Association of Business Recovery Professionals

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Dear Mr Shore,

THE INSOLVENCY SERVICE
CONSULTATION: IMPLEMENTATION OF TWO UNCITRAL MODEL LAWS ON INSOLVENCY

1. INTRODUCTION

1.1 R3 is the trade association for UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices.

1.2 The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lends by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals get back on their feet. Our members have direct experience of restructuring and insolvencies and their impact on the UK economy and various stakeholders.

1.3 This response has been prepared by R3 in collaboration with members of its General Technical Committee. The Committee deals with issues of general importance and significance to the profession in the United Kingdom, keeping under review all UK and EU legislation, prospective and other matters relating to insolvency law. The Committee is multi-disciplinary and is made up of representatives from across the insolvency and restructuring profession, including practising insolvency practitioners, lawyers (including those specialising in advising regulated entities), academics, and others.

2. GENERAL OBSERVATIONS

2.1 We fully support the aim of the Insolvency Service in ensuring that the UK remains a key jurisdiction in the context of cross-border insolvency cases. We also agree with the comments made in the consultation that the UK restructuring and insolvency regime is already well regarded in terms of its ability and willingness to assist in the international co-ordination and co-operation of cross-border restructuring and insolvency cases. We appreciate that a plan to adopt and partially implement the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments ('MLIJ') in the UK by adopting Article X may be an important development in cross-border insolvency co-operation. Furthermore, it may be seen to add another procedural mechanism facilitating ready access to the English courts to enable them to recognise insolvency-related judgments as part of the discretionary assistance available under the Cross-Border Insolvency Regulations 2006 ('CBIR'). However, it is worth noting that by partially adopting the MLIJ while it may act to encourage other jurisdictions to also take up the MLIJ, the partial adoption may be limited to providing a procedural gateway for foreign officeholders seeking assistance in the UK. The proposal envisages this to be achieved upon formal application to the English Court which then has complete discretion as to whether it recognises the judgment or not. In addition, the recognition is without any reciprocity regarding UK officeholders seeking recognition of judgments in other jurisdictions. Such recognition elsewhere will continue to depend on existing treaties and rules of private international law and may be difficult in jurisdictions that have historically been hesitant or resistant in adopting UNCITRAL Model Laws.

2.2 As you are aware, the UNCITRAL Model Law on cross-border insolvency proceedings ('Model Law') has not been adopted by the UK's main EU trading partners and is not available to UK officeholders when asking courts in those non-adopting states for recognition and assistance. Those EU states which have adopted the Model Law are Greece; Poland; Romania; and Slovenia. In most of the EU member states where the Model Law is not available, UK officeholders would instead

need to apply to the courts of each member state for recognition of their appointment and to seek the appropriate assistance as required in each case. The consequences of seeking recognition and assistance would be additional time, costs and complexity which has historically been unpredictable and is subject to a patchwork of local law rules.

2.3 Our members are interested to know what the Insolvency Service is planning to do, if anything, to assist UK officeholders faced with seeking recognition in foreign jurisdictions where the Model Law is not available and in particular where the UK no longer has the benefit of automatic recognition across Europe.

3. CONSULTATION QUESTIONS

UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

Q1. What is your view on the proposal to partially implement the MLIJ in the UK by adopting Article X?

3.1 We genuinely welcome the UK Government's wish to promote the UK as a pioneer of international co-operation in cross-border insolvency and restructuring cases in seeking to be an earlier adopter of the MLIJ. The implementation of Article X may, as mentioned above, provide a procedural gateway for the recognition of foreign judgements. We can see why the adoption of Article X has been suggested in addition to seeking to maintain the Rule in *Gibbs* whilst a full review is undertaken as to the effects of overruling this. But we are not persuaded that it is sufficient and potentially may create some uncertainty as to whether this has the desired effect (see further below). We also think that the definition of insolvency related judgement contained in the full MLIJ should be included. We would also for the sake of certainty prefer to see an express reference to the preservation of the Rule in *Gibbs* within the legislation itself, as adopting Article X with the non-exhaustive list of factors where an English court would refuse recognition, does not, in our view achieve this. In addition, we consider it necessary to also include certain safeguards and choice of law rules.

3.2 Some members have expressed concern as to whether the policy aims will actually be met as the current intention with the adoption of Article X merely provides the court with a discretion to recognise foreign judgments; it does not provide any guarantee to foreign jurisdictions that recognition will be granted. We appreciate that this approach maintains some flexibility, but this may itself come at the expense of certainty not just for parties seeking recognition (and therefore not in keeping with a universal approach to insolvency), but also in relation to contracting parties more generally.

3.3 Some members were concerned that the commentary included in the consultation, which set out the ambitions of the Insolvency Service in promoting the MLIJ, were not necessarily borne out by the mechanism of simply adopting Article X. In particular, there seems to be a disconnect between what the commentary said was being intended (i.e. its desire to preserve the Rule in *Gibbs* and overrule the Supreme Court in *Rubin*) and the effects of what was being achieved, in the way in which it is proposed to implement the MLIJ by Article X.

3.4 Some members have also noted that it is unclear as to how Article X would operate in practice. The scope for Article X to be a piecemeal method of adopting the MLIJ opens room for uncertainty as to how the MLIJ is to be implemented and interpreted, this may serve as a distraction from the policy.

Q2. 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?

3.5 We are not sure whether the suggested non-exhaustive list is sufficient and whether such list is clear and instead adds to uncertainty mentioned above. For example, one aspect of the list regarding the submission of parties would mean that on the facts of the *Rubin* case, the English court applying Article X would not in fact be overruled. As mentioned above, having a non-exhaustive list of grounds upon which recognition could be refused and allowing the court wide discretion may not offer a predictable or indeed unform approach to international co-operation. In this respect, we think that the current draft would not achieve the stated aims and in fact may do little to advance the cause of international co-operation beyond what the courts are already able to assist with.

Q3. In your opinion, what approach is needed to create the legal effect we are seeking?

3.6 In order to create the legal effect, we think that an adoption of the MLIJ should be by way of amendment to the existing CBIR, rather than by reference to Article X in the list of documents which the court must have regard to. In addition, we consider that the if Article X is to be adopted, there needs to be a number of additional safeguards expressly provided for in order to promote legal certainty. As mentioned above, in particular, there ought to be an express reference to the preservation of the Rule in *Gibbs*. In addition, we wonder whether including express safeguards as presently contained

within the Recast European Regulation on Insolvency Proceedings ('Recast EUIR') for certain types of arrangements and rights might be worth further consideration. For example, provisions similar to the protections contained in Articles 8 to 18 of the Recast EUIR, which for example respectively excludes from the insolvency proceedings any third parties' rights in rem on assets of a debtor located in another jurisdiction. These safeguards need to be expressed in clear terms so that parties can be certain that the impact of insolvency on established rights and respecting parties choice of law, will be dealt with in a predictable manner. In this regard, we question whether existing provisions included in the CBIR designed to protect creditors already in relation to the recognition of proceedings are envisaged to apply also to insolvency related judgements. We also assume that the scope of the CBIR is not to be extended and remains applicable in the case of insolvency related judgments. For example, credit institutions are excluded as per Article 1(2)(h) and (i) of Schedule 1 of the CBIR. Furthermore, the special protections afforded for financial markets contained within Article 1(4) of Schedule 1 of the CBIR, will remain outside of the court's ability to grant relief or provide cooperation in the context of insolvency related judgments. In summary, we think that further consideration should be given to express and predictable choice of law rules rather than a list of factors which allow the court not to make an order for recognition. We also note that UNCITRAL have recently advanced discussions on such choice of the law rules (which perhaps were not so well advanced when the consultation process was drafted), and we query whether it would be prudent to await those measures before pursuing a partial adoption of the MLIJ, which may not in fact achieve the intended objective and instead risks significant uncertainty as discussed above. While being the first adopter of the MLIJ has its advantages in terms of the UK being seen to be open for international business, it also has the disadvantage of being out of step with others who may be taking the opportunity to consider other developments such as the choice of law issues, which will have a significant impact on recognition. Having an opportunity to consider the interrelation with the choice of law rules, may ensure that any frame-work ultimately adopted will be more coherent and predictable.

Q4. 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?

3.7 Having a reference to the guidance published by UNCITRAL which is premised on the full MLIJ may not be helpful and could prove to be confusing to the extent that the legislation enacted along the lines of Article X departs from it, which as per the current proposal might be very significant.

<u>UNCITRAL Model Law on Enterprise Group Insolvency ('MLEG')</u>

Q5. 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?

3.8 In the UK, group insolvencies which have had a cross border aspects have historically been managed by way of cooperation agreements or protocols. We are not aware of any examples where members have been involved in similar group processes as already introduced by the Recast EUIR. There is concern that the MLEG would add complexity, time and costs to the resolution of Enterprise Groups, and therefore may be little used in practice and of course until other adopt it, will not really assist at all.

Q6. What are your views on the approach to implementation that we have outlined above?

3.9 The whole process appears to be overly complicated and may be of limited practical assistance if MLEG is not adopted elsewhere.

Q7. 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?

3.10 While we can see that this approach provides flexibility, we are concerned as mentioned above that the proposals would add additional costs with no allocation or provision of how those costs are to be met and in the absence of buy-in from other jurisdictions, it is difficult to see what purpose would be achieved in setting out any provision on funding in any event.

Q8. 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?

3.11 Similar concerns arise in the context of the lack of choice of law rules and safeguards in respect of MLIJ.

4. CONCLUSION

4.1 The adoption of MLIJ (partially) and MLEG might be considered, as a matter of policy and in principle, an important development in cross-border insolvency co-operation and add another gateway to seeking the co-operation and assistance of the UK courts. However, we query how useful they will be practice. The partial adoption of MLIJ arguably creates significant uncertainty not just in respect of the recognition process itself, but also more generally as to how it interacts with existing creditor choice of law rules and respecting those established rights. We think, further consideration should be given before adopting it. We also note that such developments will not deal with the current problems faced by UK officeholders when seeking recognition in foreign jurisdictions where the Model Law is not available. We strongly urge the Insolvency Service to consider how support can be provided as the time and costs being incurred in seeking advice and recognition remain unpredictable. We would welcome a meeting on the steps being taken to ensure that UK officeholders are afforded recognition and assistance elsewhere. In relation to MLEG, while there is nothing objectionable in the proposal, we question its utility in practice.

4.2 If you would like to virtually meet or if you have any other queries, please contact R3's Head of Technical, Ben Luxford, at ben.luxford@r3.org.uk or on 020 7566 4218.

Yours sincerely

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