

Implementation of two UNCITRAL Model Laws on Insolvency

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General Comments

We support the strengthening of the UK provisions for dealing with international insolvencies and the aim of signalling the UK's ongoing commitment to mutual cooperation and international best practice. We are therefore generally supportive of the proposals outlined in the Consultation Paper which aim to further these objectives.

Responses to Consultation Questions

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

While we believe that there is some merit in the proposal to partially implement the MLIJ in the UK by adopting Article X, we consider that in fact there may also be a strong case for implementing the MLIJ in full.

The consultation paper notes that there is a need to strike a balance between offering some certainty to the sector on the one hand and forging new relationships and enhancing the UK's ability to deal with cross-border insolvencies on the other, but ultimately concludes that it would not be appropriate to implement the MLIJ in full at this time. However, we think that there are weighty arguments for implementing the MLIJ in full now. As noted in the consultation paper, the rule in *Gibbs* (like certain other long-standing rules, such as the rule in *Government of India v Taylor*) was effectively negated by the European Insolvency Regulation (EIR). We are not aware that this created particular difficulties or attracted adverse comment. Of course, the UK is no longer subject to the EIR on an ongoing basis, but it seems to us that for that very reason, there is a strong case for enhancing the UK's ability to deal with cross-border insolvencies by other mechanisms to the maximum extent possible. It also seems to us that since, like the MLCBI, the MLIJ allows states to make changes to the terms of the model law, it might be possible to mitigate concerns about negation of the rule in *Gibbs* by making some changes to the MLIJ if enacted in full. For example, it might be possible to make provision for enforcement to be excluded or discretionary in cases where the judgment relates to a contract governed by the law of England and Wales which was entered into prior to the entry into force of the MLIJ in the UK. This would allow the maximum benefit from implementation in full to be obtained in other cases and work could still be done to consider whether sustaining the rule in *Gibbs* was justified in the longer term. We appreciate that generally, the fewer changes there are to a Model Law on implementation, the better, but consider that such an approach would still give a stronger outcome than implementation only of Article X.

If the ultimate position on *Gibbs* remains as proposed in the consultation paper, then we would certainly support the implementation of Article X rather than nothing. We also appreciate that there may be a desire to proceed cautiously in this area. If the decision is made to proceed with partial implementation at the present time, we would strongly urge that the Call for Evidence in relation to the rule in *Gibbs* be issued as soon as possible. We also look forward to responding to that Call for Evidence in due course.

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?

If the decision is to implement Article X, we are generally supportive of this approach. We note, however, that some of the wording in Article 14 of the MLIJ is rather vague and might benefit from further clarification if it is being enacted in this way.

We would add that we also think there is merit in considering making provision for the severability of judgments similar to that contained in Article 16 of the MLIJ.

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

We are not sure that simply adding a reference to Article X to the list of documents specified in reg 2(2) of the CBIR will be sufficient. We note the guidance given in para 127 of the Guide to Enactment, and therefore agree that the appropriate way of proceeding is to amend the CBIR, but we wonder if adding a separate provision would be more appropriate.

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

We strongly agree with this proposal.

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?

We consider that although it is unlikely to apply in a large number of cases, the implementation of the MLEG will enhance the insolvency regime by adding to the options available where it is applicable, which is of particular importance since the EIR no longer applies in the UK going forward.

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

We are supportive of the intention to implement the MLEG in toto and are generally supportive of the proposals set out in the consultation paper. However, with respect to the definition of insolvency proceedings, while we appreciate the reasons for proposing to allow the issue of the status of restructuring plans to be developed by the courts, we consider that it would be better to clarify at the outset that restructuring plans do count as insolvency proceedings for the purposes of the MLEG (for discussion of what constitutes an insolvency proceeding, see R Mokal, “What is an Insolvency Proceeding? *Gategroup* Lands in a Gated Community” *International Insolvency Review* (forthcoming) – available at <https://onlinelibrary.wiley.com/toc/10991107/0/0>).

We note that the consultation paper proposes that applications under the MLEG should be dealt with by the High Court of Justice in England and Wales and “its equivalent in Scotland”. We anticipate that this should be the Court of Session, which would provide consistency with the CBIR.

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?

We agree with this approach. We consider that a non-prescriptive approach is best in order to achieve maximum flexibility.

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?

We do not consider that anything further needs to be done for this purpose. With regard to rights to enforce contracts governed by the law of England and Wales (or indeed, the law of other parts of the UK), we would refer to our comments above in relation to this issue.