

Author Douglas Hawthorn and Martin Young

Remodelling the Model Law: the Model Law on recognition and enforcement of insolvency-related judgments

KEY POINTS

- The new Model Law on Recognition and Enforcement of Insolvency-Related Judgments is intended to close what UNCITRAL has acknowledged is a potential gap in the Model Law on Cross-Border Insolvency, being the recognition and enforcement of insolvency-related judgments.
- The impending loss of European Union cross-border legislation may lead to greater reliance on both Model Laws by practitioners in the United Kingdom.
- Implementation of the new Model Law on Recognition and Enforcement of Insolvency-Related Judgments in Great Britain and Northern Ireland, which would require secondary legislation being passed, could be delayed by a legislative backlog accompanying Brexit, meaning its impact could be postponed.

On 18 September 2018, the United Nations Commission on International Trade Law ('UNCITRAL') published the final, adopted text of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments ('Judgments Model Law'). The Judgments Model Law and its related guide to enactment ('Guide') were adopted by the Commission on 2 July 2018.

The Model Law on Cross-Border Insolvency ('Cross-Border Model Law') was adopted by UNCITRAL in 1997 and enacted in Great Britain (ie England, Scotland and Wales – comparable legislation applies in Northern Ireland) by the Cross-Border Insolvency Regulations 2006 ('CBIR'). The Cross-Border Model Law, like the Judgments Model Law, has no legislative force or effect in itself; rather, it is a model or precedent for legislators in adopting states. According to its guide to enactment, its purpose is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- cooperation between the courts and other competent authorities of the enacting state and foreign states involved in cases of cross-border insolvency;
- greater legal certainty for trade and investment;
- fair and efficient administration of cross-border insolvencies that protects

the interests of all creditors and other interested persons, including the debtor;

- protection and maximisation of the value of the debtor's assets; and
- facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Generally speaking, the Cross-Border Model Law has been a success, and the authors have published various articles in this publication covering recent instances of its use in Great Britain. The Cross-Border Model Law (in some form) has been adopted in 45 jurisdictions, including most recently Singapore (2017) and Israel (2018).

The Judgments Model Law is designed to assist states in constructing a framework for recognising and enforcing insolvency-related judgments, facilitating the conduct of cross-border insolvency proceedings and complementing the Cross-Border Model Law. The Guide notes that very few states have recognition and enforcement regimes that specifically address insolvency-related judgments. An exception to that is Regulation (EU) 2015/848 on insolvency proceedings (Recast) ('EU Regulation') which, under Article 32, requires member states to recognise 'judgments concerning the course and closure of insolvency proceedings, and compositions

approved by that court... judgments deriving directly from the insolvency proceedings and which are closely linked with them... [and] judgments relating to preservation measures taken after the opening of insolvency proceedings or in connection with it'. This includes actions to set aside acts detrimental to the general body of creditors and actions on the personal liability of directors based upon insolvency law. We discuss the EU Regulation again in the conclusion.

The Guide, in explaining the reasons for developing the Judgments Model Law, refers to 'certain judicial decisions that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under [the Cross-Border Model Law], to recognise and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings, on the basis that neither Article 7 nor 21 of [the Cross-Border Model Law] explicitly provided the necessary authority' (para B2). The footnotes refer to *Rubin v Eurofinance SA* [2012] UKSC 46.

RUBIN

In *Rubin*, heard as a conjoined appeal with *New Cap Reinsurance Corporation v Grant* [2012] UKSC 46, Chapter 11 bankruptcy proceedings were commenced in the US in respect of The Consumers Trust ('TCT'), a bare trust formed under English law which had operated a fraudulent sales promotion scheme in the US and Canada. On application by the Receivers of TCT's settlor company, the New York bankruptcy court gave default and summary judgments against the defendants, who were domiciled in England, requiring them to repay funds fraudulently transferred to them prior to TCT entering insolvency proceedings. The defendants did not engage

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Douglas Hawthorn is a partner in the Banking, Restructuring & Insolvency group at Michelmores, and specialises in advising on debt restructurings, turnaround and insolvency situations, acting for sponsors, financial institutions, investors, companies, directors, turnaround professionals, pension trustees and insolvency practitioners. Email: douglas.hawthorn@michelmores.com.

with the US litigation and the Receivers applied for recognition and enforcement of the US judgments in England.

The defendants appealed on various grounds. In allowing the defendants' appeal the Supreme Court held that there was no power under the CBIR (nor s 426 of the Insolvency Act 1986 or the common law) to facilitate enforcement of the US avoidance proceedings. 'Articles 21, 25 and 27 [of Sch 1 to the CBIR]', it noted, 'are concerned with procedural matters... [and] there is nothing to suggest that they should apply to the recognition and enforcement of foreign judgments.' This was not, the court concluded, a matter for judge-made law.

It was confirmed in *Pan Ocean Co Ltd, Re; Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch) and more recently in *Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch) that relief available under the CBIR is restricted to procedural matters. In *Bakhshiyeva* Mr Justice Hildyard, noting the tension between the rule in *Gibbs* (viz that a debt governed by English law could not be discharged by a foreign insolvency proceeding) and the doctrine of modified universalism, observed that the 'introduction of a new Model Law concerning the recognition and enforcement of insolvency-related judgments as proposed by UNCITRAL might solve the problem if ever adopted'.

THE JUDGMENTS MODEL LAW Insolvency proceedings

'Insolvency' is not defined but 'insolvency proceeding' refers to various types of collective proceedings commenced with respect to a debtor that is in severe financial distress or insolvent, with the goal of liquidating or reorganising that debtor as a commercial entity.

Recognition and enforcement

The Judgments Model Law generally refers to 'recognition and enforcement' of an insolvency-related judgment as a single concept, although there are some Articles in which a distinction is made between recognition on the one hand and enforcement on the other. The Guide notes that while enforcement must be preceded by

recognition, recognition need not always be accompanied or followed by enforcement.

Applicability

The Judgments Model Law applies to any insolvency-related judgment that was issued in a proceeding taking place in a state other than the enacting state in which recognition and enforcement is sought.

To fall within the scope of the Judgments Model Law, a foreign judgment needs to possess certain attributes, namely that: (a) it arises as a consequence of or is materially associated with an insolvency proceeding; and (b) that it was issued on or after the commencement of that insolvency proceeding (Article 2(d)(i)).

The Guide sets out a non-exhaustive list of judgments to which the Judgments Model Law will apply, namely judgments that deal with:

- constitution and disposal of assets of the insolvency estate;
- avoidance;
- wrongful trading;
- determination that sums not covered by (a) or (b) are owed to or by the debtor or its insolvency estate;
- plans of reorganisation or liquidation, the granting of a discharge of the debtor or of a debt, or approval of a voluntary out-of-court restructuring agreement; and
- examination of a director of the debtor, where that director is located in a third jurisdiction.

INTERACTION WITH THE CROSS-BORDER MODEL LAW

While the Judgments Model Law and Cross-Border Model Law employ similar terminology and definitions and the Judgments Model Law, in its preamble, makes clear its complementary relationship with the Cross-Border Model Law, they are standalone pieces of legislation.

The Cross-Border Model Law applies to the recognition of specified foreign insolvency proceedings (ie foreign main proceedings or foreign non-main proceedings). Other types of insolvency proceeding, such as those that are not a collective proceeding, do not fall within the types of proceeding eligible for recognition under Cross-Border Model Law.

The Judgments Model Law has a narrower

scope, addressing only the recognition and enforcement of insolvency-related judgments; that is, judgments that bear the necessary relationship to an insolvency proceeding. The decision commencing the insolvency proceeding (covered by the Cross-Border Model Law) is specifically excluded from the definition of 'insolvency-related judgment' for the purposes of the Judgments Model Law (Article 2(d)(ii)). The Judgments Model Law, like the Cross-Border Model Law, establishes a framework for seeking cross-border recognition, albeit that the Cross-Border Model Law concerns judgments rather than proceedings. That framework seeks to establish a clear, simple procedure which avoids unnecessary complexity.

Limits

Under Article 14 recognition may be refused if, inter alia: (a) the subject of the judgment was not given sufficient opportunity to put forward a defence or was improperly served; (b) the judgment was obtained by fraud; (c) the judgment is inconsistent with a judgment issued in the enacting state in a dispute involving the same parties; (d) the judgment is inconsistent with an earlier judgment issued in another state, which is enforceable in the enacting state, in a dispute involving the same parties on the same subject matter; (e) recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings; or (f) the judgment materially affects the rights of creditors generally, such as determining whether a plan of reorganisation 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, and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued.

In addition (emphasising the interaction between the Model Laws), recognition can be refused if the judgment originates from a state whose insolvency proceeding is not or would not be recognisable under [the Cross-Border Model Law], unless: (i) the insolvency representative of a proceeding that is or could have been recognised under [the Cross-Border Model Law] participated in the proceeding in

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Martin Young is a solicitor in the Banking, Restructuring & Insolvency group at Michelmores, acting on a range of corporate and personal insolvency, solvent restructuring and debt finance situations. Email: martin.young@michelmores.com

the originating state to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and (ii) The judgment relates solely to assets that were located in the originating state at the time the proceeding in the originating state commenced.

More broadly, nothing in the Judgments Model Law prevents the court from refusing to take an action if that action would be 'manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of the enacting state' (Article 7).

Provisional relief

The Judgments Model Law provides that, from the time that recognition and enforcement of an insolvency-related judgment is sought until a decision is made, and where relief is urgently needed to preserve the possibility of recognising and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement, 'grant relief of a provisional nature, including: (a) staying the disposition of any assets of any party or parties [and] (b) granting other legal or equitable relief as appropriate' (Article 12).

Reciprocity

Like the Cross-Border Model Law, the Judgments Model Law does not mandate reciprocity, although in the case of the Cross-Border Model Law some states (but not Great Britain) have chosen to include a reciprocity requirement. A foreign judgment would, therefore, be enforceable in an enacting state even where that enacting state's judgments were not recognised in the originating state.

Equivalent effect

When enacting the Judgments Model Law, states may elect to provide that an insolvency-related judgment shall either: (a) be given the same effect as it has in the originating state; or (b) be given the same effect as it would have had if it had been issued in the enacting state (Article 15). Article 15 goes on to say that where the insolvency-related judgment provides for relief that is not available under the law of the enacting 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.

Procedure

Article 11 of the Judgments Model Law sets out a framework for seeking cross-border recognition of an insolvency-related judgment. This is intended to establish a clear, simple procedure that avoids unnecessary complexity. Article 11(2) lists the documents or evidence that must be produced by the party seeking recognition and enforcement of an insolvency-related judgment. Article 11(3) entitles, but does not compel, the court to require a translation of some or all of the documents submitted under sub-para 2.

Article X

Article X of the Judgments Model Law says: 'Notwithstanding any prior interpretation to the contrary, the relief available under [Article 21 of the Cross-Border Model Law] includes recognition and enforcement of a judgment.'

The Guide acknowledges that the Cross-Border Model Law provisions on relief (principally Article 21) make no specific reference to recognition and enforcement of such a judgment, and explains that the purpose of Article X is to make it clear to states enacting (or that have enacted) the Cross-Border Model Law that the relief available under Article 21 does in fact include recognition and enforcement of an insolvency-related judgment.

One might question, given the clarification in Article X, whether states that have already enacted the Cross-Border Model Law (or are considering doing so) would need to enact the Judgments Model Law, and indeed whether the Supreme Court, seised with similar issues to those in *Rubin*, could use the Judgments Model Law and the Guide as tools of interpretation as to the intended meaning and effect of Article 21 of the Cross-Border Model Law. To the authors' minds, while the clarification set out in Article X is helpful, the additional detail and procedural guidelines set out therein make the Judgments Model Law a complementary addition to the Cross-Border Model Law.

CONCLUSION

Subject 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. For practitioners in the UK, however, its implementation may be delayed by Brexit. After Brexit we are likely to lose the benefit of, among other things, the EU Regulation and Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The Judgments Model Law, if enacted, might help to fill that vacuum. Regrettably, the Judgments Model Law (as was the case with the Cross-Border Model Law), will require secondary legislation to bring it into effect in Great Britain, and the inevitable backlog of withdrawal legislation may push it down the list.

Readers should note that of the 45 signatories to the Cross-Border Model Law, only five (the UK, Gibraltar (as a British Overseas Territory), Slovenia, Poland, Greece and Romania) are members of the European Union, and so the utility of the Judgments Model Law (and the Cross-Border Model Law) as a replacement for the relevant EU legislation would be limited (even if all the signatories to the Cross-Border Model Law adopted the Judgments Model Law). In addition, while recognition under the EU Regulation is automatic, under the Judgments Model Law (and Cross-Border Model Law) the requesting state must follow a defined application process, thus causing, comparatively speaking at least, delays and inefficiencies. Clearly then, the Judgments Model Law and the Cross-Border Model Law are no panacea and, particularly if the implementation of the Judgments Model Law is delayed, the way in which our legislators intend to replace the existing EU cross-border insolvency regime will remain a subject of great interest. ■

Further reading

- Brexit: life after the Insolvency Regulation (2016) 6 CRI 203
- *Videology Ltd* and the Cross-Border Insolvency Regulations 2006: a matter of discretion (2018) 5 CRI 161
- The slender thread of modified universalism after *Singularis* (2015) 2 JIBFL 74