interested persons ("adequate protection of third party interests") is included in the MLCBI, the MLEG and the MLIJ, but in different situations. MLCBI article 22 requires the court recognizing a foreign proceeding to ensure that those third party interests are considered when granting, modifying or terminating provisional or discretionary relief. Similarly, MLEG articles 20, 22 and 24 (also arts. 29 and 31), in accordance with MLEG article 27 (and art. 32), require that the court exercising its powers under the MLEG must be satisfied that the interests of third parties are adequately protected. The idea underlying that MLCBI and MLEG requirement is that there should be a balance between relief that might be granted and the interests of the persons that might be affected by that relief. However, the MLIJ is more narrowly focused, and the issue of protection of third party interests is only relevant in so far as MLIJ article 14, subparagraph (f) gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding giving rise to judgments that directly affect the rights of creditors and other stakeholders collectively. (Where an insolvency-related judgment affects third parties only indirectly (e.g. via the judgment's effect on the size of the insolvency estate), a separate analysis of adequate protection of third party interests would not be necessary.) Further, article 14, paragraph (g) of the MLIJ permits refusal of recognition and enforcement if the originating court did not satisfy one of the conditions in subparagraphs (i) to (iv), with subparagraph (iv) applicable to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State. Consolidation of all three model laws into a single enactment will therefore require careful consideration by the enacting State of the interaction of MLIJ article X, the MLEG, and MLIJ article 14, subparagraphs (f) and (g)(iv). (See MLCBI Guide paras. 189–199; MLIJ Guide paras. 39–41, 108–115, and 126–127; and MLEG Guide paras. 124, 175, 189–190, 209, 211, 216 and 218.)

24. Articles 22 ("Protection of creditors and other interested persons"), 23 ("Actions to avoid acts detrimental to creditors") and 24 ("Intervention by a foreign representative in proceedings in this State") of the MLCBI could be incorporated into the consolidated text without change. (See MLCBI Guide paras. 196–208.)

Chapter IV. Cooperation with Foreign Courts and Foreign Representatives

25. Chapter IV (articles 25 to 27) of the MLCBI could be included without change in the consolidated text. MLEG Chapter II ("Cooperation and coordination") could be included as a subchapter of a separate chapter on "enterprise group insolvency", but many of the MLEG Chapter II provisions are similar to those found in MLCBI Chapter IV. Some States may thus wish to integrate the MLEG Chapter II provisions (particularly, MLEG articles 9, 10, 11 and 12) into Chapter IV of the consolidated text. (See MLCBI Guide paras. 209–223; and MLEG Guide paras. 69–89.)

Chapter V. Concurrent Proceedings

26. Chapter V of the MLCBI on concurrent proceedings (articles 28 to 32) could be included in the consolidated text without change. (See MLCBI Guide paras. 224–241.)

Chapter VI. Recognition and Enforcement of Insolvency-Related Judgments

27. The remaining operative provisions of the MLIJ could be incorporated in a separate chapter on "recognition and enforcement of insolvency-related judgments" in the consolidated text. These provisions of the MLIJ are: article 3(2) (unless it has been included in consolidated article 3); article 4 (unless it has been included in consolidated article 4; for the reasons articulated in paragraph 13 above, regardless of its placement, it must nonetheless include the phrase "in which case recognition pursuant to article 17 shall not be required"); article 7; article 9; article 10; article 12 (unless it has been included in consolidated article 19); and articles 13 to 16. But for the exception noted in the following paragraph, all other provisions in this chapter may be included without change from the MLIJ, except for minor editing required to conform the provisions with the consolidated format. (See MLIJ Guide paras. 64–67, 71–74, 77–82, and 93–125.)

28. One important addition must be made to article 14 MLIJ ("Grounds to refuse recognition and enforcement of an insolvency-related judgment") subparagraph (f)(ii), by adding a reference to the adequate protection of creditors and other interested persons articulated in MLCBI article 22(1) and MLEG article 27(1). As noted above in paragraph 23, enacting States must consider the relationship between MLIJ article 14 subparagraph (f) and MLCBI article 22(1) and MLEG article 27(1) ("protection of creditors and other interested persons"). Subparagraph (f) of MLIJ article 14 should be drafted by States enacting the consolidated text to ensure that relief granted that would be subject to a requirement of adequate protection under article 22, paragraph 1 of the MLCBI, or article 65, paragraph 1 of the MLEG, would also be subject to that requirement when recognized as an insolvency-related judgment. Further, adopting States should consider the relationship between MLIJ article 14 subparagraph (g)(iv) and article 21 of the MLCBI, as modified by article X, as well as its the relationship with the MLEG. (See MLCBI Guide paras. 189–199; MLIJ Guide paras. 39–41, 108–115, and 126–127; and MLEG Guide paras. 124, 175, 189–190, 209, 211, 216 and 218.)

Chapter VII. Enterprise Group Insolvency

29. Except as otherwise noted in the discussion above, most of the operative provisions of the MLEG could be incorporated as a separate chapter of the consolidated text focused on "enterprise group insolvency". In addition, the definitions in consolidated article 2 that are relevant to the MLEG could also be placed in a separate chapter along with the operative provisions. While this approach has the advantage of simplicity and permitting States to adhere as closely as possible to the original text of the MLEG as adopted, some States may wish to integrate the MLEG more fully throughout the consolidated text. (See MLEG Guide paras. 39–49, 54–61, and 68–220.)

30. MLEG articles 4, 5 and 8 to 29 (or to 32, where adopted (see MLEG Guide paras. 28–29)) could be included without change in the separate chapter on "enterprise group insolvency", except for some minor editorial changes and adjusted cross-references to reflect the renumbering necessitated by the creation of a consolidated text. (See MLEG Guide paras. 54–61 and 68–220.)

Assistance in drafting legislation

31. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the MLCBI, the MLIJ and the MLEG. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@un.org; Internet home page: uncitral.un.org).

32. In addition, as noted above, an illustration of how the MLCBI, the MLIJ and MLEG could be enacted in a single model law by following the technical guidance in this note may be found by clicking this **link**.

European Business Organization Law Review
https://doi.org/10.1007/s40804-021-00204-4

ARTICLE

Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?

Irit Mevorach[1,2]

Abstract

In recent years modified universalism has emerged as the normative framework for governing international insolvency. Yet, divergences from the norm, specifically regarding the enforcement of insolvency judgments, have also been apparent when the main global instrument for cross-border insolvency has been interpreted too narrowly as not providing the grounds for enforcing judgments emanating from main insolvency proceedings. This drawback cannot be overcome using general private international law instruments as they exclude insolvency from their scope. Thus, a new instrument—a model law on insolvency judgments—has been developed. The article analyses the model law on insolvency judgments against the backdrop of the existing cross-border insolvency regime. Specifically, the article asks whether overlaps and inconsistencies between the international instruments can undermine universalism. The finding is mixed. It is shown that the model law on insolvency judgments does add vigour to the cross-border insolvency system where the requirement to enforce and the way to seek enforcement of insolvency judgments is explicit and clear. The instrument should, therefore, be adopted widely. At the same time, ambiguities concerning refusal grounds based on proper jurisdiction and inconsistencies with the wider regime could undermine the system. Consequently, the article considers different ways of implementing the model law and using it in future cases, with the aim of maximizing its potential, including in view of further developments concerning enterprise groups and choice of law.

Keywords Private international law · Cross-border insolvency · Modified universalism · Enforcement of judgments · Model law

The author advises the UK delegation at UNCITRAL, Working Group V (Insolvency) (and previously represented the World Bank), which drafted the instruments discussed in this article. However, the opinions expressed in this article are solely the author's and do not necessarily represent the views of these groups or organizations.

✉ Irit Mevorach
Irit.Mevorach@nottingham.ac.uk

Extended author information available on the last page of the article

Published online: 08 February 2021

1 Introduction

The collapse or distress of businesses operating across-borders can affect multiple stakeholders, including banks, trade creditors, employees, shareholders, and even entire economies. Conflict between laws, duplication of processes, lack of cooperation between courts or insolvency professionals and the disintegration of the failed business' administration exacerbate the damage.

The norm of 'modified universalism'[1] requires a global approach to multinational default, which can resolve conflicts and result in optimal insolvency solutions. The norm is reflected in the main global instrument for cross-border insolvency—the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (MLCBI) of 1997.[2] But the application of the MLCBI exposed a gap or uncertainty regarding its application to the enforcement of judgments, highlighted most impactfully by the UK Supreme Court in *Rubin v. Eurofinance* where the UK court refused to enforce a judgment emanating from the main insolvency process.[3] At the same time, insolvency, including the enforcement of insolvency judgments, is excluded from general private international instruments for commercial matters.[4]

UNCITRAL decided to step into the void and develop a new instrument, which was finally adopted by the organization in 2018 as a Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIJ).[5] The MLIJ has been quite well-received and considered by commentators a significant improvement of the current position: '[s]ubject to any shortcomings that become apparent after its implementation, the Judgments Model Law appears to be a sensible, largely uncontroversial adjunct to the Cross-Border Model Law;[6] it is 'undoubtedly a potentially significant step forward in international co-operation'.[7] Now, countries need to consider whether to enact the MLIJ and if so how to embed it in local law. Adoption may take time, as it is common for several years to pass before countries start

[1] The label 'modified universalism' was introduced by Professor Westbrook (Westbrook 1991, p 517).

[2] United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013) (https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf).

[3] *Rubin v. Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

[4] Insolvency is excluded from the Hague Convention on the Recognition and Enforcement of Foreign Judgments of 2 July 2019 (https://www.hcch.net/en/instruments/conventions/full-text/?cid=137) (see Art. 2(1)(e)); Bankruptcy judgments are also excluded from the EU regime for enforcement of judgments in civil and commercial matters (Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1). Bankruptcy matters were also excluded from the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and from the Convention of 30 June 2005 on Choice of Court Agreements. See also Mevorach and Walters (2020), p 4.

[5] UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (United Nations, Vienna 2019) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf).

[6] Hawthorn and Young (2018), p 197.

[7] Moss (2019), p 23.

enacting domestic laws on the basis of a model law.[8] The global pandemic, and in the UK the Brexit process as well, may cause further delays.

When countries do, however, contemplate adoption of the new instrument, it is anticipated that this will generate a policy and legislative discussion. The MLIJ project took place against a compound background of diverse interpretations of the existing framework and mixed aims informed it. Not all countries viewed the MLCBI as excluding judgments, and so the MLCBI and the MLIJ to some extent overlap. It may be questioned whether the MLIJ really adds to the regime and should be enacted. Where it is considered helpful, there are also questions about potential inconsistencies. Adoption of the MLIJ may also be an occasion to consider adoption of the MLCBI by countries who have not already done so before, and in the process could question whether the instruments should be enacted separately or should be merged. Countries may also consider adoption of the new model law for enterprise group insolvency (finalised a year after the MLIJ),[9] and again this may raise questions of compatibility between the instruments. The work of UNCITRAL on choice of law may also impact the MLIJ.[10] If the MLIJ is adopted, issues will likely arise concerning its application and interpretation (and the potential interaction with other model laws as enacted in the country), in individual cases. The delays caused by external forces and political circumstances can provide a breathing space to reflect on the regime and analyse the MLIJ thoroughly and in context, so that when the time comes, it is implemented in the most effective manner.

This article contributes to this awaited debate, adoption, and application process by considering the issue of the enforcement of insolvency judgments in the context of the cross-border insolvency framework and its underlying norm of modified universalism. The aim of this article is ultimately practical: to encourage wide adoption of uniform rules concerning the enforcement of insolvency judgments, and application in a way that can promote fair and efficient results in international insolvencies. The article explores alternative ways of implementation, considering the different ex ante positions of countries concerning the issue of enforcement of judgments in the context of international insolvency, also suggesting how the MLIJ can work and can be used in different circumstances.

The article is structured as follows: the next section (Sect. 2) overviews the norm of modified universalism, specifically its application to the enforcement of insolvency judgments. Section 3 shows how modified universalism is reflected in the original model law on cross-border insolvency, the MLCBI, but how the MLCBI has been interpreted by some countries narrowly, concerning the enforcement of judgments. Section 4 provides a detailed overview of the MLIJ and its key features, showing how it was also informed by general private international law instruments. Section 5 discusses the new regime for the enforcement of insolvency judgments,

[8] For example, the MLCBI was adopted by the Commission in 1997 but countries began adopting it only in the early 2000s (see https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status).

[9] See text to n. 163 below.

[10] See n. 175 below.

comparing the MLIJ and the MLCBI, highlighting overlaps and inconsistencies. Section 6 provides concrete suggestions for implementing and applying the MLIJ, and in doing so considers different alternatives as well as implications of newer developments concerning enterprise groups and choice of law rules. Section 7 concludes.

2 Enforcement of Judgments Under Modified Universalism

The private international law of insolvency has been evolving as a unique system. Insolvency is generally excluded from international instruments on private international law because of its special character and connectedness with public policy concerns.[11] Modified universalism is to date the dominant approach for addressing cross-border insolvencies.[12] It adapts (pure) universalism, which prescribes a utopic vision of a single law/single forum system for international insolvencies,[13] to the reality of a world divided into different legal systems and a myriad of business structures. Thus, modified universalism seeks to achieve global collective processes with optimal levels of centralization of insolvency proceedings.[14]

Modified universalism is much more focused than notions such as 'international comity' or assistance, which can be achieved, for example, by opening local parallel proceedings and applying domestic laws.[15] Comity generally refers to the established tradition among judges within the common law legal tradition to cooperate and assist foreign jurisdictions.[16] It encourages judicial deference and cooperation.[17] But notwithstanding the prominent status of the concept of international comity,[18] it is considered quite vague and uncertain and is understood differently in different systems.[19]

[11] See n. 4 above.

[12] See Mevorach (2018a), pp 32–38; Mevorach, (2018b), p 1403.

[13] See Westbrook (2000), pp 2293–2294. Pure universalism is contrasted with territorialism, which would confine the effects of insolvency proceedings to the jurisdiction where proceedings are opened (see LoPucki 2000, p 2218).

[14] See also 'cooperative territorialism' where each country would administer the assets located within its own borders as separate estates but may conclude agreements that allow for mutually beneficial cooperation (LoPucki 1999, pp 742–743).

[15] Cf. *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ. 2802, para. 79: '[…] If it is desired to go further, and bind foreign creditors who would not otherwise be bound, the long-standing practice in international restructurings of the present type has been to apply for parallel schemes of arrangement in other jurisdictions […]'. See also Walters (2019), p 47 (noting the competing versions of modified universalism).

[16] Fletcher (2005), p 17.

[17] Westbrook (2019), p 6 ('Comity addresses judicial deference/cooperation in light of a foreign proceeding […] Traditional comity relates to deference to other courts in the same case […]').

[18] See also ibid. (referring to a 'ubiquitous doctrine of "comity"').

[19] Mevorach (2018a), pp 99–100. Comity has also been exercised by a rather limited number of countries and has not been widely practiced (Paul 1991, pp 27–44). See also Westbrook (2019), p 7 (referring to 'the murky doctrine of comity').

Under modified universalism, deference demanded of ancillary courts flows more specifically from the designation of a main court within a body of law that seeks to centralize decision-making. These proceedings should encompass all the business' assets and all its stakeholders, depending on what is most efficient in the circumstances—'[T]he essence of modified universalism is that "bankruptcy proceedings […] should be unitary and universal, recognized internationally and effective in respect of all the bankrupt's assets".'[20] Modified universalism aims to promote fairness and an efficient system through such optimal levels of centralization that can lead to global solutions, which benefit stakeholders wherever they are located. It can increase returns to creditors as well as the likelihood of saving viable debtors. If a business spans across more than one country, it and its stakeholders in any country would benefit from an approach that minimizes the costs of multiple proceedings. Centralization of the process can keep the business together and prevent its breakup in proceedings in multiple forums and allows the conceiving of solutions that maximize the business and its assets' potential.[21]

To achieve this, the central process and its judgments and orders should have effect in other countries where the debtor has presence or where stakeholders are located.[22] Judgments related to the insolvency proceeding include those linked to the estate, such as avoidance of pre-insolvency transactions, orders concerning the recovery of assets and pursuit of claims by the insolvency representative, or contributions from directors, as well as decisions to approve plans, complete a process and discharge the debtor.[23] In this regard, universal enforcement relies not just on comity (i.e. a discretionary deference to foreign proceedings and cooperation) but on consistent and mandated support for a global central process. Recognition and enforcement of the various orders and judgments originating in the central proceeding may need to be speedy. In any event, it should not be conditioned by the similarities of the laws of the host and home country.

Modified universalism acknowledges that more than one process may be opened because that could be more efficient (for example in mega cases spanning multiple jurisdictions and time-zones), in which case several laws may apply. It also acknowledges differences between regions and systems, and the ultimate responsibility of sovereign states for their constituencies. This requires a degree of local control and a possibility that support for a main process may be denied. Yet, recognition and support should be refused in limited circumstances, essentially to uphold fundamental public policies and ensure that creditors are adequately protected. Countries should not be required to defer to a foreign system that falls below international standards (i.e. where it does not follow a collective system, which treats creditors equitably), and should be able to protect creditors against discrimination (i.e. the unfavourable treatment of local creditors, whose claims would otherwise be similarly ranked under foreign and local law, in the foreign proceeding) and against breaches of due

[20] *In re Agrokor d.d. et al* 591 BR 163 (Bkrtcy SDNY 2018), pp 47–48, citing Kannan (2017), p 43.
[21] See Mevorach (2018a), pp 14–28.
[22] See Bork (2018), p 32; Mevorach (2018a), p 25; Fletcher (2005), pp 209–210.
[23] See generally, regarding the recognition of foreign discharge, Westbrook (2005).

process.[24] Ordinary private international law rules, such as consent, residency, presence in, or submission to, the foreign forum, which apply to commercial judgments generally, would not be determinative to the recognition and enforcement process when insolvency-related judgments/orders emanate from a main proceeding.

Such distinction between enforcement of ordinary commercial judgments and judgments related to collective insolvency proceedings (which as such should be subject to special rules) was acknowledged by the UK Court of Appeal in the case of *Rubin v. Eurofinance*[25]:

> Albeit that they have the indicia of judgments in personam, the judgments of the New York court made in the adversary proceedings, are none the less judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings and as such are governed by the sui generis private international law rules relating to bankruptcy and are not subject to the ordinary private international law rules preventing enforcement of judgments because the defendants were not subject to the jurisdiction of the foreign court. This is a desirable development of the common law founded on the principles of modified universalism. It does not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context.[26]

Non-submission or consent by a creditor, namely the attempt to avoid taking part in the central process, is exactly the type of territorial strategy in cross-border insolvency which modified universalism aims to overcome.[27] Once a central process is underway, it should encompass and have effect regarding all stakeholders. The Court of Appeal in *Rubin v. Eurofinance* followed this norm and found that there was no unfairness in applying a special rule where the defendants are aware of the insolvency proceedings:

> I see no unfairness to the defendants in upholding the judgments of the New York court. The defendants were fully aware of the claims being brought against them. After taking advice they chose not to participate in the New York proceedings. They took their chance that it would be difficult to bring proceedings here, possibly because TCT as a trust is not amenable to winding up; possibly because the greater part of the transactions impugned in New York could not have been attacked here because the repugnant activity took place before 4 April 2006 when the Regulations came into effect. Whatever

[24] See *In re Foreign Econ. Indus. Bank Ltd. 'Vneshprombank' Ltd.*, No. 16-13534, and *In re Larisa Markus*, No. 19-10096 (Bankr SDNY 8 October 2019) where judge Martin Glenn observed regarding the public policy exception that '[t]he key determination is whether the procedures used in the foreign court meet our fundamental standards of fairness' (2019 LEXIS 3202 33, citing *In re ENNIA Caribe Holding N.V.,* 594 BR 631, 640 (Bankr SDNY 2018)).

[25] *Rubin and another v. Eurofinance SA* [2010] EWCA Civ. 895.

[26] Ibid., para. 61.

[27] See also Aconley et al. (2019), p 122, noting that '[i]ssues of presence and submission can be incredibly complex, particularly when the rules surrounding such concepts are not consistent across different jurisdictions'.

their reasons, they made an informed judgment. I have no sympathy for them when it transpires that they were wrong.[28]

But this approach was not followed by the Supreme Court in *Rubin*[29] (and indeed by courts in certain other cases), exposing uncertainties regarding the enforcement regime under the MLCBI.

3 Enforcement of Judgments Under the Model Law on Cross-Border Insolvency

Domestic systems of law across the globe have largely failed to develop comprehensive rules specifically for the private international law of insolvency and, in any event, what has been developed in each system has only increased conflicts.[30] The international community, therefore, designed a separate instrument for cross-border insolvency in the late 1990s—the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI). Regionally too, for example in Europe, alongside general private international law instruments,[31] a specific cross-border insolvency regime applies—the European Insolvency Regulation (EIR).[32] Globally, the regime takes the form of a model law, namely a non-binding instrument which provides uniform provisions for adoption. So far, the MLCBI has been adopted by 49 States.[33]

The MLCBI does not say this in so many words, but it generally follows the modified universalist norm and indeed has in turn influenced its development.[34] Thus, the MLCBI requires that courts and insolvency representatives cooperate to the maximum extent possible in the course of international insolvencies.[35] Notably, it requires quick recognition of a central (main) proceeding opened in the debtor's home country.[36] The MLCBI also provides a uniform jurisdictional basis for recognition, referring to the debtor's centre of main interests (COMI).[37] If the debtor has an 'establishment' (a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services[38]), the proceedings

[28] *Rubin and another v. Eurofinance SA* [2010] EWCA Civ. 895, para. 64.

[29] *Rubin* (n. 3 above).

[30] Fletcher (2005), p 7.

[31] See Brussels Regulation (Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.

[32] Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceeding [2015] OJ L 141/19 (EIR) (repealing Council Regulation 1346/2000, of 29 May 2000 on Insolvency Proceedings [2000] OJ L 160/1).

[33] See https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

[34] Mevorach (2018a), pp 111–124.

[35] MLCBI (n. 2 above), Arts. 25–27.

[36] Ibid., Arts. 15–17.

[37] Ibid., Art. 17.

[38] Ibid., Art. 2.

should be recognized as non-main proceedings.[39] Local courts are given residual control as they decide whether to grant recognition, which is not automatic and must be sought.[40] However, recognition should be granted as a matter of course based on objective criteria (the existence of foreign insolvency proceedings, main or non-main) subject to a strict public policy safeguard.[41] Certain relief (a stay) is automatic following the recognition of main proceedings,[42] and other (broad range of) relief[43] is discretionary in that it depends on what is sought and it requires finding that creditors are adequately protected.[44] The MLCBI also allows the court to provide any assistance to a foreign representative as permitted by the domestic law.[45]

Relief may also be granted to non-main proceedings.[46] Yet, the instrument's provisions primarily aim to support the main process—only the recognition of main proceedings results in immediate effects. Furthermore, when granting relief to non-main proceedings, 'the court must be satisfied that the relief relates to assets […] that should be administered in the foreign non-main proceeding or concerns information required in the proceeding'.[47]

The MLCBI is obscure, though, on the issue of the enforcement of judgments and orders. While it includes provisions on cooperation, assistance, and relief (and relief may include any appropriate relief[48]) none of the provisions of the MLCBI explicitly mention the enforcement of judgments. In *Rubin*, the UK Supreme Court reversed the decision of the Court of Appeal (noted in the previous section) and refused to enforce an insolvency-related judgment of a US Bankruptcy Court, which was the main insolvency forum.[49] The US court judgment was in default of appearance in respect of fraudulent conveyances and transfers (an insolvency-related judgment). The UK court concluded that neither the MLCBI provisions on assistance, cooperation or relief, nor common law provide special rules on the enforcement of insolvency judgments.[50] Therefore, the court applied the ordinary common law rule

[39] Ibid., Art. 17.

[40] Ibid., Art. 15.

[41] Ibid., Art. 6.

[42] Ibid., Art. 20.

[43] Including the examination of witnesses or the entrustment of the administration or realization of all or part of the debtor's assets to the foreign representative (ibid., Art. 21).

[44] Ibid., Art. 22.

[45] Ibid., Art. 7.

[46] Ibid., Art. 21 (discretionary relief which may be granted upon recognition of a foreign proceeding, main or non-main).

[47] Ibid., Art. 21(3). The EIR is even more robust where it requires that only one main proceeding is opened at the debtor's COMI and that this proceeding is automatically recognized and given effect to in other Member States (EIR, n. 32 above, Arts. 3(1) and 19). 'Secondary' proceedings may be opened where the debtor possesses an establishment, but the primary powers are given to the main process (ibid., Arts. 3(2),(3) and 19). The effects of the secondary proceedings are restricted to the assets of the debtor situated in the territory (ibid., Art. 3(2)). There is also a mechanism to avoid secondary proceedings (ibid., Art. 36).

[48] MLCBI (n. 2 above), Art. 21(1)(g).

[49] *Rubin* (n. 3 above).

[50] Ibid. Cf. *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508.

according to which a judgment *in personam* cannot be enforced against persons who were not present in the foreign country or did not submit to the jurisdiction of the court entering the judgment.[51]

Other countries have taken a firmer universalist approach, interpreting the MLCBI more inclusively regarding the enforcement of judgments. Notably, courts in the US have considered that the MLCBI, specifically the discretionary relief provision in Article 21, does allow the recognition and enforcement of insolvency judgments.[52] *Rubin* was not very well-received internationally,[53] yet it had further repercussions in the UK.[54] In subsequent cross-border insolvency cases, UK courts have interpreted modified universalism narrowly when required to defer to foreign judgments, including by applying the old rule in *Gibbs* (the 'Gibbs rule').[55]

The Gibbs rule provides that English courts will not enforce a foreign insolvency judgment discharging or modifying the terms of English-law-governed debt.[56] The rule impacts on both enforcement and choice of law. Thus, the UK court applies ordinary choice of law rules concerning contracts ('the proper law of the contract') in the context of insolvency proceedings,[57] and denies enforcement of the discharge when a different law is applied.[58] Contrary to modified universalism, the Gibbs rule precludes deference to the central court's insolvency laws and judgments save to the extent that the central court process modifies or discharges debts that the UK court, applying the Gibbs rule, would regard as properly governed by the law generally applicable in the central court. More recently, in *OJSC*, the UK court followed *Gibbs* (and *Rubin*) and refused to grant a permanent stay which in effect would enforce a foreign (Azerbaijani) restructuring plan.[59] The Court of Appeal, upholding the decision of the High Court, noted the criticism of the Gibbs rule. It rejected 'the charge of parochialism' concerning the rule,[60] given that the court in *Gibbs* accepts that 'questions of discharge of a contractual liability are governed by the proper law

[51] These principles are known as the 'Dicey rule'.

[52] See e.g., *In re Metcalfe & Mansfield Alternative Investments*, 421 BR 685 (Bankr. SDNY 2010), where the US court agreed to enforce Canadian discharges even though they contravened US law. See also Ho (2017), p 167 (referring to *In re Metcalfe* and noting that: 'This case demonstrates that the Model Law is not against the enforcement of foreign judgments').

[53] Moss noted that '[t]he decision in *Rubin* was perceived internationally as a blow to […] international co-operation via the recognition and enforcement of insolvency-related judgments' (Moss 2019, p 23).

[54] See e.g., *Singularis Holdings Ltd v. PricewaterhouseCoopers* [2014] UKPC 36, [2015] AC 1675; *Fibria Celulose S/A v. Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch).

[55] *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.

[56] See also *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ. 2802, para. 28 ('As the judge went on to note at [46], there is an exception to the rule if the relevant creditor submits to the foreign insolvency proceeding. In that situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding. But the application before the judge proceeded on the basis, as it does before us, that this exception is not engaged').

[57] See also Westbrook (2019), p 3.

[58] It seems that the rule encompasses a choice of forum rule as well whereby only an English court can discharge English law governed debts (ibid., p 12).

[59] *In re OJSC International Bank of Azerbaijan, Bakhshiyeva v. Sberbank of Russia et al* [2018] EWHC 792 (Ch), [2018] Bus LR 1270, affd, [2018] EWCA Civ. 2802, [2019] 2 All ER 713.

[60] *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ. 2802, para. 30.

of the contract, whether or not that law is English law […]'. However, it recognized that:

> […] the rule may be thought increasingly anachronistic […] In particular, there may now be a strong case for saying that, in the absence of a stipulation to the contrary, contracting parties should generally be taken to envisage that, upon the supervening insolvency of one party, a single law closely associated with that party should govern the rights of its creditors, wherever in the world its assets happen to be situated, and regardless of the proper law of the contract […][61]

The court in *OJSC* held, however, that the MLCBI is limited to procedural aspects of cross-border insolvency and does not include rules on choice of law. Therefore, creditors' substantive rights cannot be overridden by invoking the relief provisions in the MLCBI.[62] As noted above, this approach is not widely held, and both *Rubin* and *Gibbs* have been strongly critiqued.[63]

Yet, *Rubin* highlighted a weakness in the MLCBI's regime: it is prone to inconsistent application or no application at all in relation to the enforcement of judgments emanating from insolvency proceedings. Empirical studies have shown that the MLCBI has been applied quite consistently and 'universalistically',[64] including regarding the use of the instrument's discretionary relief.[65] The enforcement of judgments (and deference to foreign law), however, was a matter of concern and a 'notable problem'.[66] Requests to enforce judgments and give effect to foreign orders, which could be appropriate in various circumstances and could save costs of opening multiple proceedings, were sometimes not sought. This was likely because of uncertainties regarding the availability of such relief in the jurisdiction. For example, in the Japanese case of *Azabu Tatemono*,[67] the Japanese court recognized the foreign US Chapter 11 proceedings under the Japanese version of the MLCBI. If the Japanese court had also enforced the debt discharge granted by the US court, the foreign proceedings would have been given universal effect. Enforcement, however, was not pursued and instead concurrent local proceedings in Japan were opened to assess and adjudicate the local claims.

Courts have been somewhat unsure regarding the extent to which they can rely on the MLCBI provisions to give universal effect to foreign judgments. The UK Court

[61] Ibid., para. 31. See also *Global Distressed Alpha Fund 1 Ltd Partnership v. PT Bakrie* [2011] EWHC 256 (Comm); [2011] 1 WLR 2038.

[62] Ibid., para. 89.

[63] See notably *In re Agrokor d.d. et al*. 591 BR 163 (Bkrtcy SDNY 2018), where the United States Bankruptcy Court for the Southern District of New York recognized and enforced a settlement agreement noting (at p 192) that the Gibbs rule 'remains the governing law in England despite its seeming incongruence with the principle of modified universalism espoused by the Model Law and a broad consensus of international insolvency practitioners and jurists'. See also *in Re Pacific Andes Resources Development* [2016] SGHC 210.

[64] See generally, Mevorach (2011); Westbrook (2013).

[65] Mevorach (2011), p 543.

[66] Ibid., p 546.

[67] *Azabu Tatemono*, Tokyo District Court, 3 February 2006.

of Appeal decision in *Rubin*, for example, granted the enforcement relief (previously denied by the lower court)[68] under common law principles, expressing a concern in this respect regarding the ambiguity in the MLCBI:

> What troubles me is that the specific forms of cooperation provided by Article 27 do not include enforcement. Indeed there is no mention anywhere of enforcement yet the guidance clearly had it in mind. On the other hand cooperation 'to the maximum extent possible' should surely include enforcement, especially since enforcement is available under the common law. I would prefer to express no concluded view about the point since it is unnecessary to my decision.[69]

Even when universalist relief was granted under the MLCBI, for example, by a US court in *Condor*,[70] this was achieved after litigation and appeals.[71]

4 Enforcement Under the Model Law on Insolvency Judgments

The MLCBI appeared to have a gap or at the least there was uncertainty regarding the scope of its relief provisions. It was also clear that general private international law instruments exclude the enforcement of insolvency judgments from their scope.[72] The new instrument—the MLIJ—thus aimed to address this gap or uncertainty, to 'fix' *Rubin* (and other case law following the same approach),[73] and prevent further defections.[74]

However, the background to the MLIJ project was more compound. As noted above, some countries considered the MLCBI as already addressing the enforcement of insolvency judgments. Pursuant to this approach, the MLCBI could continue to be used for this purpose. There was also a concern about asset recovery generally,[75] and the limited reach of the MLCBI which has not been adopted by all or by the majority of countries. It was considered that perhaps a new separate instrument that did not fully follow the MLCBI framework could induce greater participation, especially by

[68] *Rubin v. Eurofinance SA* [2009] EWHC 2129 (Ch).

[69] *Rubin v. Eurofinance SA* [2010] EWCA Civ. 895, para. 63.

[70] *In re Condor Insurance Limited*, 601 F.3d 319, 2010 WL 961613 (5th Cir. 2010).

[71] Ibid. (the appellate court reversed the decisions of the first and second instance courts).

[72] MLIJ Guide to Enactment (n. 5 above), p 12.

[73] Ibid., p 11, referring as well to the decision of the Supreme Court of Korea of 25 March 2010 (case No. 2009Ma1600). See also generally, Han (2015); Takahashi (2011).

[74] The Guide to Enactment notes the concern that other countries may follow *Rubin* especially as the MLCBI stresses that it should be interpreted with due regard to its international origin, to promote uniformity in its application (MLIJ Guide to Enactment, n. 5 above, pp 11–12).

[75] The problem of asset-tracing and recovery in different contexts has since been further considered at an UNCITRAL Colloquium and may be addressed more comprehensively by UNCITRAL in the future (see UNCITRAL, International Colloquium on Civil Asset Tracing and Recovery (6 December 2019), https://uncitral.un.org/en/assettracing).

the offshore jurisdictions that tend to host companies' registered offices but often not the actual head-offices or the business (i.e. the COMI).[76]

The MLIJ, therefore, avoids referring to main, non-main proceedings or COMI. Instead, it focuses on the insolvency-related judgment. It also often tracks general private international law instruments concerning judgment enforcement, in particular the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters developed by the Hague Conference on Private International Law, which excludes insolvency from its scope.[77]

4.1 Scope and Definitions

The MLIJ has a specific scope where it applies to 'the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement is sought'. Thus, it addresses the cross-border enforcement of judgments related to insolvency. This includes an outbound aspect where the MLIJ authorizes relevant bodies in the enacting State to seek recognition and enforcement abroad,[78] and inbound provisions on the recognition and enforcement of judgments further described below.[79]

The definitions section in the MLIJ is, therefore, brief. It includes two definitions largely borrowed from the MLCBI—of 'insolvency proceeding' and 'insolvency representative',[80] and two new definitions of 'judgment' and 'insolvency related judgment'. The definition of judgment is rather obvious and includes any decision which may be issued by any authority provided it has the same effect as a court.[81] But the MLIJ clarifies the meaning of 'an insolvency-related judgment'. This definition is quite wide and covers a range of judgments and orders. Any judgment which 'arises as a consequence of or that is materially associated with an insolvency proceeding'[82] is covered, if it was 'issued on or after the commencement of that insolvency proceeding' (the judgment commencing an insolvency proceeding is excluded from the MLIJ scope).[83] The law thus covers both judgments with general effect, and orders in insolvency-related litigation between individual parties (*in personam* judgments). The MLIJ Guide to Enactment provides a (non-exhaustive) list of examples of such judgments, which explicitly include the type of judgments in issue in

[76] See Pottow (2019), p 486 (noting that 'some states are resistant to the bifurcation of "main" and "non-main" proceedings and hence loathe the concept of COMI, which serves as the doctrinal foundation of such bifurcation'). See also on the position of offshore jurisdiction, Mevorach (2018a), p 70 (fn. 109).

[77] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (https://www.hcch.net/en/instruments/conventions/full-text/?cid=137), Art. 2(e).

[78] MLIJ (n. 5 above), Art. 5.

[79] See Sects. 4.2 et seq.

[80] MLIJ (n. 5 above), Art. 2(a) and (b), which are almost identical to MLCBI (n. 2 above), Art. 2(a) and (d) (which refer though to 'foreign' proceeding and representative).

[81] Excluding interim measures of protection (MLIJ, n. 5 above, Art. 2(c)).

[82] Whether or not that insolvency proceeding has closed (ibid., Art. 2).

[83] Ibid., Art. 2(d)(ii).

cases such as *Rubin*, namely avoidance of detrimental transactions,[84] and those with general effect in issue in cases following the Gibbs rule: 'a judgment (i) confirming or varying a plan of reorganisation or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement'.[85]

4.2 Procedure for Recognition and Enforcement of Judgments

The MLIJ delineates the steps and process for the recognition and enforcement of insolvency judgments.[86] An insolvency representative or another person entitled to seek recognition abroad can seek such recognition/enforcement of the judgment in the enacting State[87] by presenting documents evidencing the existence of a judgment and the fact that it is enforceable and effective.[88] Indeed, as is common under private international law instruments,[89] it is a condition for recognition that the judgment has effect and is enforceable in the originating country.[90] After seeking recognition and enforcement of a judgment and before a decision is made, provisional relief may be granted 'where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment'.[91]

The judgment shall then be recognized and enforced unless the grounds for refusing recognition apply.[92] It shall be given the same effect it has in the originating country. Alternatively, it shall be given the same effect it would have had if it had been issued by a court in the recognizing country.[93] Recognition/enforcement shall be granted to a severed part of a judgment where this is what is sought or where only this part is capable of being recognized and enforced.[94] The MLIJ also clarifies that this procedure (and nothing in this law) prevents the court in the enacting State from providing any additional assistance.[95]

[84] MLIJ Guide to Enactment (n. 5 above), p 34.

[85] Ibid.

[86] See also Hawthorn and Young (2018), p 197.

[87] From a competent court. Recognition may also arise by way of defence or as an incidental question before such a court (MLIJ, n. 5 above, Art. 13(d)).

[88] Ibid., Art. 11.

[89] See Art. 4(3) of the 2019 Hague Enforcement Convention (n. 4 above).

[90] MLIJ (n. 5 above), Arts. 9 and 13(a). Recognition/enforcement may also be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may make recognition or enforcement conditional on the provision of such security (ibid., Art. 10).

[91] Ibid., Art. 12.

[92] Ibid., Art. 13.

[93] If the insolvency-related judgment provides for relief that is not available under the law of the receiving State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State (ibid., Art. 15).

[94] Ibid., Art. 16.

[95] Ibid., Art. 6.

4.3 Grounds to Refuse Recognition/Enforcement

The key feature of the MLIJ, and indeed the longest, is Article 14, which delineates the ground to refuse recognition and enforcement of insolvency-related judgments, complementing Article 7 as well on public policy.

4.3.1 Public Policy, Due Process, and Fraud

The MLIJ includes the usual public policy safeguard, where actions governed by the law can be refused on the basis that they would be 'manifestly contrary to public policy'.[96] The provision in the MLIJ adds that public policy includes 'the fundamental principles of procedural fairness'.[97]

Article 14 provides additional grounds akin to public policy and procedural fairness, typical in private international law instruments on enforcement.[98] Thus, recognition and enforcement may be refused in cases where a judgment was obtained by fraud;[99] or where there was no due notification about the institution of the proceeding giving rise to the judgment, or the manner of the notification was incompatible with the rules of the enacting country concerning service of documents.[100]

4.3.2 Conflict with Other Judgments

Again, in accordance with private international law instruments on enforcement,[101] recognition/enforcement may also be refused where the judgment is inconsistent with a judgment issued in the State in a dispute involving the same parties, or with an earlier judgment issued in another State or with a judgment in a dispute between the same parties on the same subject matter.[102]

4.3.3 Lack of Jurisdictional Basis

The MLIJ also allows the court in the enacting country to refuse to recognize/enforce a judgment if the origin of the judgment is in a forum that did not exercise jurisdiction on a proper basis. Proper bases include (i) consent;[103] (ii) submission;[104] (iii) the exercise of jurisdiction 'on a basis on which a court in this State could have exercised jurisdiction';[105] and (iv) the exercise of jurisdiction on a basis that 'was not incompatible with the law of this State'.[106]

[96] Ibid., Art. 7.
[97] Ibid., Art. 7.
[98] See the 2019 Hague Enforcement Convention (n. 4 above), Art. 7(1)(a) and (b).
[99] MLIJ (n. 5 above), Art. 14(b).
[100] Ibid., Art. 14(a).
[101] See the 2019 Hague Enforcement Convention (n. 4 above), Art. 7(1)(e) and (f).
[102] MLIJ (n. 5 above), Art. 14(c) and (d).
[103] Ibid., Art. 14(g)(i).
[104] Ibid., Art. 14(g)(ii).
[105] Ibid., Art. 14 (g)(iii).
[106] Ibid., Art. 14 (g)(iv).

The first and second grounds—consent and submission—are typical jurisdiction bases for the purpose of recognition/enforcement under general private international law,[107] and were the bases to refuse enforcement in *Rubin*.[108] The third and fourth refer to what is recognized as a proper basis domestically, or at least is not incompatible with domestic law. The fourth requires further clarification. The MLIJ Guide to Enactment explains that this provision is similar to the third basis (exercise of jurisdiction on a basis on which a court in the enacting State could have exercised jurisdiction), but that it is broader.[109] It is not limited to 'jurisdictional grounds explicitly permitted under the law of the receiving State'.[110] Rather, it applies 'to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State'.[111]

4.3.4 Adequate Protection

Another refusal ground is based on lack of 'adequate protection'.[112] Recognition/enforcement may be refused if '[t]he interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued'. To avoid delay and litigation, and indeed to clarify the type of judgments for which consideration of the effect on the general body of creditors is required, the MLIJ limits this refusal ground to a specific type of judgment that '[m]aterially affects the rights of creditors generally'.[113] The provision refers as examples to judgments 'determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved'.[114]

4.3.5 Interference or Mismatch with Recognized Proceedings

Two additional refusal grounds make certain connections between the MLIJ and the MLCBI and its underlying framework of recognizing collective proceedings. Thus, Article 14(e) allows courts to refuse enforcement if that would interfere 'with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State'. Article 14(h) includes an 'optional' provision for MLCBI enacting States to refuse enforcement where the judgment originated in a country whose proceeding was or

[107] See the 2019 Hague Enforcement Convention (n. 4 above), Art. 5(1)(e) and (f).
[108] See text to n. 51 above.
[109] MLIJ Guide to Enactment (n. 5 above), p 61.
[110] Ibid.
[111] Ibid.
[112] MLIJ (n. 5 above), Art. 14(f).
[113] See MLIJ Guide to Enactment (n. 5 above), p 25.
[114] MLIJ (n. 5 above), Art. 14(f)(i).

would not be recognized by the enacting country under its MLCBI, subject to certain exceptions.[115]

4.4 Article X

The final article in the MLIJ, which does not follow the previous articles' sequence and is thus entitled Article X, clarifies that the intended scope of the MLCBI *was broad*, and inclusive of enforcement of judgments:

> Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of judgments.

Article X thus admits that the MLCBI and MLIJ overlap.

5 Overlaps and Inconsistencies

The question is whether, notwithstanding overlaps, the MLIJ still strengthens the regime or whether the result is inconsistencies that can undermine the cross-border insolvency system. The answer is mixed. As is argued below, overall the MLIJ adds robustness regarding the availability of the enforcement relief and the manner to seek it, but it entails a risk of weakening the law where it is obscure in relation to jurisdiction.

5.1 Clarity Regarding What and How to Enforce

The MLIJ focuses on the enforcement of judgments. The MLCBI only refers to proceedings. The definitions of judgments and insolvency-related judgments in the MLIJ thus add to the regime. The addition is quite trivial though. It was already possible, if enforcing insolvency judgments under the MLCBI, to draw from the body of case law that evolved in the context of the EIR enforcement provisions concerning judgments deriving from and linked to insolvency proceedings.[116] Indeed, the MLIJ attempts to prevent overlap where the definition of an insolvency-related judgment excludes the commencement of the proceeding from the judgments that

[115] The receiving court may refuse to recognize/enforce the judgment unless the insolvency representative of a proceeding that is or could have been recognized under the MLCBI (as enacted in the State) participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related, and the judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced. See also MLIJ Guide to Enactment (n. 5 above), p 23.

[116] See EIR (n. 32), Art 32(1); *Gourdain v. Nadler*, Case C-133/78, ECLI:EU:C:1979:49, [1979] 3 CMLR 180; *Seagon v. Deko Marty Belgium NV*, Case C-339/07, ECLI:EU:C:2009:83, [2009] BCC 347; [2009] 1 WLR 2168; *Polymer Vision R&D Ltd v. Van Dooren* [2011] EWHC 2951.

can be enforced (as this is clearly covered under the MLCBI).[117] But otherwise, all other judgments and orders are included in both instruments. The MLCBI does not exclude judgments from its scope. Article X of the MLIJ clarifies that such exclusion was not intended. The focus on proceedings in the MLCBI derives from universalism's aim of supporting a collective, centralized process, including the tools employed and judgments granted during (mostly) the main proceeding.

The instruments, therefore, overlap in terms of scope. The MLIJ does not deviate here from the MLCBI and universalism—there is no inconsistency on this point. The clarifications, although non substantive, are welcome and may reduce litigation and delay. The provisions on the recognition and enforcement of judgments in the MLIJ add further clarifications regarding process and procedure. Under the MLCBI, to seek enforcement, the insolvency representative would need to invoke the relief provisions following recognition of (usually) main proceedings. The MLIJ specifies what the representative needs to provide in terms of evidence, and the usual requirement that such judgment be enforceable, as explained above. Again, this is not in itself material but adds clarity. However, when considered together with the clear requirement to enforce and in view of biases on decision making (discussed next), the additions become material and can strengthen universalism.

5.2 The Default Is Enforcement

Unlike the MLCBI, there is no discretion regarding the enforcement of judgments in the MLIJ. Where the procedural conditions are met, the judgment 'shall' be enforced. The approach here is different and to some extent is inconsistent with the MLCBI. The difference is not dramatic because whilst enforcement is required, it is also subject to a range of refusal grounds, which go beyond public policy and adequate protection—the applicable safeguards under the MLCBI. Furthermore, the discretion under the MLCBI is not open-ended. It is derived from the idea that an insolvency representative may seek all sorts of relief and that not all relief is adequate in any given circumstances. While a stay is automatic to give an immediate breathing space to the business in distress, other relief, including the enforcement of a judgment, may be given depending on what the representative is requesting. The relief also follows the procedure for seeking recognition, which is based on objective criteria (the existence of main or non-main proceedings). There are also specific criteria indicating when relief that was requested may be refused and this is where creditors and other stakeholders are not adequately protected.[118]

However, the fact that the default rule under MLIJ is enforcement and indeed that enforcement is the explicit focused relief under this regime, may promote universalist choices. Cognitive biases also likely impact decisions of countries and their implementing institutions. As analysed in detail elsewhere,[119] biases include loss aversion (overweighting of losses of sovereignty, compared with gains of deference

[117] MLIJ (n. 5 above), Art. 2(d)(ii).

[118] See text to n. 44 above.

[119] See Mevorach (2018a), Ch 2.

and cooperation), a status quo bias (preference for the current state of affairs which may be territorialist and path dependent), the endowment effect (difficulty to depart from existing endowments such as control over local entities and assets) and short termism (tendency to be driven by short-term concerns). These biases influence choices generally but can also play a role in international law and specifically in cross-border insolvency.[120] Vagueness in rules can exacerbate these biases and undermine compliance, because of the tendency to focus on information that is prominent and explicit.[121] The rather imprecise legislative framing of the relief provisions in the MLCBI, especially concerning the enforcement of judgments, might have contributed to territorial choices of courts and the inconsistent application of the framework in different jurisdictions.[122] Enforcement is not mentioned explicitly in the MLCBI and is only implied within the opening 'any appropriate relief' language, and the availability of 'any additional relief', in the discretionary relief rule.[123] Being explicit and focused matters. Default rules can also affect compliance as studies show that people tend to follow what is presented as the default. Defaults tend to be perceived as representing the existing state or status quo and change usually involves a trade-off. Adherence to a default option may also be due to perceiving the default rule as representing the recommended, endorsed, option.[124]

Biases may be especially acute when gains from cooperation and universalism are less vivid compared with perceived losses. For example, courts that are asked to turn over assets to a main process abroad, to the frustration of local creditors, may observe a concrete loss today, while longer term benefits of reorganization, increased international trade, certainty, and so forth are more ambiguous and harder to quantify.[125] The ability to impose the country's laws regarding local assets, locally incorporated companies and local constituencies may also be perceived as an existing entitlement (endowment) of sovereignty and vested rights. Thus, sovereign actors may be disinclined to defer to foreign laws and judgments. They may naturally prefer imposing the country's laws even where the interests of local stakeholders are not at stake.[126]

The decision of the UK Supreme Court in *Rubin* (and other judgments along such lines) reflects such tendencies to focus on local concerns. The court noted that 'the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of UK businesses without any corresponding benefit'.[127] Even though modified universalism has greater expected utility, departure from existing entitlements may be perceived as a loss—in this case, to local businesses, or in other cases local assets may be perceived as endowments—and be given greater weight compared to the long-term gains.

[120] Ibid., pp 49–79.
[121] Ibid., p 164.
[122] Ibid., p 224.
[123] MLCBI (n. 2 above), Art. 21(1) and 21(1)(g).
[124] See in more detail Mevorach (2018a), pp 64, 94–95.
[125] Ibid., p 67.
[126] Ibid., pp 69–70. See also Walters (2019), pp 73–77.
[127] *Rubin* (n. 3 above), para. 130.

5.3 Overlapping Refusal Grounds

The refusal grounds in the MLIJ are elaborated, but many of them actually overlap with the MLCBI. As we have seen, Article 14 of the MLIJ contains additional refusal grounds akin to public policy and procedural fairness. These are refusal grounds usual in the context of enforcement and indeed they track provisions in private international law instruments as noted above, but they are largely overlapping both with the MLCBI and with MLIJ's own public policy provision. The refusal grounds based on inconsistency with other judgments are also quite trivial.

Adequate protection is a safeguard in both instruments. The MLIJ narrows it, though, to judgments which materially affect the rights of creditors and other stakeholders, as noted above. The MLIJ Guide to Enactment notes the overlap where it says that '[a] requirement for protection of the interests of creditors and other interested persons, including the debtor, is included in both the Model Law and the MLCBI'.[128] Yet, it suggests that the safeguards apply in 'different situations'. The MLCBI requires that the court considers if creditors are adequately protected when 'granting, modifying or terminating provisional or discretionary relief under the MLCBI'.[129] The idea is that 'there should be a balance between relief that might be granted to the foreign representative and the interests of the persons that may be affected by that relief'.[130] The equivalent safeguard under the MLIJ has a more limited scope where it applies as a refusal ground regarding specific types of judgments. The difference is subtle, and it is only a difference of scope and focus. But the clarification of the scope of the safeguard is helpful and can avoid litigation. Indeed, consideration of the interests of the general body of creditors should not be required, under any of the instruments, regarding *in personam* judgments.

The refusal grounds in the MLIJ that seek to support collective proceedings (allowing to refuse enforcement if that would interfere with collective insolvency proceedings or if the judgment originated in non-recognizable proceedings) are important, especially if we envisage that certain countries may only adopt the MLIJ. But as such they largely reflect the MLCBI, where recognition and relief are granted to main or non-main proceedings, and where courts are required to be more cautious when granting relief to non-main proceedings.[131]

5.4 Divergence Regarding Jurisdiction

However, there is one key difference between the MLCBI and the MLIJ that risks undermining the MLCBI regime and universalism, and that is the jurisdictional basis for recognition and relief/enforcement. As we have seen, the MLCBI, in line with modified universalism, is a framework to mainly support the main proceedings. If recognition is granted to the main proceeding, certain relief is automatic and additional

[128] MLIJ Guide to Enactment (n. 5 above), p 25.
[129] Ibid., referring to Art. 22 of the MLCBI.
[130] Ibid., referring to the MLCBI Guide to Enactment.
[131] MLCBI (n. 2 above), Art. 21(3).

relief can be sought. It is not envisaged that relief be rejected based on lack of jurisdiction, as the jurisdictional ground is already dictated by and addressed in the recognition process. The bases to refuse relief are rather the public policy and adequate protection safeguards. Indeed, in *Rubin* the court did exactly the opposite and refused to grant relief because the party did not consent/submit to the foreign jurisdiction, even though the judgment emanated from a recognized main proceeding.[132] The decision in *Rubin* was, therefore, rightly perceived by many as a defection from the cross-border insolvency framework.[133] In declining to assist in any way, the UK Supreme Court rendered the decision to recognize the US main proceeding on jurisdictional grounds quite moot.

The MLIJ does not clearly reverse the *Rubin* approach by following an explicit framework of support to the main insolvency process. It provides a host of jurisdictional grounds as bases for refusing the recognition/enforcement of judgments. These include consent/submission, which, as noted, are recognized refusal grounds concerning jurisdiction under general private international law. They are not, however, the type of bases that ought to determine whether to enforce or refuse the enforcement of insolvency judgments emanating from a central process under modified universalism. For example, non-submission of a creditor to the jurisdiction where the company has its COMI and where main proceedings are taking place should not be a reason not to enforce an avoidance judgment of the main court against the creditor, indeed contrary to *Rubin*.

Other jurisdictional grounds in the MLIJ depend on domestic laws or what is not incompatible with the domestic law. The fact that the insolvency proceeding was the main proceeding is not explicitly listed as a proper, independent, jurisdictional basis. Still, reference to domestic laws or what is not incompatible with them could (indirectly) promote the recognition of main proceedings because COMI has become quite a recognized jurisdictional basis in insolvency under domestic laws. Therefore, it can be expected that judgments of courts in forums where main proceedings take place, based on COMI, will be recognized going forward in countries that enact the MLIJ. For example, in EU legal systems, COMI is a recognized jurisdictional basis because of the direct application of the EIR, where main proceedings may only be opened where the COMI is located.[134] COMI is also the basis for recognition of foreign main proceedings under the MLCBI which was enacted by 49 States.

Yet, the MLCBI has not been adopted by all countries and the MLIJ is provided as a standalone instrument—it does not require adoption of the MLCBI, and it does not explicitly endorse the COMI (and establishment) concepts. Still, courts may accept COMI as a proper jurisdictional basis, also where this is not incompatible with their countries' laws. Such an approach is not guaranteed, though, where there is no explicit agreement on COMI as a primary basis for the enforcement of insolvency judgments. Furthermore, in the MLCBI even where it is adopted, COMI is only a basis for recognition/relief. The MLCBI does not unify international

[132] See text to n. 49 above.

[133] See n. 53 above.

[134] EIR (n. 32 above), Art. 3.

jurisdiction rules nor does it unify a choice of law rule based on COMI. Notably, while the norm which centralizes the law and the forum is gradually emerging, COMI is not yet widely recognized as grounds for the application of the forum law to insolvency-related issues. As the UK High Court in *OJSC* observed:

> Put another way, our common law does not yield to, adopt or enforce the law of a COMI elsewhere than here, and the law of the COMI cannot be enforced in this jurisdiction, unless and to the extent that by treaty and/or statute that law is absorbed into and becomes in effect part of British law. Such assistance as a British court can provide in accordance with the theory and objectives of modified universalism is restricted to what by its own common law it has jurisdiction to do, or by what under such an express treaty or statute it is empowered to do […].[135]

As noted above, the MLIJ Guide to Enactment explains that the jurisdiction bases are broad and not limited to those explicitly permitted under the domestic law. They also include what is not incompatible with the law of the receiving State. The Guide further explains that the purpose of the provision is:

> to discourage courts from refusing recognition and enforcement of a judgment in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided that exercise was not incompatible with the central tenets of procedural fairness in the receiving State.[136]

A report by INSOL International explains that this provision aims to address the judgment in *Rubin.* In similar circumstances, and pursuant to the MLIJ:

> […] for a UK court to refuse recognition and enforcement of a US judgment, a party must demonstrate that although the US court found jurisdiction under US law to enter the judgment and provided adequate notice of the proceeding to the judgment-debtor, the US court's judgment violates the 'central tenants of procedural fairness' in the UK.[137]

The UK court also noted in *Bakhshiyeva v. Sberbank of Russia*,[138] regarding the tension between the Gibbs rule and modified universalism, that 'the introduction of a new Model Law concerning the recognition and enforcement of insolvency related judgments as proposed by UNCITRAL may solve the problem if ever adopted'.[139]

Thus, *Rubin* might be fixed by these provisions, but that depends on future interpretations of the MLIJ, which is somewhat obscure on jurisdictional bases and is not

[135] *Re OJSC International Bank of Azerbaijan, Bakhshiyeva v. Sberbank of Russia et al* [2018] EWHC 792 (Ch), [2018] Bus LR 1270 (para. 86).
[136] Ibid.
[137] INSOL International (2019), p 9.
[138] *Re OJSC International Bank of Azerbaijan, Bakhshiyeva v. Sberbank of Russia et al* [2018] EWHC 792 (Ch), [2018] Bus LR 1270.
[139] Ibid., para. 160. See also *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ. 2802, para. 78.

fully consistent with the general cross-border regime.[140] The jurisdictional grounds in the MLIJ are broad and, especially a jurisdictional basis which is not incompatible with domestic law, would not require that the basis be identical to what is provided locally. Yet, there is a risk that courts might not see 'incompatible' as the same as fundamental fairness in the public policy/adequate protection sense (per the INSOL interpretation in the quote above) where these grounds are already covered in Articles 7, 14(a), 14(c) and 14(f)) of MLIJ. The fact that the MLIJ refrained from making any reference to the notion of main proceedings/COMI and linking its recognition/enforcement regime primarily to such proceedings, at the least creates ambiguities regarding support to a centralized process. Thus, countries that may enact the MLIJ as a stand-alone instrument (see further below on alternative ways of implementation) without becoming parties to the MLCBI or otherwise recognizing COMI as a jurisdiction basis for insolvency,[141] may not enforce orders and judgments emanating from main proceedings if there is no submission or consent.

The MLIJ does reject the *Rubin* approach, though, in Article X, which states that the intention *is* to include the enforcement of judgments in the MLCBI relief provisions.[142] This article, however, is quite disconnected from the rest of the MLIJ text technically and in substance. The relief in Article 21 of the MLCBI (to which Article X refers) is discretionary, whilst Article 13 of the MLIJ (the operational article on enforcement) requires that judgments *shall* be recognized and enforced if they meet the requirements. The MLIJ also includes definitions and procedural requirements that do not exist in the MLCBI. Importantly, Article X reflects an international agreement that relief, primarily to main proceedings, includes the enforcement of judgments. The main text of the MLIJ, however, does not clearly and explicitly follow the same approach. The MLIJ Guide to Enactment also confirms that Article X relates to the interpretation of the MLCBI, and therefore 'it is not intended that it be included in legislation enacting this Model Law'.[143] As has been observed by the late Gabriel Moss, '[t]his is an odd suggested provision'.[144] The peculiarity of Article X can be explained by the divergent views and controversy concerning the MLCBI relief provisions and their coverage of enforcement of judgments. Article X does clarify this and resolves that controversy, but in view of the development of the MLIJ alongside this clarification, there is also a potential for inconsistency.

[140] See also Pottow (2019), p 500 ('This language from the GTE [Guide to Enactment] is a thinly veiled (if veiled at all) rebuke of *Rubin*').

[141] Instead, they may, for example, rely solely on place of incorporation.

[142] See also MLIJ Guide to Enactment (n. 5 above), p 25.

[143] Ibid., para. 127.

[144] Moss (2019), p 21.

6 Implementation

The practical question is whether in view of overlaps and inconsistencies, countries should (or should not) adopt the MLIJ and if they should adopt it, in what way. The MLIJ is quite obscure concerning the manner of adoption. It is stated in the preamble that the MLIJ's purpose is '[w]here legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation'.[145] This suggests that the MLIJ and MLCBI should be linked and complementary. Yet, enactment of the MLCBI is not stated as an aim or precondition. It is only 'where' the MLCBI was adopted that MLIJ would complement such legislation. It is also not clear if the MLIJ should complement the MLCBI by operating alongside it as a parallel system or if it should be interwoven within it.[146] As shown above, the standalone nature of the instrument is not merely technical and the MLIJ is not easily aligned with the MLCBI. Divergences also reflect prior approaches, compromises, and mixed aims. It is, therefore, expected that consideration of adoption will instigate legislative discussions. Following implementation, questions may arise concerning the application and interpretation of the law. It is important that legislators and courts will have due regard in this process to the broad context of cross-border insolvency objectives, the existing instruments and additional developments.

6.1 All Adopt!

Countries that have considered that the MLCBI already allows courts to enforce judgments, might take the position that a new instrument on this matter is not needed for their cross-border insolvency system. Article X now clarifies that the enforcement of judgments is included in the MLCBI relief provisions. Therefore, it is arguably enough if countries adopt the MLCBI, or do nothing if they have enacted it already, because then according to Article X they can enforce insolvency-related judgments.[147]

Such an approach would be misconceived. The effectiveness of international instruments for cross-border insolvency relies on their wide adoption. Enactment of the MLIJ by countries generally and especially by major economies with more experience with cross-border insolvency cases and the application of the MLCBI would send a signal about the importance of the regime, serving as a nudge and inducing participation by other countries, which would promote uniformity and consistency.[148] In the process of adopting the MLCBI, which was finalized in 1997, the enactment of the regime in 2005–2006 by the USA and the UK gave it a boost and

[145] MLIJ (n. 5 above), Preamble 1(f).

[146] The MLIJ Guide to Enactment does provide some guidance on the relationship between and the complementary nature of the MLIJ and the MLCBI, noting areas of overlap, similarity, and discrepancy (MLIJ Guide to Enactment, n. 5 above, pp 23–25).

[147] See also Hawthorn and Young (2018), p 197.

[148] See on the effect of nudges in cross-border insolvency and the peer effect, Mevorach (2018a), pp 59, 65–66, 74–75, 77.

seems to have induced other countries to follow.[149] Once a good number of leading economies had adopted the MLCBI, there was also more leverage when international organizations such as the World Bank made efforts to introduce the MLCBI into legal systems, especially in developing countries.[150]

Importantly, the MLCBI is currently vague regarding the enforcement of judgments. The MLCBI speaks of proceedings rather than judgments, and in its relief provisions the enforcement of judgments is not specified explicitly. As a result, the MLCBI does not include concrete definitions and procedures for the seeking of recognition and the enforcement of insolvency judgments. It also does not cover non-COMI/establishment judgments. Article X does not fill these gaps. It only clarifies that the relief available under the MLCBI includes recognition and the enforcement of judgments notwithstanding prior interpretation. It does not provide the detailed procedure for seeking enforcement. Additionally, the enforcement regime under the MLIJ is stronger where enforcement is required (subject to refusal grounds), compared with the MLCBI where enforcement is a matter of discretionary relief.

Where the MLIJ is enacted, foreign users would have a clearer guidance on seeking enforcement of judgments. Implementing institutions in the country could also then follow a stronger, more straight-forward procedure when enforcing insolvency-related judgments, avoiding conflicting judgments and interpretations within the jurisdiction, saving litigation costs. Even in countries such as the United States, which has been generous when applying the MLCBI, decisions regarding recognition, enforcement and effect to foreign orders and judgments have not always been consistent.[151] Furthermore, often generosity has at least partially relied on comity (which indeed is embedded in the MLCBI as it is enacted in the United States).[152] But comity is a precarious and unreliable basis for the recognition and enforcement of judgments.[153]

[149] In the decade between 2005–2015, more than thirty additional countries enacted legislation based on the MLCBI.

[150] Mevorach (2018a), p 75.

[151] See e.g., *In re Elpida Memory Inc*, No 12-10947 (D Del 16 Nov. 2012) where the court when asked to recognize an asset sale transaction which was already approved by a foreign main reorganization proceedings instead applied the domestic rules concerning assets sales, and *in re Qimonda* (2013) 737 F3d 14 where the court refused to defer to German law which permitted the cancellation of US patent licences, even though the German bankruptcy system was considered in line with fundamental fairness standards. Cf. *In re Avanti Communications Group plc*, 582 BR 603, 614 (Bankr. SDNY 2018) and *In re Energy Coal SPA* (2018) 582 BR 619 where the court gave effect to foreign restructurings.

[152] See e.g., *In re Daebo International Shipping Co, Ltd*, 543 BR 47 (2015); *In re Atlas Shipping A/S*, 404 BR 726, 739 (Bankr. SDNY 2009). These decisions were primarily based on the MLCBI as enacted in the USA, but reaching universalist decisions required reference to comity, enshrined in the US version of the MLCBI. The court in *re Daebo*, referring as well to *re Atlas* noted that: 'Chapter 15 "contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post recognition relief"' (*In re Daebo International Shipping Co, Ltd*, 543 BR 47 (2015), para. 2).

[153] See also Chung (2014), pp 96, 104 (noting that comity is ambiguous and ill-defined); Beckering (2008), p 281 (noting that: 'The major historical impediment to achieving sustainable unification in cross-border corporate insolvency administration is comity based theoretical analysis in bankruptcy reorganization for dissolution cases' and that: 'By maintaining comity as the focal point in the […] United States judiciary, which is still possible under the construct of Chapter 15, forward-looking reform of antiquated bankruptcy law in foreign countries will be negligible, at best').

6.2 Avoiding Carve-Outs

Certainly, the MLIJ should be welcomed by countries that 'called for it', such as the United Kingdom, Japan and South Korea, whose courts have interpreted the MLCBI narrowly. UK courts explicitly sought clear legislation through international negotiations to be able to enforce judgments on bases beyond the general ones under their domestic laws.[154] The UK Supreme Court in *Rubin*, refusing to enforce the New York judgment based on common law or the provisions in the MLCBI, noted that typically rules on enforcement are a product of negotiations, and that in any event it is an area where a change in the law requires legislation:

> In my judgment, the dicta in Cambridge Gas and HIH do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the Dicey Rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation.
>
> A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation […][155]

Adoption of the MLIJ by countries that have interpreted the MLCBI restrictively can resolve the persisting uncertainty in these systems concerning enforcement of judgments and orders. In the UK, for example, the Supreme Court may, if faced again with circumstances akin to *Rubin* or *Gibbs*, change direction having regard to the international agreement in the MLIJ, even prior to enactment of the instrument. Yet, enactment of the model law can provide the statutory basis for consistent recognition and enforcement of judgments.

There is a risk though that countries that have interpreted the MLCBI narrowly will end up applying the MLIJ restrictively as well, or even explicitly carveout certain types of judgments or scenarios in which the local court may not be obliged to recognize and enforce a foreign judgment. For example, legislators could seek to exempt the enforcement of a foreign discharge where the debt was governed by the local law (following a Gibbs-like rule).[156] The 'trick' is to see the MLIJ and its implementation process as an exercise of international development rather than as a

[154] See also Lord Neuberger (2017), para. 26 (pointing to national inconsistencies that require 'more international legislative action').

[155] *Rubin* (n. 3 above), paras. 128–129.

[156] See Clarke (2019).

process of aligning and modifying instruments to fit with pre-existing domestic rules and practices.

6.3 Alterative I: Adoption of the Model Law on Judgments as a Stand-Alone Instrument

The MLIJ may be adopted almost verbatim with limited modifications as a separate instrument like it is designed. The advantage of this approach is that it will ensure uniformity and alignment with the original international instrument, and at least in terms of enactment, it will demonstrate full compliance with the international law. Arguably, promoting the MLIJ as an instrument separate from the MLCBI would also persuade more countries to adopt it, including countries that have been resistant to COMI—the basis for recognition of main proceedings under the MLCBI. Encouraging wide adoption is in line with modified universalism, which requires a broad practice of the norm as it relies on uniformity of the private international law aspects of insolvency. Indeed, the norm can become customary international law if it is followed consistently by countries based on a belief in the conformity of the practice with international law.[157]

If adoption is by a country that already adopted the MLCBI or that is intending to adopt it, then, implementation may also include an amendment pursuant to Article X of the MLIJ. Depending on prior interpretations of Article 21 of the MLCBI in the country, the equivalent of Article 21 may be clarified to say that any other relief includes the enforcement of judgments as well. The result is that there will be two laws pursuant to which enforcement of insolvency judgments can be sought.

In a future case, if enforcement is sought concerning a judgment or order granted by a court in a main proceeding, it may be simplest to invoke the MLCBI. A representative may seek recognition of the proceeding anyway, and following this ask for various relief, which may include the enforcement of orders/judgments. The representative should foresee that enforcement will be granted if there are no anticipated concerns regarding public policy/adequate protection. The MLIJ procedural requirements can further provide guidance regarding the need for such a judgment to be enforceable and not inconsistent with another. If enforcement is requested concerning a judgment emanating from another forum, then it may be sought under the MLCBI (if from non-main proceedings) or the MLIJ, but there will be hurdles to overcome including showing that such enforcement will not interrupt the main proceeding.

If a representative invokes the MLIJ where the judgment/order was granted by a main forum, because she so chooses or because the MLCBI is not available in the foreign country, then as a matter of principle, enforcement should be granted (if there are no problems concerning public policy/adequate protection). The jurisdiction bases within the refusal grounds in the MLIJ should be applied in line with the clarifications in the MLIJ Guide to Enactment and modified universalism

[157] See generally, Mevorach (2018b).

(increasingly becoming an international norm) to view COMI as an acceptable jurisdictional ground.

Indeed, if countries adopt the MLIJ driven by a reluctance to join the MLCBI, they may also be reluctant to interpret the MLIJ broadly in this way. Article X may also have no effect as it will not be enacted or be of assistance in the interpretation of the MLCBI (as this instrument will not be available in the domestic system). Thus, while the standalone document might encourage buy-in, the trade-off is an inconsistency problem. At the same time, it is frankly difficult to see why countries will find the MLIJ attractive only for the purpose of allowing representatives from other countries to enforce and recover assets in their jurisdictions, without participating more generally in the uniform cross-border border insolvency system which supports collective proceedings.

6.4 Alternative II: Integration of the Model Law on Judgments in the Cross-Border Insolvency Framework

A more arduous task for legislators, but one which can ultimately promote a coherent system, would be to merge the MLIJ and the MLCBI into one instrument, whether the MLCBI is already law in the country or will be enacted at the time of enactment of the MLIJ. Especially if done in consultation with UNCITRAL, uniformity can be promoted and supported. An integrated approach promoted worldwide can also encourage more countries to adopt the MLCBI when they consider adoption of the MLIJ, thus advancing the cross-border insolvency system generally.[158] It can also reassure countries that already adhere to a regime where recognition and relief is primarily to main proceedings, such as EU Member States, that the MLIJ will not deviate from that framework, urging more such countries to adopt the existing and new UNCITRAL model laws.[159]

Whilst it is possible just to slightly amend Article 21 of the MLCBI (to which the MLIJ refers in Article X) and note that additional discretionary relief that may be granted includes enforcement of judgments, a fuller amalgamation of the regimes could strengthen the framework. The MLIJ definitions where they do not already overlap with those in the MLCBI—importantly, the definition of insolvency-related judgments—could be added as an elaboration of the definitions provided in the MLCBI (Article 2). The relief section in the MLCBI (Articles 19-21)[160] as enacted in the country could be clarified to explicitly refer to the recognition and enforcement of insolvency-related judgments. In this context, the law could provide the detail of the procedure and conditions for the recognition and enforcement

[158] There is some indication of support to such approach in the INSOL Report which notes that '[n]early 70% of the INSOL survey respondents support the incorporation of the [MLIJ] Model Law into existing cross-border insolvency regimes' (INSOL International 2019, p 10).

[159] See also McCormack and Anderson (2017), p 553 (noting that adoption of the MLCBI either by the EU or unilaterally by Member States, which have not already adopted it, would be 'a welcome development' and that the EU and Member States should be assured by the fact that mandatory relief is only required regarding main proceeding under the MLCBI).

[160] Relief in both the MLCBI and the MLIJ also includes provisional relief.

of judgments as specified in the MLIJ. It could also simultaneously solidify the MLCBI as enacted (or when enacting it) by requiring, rather than just allowing, that following recognition as main proceeding, foreign judgments from this proceeding be recognized and enforced. In other words, Article X may not be enacted verbatim but inspire a more robust change in the law based on the main text of the MLIJ. It should also be clarified, in any event, that the judgment shall be given the same effect it has in the originating country or the same effect it would have had if it had been issued by a court in the recognizing country.

The MLIJ grounds to refuse recognition and enforcement akin to public policy (fraud, lack of notice, etc.) may be added and specified, or could be consumed by the general public policy safeguard already provided in Article 6 of the MLCBI. In any event, the consequences in practice are unlikely to be material. The adequate protection safeguard (Article 22 of the MLCBI) can be construed narrowly regarding the enforcement of judgments, to apply only to judgments which materially affect the rights of creditors generally, in line with the MLIJ. It should also be clarified that judgments would be enforced only where they are not inconsistent with other judgments as provided in the MLIJ and when they are enforceable in the original jurisdiction.

The additional grounds in Article 14(g) of the MLIJ that speak of consent/submission or other referrals to domestic laws may not be required when the insolvency proceeding is recognized as the main proceeding under the MLCBI. Proceedings recognized as foreign main proceedings would ideally receive the most support, including concerning orders and judgments, subject to public policy and adequate protection and unless there is inconsistency with another judgment. A distinction could be made explicitly in the law to clarify that recognition of the underlying proceedings as main proceedings suffices as a basis for recognition/enforcement of the judgments emanating from that jurisdiction (in line with Article X). No further analysis of 'compatibility' with domestic law may be required in such circumstances. In any event, application of the law and the enforcement process including the grounds to refuse enforcement in this way could fix *Rubin* and the rule in *Gibbs*.

Relief is also available to non-main proceedings (where the debtor has an establishment) under the MLCBI's discretionary relief provision. However, as noted earlier, the MLCBI states that before granting relief to such proceedings, the court should be satisfied that the relief relates to assets that should be administered in the foreign non-main proceeding or concerns information required in that proceeding.[161] If the distinction between forms of proceedings is kept, a similar restriction should apply to the enforcement of judgments emanating from non-main proceedings.

Separate provisions can be added regarding the recognition/enforcement of insolvency-related judgments, which do not emanate from main or non-main proceedings. In any event, regarding such judgments that do not emanate from proceedings recognized under the MLCBI, the full range of rejection grounds should apply, including where enforcement might interfere with the administration of the debtor's insolvency process or because the foreign court did not have jurisdiction under

[161] See text to n. 47 above.

recognized general private international law (submission, consent, etc.). Support might be restricted concerning such foreign judgments in view of existing or forthcoming main proceedings or because there is no jurisdictional basis under the special cross-border insolvency system for enforcing such judgments. Judgments may be enforced, however, in the circumstances specified in Article 14(h) of the MLIJ, namely when the insolvency representative of a recognized proceeding participated and engaged in the proceeding concerning the foreign judgment which relates solely to assets that were located in the originating State at the time of the proceeding.[162]

6.5 The Model Law on Judgments, and Groups

The MLCBI does not provide specific rules for groups—a gap that was addressed in 2019 as UNCITRAL introduced a new model law on enterprise group insolvency (MLEGI).[163] This model law complements the MLCBI and provides specific mechanisms to achieve group solutions. The MLEGI tracks the MLCBI's concepts of cooperation, coordination, recognition, relief, main and non-main proceedings and extends them to groups.[164] It also adds new features unique to groups, importantly the concepts of 'group insolvency solution' which may be developed in a 'planning proceeding' thus supporting a concentrated process for the group as a whole (or a relevant part).[165] The MLEGI provides mechanisms for deferring to that central group process, avoiding opening local proceedings,[166] and providing a range of relief to support that process.

Thus, MLEGI is an important addition to the global framework for international insolvency. When enacting MLIJ, consideration should be given to enacting MLEGI as well (or vice versa) and to ensuring consistency between the instruments. The interaction of MLEGI and MLIJ has not been considered and there is no equivalent of Article X to tell us how to read MLEGI in that regard. The MLEGI does work well as a separate instrument as it is in line and is fully consistent with the MLCBI, or it could be quite easily merged with the MLCBI. Importantly, the regime would be improved and become coherent if in the process it is clarified (in the law or in practice when the law is applied) that relief under the MLEGI includes the enforcement of judgments and orders of the planning process, subject to public policy and adequate protection of the interests of creditors of each enterprise group member.[167]

[162] MLIJ (n. 5 above), Art. 14(h)(ii).

[163] UNCITRAL Model Law on Enterprise Groups Insolvency (2019) (advanced copy), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_-_advance_pre-published_version_-_e.pdf.

[164] Ibid., Chapter 2.

[165] Ibid., Art. 2.

[166] Ibid., Arts. 30–32.

[167] Art. 27 of the MLEGI (n. 163 above) provides that '[i]n granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors of each enterprise group member subject to or participating in a planning proceeding and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected'.

6.6 Uniform Choice of Law Rules

With the adoption of the MLIJ and the MLEGI in 2018–2019, the cross-border insolvency system has become more complete (assuming the instruments will be enacted by a significant number of countries) but it is still missing an important piece—uniform rules on choice of law. The absence of choice of law rules can also impact the implementation and application of MLIJ. It was noted above how choice of (insolvency) law is intricately linked to the enforcement of (insolvency) judgments (see the discussion above of the Gibbs rule[168]). When a local court is required to enforce a judgment or an order of a foreign court, it may indirectly also need to defer to the foreign law. If enforcement is based on cross-border insolvency-specific grounds like the fact that the foreign proceeding is the main proceeding, rather than the general domestic private international law rules, deference may not be readily accepted. Indeed, in *Rubin*, the court did not consider the issue of choice of law. It refused to enforce the avoidance judgment in the absence of submission or consent. It can be presumed that if the foreign court had exercised jurisdiction based on ordinary (English) private international law, the English court would have enforced the judgment.[169] It could also be the case that the judgment would have been enforced if the foreign court had applied English (avoidance) law.

To compare, in the EU, the position on enforcement is clear as judgments emanating from the automatically recognized proceedings opened in a Member State must be enforced, and there are no additional refusal grounds beyond the public policy safeguard.[170] But the EIR provides uniform rules concerning choice of law. Under this regime, the law of the main forum (*lex fori concursus*) applies,[171] subject to a set of exceptions (and the possibility that secondary proceedings are opened).[172]

The MLCBI does not *prohibit* deference to the forum laws but does not explicitly provide which law applies in main or secondary proceedings. The original drafters of the MLCBI proceeded with caution when they, for the first time, designed an international framework for cross-border insolvency in 1997. They seemingly preferred to leave out an explicit relief concerning the application of foreign law,[173] allowing the practice to develop through the application of the MLCBI flexible provisions.[174] But we have seen the consequences of vagueness in the cross-border insolvency instrument. Thus, while the enforcement of judgments in line with universalism is achievable, especially if the MLIJ is taken on board in the manner

[168] See text to nn. 56–58 above.

[169] See *Rubin and another v. Eurofinance SA and others* and *New Cap Reinsurance Corporation (in Liquidation) and another v. AE Grant and others* [2012] UKSC 46 where regarding New Cap, the court found that because the appellant had in fact submitted to the Australian Court's jurisdiction, the normal common law test for enforcement was satisfied.

[170] EIR (n. 32 above), Art. 32.

[171] Ibid., Art. 7.

[172] Ibid., Arts. 8–18.

[173] See generally, Gropper (2014).

[174] See generally, Gopalan and Guihot (2015) (arguing that the MLCBI was intentionally vague in various areas).

suggested above, it requires completion of the framework by implementing uniform, globally accepted rules on choice of law.[175]

7 Conclusion

The international community has clearly signalled its dissatisfaction about defections from modified universalism where the MLCBI regime was interpreted narrowly regarding the enforcement of insolvency judgments. It was also concerned about gaps in private international law instruments, which exclude insolvency from their scope, including regarding the enforcement of judgments. The process of closing the gap by UNCITRAL through the development of the MLIJ has been arduous, however, in view of divergences of interpretation of the existing framework (in particular the MLCBI) and what is, in this light, the aim of the new instrument.

This article highlighted overlaps between the cross-border insolvency instruments and the risks of inconsistencies, which should inform the implementation process by countries as well as future application of the law following its adoption in legal systems. It was shown that the MLIJ does add vigour to the cross-border insolvency system where the requirement to enforce and manner for seeking enforcement of insolvency judgments is explicit and clear. The MLIJ should, therefore, be adopted widely. At the same time, ambiguities in this instrument concerning refusal grounds based on proper jurisdiction and inconsistencies with the MLCBI could undermine the system. Against this backdrop, the article considered different ways of implementing the MLIJ and using it in future cases, with a view of maximizing its potential, including in view of further developments concerning enterprise groups and choice of law.

Apart from addressing an important weakness in the existing cross-border insolvency regime where the conditions for enforcing insolvency judgments have not been clear, the MLIJ serves as a prompt to countries to consider if their cross-border insolvency laws need improvement. In particular, as UNCITRAL notes in its decision to adopt the MLIJ, countries should '[…] continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency (1997)'.[176] Such wide adoption of the MLCBI as well as the newer additions can increase preparedness for future international insolvencies.

Acknowledgements The author would like to thank Adrian Walters and Allan Gropper for helpful comments, and to the participants at the Insolvency Lawyers' Association (ILA) Academic Forum, Allen

[175] The choice of law problem has been considered a 'candidate' for possible future work since 2013 (United Nations Commission on International Trade Law, A/CN.9/798, Report of Working Group V (Insolvency Law) on the work of its forty-fourth session (Vienna, 16–20 December 2013), para. 30, https://undocs.org/en/A/CN.9/798). It may be due for further deliberations by UNCITRAL Working Group V following the UNCITRAL/HCCH Virtual Colloquium on Applicable Law in Insolvency Proceedings, which took place on 11 December 2020 (https://uncitral.un.org/en/applicablelawcolloquium).

[176] Report of the United Nations Commission on International Trade Law Fifty-first session (25 June–13 July 2018, https://undocs.org/en/A/73/17%20, p 21).

& Overy, 29 March 2019 where preliminary ideas concerning this article were presented. All mistakes made are solely the author's.

References

Aconley L, Marshall J, Allen & Overy (2019) What impact might a no-deal Brexit have on cross-border insolvencies and restructurings. https://www.allenovery.com/en-gb/global/news-and-insights/publications/what-impact-might-a-no-deal-brexit-have-on-cross-border-insolvencies-and-restructurings. Accessed 12 Jan 2021

Beckering KJ (2008) United States cross-border corporate insolvency: the impact of Chapter 15 on comity and the new legal environment. Law Bus Rev Am 14:281–312

Bork R (2018) Principles of cross-border insolvency law. Intersentia, Cambridge

Chung JJ (2014) In re Qimonda AG: the conflict between comity and the public policy exception in Chapter 15 of the Bankruptcy Code. Boston Univ Int Law J 32:91–121

Clarke S (2019) The new model law: goodbye to Gibbs. https://hardwicke.co.uk/the-new-model-law-goodbye-to-gibbs/. Accessed 23 Oct 2020

Fletcher IF (2005) Insolvency in private international law. Oxford University Press, Oxford

Gopalan S, Guihot M (2015) Recognition and enforcement in cross-border insolvency law: a proposal for judicial gap-filling. Vanderbilt J Transnatl Law 48:1225–1284

Gropper AL (2014) The curious disappearance of choice of law as an issue in Chapter 15 cases. Brook J Corp Financ Commer Law 9(1):151–179

Han M (2015) Recognition of insolvency effects of a foreign insolvency proceeding: focusing on the effect of discharge. In: Ramaswamay MP, Ribeiro J (eds) Trade development through harmonization of commercial law. New Zealand Association for Comparative Law, Wellington, pp 345–364

Hawthorn D, Young M (2018) Remodelling the model law: the model law on recognition and enforcement of insolvency-related judgments. Corp Rescue Insolv 195–197

Ho LC (2017) Cross-border insolvency, a commentary on the UNCITRAL Model Law. Global Law and Business, 4th edn. Globe Law and Business, London

INSOL International (2019) UNCITRAL's model law on recognition and enforcement of insolvency-related judgments—a universalist approach to cross-border insolvency. March 2019. https://www.blankrome.com/sites/default/files/2019-03/uncitralmodellaw-antonoffzucker2019.pdf. Accessed 21 Jan 2021

Kannan R (2017) The Gibbs principle: a tether on the feet of good forum shopping. Singap Acad Law J 29:43–74

LoPucki LM (1999) Cooperation in international bankruptcy: a post-universalist approach. Cornell Law Rev 84:696–762

LoPucki LM (2000) The case for cooperative territoriality in international bankruptcy. Mich Law Rev 98:2216–2251

McCormack G, Anderson H (2017) Brexit and its implication for restructuring and corporate insolvency in the UK. J Bus Law 7:533–556

Mevorach I (2011) On the road to universalism: a comparative and empirical study of UNCITRAL Model Law on Cross-Border Insolvency. EBOR 12:517–557

Mevorach I (2018a) The future of cross-border insolvency: overcoming biases and closing gaps. Oxford University Press, Oxford

Mevorach I (2018b) Modified universalism as customary international law. Texas Law Rev 96:1403–1436

Mevorach I, Walters A (2020) The characterization of pre-insolvency proceeding in private international law. EBOR. https://doi.org/10.1007/s40804-020-00176-x

Moss G (2019) UNCITRAL model law on recognition and enforcement of insolvency-related judgments. Insolv Int 32:21–24

Neuberger D (2017) Keynote speech at the international insolvency institute annual conference: the Supreme Court, the Privy Council and international insolvency. https://www.supremecourt.uk/docs/speech-170619.pdf. Accessed 23 Oct 2020

Paul JR (1991) Comity in international law. Harv Int Law J 32:1–19

Pottow JAE (2019) The dialogic aspect of soft law in international insolvency: discord, digression, and development. Mich J Int Law 40(3):479–503

Takahashi S (2011) The reality of the Japanese legal system for cross-border insolvency driven by fear of universalism. https://www.iiiglobal.org/sites/default/files/media/2011Prizepaper.pdf. Accessed 12 June 2020

Walters A (2019) Modified universalisms & the role of local legal culture in the making of cross-border insolvency law. Am Bankruptcy Law J 93:4–110

Westbrook JL (1991) Choice of avoidance law in global insolvencies. Brooklyn J Int Law 17:499–538

Westbrook JL (2000) A global solution to multinational default. Mich Law Rev 98:2276–2328

Westbrook JL (2005) Chapter 15 and discharge. Am Bankruptcy Inst Law Rev 13:503–520

Westbrook JL (2013) An empirical study of the implementation in the United States of the Model Law on Cross Border Insolvency. Am Bankruptcy Law J 87(2):247–270

Westbrook JL (2019) Comity and choice of law in global insolvency. Texas Int Law J 54(2):1–14

Authors and Affiliations

Irit Mevorach[1,2]

[1] Professor of International Commercial Law, University of Nottingham, Nottingham, UK

[2] Co-Director, University of Nottingham Commercial Law Centre, Nottingham, UK

Faculty

Harold Foo is senior assistant director in the Policy Advisory Division, and the counsel for Parliamentary Affairs, at the Ministry of Law of the Republic of Singapore in Singapore. He has been closely involved in debt-restructuring, insolvency policy development and legislative reform in Singapore, including the Companies (Amendment) Act 2017, Companies (Amendment) Act 2018, and Insolvency, Restructuring and Dissolution Act 2018 — Singapore's omnibus insolvency legislation. Internationally, Mr. Foo has been part of Singapore's delegation to UNCITRAL Working Group V (Insolvency Law) since May 2017, and he has chaired the Working Group since its 56th session (December 2019). He also was actively involved in the negotiations and completion of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) and the UNCITRAL Model Law on Enterprise Group Insolvency (2019). Mr. Foo is a member of the International Insolvency Institute's NextGen Leadership Programme and a facilitator for the insolvency law preparatory course for the Singapore Bar Examinations. Prior to joining the Singapore Legal Service, he was a member of the debt-restructuring and insolvency team at one of Singapore's largest law firms. Mr. Foo received his LL.B. with honors from the National University of Singapore and his LL.M. in insolvency Law and practice from the Singapore Institute of Legal Education.

Hon. Allan L. Gropper is a U.S. Bankruptcy Judge for the Southern District of New York, appointed on Oct. 4, 2000. In 1972, he joined the law firm of White & Case, becoming a partner in 1978. He was for many years head of the firm's bankruptcy and reorganization practice group and was active in many of the nation's largest chapter 11 cases, including Manville Corp., Texaco, LTV Corp., Federated Department Stores/Allied Stores Corp., Maxwell Communications Corp., MGM, United States Lines, Pan American World Airways and Waterman Steamship Corp. He also was active in international insolvencies and restructurings and was located in the White & Case Hong Kong office from 1999-2000. Judge Gropper has lectured in several foreign countries on insolvency matters and is a co-editor of a two-volume text, *International Insolvency*, published in 2000. He is adjunct professor of law at Fordham Law School. Judge Gropper received his B.A. *cum laude* from Yale University in 1965 and from 1965-66 was a Fulbright tutor at Christ Church College in Kanpur, India. He received his J.D. *cum laude* from Harvard Law School in 1969 and became an attorney in the Civil Appeals Unit of the New York City Legal Aid Society.

Mark Phillips, KC is an experienced Silk with South Square in London who guides large companies and high-profile individuals through complex commercial and sporting challenges. His clients have included the governor of the Bank of England, UEFA and the Football League, as well as liquidators, directors, sportsmen and premier sports clubs, and he was named as Company/Insolvency Silk of the Year by *Chambers and Partners* in 2018. Mr. Phillips has more than 30 years of experience winning complex cases in the highest courts. His first appearance in the Court of Appeal was at the start of his practice in 1986 in the ground-breaking case of *West Mercia Safetywear v Dodd*. Subsequently, he has led or has appeared in many cases in the House of Lords and Supreme Court, including the Lehman's pensions appeal, *Toshoku Finance*, *Paramount Airways*, *Leyland Daf*, *Sher v Policyholders Protection Board* and *Three Rivers District Council v the Governor and Company of the Bank of England*. He successfully defended the Bank of England in a two-year trial against the claim made arising out of its regulation of BCCI and defended the GT Liquidators in the Saad fraud trial that

lasted for 129 days in court over 12 months. Mr. Phillips also has a high-profile sports law practice and was involved in the establishment of the Premier League for the "big 5 clubs." In 2013, he advised the chairman of the FA on changes that could be made in English Football to help the England Team win a major championship. He has appeared at several disciplinary and regulatory hearings; he prosecuted Manchester City on behalf of UEFA, and Sheffield Wednesday and Derby County on behalf of the Football League, and he has appeared for Lewis Hamilton in relation to several matters including the "Ferrari Gate" hearing. He also has assisted with the future of football regulation and the EFL's covid task force. Mr. Phillips is often quoted in the business press and in industry forums in relation to the government's response to businesses' support during the COVID-19 pandemic. He produced the Administration Consent Protocol and is assisting Back to Business UK. Mr. Phillips is active on social media and has spoken at several international conferences on how to help small and medium-sized businesses deal with debt acquired during the COVID period. He received his LL.B. and his LL.M. in commercial law from Bristol University.

Prof. Irit Ronen-Mevorach is a professor of international commercial law and the founder and co-director of University of Nottingham Commercial Law Centre in Nottingham, U.K. She teaches and researches issues in corporate law, enterprise groups, insolvency, cross-border insolvency and bank resolution. Between 1998 and 2003, Prof. Ronen-Mevorach practiced law at Lipa Meir & Co. in Tel-Aviv, Israel, where she led financing and secured transactions, commercial litigation, and advice in corporate restructuring, liquidations and administrations. Since 2006, she has been acting as an expert adviser to the U.K. government's delegation to the United Nations Commission on International Trade Law (UNCITRAL), and from 2013-16 she represented the World Bank at the Commission in deliberations in the areas of insolvency and cross-border insolvency. In 2013, Prof. Ronen-Mevorach was appointed senior counsel to the World Bank and headed the Bank's Global Initiative on Insolvency and Creditor/Debtor Regimes (2013-15). In that capacity, she advised governments of some 10 countries in Africa, Asia, Europe and the Caribbean on the reform of business and personal insolvency and creditor/debtor systems. She also headed the Bank's Global Task Force on Insolvency and Creditor Rights. She has retained a consultancy with the World Bank and continues to provide training and advice in projects involving emerging markets. Prof. Ronen-Moevorach's book *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009) won the Edwin-Coe/INSOL Europe Prize for Outstanding Legal Scholarship in 2010, and she has been awarded British Academy grants for her empirical and comparative research in the area of cross-border insolvency; her academic and policy work has influenced law reform in Europe and globally. Prof. Ronen-Mevorach was elected to the International Insolvency Institute (III) membership in 2012 and is currently co-chair of its academic wing. She was elected to the American College of Bankruptcy in 2019 and sits on the editorial board of the *Global Restructuring Review* (GRR), the *Spanish Journal of Insolvency and Restructuring* and the International Advisory Council of the Singapore Global Restructuring Initiative (SGRI). In 2020, Prof. Ronen-Mevorach was appointed to UK Office for Science Covid-19 Recovery Trade and Aid Working Group, which synthesized evidence against research questions that departments should consider in the medium-to-long-term recovery from the COVID-19 emergency. She also was named in 2020 to the inaugural *Lawdragon 500 Leading Global Restructuring & Insolvency Lawyers*, and was appointed to the Lord Chancellor's Advisory Committee on Private International Law, Ministry of Justice. Prof. Ronen-Mevorach holds received her LL.B. magna cum laude in 1997 and her LL.M. in commercial law in 2001 from from Tel-Aviv University, and her Ph.D. from UCL in London.