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UNCITRAL's Model Law on Recognition and Enforcement of Insolvency-Related Judgments - a universalist approach to cross-border insolvency

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INSOL SPECIAL REPORT

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Acknowledgement

INSOL International is pleased to present this Special Report titled “UNCITRAL’s Model Law on Recognition and Enforcement of Insolvency-Related Judgments – a universalist approach to cross-border insolvency”, by Evan J Zucker and Rick Antonoff of Blank Rome LLP, USA.

In its July 2018 session, UNCITRAL adopted and promulgated the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ). The MLIRJ has been developed over the last four years by UNCITRAL’s Working Group V (Insolvency) and is designed to supplement the UNCITRAL Model Law on Cross-Border Insolvency. Prompted by inconsistent judicial decisions under the Model Law on Cross-Border Insolvency in regard to the recognition and enforcement of foreign insolvency judgments, the MLIRJ provides a streamlined procedure and greater clarity on when an insolvency-related judgment should be recognised and enforced.

By way of background, this Special Report summarises two influential cross-border cases under the Model Law on Cross-Border Insolvency addressing insolvency-related judgments and the commentary these cases prompted, leading to the introduction of the MLIRJ. The main part of the Report describes key provisions of the MLIRJ and its accompanying Draft Guide to Enactment. This is followed by a discussion of the likely path towards adoption of the MLIRJ across the globe.

INSOL International would like to sincerely thank Evan J Zucker and Rick Antonoff for authoring this timely and relevant Special Report on the MLIRJ which members no doubt will find useful in light of its recent adoption.

March 2019

UNCITRAL's Model Law on Recognition and Enforcement of Insolvency-Related Judgments - a universalist approach to cross-border insolvency

By Evan J. Zucker and Rick Antonoff[1] Blank Rome LLP, USA

1. Introduction

In its July 2018 session, UNCITRAL adopted and promulgated the Model Law on Cross–Border Recognition and Enforcement of Insolvency Related Judgments (the IRJ Model Law).[2] The IRJ Model Law has been developed over the last four years by UNCITRAL's Working Group V (Insolvency) and designed to supplement UNCITRAL's existing Model Law on Cross-Border Insolvency (the CBI Model Law).[3] Prompted by inconsistent judicial decisions under the CBI Model Law with respect to foreign insolvency judgments, the IRJ Model Law provides a streamlined procedure and greater clarity on when a judgment should be recognized and enforced.

First, to provide background, this paper summarizes two influential cross-border cases under the CBI Model Law addressing insolvency-related judgments and the commentary they prompted leading to the IRJ Model law. Second, this paper describes key provisions of the IRJ Model Law and its accompanying Draft Guide to the Enactment (Guide to Enactment).[4] Finally, this paper discusses the path towards adoption of the IRJ Model Law.

2. The need for the IRJ Model Law: inconsistent enforcement of insolvency judgments under the Cross-Border Model Law

A challenge in cross-border insolvencies is that corporations' assets and creditors are global in scope while their legal structures are based on a single, local jurisdiction. The CBI Model Law was designed to provide a legal framework for, among other things, cross-border cooperation between courts in different countries, greater legal certainty, a fair and efficient administration of cross-border insolvency proceedings, protection of all creditors and other parties and maximization of the value of the debtor's assets.[5] Despite the CBI Model Law's emphasis on cooperation and coordination, it does not specifically address the enforcement of

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[2] UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) (available at http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf).

[3] UNCITRAL Model Law on Cross-Border Insolvency (1997) (available at http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf). The CBI Model Law has been adopted by 44 countries. (available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html).

[4] Recognition and Enforcement of Insolvency-Related Judgments: Draft Guide to Enactment of the Model Law, A/CN.9/WG.V.WP.157 (available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/009/44/PDF/V1800944.pdf?OpenElement). Working Group V recommended certain revisions to the current draft and as of the time of this writing, UNCITRAL has not yet published a final version of the Guide to Enactment. As such, the Guide to Enactment does not address article 10 of the IRJ Model Law which was not in the IRJ Model Law at the time the Guide to Enactment was published in draft form. Article 10 provides that a court may refuse or postpone recognition of a judgment or require the posting of security if the judgment is the subject of review in the originating country or if the time for such review has not expired. Because of the last-minute insertion of article 10, references to IRJ Model Law articles 10 and higher in the Guide to Enactment are off by one number. This Special Report refers to the article numbers as they appear in the final version of the IRJ Model Law rather than as they appear in the Guide to Enactment. INSOL and its members are active participants in Working Group V and have provided comments to the IRJ Model Law and the Guide to Enactment.

[5] Preamble to CBI Model Law.

foreign insolvency judgments within local jurisdictions. Consequently, enforcement of foreign insolvency judgments has been inconsistent, thereby compromising legal certainty and potentially other purposes of the CBI Model Law.

A common theme in cases decided under the CBI Model Law is the tension between country territorialism and recognition of universal insolvency principles.[6] Specifically, the tension is whether a country should enforce a foreign judgment if that judgment is contrary to or in some way inconsistent with local law. Although there are many cases that demonstrate this tension, two well-known cases that exemplify the issue and led to the development of the IRJ Model Law are *Rubin v. Eurofinance*[7] from England and *In re Vitro S.A.B. de CV*,[8] from the United States.

2.1 *Rubin v. Eurofinance SA*

In *Rubin*, the central issue was whether an English court should recognize and enforce a default judgment for a fraudulent transfer entered by the US Bankruptcy Court against defendants who were English residents and did not appear in the US case. The UK Supreme Court held that the US judgment should not be enforced under either common law or the UK's Foreign Judgments (Reciprocal Enforcement) Act 1933 because the defendants did not submit to the jurisdiction of the US court. In coming to its conclusion, the UK Supreme Court found that there is no separate rule at common law in England for foreign insolvency judgments, and that under common law the English courts will not enforce a judgment where the English creditor was neither present nor had submitted to the jurisdiction of the foreign court.

Additionally, in discussing the CBI Model Law, the UK Supreme Court noted there was no provision in the CBI Model Law addressing the enforcement of foreign judgments against third parties. According to the UK Supreme Court, the provisions of the CBI Model Law relating to relief upon recognition and cross-border cooperation related to procedural matters. While the provisions should be widely construed in light of the objectives of the CBI Model Law, it determined that it would be "surprising if the [CBI] Model Law was intended to deal with judgments in insolvency matters by implication" given that the "recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations."[99] The court went on to observe that the CBI Model Law was not designed to provide for the reciprocal enforcement of judgments.[10]

As a result, the decision in *Rubin* created uncertainty regarding the scope of the relief and assistance provisions under the CBI Model Law and cross-border cooperation in jurisdictions that have traditionally followed English judiciary developments on common law, such as Hong Kong, Singapore, and Australia.

Specifically, *Rubin* signaled a departure from the trend towards a modified version of universalism[11] and the reaffirmation of a policy of territorialism. Under the holding

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[6] Territorialism is where each national court under local law favors and protects local creditors and assets at the expense of foreign creditors. The principle of universalism, on the other hand, is the theory under which there would be a single insolvency proceeding in one jurisdiction that has universal effect so that creditors can be treated equally regardless of their location and that one jurisdiction's decisions are given worldwide effect.

[7] SA [2012] UKSC 46.

[8] 701 F.3d 1031 (5th Cir. 2012).

[9] *Rubin v. Eurofinance SA*, [2012] UKSC 46 at p. 41.

[10] *Id*. at p. 42.

[11] A hybrid of territorialism and universalism, modified universalism accepts "the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors." *In Re Maxwell Communication Corporation*, 170 BR 800 (Bankr.SDNY 1994).

of *Rubin*, to recover avoidance actions, a foreign representative might have to commence separate actions in a defendant's home state regardless of the defendant's connections to the state where the foreign insolvency proceeding is pending. This approach will be less efficient and effective than a centralized, universalist process to obtain foreign judgments that can be enforced locally.

The impact of *Rubin* extends beyond just the enforcement of judgments relating to avoidance actions. Taken to its logical conclusion, a US reorganization judgment could be ignored by corporate shell entities that are deliberately structured to avoid contact with a US debtor, while affiliated companies participate in the US bankruptcy cases. "If that were permitted, the judgment arising from approval of a reorganization would be of dramatically reduced value. For example, an off-shore shell that had taken assignment of the debt could sue the reorganized company in England for the full amount originally owed while the rest of the creditors had settled for less. In turn, that prospect would make it far less likely the other creditors would agree to a plan in the first place—the classic holdout problem that both United Kingdom and United States reorganization (or rescue) provisions are designed to overcome."[12]

2.2 *In re Vitro S.A.B. de CV*

In *Vitro S.A.B. de CV*, the United States Court of Appeals for the Fifth Circuit upheld a US Bankruptcy Court's decision denying enforcement of a third-party release provision in a *concurso* (*i.e.*, a plan of reorganization) approved by a Mexican court. Specifically, the provision sought to release non-debtor affiliates that had guaranteed the debtor's obligations to three groups of noteholders (mainly US entities). In affirming the US Bankruptcy Court's decision, the Fifth Circuit found that there are limits to which comity should be applied and that the language of sections 1507 and 1521 of the US Bankruptcy Code (*i.e.*, Articles 7 and 21 of the CBI Model Law) prevented the enforcement of third-party releases.

The Fifth Circuit held that the relief requested — recognition of nonconsensual third-party releases — was not included in the relief specifically enumerated in section 1521 of the Bankruptcy Code and fell outside the scope of section 1521's catchall, "any appropriate relief" for two reasons. First, the relief was not appropriate because the Fifth Circuit explicitly prohibits US bankruptcy courts within its circuit from granting non-consensual third-party releases. Although other courts outside the Fifth Circuit have recognized such releases, even then enforcement is proper "only in rare cases." Second, although section 1507 of the Bankruptcy Code authorizes a bankruptcy court to grant "additional assistance" to a foreign representative, any such assistance is "[s]ubject to the specific limitations stated elsewhere' in chapter 15 of the Bankruptcy Code. While noting that non-consensual third-party releases were theoretically possible under the US Bankruptcy Code – at least in other circuits – the Fifth Circuit found that the foreign representative in *Vitro S.A.B. de CV* had not met its burden of demonstrating exceptional circumstances justifying the releases.

The decision in *Vitro S.A.B. de CV* again demonstrates a departure from the purpose and goal of the CBI Model Law. Under the Fifth Circuit's ruling, decisions in a foreign main insolvency proceeding are not enforceable in the United States if the provisions in the order are not similar and in compliance with the US Bankruptcy Code.

Additionally, given that the Fifth Circuit's decision was premised upon a minority view with respect to third party releases, it opened the door for inconsistent

[12] Westbrook, Jay Lawrence, *Ian Fletcher and the Internationalist Principle* (2015) 3 NIBLeJ 30; U of Texas Law, Public Law Research Paper No. 682. Available at SSRN: https://ssrn.com/abstract=3064868.

enforcement within the United States of foreign insolvency-related judgments under the CBI Model Law. For example, in April 2018, the US Bankruptcy Court for the Southern District of New York, in *In re Avanti Communications Group PLC*, held that non-consensual third-party releases in a UK scheme of arrangement were enforceable under chapter 15 of the United States Bankruptcy Code at least within the Second Circuit where third-party releases are often enforced.[13] In coming to this conclusion, the court found that Section 1521(a) allows the courts to grant "any appropriate relief."

Section 1507 also provides that courts may grant "additional assistance" to foreign representatives upon consideration of whether such additional assistance would, consistent with principles of comity, reasonably assure creditors' just treatment.

Thus, notwithstanding the CBI Model Law's intent to be a predictable, streamlined process to facilitate a modified universalist approach to insolvency proceedings, case law interpreting the CBI Model Law highlights potential issues within the textual language of the CBI Model Law that resulted in inconsistent rulings on the recognition and enforcement of insolvency-related judgments.[14] Additionally, given that Article 8 of the CBI Model Law gives international effects to decisions interpreting the CBI Model Law, decisions like *Rubin* and *Vitro* have the potential to impair the effectiveness of the CBI Model Law to provide a degree of predictability and reliability in judicial cooperation and recognition.[15] In light of this uncertainty, Working Group V resolved to formulate a model law to rectify these known difficulties.

3. Overview of the Insolvency Related Judgments (IRJ) Model Law

As stated in the draft Guide to Enactment, the purpose of the IRJ Model Law is to provide countries with a "framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement" the CBI Model Law.[16] In drafting the IRJ Model Law, Working Group V recognized, among other things, that (i) although there might be a general tendency towards more liberal recognition of foreign judgments, it relates only to subject matters found in international treaties or conventions on foreign judgments, and insolvency decisions are typically excluded from such treaties or conventions and (ii) what is deemed an "insolvency" order or judgment has been inconsistent, as in some regime, it might not cover "all orders that might broadly be considered relate to insolvency proceedings."[17] The IRJ Model Law, as promulgated, is a means to provide an efficient streamlined process for recognition and enforcement of all "insolvency-related" judgments, where recognition and enforcement is the norm not the exception.

3.1 New terminology: "insolvency-related judgments"

The IRJ Model Law follows the UNCITRAL texts and develops new terminology, including the term "insolvency-related judgments," to avoid confusion with the term "insolvency" which has been used and interpreted differently in various jurisdictions.

3.1.1 An expansive definition

The IRJ Model law introduces the term "insolvency-related judgment," defined as:

[13] Case No. 18-10458 (MG), 2018 WL 1725544 (Bankr. SDNY Apr. 9, 2018).
[14] Guide to Enactment § II.I.B.
[15] *Id*.
[16] *Id*. § II.I.A.
[17] *Id*. § II.I.B.5-8.

(i) a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding.[18] The definition specifically includes "arises as a consequence of or is materially associated with," because the IRJ Model Law is intended to be interpreted broadly. Toward that end, Working Group V specifically rejected the inclusion of a specified list of judgments in the text of the IRJ Model Law. The Guide to Enactment, however, provides a non-exhaustive list of examples of what is meant by "insolvency-related" including: -

(i) judgments relating to the disposal of assets of an insolvency estate;

(ii) judgments relating to avoidance actions;

(iii) judgment determining that a director of the debtor is liable for action taken when the debtor was insolvent or approaching insolvency;

(iv) judgments confirming plans of reorganization or liquidation;

(v) judgments granting a discharge of debts;

(vi) judgments approving an out-of-court restructuring agreement; and

(vii) a judgment authorizing the examination of a director where that director is located in a third jurisdiction.

Through this list, the Guide to Enactment, is meant to include judgments of the type at issue in *Rubin* and *Vitro* within the definition of insolvency-related judgments.

Further, demonstrating the IRJ Model Law's broad scope is the definition of "judgment" which includes "any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision." The definition includes a decision not just by a court with specialized insolvency jurisdiction, such as a US Bankruptcy Court, but also a decision of any court so long as it is "insolvency-related." In drafting a broad definition, Working Group V specifically rejected the inclusion of "on the merits" after the words "any decision"[19] because many "judgments issued in the course of insolvency proceedings might not be considered to be judgments on the merits, but would nevertheless be judgments that were important to the conduct of the insolvency proceedings."[20] For example, default judgments. Additionally, the term "on the merits" was also thought to be vague and lacked the clarity needed to avoid litigation.[21]

3.1.2 Limitations on scope

There are limits to the broad scope of the definitions. The definition of "judgment" specifically excludes "any interim measures of protection." Further, the definition of

[18] Article 2(d) of the IRJ Model Law.
[19] A/CN.9/WG.V/WP.145 at p.4.
[20] A/CN.9/898.
[21] *Id*.

"insolvency-related judgments" excludes the decision or order commencing the insolvency proceeding. The commencement decision is specifically left as the subject of recognition under the CBI Model Law.[22]

Finally, notably absent from these definitions is the clarity many have sought concerning the inclusion of insolvency-related arbitral decisions. While an insolvency-related judgment does not have to be issued by a court, it must come from an "administrative authority." An arbitration may not be considered within the ambit of an "administrative authority." An administrative authority is not defined in either the IRJ Model Law, the CBI Model Law or their guides to enactment. The Guide to Enactment does suggest, however, that an administrative authority is a specialized authority that administers insolvency proceedings in regimes where a court does not oversee an insolvency proceeding.[23] Thus, arbitration decisions, even if insolvency-related, will likely not be deemed judgments under the IRJ Model Law.

3.2 Recognition and enforcement of an insolvency-related judgment

Under the IRJ Model Law, "recognition and enforcement" is referred to as a single concept. To the extent a country's laws distinguish between recognition of a judgment and enforcement of a judgment, the IRJ Model Law allows a single application to address both steps.[24] Additionally, in these jurisdictions, while enforcement must be preceded by recognition, recognition does not need to be followed by enforcement.[25]

3.2.1 Streamlined procedure

Article 11 of the IRJ Model Law sets out a simple, expeditious structure that is designed with flexibility for obtaining recognition and enforcement of an insolvency-related judgment.[26] To obtain recognition, a party entitled under the law of the originating country to seek recognition and enforcement, including a creditor whose interests are affected by a judgment or an insolvency representative,[27] must:

- file a certified copy of the insolvency-related judgment and any other document necessary to establish that the insolvency-related judgment has effect and is enforceable in the originating country; and
- must include information concerning any pending review or appeal of the judgment.

Additionally, the Guide to Enactment suggests solely for the purpose of demonstrating that the judgment is related to an insolvency proceeding, to attach a copy of the decision commencing the insolvency proceeding.[28] A court, however, is not to consider the merits of the foreign court's decision to commence an insolvency proceeding. Finally, while the IRJ Model Law requires an applicant to provide notice to any party against whom relief is sought, the amount and type of notice is left to the enacting country to determine.

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[22] Decisions, however, issued as of the commencement of the insolvency proceeding, such as first-day orders under Chapter 11 of the US Bankruptcy Code may be included within the definition of "insolvency-related judgments" to the extent that they are not "interim measures of protection." Guide to Enactment § II.V.57.

[23] *Id*. § II.V.51.

[24] *Id*. § II.III.B.26.

[25] *Id*. § II.III.B.27.

[26] *Id*. § II.V.85-86.

[27] An insolvency representative is defined in Article 2(b) of the IRJ Model law as "a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding."

[28] Guided to Enactment § II.V.85.

3.2.2 Standard for recognition

Article 13 of the IRJ Model Law provides a clear and predictable criteria for when a court must recognize and enforce an insolvency-related judgment. It requires an application for recognition and enforcement to be granted, subject to limited exceptions under articles 7 and 14 (discussed *infra*), if:

(a) the insolvency-related judgment is a judgment that is legally effective and enforceable in the originating state;

(b) the application is brought by a proper party under article 11(1);

(c) it includes the necessary documents set forth in article 11(2); and

(d) the judgment comes from a competent court or authority, as set forth in article 4, or arises by way of defense or as an incidental question before such court or authority.

This criteria is intend to provide a procedural framework for granting recognition expeditiously without the receiving court making any determinations on the merits of the insolvency-related judgment or the validity of the foreign insolvency proceeding.[29]

Pending a determination on the application for recognition and enforcement, the IRJ Model Law, similar to the CBI Model Law, allows for a court to provide provisional relief on an *ex parte* basis.[30] Provisional relief may be in the form of a stay of any disposition of assets. It should be invoked where there is a concern that, without such relief, upon recognition of a judgment there might not be any assets left to collect.

3.3 Grounds for refusal to recognize insolvency-related judgments

Since the purpose of the IRJ Model Law is to facilitate and encourage cross-border recognition and enforcement of foreign insolvency-related judgments that is easy and predictable, the IRJ Model Law only includes a limited number of circumstances in which recognition and enforcement may be refused. Article 14 sets out eight specific grounds, in addition to the public policy grounds under article 7 on which recognition and enforcement might be refused.

3.3.1 The limited and specifically identified grounds for denial of recognition

Article 14 of the IRJ Model Law provides that “recognition and enforcement of an insolvency-related judgment may be refused if:”

(a) a defendant in a proceeding giving rise to the insolvency-related judgment was not properly notified of that proceeding;

(b) the judgment was obtained by fraud;

(c) the judgment is inconsistent with a judgment entered in the receiving country involving the same parties;

(d) the judgment is consistent with an earlier judgment entered in another country involving the same parties and subject matter;

[29] *Id*. § II.V.97.
[30] Article 12 of the IRJ Model Law.

(e) recognition and enforcement would interfere with the administration of the debtor's insolvency proceeding;

(f) the judgment materially affects the rights of creditors generally and their interests were not adequately protected in the proceeding that led to the judgment; or

(g) the originating court had inadequate jurisdiction to enter the judgment.[31]

The list of exceptions to recognition and enforcement under article 14 of the IRJ Model Law is intended to be an exhaustive list.[32] There is no general catch-all exception, other than on public policy grounds, upon which a court can refuse to grant recognition of a foreign insolvency-related judgment. In fact, to further the policy towards liberal recognition of a judgment, the Guide to Enactment notes that the use of the word "may" in article 14 is intentional and that a court, even if one of the provisions of article 14 is applicable, is not obligated to deny recognition and enforcement. The burden is on the party opposing recognition to demonstrate why recognition and enforcement must be refused.[33]

Under the inadequate jurisdiction exception to recognition, article 14(g)(iii) of the IRJ Model Law provides that a judgment may not be recognized if the receiving court, in an analogous dispute, did not have jurisdiction to render a judgment. If the law of the receiving country would have permitted a court to exercise jurisdiction, then the receiving court cannot refuse recognition and enforcement on the basis of improper jurisdiction. Article 14(g)(iv) further limits when a receiving court can refuse to recognize a judgment on jurisdictional grounds. While article 14(g)(iii) is limited to the jurisdictional grounds set forth in the laws of the receiving country, article 14(g)(iv) provides that if the originating country exercised jurisdiction on a basis that the receiving country could not have exercised jurisdiction, so long as that basis was not *incompatible* with the laws of the receiving country, the judgment must be recognized. Thus, to refuse recognition on jurisdictional grounds, the court that entered the judgment must be found to have exercised jurisdiction on grounds that are wholly unreasonable and procedurally unfair to the receiving country. The purpose of this section is to discourage a receiving court from refusing to recognize a judgment merely because the originating court's basis for jurisdiction is not recognized in the receiving country.[34]

These provisions seek to address the holding in *Rubin* which denied recognition and enforcement of a foreign insolvency-related judgment because the defendants, by not appearing, did not submit to the jurisdiction of the US Bankruptcy Court.[35]

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[31] The inadequate jurisdiction exception to recognition under Article 14(g) of the IRJ Model Law provides that: In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

. . .

(g) The originating court did not satisfy one of the following conditions:

(i) The Court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State.

[32] Guide to Enactment § II.V.98.

[33] *Id*.

[34] Id. § II.V.114-15.

[35] "The basis of jurisdiction of the US Bankruptcy Court under United States law over the individual defendants in *Rubin* was that they were subject both to the general jurisdiction of the court (ie connection of the defendant

Under the so-called *Dicey* Rule, a foreign judgment "will only be enforced in England at common law if the judgment debtors were present (or, if the 1933 Act applies, resident) in the foreign country when the proceedings were commenced, or if they submitted to its jurisdiction." For example, notwithstanding the *Dicey* Rule, under the article 14(g)(iv) of the IRJ Model Law, for a UK court to refuse recognition and enforcement of a US judgment, a party must demonstrate that although the US court found jurisdiction under US law to enter the judgment and provided adequate notice of the proceeding to the judgment-debtor, the US court's judgment violates the "central tenants of procedural fairness" in the UK[36]

3.3.2 The public policy exception

The public policy exception in the IRJ Model Law is similar to the exception in the CBI Model Law and provides that recognition can be refused in limited circumstances where recognition would be "manifestly contrary to the public policy" of a country. The public policy exception of IRJ Model Law, however, differs in one significant way. Its language explicitly adds the proviso "including the fundamental principles of procedural fairness" to the public policy exception. This additional language is intended to only clarify the public policy exception to the extent that under the CBI Model Law courts have interpreted procedural fairness as a distinct and different concept from the narrow definition of public policy.[37] The language of article 7 of the IRJ Model Law and article 6 of the CBI Model Law are intended to be interpreted in the same way.[38]

3.3.3 The effect of review in the originating state

Article 10 of the IRJ Model Law provides that a court may refuse or postpone recognition or enforcement, or condition recognition or enforcement on the posting of security, if the judgment is the subject of review in the originating state or if the time for such review has not expired. Article 10 makes clear that any such refusal is without prejudice so that the party seeking recognition or enforcement may apply at a later time.

4 The path to enactment of the IRJ Model Law in UNCITRAL member states

Adoption of the IRJ Model Law by many of UNCITRAL member states is not expected to be immediate.

4.1 The adoption rate of the CBI Model Law as an indicator of the IRJ Model Law's adoption by UNCITRAL member states

The adoption rate of the CBI Model Law by member states indicates that countries are generally slow to enact UNCITRAL's Model Laws. While the CBI Model Law is currently adopted by more than 40 countries, it was promulgated in 1997 and more than half of the countries that have incorporated the CBI Model Law into their insolvency regime have done so within the last decade.[39]

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with the jurisdiction) and also to the specific jurisdiction of the court (ie connection of the cause of action with the jurisdiction) because they specifically sought out the United States as a place to do business and specifically sought out United States merchants and consumers with whom to do business." *Rubin v. Eurofinance SA*, [2012] UKSC 46; Guide to Enactment § II.V.119.

[36] *Id*.

[37] *Id*. § II.V.74.

[38] In the early stages of drafting the IRJ Model Law, various proposals were made to delete the word "manifestly" on the grounds that it set too high a standard for refusal. Ultimately, it was decided that since many jurisdictions adopted the CBI Model Law with the word "manifestly" to delete it under the IRJ Model Law would raise uncertainty and questions of interpretation. *See* A/CN.9/870, REPORT OF WORKING GROUP V (INSOLVENCY LAW) ON THE WORK OF ITS FORTY-NINTH SESSION (2016).

[39] Status UNCITRAL Model Law on Cross-Border Insolvency (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited July 3, 2018).

4.2 INSOL's survey on issues related to the adoption of the IRJ Model Law

In connection with UNCITRAL's promulgation of the IRJ Model Law, INSOL surveyed its membership with a view to providing practitioners with a global perspective on the adoption of the IRJ Model Law. The results identified two key issues that will impact on the adoption of the IRJ Model Law:

(i) local politics; and

(ii) whether to adopt the IRJ Model Law as a stand-alone law or as part of the existing statutes adopting the CBI Model Law.

4.2.1 Local politics will delay enactment

Universally, surveyed practitioners have expressed that adoption will take at least four years, if not longer, for their government to address the IRJ Model Law.

According to surveyed practitioners, the primary factors delaying adoption in many jurisdictions are that these countries are grappling with other significant geopolitical issues and local politics. Given that these other issues have dominated the legislative agenda, surveyed practitioners believe there is little political will to address the IRJ Model Law as a matter of priority. The views expressed by practitioners may not necessarily be shared by the members of Working Group V who are from the same countries as these practitioners. Members of Working Group V are actively working to have their respective countries adopt the IRJ Model Law.

4.2.2 Division on how to enact the IRJ Model Law

When considering adoption, a member state must decide whether to adopt the IRJ Model Law as a stand-alone body of law or incorporate it into existing insolvency law. Nearly 70% of the INSOL survey respondents support the incorporation of the IRJ Model Law into existing cross-border insolvency regimes. According to the results of the survey, the reasons for or against inclusion of the IRJ Model Law into existing legislation are largely similar across jurisdictions.

4.2.2.1 Rationale for Inclusion into existing laws

- IRJ Model Law and the CBI Model Law have similar and overlapping provisions. A member state can therefore efficiently add the key provisions of the IRJ Model Law into existing law, such as, for example, Chapter 15 of the US Bankruptcy Code.

- Encourage uniformity and harmonization among insolvency laws within a jurisdiction.

4.2.2.2 Rationale for a stand-alone law

- The IRJ Model Law is designed as an independent body of law.

- To ensure the purpose of the IRJ Model Law is accomplished, wholesale adoption is necessary.

- To prevent the inconsistent interpretations under the CBI Model Law from affecting interpretations of the IRJ Model Law.

- Some jurisdictions do not have a single uniform insolvency legislation but

instead multiple rules or statutes, suggesting that the only way that the jurisdiction will adopt the IRJ Model Law is through a separate enactment.

Regardless of form, similar to the case of the CBI Model Law, adoption of the IRJ Model Law in member states will only be accomplished, through the support of global institutions recommending its adoption.

5. Conclusion

The IRJ Model Law clarifies issues raised by decided case law under the CBI Model Law and facilitates the fair and predictable recognition and enforcement of foreign insolvency-related judgments. The IRJ Model Law will provide a more predictable environment for commercial enterprises and will ensure that all parties are treated fairly on a global basis. The IRJ Model Law demonstrates the ongoing effort by UNCITRAL to facilitate international trade and business through the modernization and harmonization of rules on international commercial law.

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