Cross Border Insolvency Regulations 2006
Evaluation Questionnaire

Questions:

1. **In general, do the Cross-Border Insolvency Regulations 2006 ("CBIR") work satisfactorily and, if not, what changes would you suggest?**

   In general the CBIR provide a helpful addition to the framework for recognition of foreign insolvency proceedings and foreign representatives. The procedure for recognition in practice seems to work efficiently in terms of timing and the fact that the process is by way of a prescribed format means that it is relatively straightforward and cost effective to pursue. At the same time it should be recognised that the CBIR are limited in their scope and do not provide substantive law provisions for cross border cases but are nonetheless a useful gateway into the English Court system.

2. **What use have you made of the CBIR? (Please give examples)**

   Our members have made use of the CBIR on a number of occasions.

   For example in October 2008 an application was made for the recognition of winding proceedings taking place in Belize. The application was issued and an order for recognition was granted within 7 days.

   In addition there have been a number of reported cases where relief has been sought beyond mere recognition. The cases where the CBIR have been put to use can be divided into three main issues: (i) Remittal of assets (e.g.***Re Swissair[2009] EWHC 2099)***; (ii) Enforcement of foreign money judgement ***(Rubin and Lan v Eurofinance SA and Roman [2009] EWHC 2129 (Ch)***; and (iii) Application of foreign law to English law contracts ***(e.g. D/S Norden v Samsun Logix Corporations [2009] EWHC 2304 and Lehman Brothers Special Financing Inc.)*** We consider them further below.

3. **Are there any reasons why the CBIR may not be being used more widely?**

   As with any court process, the attendant costs of any application may deter a wider use. In particular given the fact that the nature of the CBIR is such that the practical impact of recognition alone is limited and for specific relief further applications normally required.

4. **Are you aware of any specific improvements in the conduct of cross-border cases which have been made possible by the CBIR, or its counterpart in a foreign state, which were not achievable under the law as previously in force? (If so, please give examples)**

The operation of CBIR has provided a framework for recognition where previously the judiciary had to rely on their discretionary powers based in the common law, or if the proceedings fell within the geographical boundaries applicable to section 426 of the Insolvency Act 1986 or the EC Regulations on Insolvency Proceedings. Since the CBIR does not rely on reciprocity, the UK court is able to recognise foreign proceedings from countries where the foreign proceedings originate from jurisdictions that have not adopted the Model Law themselves. In particular debtors based in the US and outside of Europe have benefited from the CBIR. For example, in July 2009 in a case ***Re Swissair***, the court considered its powers under the CBIR to remit assets realised in an English provisional liquidation to the Swiss liquidation for distribution. The application was made by the Swiss representative under Article 21 of the CBIR which provides that the court may entrust all or part of a debtors assets located in Great Britain to a foreign representative. Previously such an application would have relied upon the court exercising its inherent jurisdiction to remit assets.

Also in July 2009, in the case ***D/S Norden v Samsun Logix Corporations*** recognition of a receivership in Korea was successful and relief granted under Article 21 imposing a stay against a secured creditor from enforcing its security pending the outcome of Korean proceedings seeking to challenge the security itself. Although relief was granted, the deputy judge stated that he did not think it likely that the CBIR gave the English courts the power to apply a foreign insolvency law to an English law contract. This is one disadvantage when one compares the regime under the CBIR for co operation to that provided by under section 426 Insolvency Act 1986.

The extent to which the UK courts will co-operate will be tested in a case arising out of the Lehman Brothers collapse, yet to be fully determined. The trustee of Lehman Brothers Special Financing Inc ("**LBSF**") has already obtained recognition under the CBIR in England and a letter from the English court inviting the co-operation of the US Bankruptcy Court already been sent in relation to a specific issue concerning the priority of noteholders governed by an English law contract. As to whether ultimately the English court will exercise its discretion in grating relief to the US trustee of LBSF remains to be seen.

5. **Are overseas cases being properly recognised in the UK?**

It is difficult to assess on a general basis, the evidence from practice and reported decisions suggests that recognition is being given to overseas cases. In particular as exemplified by the reported decision of ***Bud-Bank Leasing SP.ZO.O 2009 WL 1894618*** the English court considered the nature of Polish rescue proceedings very carefully before granting an order for recognition. Unlike the EC Regulation on Insolvency Proceedings, there is no list of proceedings that are automatically recognised.

6. **Are UK insolvencies being properly recognised in other jurisdictions that have adopted the UNCITRAL Model Law?**

The practice is very much jurisdiction dependent.

Recognition in the US

In the US since the adoption of the Model Law in October 2005 in the form of Chapter 15 of the US Bankruptcy Code, there have been a significant number of successful recognition proceedings from a diverse geographical spread. Proceedings commenced in the UK and Canada appear to be regularly recognised under Chapter 15 of the US Bankruptcy Code. In particular, in the Southern District of New York, the courts have recognised numerous English proceedings as long as they have satisfied the requirements of Chapter 15. Costs and timings vary on the circumstances of each case including the number of creditors, how organised the books and records of the company are (particularly with respect to potential creditors and their addresses) and the specific issues facing each debtor, including whether any element of the petition is subject to challenge. A large third party cost of a Chapter 15 case (including in circumstances where no party objects) is attributable to publication of (a) notice of the commencement of the Chapter 15 case and (b) the order granting recognition. Depending on the number of potential creditors to receive individual notices by mail, such mailings can constitute a large portion of the overall cost of a Chapter 15 case.

With respect to timing, as a general matter and in our experience, the US Bankruptcy Courts may generally conduct a hearing to consider our petitions between 25 and 30 days after the petition is filed and, as such, (absent credible objections to the petition) an order granting recognition may be entered between 25 and 30 days after the filing of the petition. Provisional relief may be available prior to recognition, and the timing of this relief may vary.

Other Model Law Jurisdictions

In other jurisdictions where the legislation is relatively new and untested – the main issue that seems to come from the practical experiences of our members is that the efficiency of the recognition process varies. In jurisdictions where there is no precedent, there may often be additional costs involved to promote the understanding of the Model Law and its local application to ensure that proceedings are afforded the proper recognition and relief.

7. **Are there any tensions between the CBIR and other provisions available in cross-border cases, such as the EC Regulation on Insolvency Proceedings or section 426 of the Insolvency Act 1986?**

The approach to conflict in relation to the EC Regulation on Insolvency Proceedings and CBIR is specifically provided for in Article 3 of Schedule 1 to the CBIR which determines that EC Regulation should prevail. This limits the potential for conflicts. In terms of the operation of the CBIR this seems consistent with the EC Regulations of Insolvency Proceedings in respect of how it considers the issue of COMI. In particular for debtors without a COMI in the EU, the CBIR is a useful new tool. For example in the case of ***Stamford International Bank Limited*** the recognition of an Antiguan Liquidator under the CBIR considered its approach to COMI by reference to the cases on the EC Regulation on Insolvency Proceedings.

We are not aware of any practical examples of tension between section 426 and the CBIR.

Further, in respect of the CBIR and existing common law principles of recognition, it was considered by the judge in the Stamford Bank case referred to above that where certain Stamford entities over which a US receiver had been appointed, he ought to be recognised under the common law principles of recognition, and that such principles co-exist with the CBIR.

8. **Have the Regulations had any impact on "forum" shopping?**

We are not aware of the CBIR being used in relation to forum shopping. Unlike the EUIR where COMI may be the subject of manipulation for the commencement of insolvency proceedings, the CBIR do not address the issue of where proceedings should be commenced. The emphasis on the CBIR is recognition of insolvency processes already commenced.

A wider use for the CIBR and the extent to which the co-operation under the CBIR and has been tested is illustrated by the case of ***Rubin and Lan v Eurofinance SA and Roman [2009] EWHC 2129 (Ch)*** from July 2009 the receivers and managers of a US business first sought to use the CBIR as a mechanism to directly enforce a foreign money judgement. Whilst it was recognised that the summary judgement should be considered part of the foreign proceedings and part of the overall process of collecting the debtors assets, the relief sought under Article 21 did not assist the applicants as the foreign judgment was not located in Great Britain and there was a distinction between the realisation of assets and permitting an action to be made in Great Britain. Further, whilst the court recognised that Article 25 enshrined the principle that the court could co-operate to the maximum extent possible, this did not extend to co-operation which would disregard important provisions of the existing legal system which already had a mechanism for enforcing foreign monetary judgements (i.e. under the terms of

specific treaties or under the common law where the debtor is either present in the jurisdiction or otherwise submitted to the jurisdiction.)