Law Society of Scotland

Consultation response

Implementation of two UNCITRAL Model Laws on Insolvency

September 2022

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Banking, Company and Insolvency Law Sub-Committee and Civil Justice Committee welcome the opportunity to respond to The Insolvency Service's Consultation on Implementation of two UNCITRAL Model Laws on Insolvency[1].

We have the following comments to put forward for consideration:

Consultation questions

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

We agree with this proposal, as it appears to be a sensible way to facilitate the recognition and enforcement of insolvency-related judgments in the UK (including within Scotland). Furthermore, we consider that the proposal provides a sensible middle-ground between advancing cross-border cooperation in insolvency matters and maintaining a degree of creditor protection through the exercise of the court's discretion.

We recognise that it is desirable to reverse the decision in *Rubin*[2] but parties may have taken the decision in *Gibbs*[3] into account in making their contractual arrangements. We agree that more evidence is needed before that can be discounted and the rule in *Gibbs* overridden completely. Coordination across UK jurisdictions is equally desirable in insolvency matters and *Gibbs* applies equally in Scots law (*Heritable Bank plc v Landsbanki Islands HF* 2013 SC (UKSC) 201) at [44]). We also support the suggestion for a further Call for Evidence on the rule in *Gibbs*.

[1] Implementation of two UNCITRAL Model Laws on Insolvency Consultation - GOV.UK (www.gov.uk)
[2] *Rubin and another v Eurofinance SA* and others [2012] UKSC 46
[3] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399

2. 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?

We broadly support this. We consider that flexibility and discretion are key elements that are fulfilled by an approach involving a non-exhaustive list of factors, but we note that there is always a risk of uncertainty with a non-exhaustive list. Nevertheless, we acknowledge the support for a non-exhaustive list in the consultation and the desirability of following a flexible approach in this matter.

We also acknowledge, that where the matter remains entirely within the discretion of the court, such a list of factors is unnecessary, however it may assist in guiding the exercise of judicial discretion.

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

We consider that flexibility and discretion are key in relation to the proposal regarding Article X. We consider that the proposed approach ought to achieve the desired effect. It extends the scope for insolvency-related judgments to be recognised and enforced in Scotland whilst maintaining important elements of creditor protection. It also allows the Scottish courts to decide what is appropriate within their own jurisdiction, having necessary regard to requirements of comity with foreign courts. However, we may have additional comments on this topic once we have reviewed the Call for Evidence and the proposals regarding the rule in *Gibbs.*

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

We support this as it brings the law into conformity with international standards, and we agree that it is a sensible approach and that the court should be able to have regard to the most recent guidance. Furthermore, the list of documents to which the court can refer should be (as far as possible) complete.

5. 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 it will not have significant impact on Scots law and the UK more broadly, but it may give rise to some minor advantages in dealing with the insolvency of related enterprises.

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

We believe that consideration may need to be given to the definition of “insolvency proceeding” to ensure that it is wide enough to cover trust deeds and debt arrangement schemes under devolved

Scots law. The reference to competent authority, in the definition, itself needs to be defined and from a Scottish perspective, we have doubts as to whether this should include the Accountant in Bankruptcy.

We note the intention for applications under the MLEG to be heard before the High Court of Justice in England and Wales and that there is a reference to "its equivalent in Scotland". The Court of Session is the relevant equivalent court in Scotland to deal with such matters. In any event, the issues touched on in this response would engage the legislative consent convention and will require the consent of the Scottish Parliament. This matter should be discussed with the Scottish Government.

7. 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 have no objection to this, and the relevant circumstances can determine who will fund it.

8. 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 have no comment from a Scots law perspective and note that the latter part of the question is focused on English law specifically.

For further information, please contact:

Gavin Davies
Policy Team
Law Society of Scotland
DD: 0131 370 1985
GavinDavies@lawscot.org.uk