

England’s treatment of foreign insolvency-related judgments – could change be just around the corner?

KEY POINTS

- The UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments (‘MLIJ’) was published in 2018, with the aim of supplementing the previous Model Law on Cross-Border Insolvency, and to clear up a general ambiguity left by this law in relation to the treatment of foreign judgments originating from overseas insolvency proceedings.
- This ambiguity has added fuel to the fire of a longstanding debate in English insolvency circles – between the territorial and universal – as judges have grappled with hotly contested common law principles, such as the rules in *Gibbs* and *Rubin*, and applied these to complex arrangements involving UK creditor rights in foreign restructurings.
- However, this debate may soon be put to rest, as the UK Insolvency Service prepares to publish the results of its consultation into the MLIJ (hopefully, in the coming months). The results, and the UK’s potential adoption of the MLIJ through ‘Article X’, could precipitate considerable change, setting the UK on course for far greater cross-border cooperation than English common law arguably currently allows.

THE MLCBI

In May 1997, the United Nations Commission on International Trade Law (‘UNCITRAL’) adopted its Model Law on Cross-Border Insolvency (the ‘MLCBI’). The instrument was warmly received as a welcome application of UNCITRAL’s mandate to promote the harmonisation of international trade law to the realm of cross-border insolvency. By providing a framework for international recognition of foreign insolvency proceedings, it marked a shift away from a purely territorial approach, to one of greater international cooperation between courts and office holders in different jurisdictions. It was adopted by the UK in 2006 via the Cross-Border Insolvency Regulations (the ‘CBIRs’), however its application and scope has been the subject of continued uncertainty and discussion.

Despite being welcomed at the time, the MLCBI failed to expressly contemplate or provide a mechanism for cross-border recognition of insolvency-related judgments –

as a result, so too did the national legislation required to implement it (eg, the CBIRs). Therefore, and in the absence of an authoritative clarification to the contrary, English courts handling cases involving foreign insolvency proceedings continued (and continue) to apply traditional common law rules. This, many argue, has conflicted with the modern, globalised insolvency regime that the MLCBI sought to establish, thereby fanning the flames of a very real debate in insolvency circles: between (1) the territorial and domestic imperative (which assumes each country to have exclusive jurisdiction over the insolvency of a particular debtor) and (2) the internationalist and universal (which calls for the universal recognition of insolvency proceedings, irrespective of the location of the debtor’s assets).

Two cases in particular have brought this debate into sharp focus and highlighted the gap left by the MLCBI: (1) *Antony Gibbs & sons v La Société Industrielle et Commerciale des Métaux* [1890] LR 25 QBD 399 and (2) *Rubin v Eurofinance SA* [2012] UKSC 46.

THE RULE IN GIBBS

Anthony Gibbs v La Société Industrielle was a nineteenth century decision of the Court of Appeal concerning an English law governed debt incurred in respect of trading on the London Metal Exchange, and whether it had been validly discharged by a French insolvency proceeding. The court’s judgment gave birth to the eponymous ‘rule in *Gibbs*’: that English courts would not recognise or validate a foreign law discharge of English law debt absent (i) a treaty authorising such discharge; or (ii) the creditor’s submission to the relevant foreign proceeding.

The rule in *Gibbs* has been subjected to considerable criticism from lawyers and academics alike, who view it as an anachronistic relic from an age of English parochialism, and a nuisance to an effective restructuring in a single forum (see, for example, Professor Ian Fletcher in *The Law of Insolvency* (5th Edition) at para 30-061). Many have argued it creates a double-standard: whereby English courts have proven themselves willing to confidently assert their jurisdiction when it comes to foreign insolvency proceedings and validate the discharge of foreign debts (eg, *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch); *Sea Assets Ltd v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 or *Harms Offshore Aht ‘Taurus’ GmbH & Co Kg v Bloom & Ors* [2009] EWCA Civ 632), but will not countenance the reverse – perhaps symbolic of the sort of Anglo exceptionalism the rule is said to represent. Some have even suggested that the rule is excessively protective of creditor rights, insofar as contracting parties should generally envisage (in the absence of a stipulation to the contrary) that, in

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the event of the other party's insolvency, a single law closely associated with that party should govern its rights, irrespective of the law governing the contract (see [2018] EWCA Civ 2802, per Henderson LJ at [31]). Others have criticised the rule for hampering effective 'forum shopping' (see for example, *Re Codere* [2015] EWHC 3778 (Ch), [17]-[18]; or Mokal, R (2017) *Shopping and Scheming*, and the Rule in *Gibbs*. South Square Digest pp. 58-63).

Not all of this criticism however has come from English quarters: recently, the US Bankruptcy Court for the Southern District of New York noted the rule's 'seeming incongruence with [...] a broad consensus of international insolvency practitioners and jurists' and quoted the oft-cited criticism of Professor Fletcher: that the rule 'belongs to an age of Anglocentric reasoning which should be consigned to history' (see *re Agrokro D.D.* Case No. 18-12104, Bankr. S.D.N.Y. Oct. 24, 2018): charges described by the Singapore High Court as 'compelling' (*Pacific Andes Resources Development Ltd* [2016] SGHC 210).

Nonetheless, the rule has been affirmed by English courts repeatedly (see, *inter alia*, *Adams v National Bank of Greece SA* [1960] 3 WLR 8, 26 per Lord Denning; *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] Bus LR 1041 at [112] per Morgan J; *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 at [12] per Lord Sumption). The debates it has generated arguably came full circle in 2018 in *Bakhshiyeva v Sberbank* [2018] EWCA Civ 2802, which concerned a bank that had entered restructuring in Azerbaijan under Azeri law. The English court recognised the proceeding and granted a moratorium preventing enforcement of the bank's security by UK creditors. Upon the moratorium's expiry, several English law creditors who had objected to the restructuring originally sought to enforce debts against the bank's English assets, to which the bank responded by applying in England to indefinitely extend the moratorium under the CBIRs. The court (at first instance and on appeal) affirmed the rule in *Gibbs*, confirming (1) that the CBIRs could not enable English courts to discharge

or vary the substantive rights of English debt creditors and (2) in any event, the MLCBI was limited to 'procedural' aspects of cross-border insolvency (see [66]-[67] and [89]).

English courts have therefore made clear: unless a party wishes to challenge it before the Supreme Court, or an Act of Parliament confirms otherwise, the rule in *Gibbs* is here to stay. This will however not insulate the rule from sustained criticism – even from puisne and appeal judges who continue to affirm it with heavy reluctance (see, eg, Teare J at [14] of *Global Distressed Alpha Fund I Ltd v PT Bakrie Investindo* [2011] EWHC 256 (Comm)).

THE RULE IN RUBIN

Alongside *Gibbs*, the Supreme Court's judgment in *Rubin v Eurofinance SA* is also of central relevance to the treatment of insolvency-related judgments in England. *Rubin* concerned Chapter 11 bankruptcy proceedings initiated in New York in relation to The Consumer Trust ("TCT"). The Receivers of TCT's settlor company sought to enforce a default judgment handed down in New York against English Defendants. Its enforcement would have required the Defendants (who had not participated in the US proceeding) to repay funds transferred to them by way of a fraudulent preference. The Supreme Court held that, as foreign judgments operate *in personam*, they can only be enforced against entities which have submitted to the foreign court's jurisdiction. In ruling that the CBIRs were therefore incapable of displacing this common law assumption, the court confirmed (as in *Sberbank*) that the CBIRs were concerned merely with 'procedural matters' and 'there [was] nothing to suggest that they should apply to the recognition and enforcement of foreign judgments' under English law. Indeed, Lord Collins stated that to determine otherwise would be 'a radical departure from substantially settled law'.

Rubin was applied in reasonably quick succession in *Fibria Celulose v Pan Ocean Co* [2014] EWHC 2124 (Ch). In this case, a Korean shipping company (P), entered Korean insolvency proceedings

recognised by the English court, and the issue was whether a Brazilian exporter (F) could terminate an English law governed contract entered into with P on the basis of a clause allowing termination in the event of a party's insolvency. P argued that any attempts to enforce the contract ought to be stayed by the English court, on the basis that such clauses were invalid under Korean law and, in light of the Korean insolvency proceeding, its rights were protected by the Korean insolvency court. The English court disagreed, and held that any judgment of the Korean court purporting to protect P's rights under an English law contract could not be enforced as a matter of English law in England (and that, in any event, the CBIRs did not provide for the enforcement of foreign judgments).

Rubin arguably served as a useful clarification of the scope of the MLCBI and CBIRs. However, it was also a reminder of the *unhelpful* gap left by both in relation to insolvency-related judgments – and the manner in which courts would 'fill' this gap. For example, many pointed to the court's overruling of *Cambridge Gas v Navigator Holdings* [2006] UKPC 26 as evidence that *Rubin* represented a major setback for modified universalism: 'on one view it was killed off' (Lord Neuberger's speech at the 2017 International Insolvency Institute Annual Conference). In *Cambridge Gas*, a Manx company entered a Chapter 11 plan under the US Bankruptcy Code in New York, which would affect the holdings of its shareholders. The court held that judgments of foreign courts in foreign bankruptcy proceedings were neither *in rem*, nor *in personam*, meaning jurisdiction **could** be conferred on the Manx court to assist the insolvent company by subjecting foreign companies to the jurisdiction of a foreign insolvency proceeding. *Cambridge Gas* was described by Lord Sumption as 'mark[ing] the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation' (*Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] A.C. 1675 at [18]). Yet to the disappointment of many, it was laid to rest by *Rubin*.

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THE MLIJ

Gibbs and *Rubin* have highlighted an enduring uncertainty left by the MLCBI in relation to the treatment of foreign insolvency judgments – an uncertainty which has arguably only increased following the UK's departure from Recast European Insolvency Regulation (Regulation (EU) 2015/848 in Insolvency Proceedings (Recast)), Article 32 of which required member states to recognise (*inter alia*) 'judgments concerning the course and closure of insolvency proceedings, [...] deriving directly from the insolvency proceedings and which are closely linked with them [...] and] relating to preservation measures taken after the opening of insolvency proceedings or in connection with it'.

In his 2017 IIIAC speech (op. cit.) Lord Neuberger observed that this uncertainty had led to a form of judicial cautiousness, with judges who might otherwise be inclined towards greater cooperation in cross-border insolvency nonetheless continuing to apply common law rules (eg, *Gibbs* and *Rubin*) for fear of 'developing the law for themselves'. However this, his Lordship argued, could 'actually serve to act as a spur to the agreeing of legislative measures increasing cooperation'.

In this regard, his Lordship appeared to have been somewhat vindicated when, in July 2018, UNCITRAL announced the adoption of its Model Law on Recognition and Enforcement of Insolvency Related Judgments ('MLIJ'), stating that it had been designed to address the fact that 'few existing international instruments deal with the recognition and enforcement of judgments generally and those that do exist exclude from their scope matters relating to insolvency and thus recognition and enforcement of insolvency-related judgments'.

The extent to which the MLIJ can clear up the ambiguity left by *Gibbs* and *Rubin* however, depends on how the UK chooses to adopt it into national legislation.

THE UKIS CONSULTATION AND ARTICLE X

On 7 July 2022, the UK Insolvency Service ('UKIS') published a consultation with respect to the CBIRs, in which it proposed that: instead of implementing the MLIJ in

full, the UK should implement it **in part**, via a provision called 'Article X'. Article X would enable recognition and enforcement of insolvency-related foreign judgments, stating that this is a form of assistance **can** be granted by UK courts under the MLCBI, but giving them ultimate discretion in deciding whether to exercise this.

To assist the court in the exercise of discretion, it is proposed that the CBIRs contain a list of 'discretionary, illustrative, and non-exhaustive grounds' of refusal, including: (1) whether the creditor's rights were not adequately defended; (2) whether the relevant judgment was obtained by fraud; and (3) whether the defending party submitted to the jurisdiction of the foreign proceeding.

WHERE WOULD THIS LEAVE THE RULES IN GIBBS AND RUBIN?

Article X's confirmation that the recognition and enforcement of insolvency-related judgments could be granted under the MLCBI is significant, particularly when one considers that the courts in both *Rubin* and *Pan Ocean* reached their conclusions on the basis of an ambiguity left by the CBIRs. If Article X effectively clears up this ambiguity, it is hard to see how any court can affirm *Rubin* in circumstances where an English creditor seeks to avoid compliance with a foreign insolvency judgment on the basis of that judgment not being captured by the CBIRs. This will be viewed by many as a welcome development: affording UK courts greater flexibility, moving towards greater international comity, and reducing costs frequently incurred in connection with having to open parallel insolvency proceedings in England.

However, Article X is notable in leaving *Gibbs* untouched. Were UKIS to endorse the adoption of the MLIJ in full, this would provide for mandatory recognition and enforcement of foreign insolvency-related judgments (unless specific grounds for refusal could be satisfied), as opposed to subjecting their recognition to judicial discretion. This would be a strong thing, effectively overriding *Gibbs*. Article X therefore perhaps strikes a judicious compromise: paving the path towards greater internationalism, whilst

maintaining the confidence of English law creditors that their debts will not suddenly be discharged without their voluntary submissions to a foreign process.

WHAT NEXT?

The UKIS consultation closed on 29 September 2022; and whilst many have been waiting with bated breath for its results, it is not clear when they will be published (though it is understood that a large proportion of the responses have been unsupportive). However, the potential incorporation of Article X into the CBIRs could be a significant thing indeed – casting doubt over the continued relevance of *Rubin* and (in the unlikely event of a full-throated adoption of the MLIJ), calling into question *Gibbs*.

Ultimately, the impact of the MLIJ will only be felt if widely adopted by other Member States. However to date, only one jurisdiction has signalled its intent to adopt the MLIJ: the UK. Without widespread global adoption, the MLIJ is unlikely to ever compare to international equivalents. In this regard, we need only remind ourselves of the general reticence of EU Member States to adopt the MLCBI, with only four current EU Member States having done so among the 45 international signatories (Greece, Poland, Romania and Slovenia). This, combined with the reasonably strict application process circumscribed in the MLIJ, could spell trouble for the instrument, damaging the prospects of a genuinely international insolvency regime and perhaps throwing a lifeline to *Rubin* and *Gibbs*, which may live to fight another day. ■

Further reading

- LexisPSL Banking & Finance; FMLC responds to Insolvency Service consultation on implementing UNCITRAL Model Laws on Insolvency
- <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation>
- UNCITRAL Model law on enterprise group insolvency (2022) 5 CRI 167