International Corporate Rescue

Published by

Chase Cambria Company (Publishing) Ltd

ChaseCambria

www.chasecambria.com

SOUTH SQUARE

Centre for Commercial Law

UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2017 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 520.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

EDITORIAL

UNCITRAL Judgments Model Law: Five Years On

Olya Antle, Associate, Cooley LLP, Washington, USA, **Evan Zucker**, Of Counsel, Blank Rome LLP, New York, USA, and **Katharina Crinson**, Counsel, Freshfields Bruckhaus Deringer LLP, London, UK

Synopsis

On 21 April 2023, the International Insolvency Institute ('III'), supported by UNCITRAL, hosted a one-day conference at the U.S. Bankruptcy Court for the Southern District of New York dedicated to the five-year anniversary of one of the UNCITRAL Model Laws: the Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

The conference

Since its formation, UNCITRAL Working Group V (Insolvency Law) has sought to harmonise key principles in international insolvency proceedings. Despite the complexity, the Working Group has reached consensus on three model laws, legislative guides, and legislative recommendations on insolvency of micro- and small enterprises. The model laws include:

- UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997 (the 'Cross-Border Insolvency Model Law');
- UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, adopted in 2018 (the 'Judgments Model Law'); and
- UNCITRAL Model Law on Enterprise Group Insolvency, adopted in 2019 (the 'Enterprise Group Model Law').

The purpose of the conference hosted by the III was to discuss amongst practitioners, judges and scholars how the Cross-Border Insolvency Model Law and the Judgments Model Law fit together, whether the latter 'plugs the gap' left by the former, and if so, what degree of harmonisation is required if a country wished to adopt both (or indeed, all three) model laws. The day was introduced by Evan Zucker (Blank Rome) on behalf of the III, followed by a brief welcome address by Chief Judge Martin Glenn, U.S. Bankruptcy Court for the Southern District of New York, who welcomed delegates to the courthouse. Harold Foo from the Ministry of Law, Singapore and Chair of each Working Group V session since its 56th session in December 2019, delivered a keynote address discussing the work of Working Group V and the significance of the model laws.

The Drafting & Origination of the Judgments Model Law

This panel was introduced and moderated by Stacy Lutkus (McDermott Will & Emery). Panellists, all of whom are delegates to Working Group V, included Irit Merovach (University of Nottingham, England), Judge Allan L. Gropper (former bankruptcy judge at the Southern District of New York, USA), Rodrigo Rodriguez (University of Lucerne, Switzerland) and Susana Hidvegi (Riveron, Colombia).

Professor Merovach explained the origination of the Judgments Model Law stemmed from the UK Supreme Court decision in *Rubin v Eurofinance* [2012] UKSC 46. In *Rubin*, the English courts were being asked to enforce US judgments based on insolvency avoidance powers. The foreign judgments had been obtained in default of the appearance of the defendants who had neither participated in the proceedings nor submitted to the jurisdiction of the US courts.

The Supreme Court ruled that there was no scope for foreign insolvency judgments to be recognised or enforced in the UK under the Cross-border Insolvency Regulations 2006 (the 'CBIR'), which are the UK domestic enactment of the Cross-Border Insolvency Model Law. The Supreme Court unanimously concluded that, as the CBIR includes no express provision dealing with enforcing a foreign judgment against a third party, there was no power under the CBIR for the court to do so. Lord Collins commented:

'It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties' (paragraph 143).

Following this, Working Group V set to task to adopt a model law that dealt very explicitly with the recognition and enforcement of insolvency related judgments.

The Judgments Model Law is a free-standing model law made for this purpose. The Working Group however also recognised that not all countries had followed or endorsed the more restrictive interpretation by the UK Supreme Court in *Rubin* and, indeed, some countries already considered that the Cross-Border Insolvency Model Law contained the power to recognise and enforce insolvency related judgments. As Judge Gropper noted, this was the case for the United States, where Chapter 15, the US domestic adoption of the Cross-Border Insolvency Model Law, allows the courts to recognise and enforce insolvency related judgments.

Those countries would – arguably – not need a free-standing model law to cover the topic. Therefore, the Working Group also provided a different mechanism to clarify the gap left by the Rubin interpretation: Article X. Professor Merovach explained that the purpose of Article X is to allow countries that have adopted the Cross-Border Insolvency Model Law to clarify, by virtue of slotting Article X into that Model Law, that the Cross-Border Insolvency Model Law allows the recognition and enforcement of insolvency related judgments. Professor Rodriguez noted that 'Minding the Gap' does lead to complexities and overlapping instruments. Judge Gropper noted that the UNCITRAL Secretariat had produced a document showing how all three model laws can be combined into one instrument and how this, together with the various guides to enactment, provided a wealth of material for countries wishing to adopt any of the model laws.

Pathways Toward Adoption: Practitioner Viewpoints on the Need for the Judgments Model Law and How the Judgments Model Law Can Assist in Successful Cross-Border Cases

This panel was moderated by Adam Crane (Baker & Partners) and made a full house with practitioners from around the globe: Debra Grassgreen (Pachulski Stang Ziehl & Jones, USA), Smitha Menon (Wong Partnership, Singapore), Howard Morris (Morrison Foerster, England), Robert van Galen (NautaDutilh, Netherlands), Min Han (Kim & Chang, South Korea) and Diana Rivera Andrade (Rivera Andrade, Colombia).

While legislation based on the Cross-Border Insolvency Model Law has been adopted in 57 states in a total of 60 jurisdictions, the other two model laws have not fared quite so well: neither have been enacted to-date. This may all be about to change, as the UK issued a public consultation in 2022 to consult on the adoption of both the Judgments Model Law and the Enterprise Group Model Law.

Howard Morris made the point that the UK has lost a great deal in relation to its cross-border insolvency toolkit through Brexit as the European Insolvency Regulation, which provides reciprocal recognition throughout the EU, is no longer applicable to the UK. This however might have been a driver for the UK to be the first country to consult on adoption of the Judgments Model Law – by virtue of adopting Article X. Mark Smith, head of the UK delegation to UNCITRAL Working Group V and Deputy Director, Insolvency law at *Department for Business, Innovation and Skills*, commented that submissions to the consultations had been somewhat mixed and that the Insolvency Service was in the process of writing up its conclusions. Contrast with Debra Grassgreen, who commented that there is very little political appetite in the United States to implement the Judgments Model Law at this stage (not least of course because of the United States' broader interpretation of the Cross-Border Insolvency Model Law, which does not create a gap to be filled), emphasising, however, that the incorporation of the entire Judgments Model Law (and not only Article X) into Chapter 15 of the U.S. Bankruptcy Code could nonetheless be beneficial in streamlining the process of debt collection across the fifty US states, the District of Columbia, and the US territories.

No cross-border insolvency panel can escape the reach of the rule in *Gibbs* and Howard Morris was well-aware of his role as the 'pantomime villain' having to defend the rule. As a reminder, the rule in *Gibbs* says (at its essence) that you can only effect a discharge of English law debt by using an English proceeding.

Robert van Galen made the point that at the outset Working Group V was a very common law orientated project, but that this has radically shifted and that this shift in engagement with the Working Group and participation in it will be helpful for civil law jurisdictions to contemplate whether to adopt the model laws.

Practitioners from the United States and Singapore noted that in today's world of large companies with complex group and contractual structures it was important to find a single forum that enables comprehensive restructuring rather than use a piecemeal approach. To this end, Singapore has proved itself to be in favour of an internationalist and universalist approach and favours good forum shopping – to wherever that may be.

Implementing Strategies

This panel was moderated by Olya Antle (Cooley LLP, USA) with panellists Mahesh Uttamchandani (World Bank) – by video, Sergio Savi (BMA Advogados, Brazil), Katharina Crinson (Freshfields, England) and Dario Oscos (Oscos Abogados, Mexico).

The panel explored the interaction between the Cross-Border Insolvency Model Law and the Judgments Model Law, possible implementation strategies of the Judgments Model Law, as well as a potential need for harmonisation as between the two model laws. The panellists agreed that the Judgments Model Law can be adopted as a stand-alone tool but noted that, in

practice, it is more likely that a country that has already adopted the Cross-Border Insolvency Model Law will adopt further model laws, expanding on the earlier discussions regarding the possibility of adoption of the Judgments Model Law in the UK, as well as in civil law jurisdictions such as Mexico and Brazil. The panellists noted that if adoption of both model laws is considered, a country needs to decide how to deal with either a harmonisation or overlapping instruments. To this end, panellists were united that, at least from a practitioner's perspective, overlapping instruments are not an obstacle – especially as it widens the toolbox available and can cater for different circumstances. Panellists also noted that even countries that take a more expansive approach to the interpretation of the Cross-Border Insolvency Model Law could benefit from the adoption of the Judgments Model Law, for example, to provide for easy access of recognition for just one judgment (rather than a whole insolvency proceeding), or to provide a system that has, as its starting point, the recognition of a judgment (rather than providing that recognition is discretionary). This panel too could not escape the reach of the rule in *Gibbs* and noted that the adoption of the Judgments Model Law in its entirety or through Article X would mark a policy shift in the UK.

Attendees came away from the conference recognising and celebrating how much progress had been made since the adoption of the Cross-Border Insolvency Model Law in 1997 and how the continued participation by countries from different legal backgrounds assists in laying a broad foundation for adoption of future model laws. Which country will be the first to adopt the Judgments Model Law and in what form remains to be seen – but the cross-border dialogue certainly remains active.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com