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Client Alert Commentary

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UK Government to Implement UNCITRAL Model Law on Enterprise Group Insolvency

The model law aims to maximise group-wide recoveries in an insolvency through cooperation and efficient administration.

The UK government has announced its intention to legislate to implement the UNCITRAL Model Law on Enterprise Group Insolvency (MLEG) "at the earliest opportunity".[1] The UK may therefore become the first country to adopt the MLEG, a step that the government believes will "enhance the UK's highly regarded insolvency regime" and ensure that the UK "stays aligned with international best practice".

This Client Alert explains the scope and purpose of the MLEG and asks how its implementation by the UK may affect the course of complex cross-border group insolvencies.

Enterprise Group Insolvency: Scope and purpose

The United Nations Commission on International Trade Law (UNCITRAL) published the MLEG in 2019 to fill a perceived gap in the Model Law on Cross-Border Insolvency (MLCBI). In its 25-year history, the MLCBI has had modest success, having been adopted in 61 jurisdictions. The UK implemented the MLCBI through the Cross-Border Insolvency Regulations 2006, which have enjoyed something of a renaissance as a tool for foreign insolvency officeholders to obtain relief in the UK following the removal of the automatic recognition of EU insolvency processes upon Brexit.

However, while the MLCBI provided for the recognition of foreign insolvency proceedings on an entity-by-entity basis, it did not provide any mechanism for the coordination of multiple insolvency proceedings of related companies belonging to the same enterprise group across jurisdictions. Historically, English and other common law jurisdictions have shown flexibility in designing protocols between courts to manage large cross-border, group-wide insolvencies, as the Nortel, Lehman, and — going back to the 1990s — Maxwell Communications cases illustrate. Up until now, these solutions have been bespoke and largely ad hoc arrangements designed to suit each individual case.

By contrast, the MLEG provides a formal framework for cooperation between insolvency officeholders and coordination of proceedings, while preserving each group company's independent insolvency process where this has already commenced. Its overriding purpose is to maximise group-wide recoveries in an insolvency through cooperation and efficient administration while providing adequate protection of creditors' interests across the relevant jurisdictions.

Coordination through “planning proceedings”

The MLEG introduces the concept of a “planning proceeding” through which a group-wide insolvency solution is developed. The planning proceeding would be instigated where the main debtor in the group has its “centre of main interests” and would be designated the “main proceeding" (borrowing concepts familiar from the EU Insolvency Regulation and the MLCBI). Once commenced, the representative of the planning proceeding (the group representative) may seek relief from the UK court to protect the value of an enterprise group member. This may take the form of commonly requested remedies, such as stays, injunctions, entrusting the administration or realization of enterprise group members to the group representative, examination of witnesses and discovery, and the approval of funding arrangements.

One innovative feature of the MLEG is a mechanism to treat foreign creditor claims in the planning proceeding according to the law that would have applied to them had non-main proceedings commenced for the relevant group company. These so-called “synthetic non-main proceedings” avoid the expense and complication of separate proceedings for group enterprise companies and would, for example, permit the English court to apply foreign law where a planning proceeding is coordinated by a group representative from the UK and encompasses foreign-incorporated enterprise group companies. Despite encouragement from certain consultation respondents, the UK government has no current intention to expand the scope of the implementation expressly to cover schemes of arrangement and restructuring plans.

First-mover advantage?

Because the MLEG envisages the coordination of planning proceedings across jurisdictions, and their recognition in jurisdictions where affected group companies are domiciled, each relevant jurisdiction must have adopted the MLEG for it to achieve its purpose. This reciprocity will inevitably take time to build as countries adopt the MLEG at different speeds. The utility and benefits of adopting the MLEG will therefore necessarily be incremental at first. Although not an exact parallel, the Recast EU Insolvency Regulation introduced a similar group insolvency proceeding tool in 2017. Notwithstanding the inbuilt reciprocity within the EU framework, these provisions have to date been used sparingly if at all. The timeframe in which the MLEG will become a useful restructuring tool is likely medium to long term at best, but this outlook may change if the larger systemic jurisdictions adopt the MLEG with the same enthusiasm as the UK.

Recognition of insolvency-related judgments: Implementation postponed

At the same time as its MLEG announcement, the UK government said that it would pause its proposed implementation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The proposed implementation route raised complicated conflicts-of-law issues resulting from the UK government’s expressed desire to retain the Rule in *Gibbs*,[2] which restricts the ability of foreign law judgments to compromise English law-governed debt. The UK government will “continue to develop the details of the proposal to implement the MLIJ, to ensure that the surrounding issues that have been raised are resolved before proceeding”. This may take some time.

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Bruce Bell
bruce.bell@lw.com
+44.20.7710.1145
London

Jessica Walker
jessica.walker@lw.com
+44.20.7710.3068
London

Oliver Henry Bretton
olly.bretton@lw.com
+44.20.7710.4706
London

Tim Bennett
Knowledge Management Counsel
tim.bennett@lw.com
+44.20.7866.2664
London

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Endnotes

1 https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation.

2 *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 (English Court of Appeal). For further detail, please see https://www.lw.com/en/insights/2023/06/In-Defence-of-Gibbs.