

End in Sight for the “Rule in *Gibbs*”?

UK launches consultation on whether to extend recognition and enforcement of insolvency-related judgments and/or adopt UNCITRAL Model Law on Enterprise Group Insolvency; “Rule in *Gibbs*” remains for now

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At a Glance

Proclaiming the UK's commitment to international co-operation in respect of insolvency proceedings and the sponsoring of international best practice, the UK Insolvency Service today launched a public [consultation](#) which proposes to adopt:

- ▶ a modification to the [UNCITRAL Model Law on Cross-Border Insolvency](#) (the **Original Model Law**) which would facilitate the recognition and enforcement of insolvency-related judgments, via a provision known as "Article X" – though stopping short of overturning the long-standing "rule in *Gibbs*" (that any discharge of, or variation to, a contractual obligation must be governed by the proper law of the contract)¹; and
- ▶ the [UNCITRAL Model Law on Enterprise Group Insolvency](#) (the **Group Model Law**), which provides tools to manage and co-ordinate insolvencies within corporate groups, while respecting that each company remains a separate legal entity.

The [UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments](#) (the **Judgments Model**)

Law) is a separate model law providing for recognition of foreign insolvency-related judgments (which would include foreign plans of reorganisation compromising English law debt, thereby effectively overturning the "rule in *Gibbs*"). Today's consultation announces that the Insolvency Service does *not* consider it appropriate to implement the Judgments Model Law in full at the present time, to avoid "as yet unanticipated effects" upon domestic contract law.² Instead, the Insolvency Service will issue a further call for evidence on the "rule in *Gibbs*" in due course.

If the UK does implement Article X or the Group Model Law into national law, it would be the very first jurisdiction to do so.

Next steps: The consultation closes on 29 September 2022. Given the paralysis in UK Government, the timeframe for further action is uncertain. Any reform would be effected via secondary legislation (i.e., without requiring an Act of Parliament).³ The Government proposes to implement the Group Model Law "as soon as possible".

We are happy to discuss this further with interested clients.

"Co-operation 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."

"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.**"

Insolvency Service consultation, 7 July 2022

1. More specifically, the English law "rule in *Gibbs*" provides 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 (stemming from the case of *Antony Gibbs & sons v La Société Industrielle et Commerciale des Métaux* (1890)) – unless the affected parties have taken part in the proceedings or otherwise submitted to them (e.g., by voting) or were present in the foreign jurisdiction when the proceedings were commenced. This effect was recently illustrated in *OJSC International Bank of Azerbaijan* (2018), when certain creditors with debts governed by English law did not participate in the Azeri restructuring proceeding and – based on the "rule in *Gibbs*" – successfully opposed the granting of a permanent moratorium (which would have effectively amounted to a permanent compromise of their claims).
2. The consultation specifically references concerns regarding financial contracts (such as those governing international swaps and derivatives), and the certainty that the rule in *Gibbs* provides to contracting parties
3. Pursuant to a power in the Private International Law (Implementation of Agreements) Act 2020

Background

Nature of UNCITRAL Model Laws

- ▶ The United Nations Commission on International Trade Law (**UNCITRAL**), part of the United Nations, has a mandate to harmonise and unify national laws regarding international trade.
- ▶ UNCITRAL has developed various model laws, which are not laws in their own right but provide a legal text for incorporation into national law.
- ▶ States may adapt provisions of the model laws if they wish.

Complementary Nature of Proposed Reforms

The Original Model Law (on Cross-Border Insolvency) was adopted 25 years ago.

- ▶ It provides a legal framework authorising and encouraging co-operation and co-ordination between jurisdictions in cross-border insolvency proceedings.
- ▶ A key element of the Original Model Law is the ability for a court of the enacting state to grant recognition of qualifying foreign insolvency proceedings, and related relief to assist those proceedings.
- ▶ Legislation based on the Original Model Law has been adopted by 51 states¹, including the UK² and the US³.

Article X would be added to the UK's version of the Original Model Law, so as to expressly provide that the recognition of insolvency-related judgments is a form of assistance that can be granted under the Original Model Law. This would include a plan of reorganisation / restructuring plan (though deliberately stopping short of overturning the long-standing "rule in *Gibbs*", as noted).

The Group Model Law also complements the Original Model Law: the latter applies to insolvency proceedings concerning a single debtor, whilst the former focusses on insolvency proceedings relating to multiple debtors that are members of the same group. It aims to provide effective mechanisms for co-ordination and co-operation between courts, insolvency representatives and a group representative (where appointed), with the goal of a group insolvency solution through a single insolvency proceeding.

1. Full list [here](#)

2. Pursuant to the Cross-Border Insolvency Regulations 2006

3. Pursuant to chapter 15 of the U.S. Bankruptcy Code

“Article X”

BACKGROUND

Article X stems from judgments¹ raising uncertainty as to whether the Original Model Law provided for recognition and enforcement of insolvency-related judgments (as distinct from recognition of insolvency proceedings *per se*).

NATURE

Offers a new route for foreign insolvency-related judgments to be recognised in the UK (upon application), where this will assist foreign insolvency proceedings that have also been recognised.

Article X

“Notwithstanding any prior interpretation to the contrary, the relief available under [the discretionary relief provisions under the Cross-Border Insolvency Regulations 2006, upon recognition of a foreign proceeding] includes recognition and enforcement of a judgment.”

POTENTIAL GROUNDS FOR REFUSAL TO RECOGNISE

The Insolvency Service proposes to 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, including:

- ▶ public policy;
- ▶ where creditors’ rights were not adequately protected;
- ▶ where 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 (essentially, preserving the “rule in *Gibbs*”); and
- ▶ other specific grounds, including fraud and lack of notice.

The court will retain discretion as to the relief granted.

The court will also retain discretion to recognise a judgment even if one of the above factors applies (if appropriate), or to apply another relevant factor in deciding not to recognise a judgment.

IMPACT OF UK ADOPTION

Adopting Article X would provide a mechanism for recognition of foreign insolvency-related judgments in the UK, including judgments confirming foreign plans of reorganisation.

However:

- ▶ The “rule in *Gibbs*” would remain for now, pending further consultation – i.e., English courts would not consider English law claims / rights as discharged / compromised by a foreign proceeding unless the relevant stakeholder submitted to the foreign proceeding (e.g., by voting) or was present in the foreign jurisdiction when the proceeding was commenced; and
- ▶ UK courts would retain broad discretion to refuse recognition (see left). The application of such grounds would be far from straightforward (for example: exactly what constitutes adequate protection of creditors’ rights? What are the limits of “public policy”?).

There will be no change to the likelihood of recognition of English insolvency-related judgments in other jurisdictions.

1. Principally, the UK Supreme Court’s decision in *Rubin v Eurofinance SA and others* [2012] – which would essentially be set aside by the adoption of Article X

Group Model Law

BACKGROUND

- ▶ Restructuring groups of international companies remains challenging; multiple parallel insolvency processes are usually highly value-destructive.
- ▶ Although the Recast EU Insolvency Regulation includes provisions for restructuring groups, we understand these provisions have not been used since their introduction five years ago.

NATURE

- ▶ Designed to facilitate insolvencies affecting multiple members of the same group, via various provisions for co-operation, communication and efficient administration.
- ▶ Designed to maximise the value of the group's assets and operations, whilst seeking to protect the (potentially divergent) interests of creditors of different group members.

EFFECT

- ▶ **Planning proceedings:** The Group Model Law envisages the possibility of a voluntary “planning proceeding” - a single insolvency proceeding in which multiple members of the group participate jointly, in order to develop and implement a group insolvency solution.¹ Solvent group members may also take part in the plan. The Group Model Law also includes provisions for recognition of foreign planning proceedings.
- ▶ **Procedural co-ordination, not substantive consolidation:** This model law is intended to respect the separate legal identity of each group member: unification of insolvency proceedings against separate entities is intended for administrative purposes only. It would not usually involve substantive consolidation (i.e., combining the assets and liabilities of related companies as if they were part of a single insolvency estate). Instead, liabilities would generally remain attached to the specific group company and voting on a unified plan of reorganisation would be conducted by creditors of each entity on an entity-by-entity basis.
- ▶ **Co-operation:** The Group Model Law also requires courts of the adopting state to co-operate “to the maximum extent possible” with other courts, insolvency representatives and any group representative appointed, by “any appropriate means”. This includes the possibility of co-ordinated hearings. However, the Group Model Law preserves the independent jurisdiction and authority of the court regarding the matters and parties appearing before it; even in co-ordinated hearings, the UK court would remain responsible for reaching its own decision on the matters before it.
- ▶ **Protection of creditors' interests:** In considering relief under the Group Model Law, the court must be satisfied that the interests of the creditors of each enterprise group member subject to a planning proceeding (and other interested persons) are adequately protected.

IMPACT OF UK ADOPTION

- ▶ Adopting the Group Model Law would provide a framework in the UK for the efficient conduct of multi-debtor insolvency proceedings, including the possibility of a single “planning proceeding” to co-ordinate management of the insolvency.
- ▶ UK courts would have the ability to recognise foreign planning proceedings and an obligation to co-operate with other courts involved in the group's insolvency proceedings.
- ▶ However:
 - Practical impact may be limited unless and until other jurisdictions also enact the Group Model Law.
 - The consultation notes that a scheme of arrangement would likely not fall within the definition of “insolvency proceeding” for this purpose and that it is uncertain whether a restructuring plan would qualify. This risks unhelpfully limiting the beneficial impact to insolvencies and excluding restructurings.
- ▶ Difficult questions are likely to arise regarding the adequate protection of creditors' interests and the sharing of confidential information.

1. Certain requirements and limitations apply, including the requirement for a group representative to be appointed to co-ordinate the development of a group insolvency solution through the planning proceeding.

International Reach

