

III-UNCITRAL, New York: “seeking perfection is a fantasy”

Ben Clarke
26 April 2023



From left to right: Olya Antle, Katharina Crinson, Dario Oscos, Sergio Savi (Credit: Evan Zucker)

On the fifth anniversary of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ), lawyers, judges and academics from around the world discussed gaps that can be plugged by the new law and whether the UK will ever override the “questionable and outdated” *Gibbs* rule.

At a conference hosted by the International Insolvency Institute in New York last week, University of Nottingham professor **Irit Mevorach** explained that UNCITRAL Working Group V drafted the latest law after the English case of *Rubin* highlighted a gap in the relief provisions of the existing Model Law on Cross-Border Insolvency (MLCBI).

“There was also an acknowledgment that we need more tools to facilitate asset tracing and recovery,” Mevorach said.

In the *Rubin* case, the UK Supreme Court refused to enforce an avoidance order made by a US bankruptcy court because it was directed towards a specific person that had not submitted to the court making the order.

The new model law deals explicitly with recognition and enforcement of insolvency-related judgments, to try to remove such uncertainties that have arisen since the MLCBI was introduced 25 years ago.

Mevorach noted that Article X of the MLIRJ includes a statement indicating the relief provision in the MLCBI does allow for the recognition and enforcement of insolvency-related judgments, so there are now two instruments relevant to the recognition and enforcement of insolvency-related judgments.

“That creates certain overlaps and potential inconsistencies and uncertainties that it is good to be aware of as we start to operationalise and try to adopt the Model Law on Insolvency-Related Judgments,” she said.

She explained that while the relief provision in the MLCBI is discretionary, the MLIRJ has a requirement to recognise and enforce insolvency-related judgments – albeit with eight grounds to refuse recognition, including in relation to public policy, fraud, inconsistency with previous judgments and jurisdictional grounds.

Mevorach said the two separate laws will give countries options and allow them to tailor relief to particular circumstances.

“The Model Law system isn’t perfect but seeking perfection is a fantasy,” she said. “We need to make the most of what we have and in my view we have some good options here”.

Options include adopting the MLIRJ as a standalone instrument or integrating it into the MLCBI if the country has already enacted that. “The less good option is to not do anything,” Mevorach said.

In a later panel, London-based Freshfields Bruckhaus Deringer counsel **Katharina Crinson** said she doesn’t mind laws that overlap.

“Overlaps mean I get to choose what suits my particular circumstances best,” she said. “Overlaps are difficult but insolvency is already a niche sport; overlaps give options and options can be beneficial.”

The conference came as the UK became the first country to enter a [consultation period](#) last year to seriously consider adoption of the MLIRJ, with an approach that would include implementing Article X and bringing in procedural guidelines for the courts to follow.

Mark Smith, a government lawyer in the UK who advises the Insolvency Service, told delegates in New York that the response had been “a bit mixed” and they were preparing to publish the government’s response soon.

Asked later in the day by **Adam Crane** of Cayman Islands firm Baker & Partners why the UK has been so quick to explore adoption of the new model law, Morrison Foerster restructuring head **Howard Morris** said the UK has “lost a great deal” since Brexit.

The loss of the European Insolvency Regulation has concerned the profession, Morris said, but consulting early on the new model law is a statement that the UK wants to remain present in international restructuring and insolvencies.

“Are we more universalist now? I don’t think we are,” said Morris. “I think we’ve become modified universalist, which some translate as meaning we’re in favour of universalism so long as English law is paramount!”

Morris said that implementing Article X would make the least change to the UK’s existing law derived from the MLCBI, but would overcome the challenge posed by *Rubin* and allow courts to recognise judgments.

“No doubt” *Gibbs* will be overridden

With panellists and delegates from many countries around the world, much of the debate was devoted to the UK’s rule in *Gibbs*, which Crane said is “antithetical” to the model laws’ purposes of protecting and maximising the value of insolvency estates.

“Every English lawyer knows exactly what the world’s attitude will be towards *Gibbs*, it’s going to be a mixture of disapproval based on their principled impropriety and let’s face it, jealousy, because it attracts work to their location,” said Morris.

But while Morris noted most English lawyers believe the *Rubin* judgment was wrong and came as a surprise, many would defend *Gibbs*.

He said that international trade and commerce has grown throughout his career and led to a “titanic battle” between competing governing laws as to which laws will be chosen by parties who have no relationship to a particular jurisdiction.

Because of the success of English law on the international stage, parties with no connection to the jurisdiction choose English law, Morris said, adding that the principled view is that if parties want English law, they want everything that goes with it – English judges and predictable outcomes but also the rule in *Gibbs*.

On a more practical basis, London has become a centre for international restructurings and there is a fear local practitioners would lose work if *Gibbs* was overridden, he said.

WongPartnership restructuring head **Smitha Menon** said Singapore has a “really firm, universalist approach” and practitioners there don’t like the *Gibbs* rule because it is a threat to good forum shopping, which she said is an efficient way to maximise value for insolvent estates.

“We also find the principles underlying the [*Gibbs*] decision to be quite questionable and outdated,” Menon said. “We think the court was wrong to characterise it as a contractual issue.”

“We feel primacy should have been given to the fact that it is about insolvency, which is a collective proceeding, and that overrides contractual considerations,” she said. “Policy trumps contract.”

Morris said he has “no doubt” that *Gibbs* will be overcome eventually but he urged delegates to look at how much progress has been made in the international insolvency arena in recent decades.

“Each time that we recognise a foreign proceeding and foreign judgment it is a ceding of the absolute authority of one’s nation’s courts,” he said. “The degree of international cooperation that’s been achieved, albeit slowly and slower than many would like, is remarkable.”

Morris praised the achievements of the UNCITRAL Model Law. “It’s a journey which at the outset of my career was unthinkable, that we would come together as an international comity of nations to such a degree that we are sitting trying to further progress and get over the remaining bumps in the road.”

The one-day III conference, chaired by Blank Rome of counsel **Evan Zucker**, was hosted at the US Bankruptcy Court for the Southern District of New York and supported by UNCITRAL.

Speakers

Judge Martin Glenn, US Bankruptcy Court for the SDNY, USA

Evan Zucker, Blank Rome, USA

Harold Foo, Ministry of Law, Singapore

Stacy Lutkus, McDermott Will & Emery, USA

Irit Mevorach, University of Nottingham, UK

Judge Allan Gropper, former SDNY bankruptcy judge, USA

Rodrigo Rodriguez, University of Lucerne, Switzerland

Susana Hidvegi, Riveron, Colombia

Adam Crane, Baker & Partners, Cayman Islands

Debra Grassgreen, Pachulski Stang Ziehl & Jones, USA

Smitha Menon, WongPartnership, Singapore

Howard Morris, Morrison Foerster, UK

Robert van Galen, NautaDutilh, Netherlands

Min Han, Kim & Chang, Korea

Diana Rivera Andrade, Rivera Andrade, Colombia

Olya Antle, Cooley, USA

Dario Oscos, Oscos Abogados, Mexico

Katharina Crinson, Freshfields Bruckhaus Deringer, UK

Sergio Savi, BMA Advogados, Brazil

Mahesh Uttamchandani, World Bank, USA

Ben Clarke

Author | Deputy Editor

benjamin.clarke@lbresearch.com