The City of London Law Society

By email: policy.unit@insolvency.gov.uk

28 September 2022

The City of London Law Society: Response to The Insolvency Service's consultation "Implementation of two UNCITRAL Model Laws on Insolvency"

1. Introduction

1.1 In July 2022, The Insolvency Service published a consultation proposing the implementation into UK law of two "model laws" adopted by the United Nations Commission on International Trade Law (**UNCITRAL**) (the **July 2022 Consultation**).[1] In this response document, we adopt the definitions from the glossary in the July 2022 Consultation.

1.2 The City of London Law Society (the **CLLS**) represents approximately 17,000 City lawyers, through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The CLLS Insolvency Law Committee, made up of solicitors who are expert in the field, has prepared the comments below in response to the Consultation. A link to a list of the individuals and firms represented on this Committee is set out at the end of this response.

1.3 In this response, we set out (in section 2) some initial high-level thoughts and concerns regarding the proposals in the July 2022 Consultation before turning (in section 3) to the specific questions in the July 2022 Consultation. In summary, our recommendations are as follows:

(a) we have no issues with the policy underpinning the MLEG although we do wonder how often in practice this will be used. We do however believe that

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

there are a number of points, outlined below, which would merit further consideration before its implementation in the UK, in order to ensure that the legitimate interests of creditors are properly protected;

(b) in relation to the proposals regarding Article X and the MLIJ, while we welcome a change that would give the UK courts a discretion to recognize a foreign insolvency-related judgment, we do think there needs to be the right degree of certainty for those structuring transactions about when that discretion will be exercised. In this regard, we are concerned about the lack of any choice of law rules or safe-harbours in the proposals given that, in effect, the UK courts will be applying foreign insolvency law when giving effect to the foreign insolvency-related judgment. Our strong preference would be to wait until UNCITRAL has published its model law on applicable law in insolvency proceedings (which is the subject of meetings in September and December) so that the two model laws can be implemented together. Alternatively we would encourage the UK government to include its own choice of law rules, perhaps based on the choice of law rules in the Recast European Insolvency Regulation (**EIR**)[2], particularly those in relation to rights in rem, set-off rights, pending legal proceedings, transaction avoidance and financial markets;

(c) if for whatever reason The Insolvency Service does not wish to include clear choice of law rules, we do think the circumstances in which the UK courts would be able to exercise their discretion in relation to a foreign insolvency-related judgment need to be more clearly set out in the amendments to the CBIR. At present, it is not clear to us that the proposals would have the stated objective of preserving the rule in *Gibbs*, nor is it clear to us what the proposals would add to the current common-law regime for recognizing and enforcing a judgment based on the so-called "Dicey principles" (as referred to below).

1.4 We have set out at the end of this response the members of the working group who were involved in drafting this response. Any member of the working group would be happy to discuss or expand on any of the comments made in this response. Alternatively please feel free to contact our chairperson, Jennifer Marshall (Allen & Overy LLP) whose details are set out below.

2. General observations on the consultation

Proposals in relation to Article X and the MLIJ

2.1 **Balancing certainty and transparency for investors with the benefits of managing cross-border insolvency cases**: The CLLS supports the overarching objective set out in the July 2022 Consultation of further developing the international framework for the management of cross-border insolvencies. We also acknowledge that giving the UK courts the discretion to recognize an insolvency-related judgment may assist in managing such cases, particularly by reducing the costs of having multiple parallel

[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

insolvency proceedings. However, for the sake of certainty and transparency (including for those who are originating or structuring transactions), the circumstances in which such insolvency-related judgments will be recognized by the UK courts need to be clear. Our strong preference would be for clear choice of law rules (referred to below) but, at the very least, the circumstances in which the courts should not recognize an insolvency-related judgment need to be clearly set out. For the reasons given below, we are not convinced that this is the case with the proposals set out in the July 2022 Consultation.

2.2 **Relationship of proposals with existing framework for recognition of judgments**: There are currently a number of ways in which a monetary judgment of any kind (not only one relating to insolvency) can be recognized[3]. Ignoring the Hague Convention on Foreign Judgments in Civil and Commercial Matters[4] and the Lugano Convention[5], both of which include express carve-outs for insolvency-related judgments, these include:

(a) under common law principles, sometimes referred to as the "Dicey principles" after the leading textbook of that name, if (very broadly) there is an exclusive jurisdiction clause in favour of the originating state or the defendant has submitted to, or is present in, the overseas jurisdiction where the judgment is made; or

(b) pursuant to one of the existing statutes for the recognition of judgments such as the Foreign Judgments (Reciprocal Enforcement) Act 1933 or the Administration of Justice Act 1920.

It is not clear to us how the proposals in the July 2022 Consultation are intended to fit with this existing framework (including in particular the "Dicey principles"). For the reasons given below, it may be that the discretion to recognize an insolvency-related judgment under Article X would go no further than the Dicey principles and the only advantage of the current proposals would be a procedural one. This should, however, be clarified, perhaps in any guide to enactment.

2.3 **Lack of choice of law rules**: Until 31 December 2020, and provided that certain conditions were met, the UK courts were required to give effect to certain insolvency-related judgments from an EU Member State pursuant to the Recast EU Insolvency Regulation. However, it is important to note that the Recast EU Insolvency Regulation contained clear choice of law rules and safe-guards intended to protect the legitimate expectations of the parties and to deliver certainty in this regard. These included choice of law rules for rights in rem, set-off rights, pending legal proceedings and the avoidance of transactions (to name just a few).

---

[3] The court has made clear that it is not possible to recognise an insolvency-related judgment under section 426 of the Insolvency Act 1986 but this provision does allow the English court to apply foreign insolvency law (as well as English insolvency law). Hence the English court may well get to the same position as the foreign court pursuant to section 426, assuming the English court applies the foreign insolvency law in the same way.

[4] Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

[5] Convention of 21 December 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

2.4 We note that neither Article X nor the MLIJ contains any such choice of law provisions and, in our view, this is a very significant impediment to implementation. We understand that UNCITRAL is currently working on a new model law that would contain such choice of law provisions and, indeed, there are working group meetings in September and December where these provisions will be discussed. We would strongly suggest that The Insolvency Service waits, before implementing Article X, until that model law is available. Alternatively, we would encourage The Insolvency Service to build in some of the choice of law rules from the Recast EU Insolvency Regulation (and in particular those relating to rights in rem, set-off and transaction avoidance)[6] into the discretionary factors that the court should take into account when deciding whether to recognize an insolvency-related judgment. In our view, the provisions of the Recast EU Insolvency Regulation (and its predecessor) have worked well in practice in relation to the recognition and enforcement of judgments while giving certainty to those structuring transactions. Although there are some areas of uncertainty, there has been surprisingly little litigation.

2.5 **Stated objectives in July 2022 Consultation**: We note that the UK courts would only be given a discretion as to whether to recognize an insolvency-related judgment via the adoption of Article X and you may consider that this goes some way towards addressing our concerns regarding the absence of any choice of law rules. However, it needs to be clear to both the courts and to those structuring transactions how that discretion should or will be exercised. We note that the July 2022 Consultation contains two statements of intent in this regard in respect of the decisions in *Rubin*[7] and *Gibbs*[8] but it is not clear to us that the proposals would have the stated objective in respect of *Gibbs* and there may be some misunderstanding as to what impact the proposals would have on a scenario similar to that which arose in *Rubin*. We discuss the impact of the proposals in each of these regards below.

2.6 **Impact on the rule in *Gibbs***: We do not intend to engage in a detailed debate, in this paper, regarding the pros and cons of the rule in *Gibbs* and we think that the July 2022 Consultation does a good job of articulating the tensions in this regard. We note (and agree with) the statement that "[c]ontracts governed by the law of England and Wales hold a unique position in their widespread international use combined with the certainty that the rule in *Gibbs* provides to the contracting parties". We would point out, however, that the rule in *Gibbs* is not limited to English law contracts and, if it is preserved, it would prevent the UK courts from recognising a foreign insolvency-related judgment from, say, a French court if and to the extent that it purported to vary or discharge rights under, say, a New York law governed contract. This would of course limit quite substantially the number of foreign insolvency-related judgments that could be recognised and so the practical impact of the proposals might be quite limited. Leaving aside this debate, we suspect that clear choice of law rules (such as those found in the EU Insolvency Regulation) would deliver this certainty in a manner that might be easier to justify in the context of cross-border insolvency or restructuring proceedings.

---

6 These would clearly need to be adapted so as to apply in any main or non-main proceedings that may be subject to the CBIR, and not just insolvency proceedings commenced in a Member State. Our working group would be very happy to work with The Insolvency Service in designing suitable rules in this regard.

7 *Rubin v Eurofinance SA* [2012] UKSC 46

8 *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399

Without such clear choice of law rules, we suspect that, on balance, there is a case to be made for preserving the rule in *Gibbs*.

2.7 Regardless of this debate, we note that the July 2022 Consultation clearly states that it is not your intention that the proposals "will affect the application of the rule in *Gibbs* to the rights of creditors who have contracted with the insolvent under the law of England and Wales" (page 15). However, we also note that it is not intended to include an express reference to the rule in *Gibbs*, or to the impact of a foreign insolvency-related judgment on English law contracts, in the non-exhaustive list of discretionary factors that the court will take into account in Article 14 of the MLIJ. Given that, post the adoption of Article X, the UK courts will have the power to recognize an insolvency-related judgment, we would like to understand why you are of the view that the proposals would not impact on the rule in *Gibbs*. Is it not possible that a judge would conclude that she can now recognize an insolvency-related judgment, even if it impacts on an English law contract, given that there is nothing to say otherwise? The rule in *Gibbs* is clearly a common law, judge-made rule and the UK courts may take the view that such a rule has been superseded by the statutory provisions comprising the amended CBIR.

2.8 We note that, on page 15 of the July 2022 Consultation, you state that you would "expect that UK courts will continue to have regard to other UK law and to apply the safeguards specified in the [CBIR]". We wondered whether, in light of this, you are of the view that the rule in *Gibbs* would be protected by either Article 14(f)(ii) of the MLIK or Article 22 of the MLCBI, both of which refer to the concept of "adequate protection". Is your view that, if a creditor has a right or interest under an English law contract, it would not be adequately protected if that right or interest were to be varied or discharged by the foreign insolvency-related judgment? And how does this reconcile with the view stated above that *Gibbs* does not only relate to English law contracts – does that mean that a creditor with a right or interest under a contract governed by a different law from the law of the foreign insolvency proceedings would not be adequately protected if that right or interest were to be varied or discharged by the foreign insolvency-related judgment? If so, we are not sure we agree that the concept of "adequate protection" would have that effect and instead we consider that this concept (which is not defined) is more aimed at ensuring that there are procedural rules in the foreign insolvency proceedings whereby UK creditors (for example) will still be given notice of, and the opportunity to participate in, the foreign proceedings or preventing rules that might discriminate against UK creditors when compared with the treatment of local creditors.

2.9 If the intention is to preserve the rule in *Gibbs*, we consider that this should be clearly stated in the legislation (for example by adding this to the Article 14 factors) rather than merely setting this intention out in the July 2022 Consultation. Of course, thought would need to be given (a) to whether to limit such a safe-harbour to English law contracts or whether, in line with the rule in Gibbs, it should apply regardless of the governing law of the contract; and (b) to what the impact would be if the rule in *Gibbs* were subsequently to be overturned by the Supreme Court or by legislation.

2.10 **Impact on the decision in Rubin**: We note that the July 2022 Consultation states that you "expect that the effect [of the proposals] would be to set aside the approach taken in the previous judgment of the Supreme Court in *Rubin* in respect of the recognition of insolvency-related judgments" (page 12). We agree that, by giving the UK courts a discretion to recognize such a judgment (subject to the comments made below about how such a discretion is to be implemented into the law), that part of the *Rubin* decision would be overturned.

2.11 We note, however, that, on the facts of the *Rubin* case, there was no jurisdiction clause in favour of the US court, nor had the defendant submitted to the jurisdiction of the US bankruptcy court, and therefore the originating court did not satisfy the conditions set out in Article 14(g)(i) or (ii) of the MLIJ. Furthermore, we do not consider that the US bankruptcy court exercised jurisdiction on a basis which a UK court could have exercised jurisdiction so the originating court did not satisfy the condition set out in Article 14(g)(iii) either. We find Article 14(g)(iv) quite confusing; we can see that it might be possible to rely on this condition even where the defendant has not submitted to the jurisdiction of the originating court but we suspect that such circumstances will be limited in practice. Hence, on the particular facts of *Rubin*, we wonder if the UK courts would reach a different decision under the current proposals than the Supreme Court reached on the basis of the CBIR as it stood at that time.

2.12 It may well be that this is intentional and that you would expect the Dicey principles (of a jurisdiction clause, presence or submission) to be satisfied before a foreign insolvency-related judgment would be recognized under the proposals. This does lead to the question, though, of what changes to UK law the proposals are intended to achieve. We wonder whether you had in mind a procedural rather than a substantive effect. We understand that, in order to enforce a judgment on Dicey principles, it would be necessary to commence new proceedings in the UK whereas, under the current proposals, the request for the recognition of the insolvency-related judgment could simply be added to the list of requested relief under the existing CBIR proceedings. We do wonder, however, whether this should be more clearly spelt out as we suspect that some people reading the July 2022 Consultation would expect that, if a case on the facts of *Rubin* were to come before the UK courts in the future, the decision would be different.

2.13 **Procedural vs substantive relief**: It is also not clear to us whether the proposals would have the effect of overruling those decisions (such as *Pan Ocean*[9] and *Re OJSC International Bank of Azerbaijan*[10]) that have held that the UK courts are only able to provide procedural relief under the CBIR and not substantive relief. We assume that the intention is that, if the UK courts were to exercise their discretion to recognize and give effect to a foreign insolvency-related judgment, the UK courts would have the power to grant substantive relief in respect of that judgment. So if for example the judgment being recognized was a US chapter 11 plan of reorganization that purported to discharge or vary New York law contracts (so as to avoid for these purposes any consideration of the rule in *Gibbs*), we assume that the intention would be for the UK

[9] Fibria Celuose SA v Pan Ocean [2014] EWHC 2124 Ch

[10] [2018] EWCA Civ

courts to treat those New York law contracts as having been varied or discharged for all purposes in the UK (so that the creditors in question could not seek to enforce against assets in the UK) rather than merely allowing the UK courts to grant a temporary injunction preventing the creditors from enforcing in the UK. If this is the intention, we wonder if it would be better to state that expressly in the amended CBIR.

2.14 **Method of implementation**: We note that the July 2022 Consultation states that, "[i]n order to give effect to Article X in the UK, we will add a reference to it on the list of documents specified in Regulation 2(2) of the [CBIR] which implement MLCBI in Great Britain" (page 16)[11]. The consultation also states that you "will insert a new Regulation that will provide a list of discretionary, illustrative and non-exhaustive grounds of refusal, that the courts can rely on when deciding whether or not to recognize and enforce a foreign judgment under Article 21 of the MLCBI. This list will build on Article 14 of the MLIJ". We have a number of concerns regarding these proposals.

2.15 First, we do not consider that simply giving the court a discretion to consider Article X when ascertaining the meaning of the MLCBI as set out in Schedule 1 to the CBIR would be sufficient to overturn the relevant part of *Rubin.* The list of documents referred to in Regulation 2(2) of the CBIR is non-exhaustive and it could be argued that, even without this addition, the UK courts could have reference to Article X. However, the Supreme Court has held that the CBIR (and in particular the provisions set out in Schedule 1 to the CBIR) do not allow the recognition of an insolvency-related judgment and we do not think that a lower court could come to a different decision simply because the court now has a discretion to consider Article X when ascertaining the meaning of the MLCBI as set out in Schedule 1 to the CBIR[12]. In order to achieve the consultation's stated objective of setting aside the relevant part of the Supreme Court in Rubin, in addition to (or instead of) referring to Article X in Regulation 2(2), we consider that Article 21 itself, as set out in Schedule 1 to the CBIR, should be amended by the addition of Article X so it is clear that the scope of relief available under the CBIR has been amended (and expanded) in this respect[13]. This would also have the advantage of ensuring, and putting beyond any doubt, that any relief given comprising of the recognition of an insolvency-related judgment would be subject to the provisions of, and protections in, Articles 21 and 22 (and elsewhere in the MLCBL as set out in Schedule 1 to the CBIR).

2.16. Secondly, we note that Article X merely refers to a judgment and not an insolvency-related judgment (and the definition of the latter is set out in the MLIJ). Given that the intention of the proposals is to give the UK courts the discretion to recognize an insolvency-related judgment, but no other judgments, we would suggest that the definition of an insolvency-related judgment contained in the MLIL is added to Schedule 1 to the CBIR.

---

11 The July 2022 Consultation also states that you will update the same Regulation to take account of the publication by UNCITRAL of "The Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation" in 2014.

12 Questioning jurisdiction is one way in which even the most unmeritorious party can seek to challenge proceedings and we consider that such a party could try to argue that the Supreme Court has already considered the meaning of Schedule 1 to the CBIR and so all lower courts are bound by that decision unless and until Schedule 1 is amended.

13 This could be done by inserting the wording of Article X as a new paragraph 5 of Article 21 (*Relief that may be granted upon recognition of a foreign proceeding*) of the MLCBI set out in Schedule 1 to the CBIR.

2.17. Thirdly, we are pleased that the intention is to amend the CBIR to include the Article 14 factors from the MLIJ and we understand from the consultation that this will be done by way of a new Regulation inserted into the CBIR and not by way of amendment to Schedule 1 to the CBIR . Again, we wonder whether it would be best to include these factors in Schedule 1 itself (and by reference to the relief that can be granted under Article 21 in respect of an insolvency-related judgment) rather than in the Regulations that come prior to the Schedules so that all of the relevant, and substantive, provisions are in the same place.

2.18 Fourthly, from a procedural perspective, we wonder whether Part 3 of Schedule 2 to the CBIR should also be amended to include certain procedural requirements set out in Article 11 (Procedure for seeking recognition and enforcement of an insolvency-related judgment) of the MLIJ so that the court has all relevant documentation and evidence before it when considering whether to grant relief in the form of recognition and enforcement of an insolvency-related judgment.

2.19 Finally, we consider that the list of documents referred to in Regulation 2(2) of the CBIR should be amended to include the relevant parts of the Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments that relate to those provisions and definitions of the MLIJ to be adopted by the proposed amendment to the CBIR (i.e. Article X, Article 14 and the definition of "insolvency-related judgment").

Proposals in relation to the MLEG

2.20 We fully understand the rationale for adopting the MLEG, in that it creates additional tools which could potentially increase returns for stakeholders by facilitating the co-ordination of insolvencies within corporate groups. We are not sure how often the new powers would be used in practice, given the practical issues outlined below, but fully appreciate that someone needs to start the ball rolling and that the powers contained in the MLEG may be increasingly used over time, as more jurisdictions adopt it.

2.21 We are, however, concerned (as we are in relation to the proposals regarding Article X) that the MLEG does not include clear choice of law rules and safe-guards intended to protect the legitimate expectations of the creditors of a company within an enterprise group. While Article 27 does incorporate the concept of "adequate protection", it does not deliver certainty that choice of law rules for rights in rem, set-off rights and pending legal proceedings could not be impacted by a decision to seek a group solution (for example as a result of a stay on enforcement while that solution is developed).

2.22 This point is significant in the context of developing a group insolvency plan, as a group member may initially seek a stay on enforcement and then alter its CoMI as part of a plan, in order to make it easier to comply with Article 26 of MLEG. Such a move could have a significant impact on the position of creditors, potentially resulting in a

different outcome to that which would have been the case, had safe-guards been put in place.

2.23 We would therefore suggest that, as with Article X, The Insolvency Service should wait until the proposed model UNCITRAL law dealing with choice of law provisions is made available before implementing the MLEG, as specific reference to the protections contained in the forthcoming model law would provide the market with greater certainty concerning the potential operation of the MLEG.

2.24 We would also suggest, again in the interests of certainty, that a number of minor modifications, as outlined below, should be considered prior to the UK implementation of the MLEG.

3. Responses to specific questions

Questions on Article X / MLIJ

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

3.1 For the reasons given above, we are concerned that the circumstances in which the UK courts could exercise their discretion to recognize an insolvency-related judgment are not clearly set out and could lead to a lack of clarity for those originating and structuring transactions. We would prefer any laws implementing either the MLIL or Article X to have clear choice of law rules or safe-harbours, similar to the ones that were contained in the EIR. It is understood that UNCITRAL is working on a new model law containing choice of law rules and so it may be better to delay these proposals until that model law is available. Alternatively, such choice of law rules could be built into the CBIR based on similar provisions in the EIR (but applying to all main and non-main proceedings and judgments rather than just those from an EU member state).

3.2 It is also not clear to us whether the proposals are intended to expand on the existing position for recognition of a judgment under the common law on the so-called Dicey principles.

3.3 If notwithstanding these concerns the decision is taken to go ahead with the proposals, we think more thought needs to be given as to whether the proposals do achieve the stated objective of preserving the rule in *Gibbs*. Clarity is also needed as to whether the proposals would allow the UK courts to grant substantive as well as procedural relief in relation to insolvency-related judgments.

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 recognize an insolvency-related judgment?

3.4 We think this is essential to give clarity to both the UK courts and to those structuring transactions as to when and how the UK courts' discretion would be exercised.

However, for the reasons given above, we are not certain that the Article 14 factors from the MLIJ are sufficient for these purposes. In particular we consider that these factors should include the preservation of the rule in *Gibbs*.

3.5 We would also recommend that these factors are built into Schedule 1 of the CBIR rather than being included in the Regulations in the first part of the CBIR.

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

3.7 As referred to above, we would suggest:

(a) that the reference to Article X is included by way of an amendment to Article 21 in Schedule 1 to the CBIR rather than adding this as a document to which the court may have reference in Regulation 2(2);

(b) that Article X is amended to refer to a foreign insolvency-related judgment (rather than just a foreign judgment) and that the relevant definition from the MLIJ is included in Schedule 1 to the CBIR;

(c) if the intention is to preserve the rule in Gibbs, that this is expressly stated, perhaps by adding it to the Article 14 MLIJ factors;

(d) that the amendments to Article 21 make it clear that the UK courts are able to grant substantive as well as procedural relief in relation to a foreign insolvency-related judgment.

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?

3.8 We consider that this is sensible. We note that there is also some (limited) commentary regarding Article X in the 2018 Guide to Enactment in respect of the MLIJ. While the UK courts would not need to take into account all of that Guide to Enactment, we do wonder whether it is worth referring to the commentary regarding Article X.

Questions on MLEG

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?

3.9 The new insolvency tools contained in the MLEG could potentially be useful when dealing with complex group structures. We could, however, recall few, if any, practical examples where the availability of the MLEG in the UK would have had a material impact on the outcome of a restructuring or insolvency procedure, not least as there is already considerable scope for voluntary co-operation between insolvency office-holders, particularly in a UK domestic context, where such co-operation is clearly in the interests of each company.

3.10 The use of the MLEG may, in practice, be limited to situations where (i) each group member is in a jurisdiction which has implemented the MLEG, (ii) there is consensus that a group solution would clearly benefit each group member, (iii) group members are willing and able to meet the costs of developing such a solution, (iv) any proposed solution is consistent with the insolvency legislation of each jurisdiction in which a group member has its CoMI and (v) the proposed solution is acceptable to the creditors of each group member.

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

3.11 We generally agree with the approach to implementation outlined in the July 2022 Consultation, particularly in relation to its scope (Article 1), the requirement that any "group representative" appointed within the UK should be an qualified insolvency practitioner (Articles 2 and 19), the identification of the competent court (Article 5), the rules relating to agreements, the appointment of a single representative and participation (Articles 16, 17 and 18) and the proposals relating to provisional relief (Article 22).

3.12 We would, however, suggest, as noted below, that the requirement to co-operate (Articles 10 and 15) should contain a similar formulation to that set out in Article 56 of the EIR, which contains similar provisions relating to co-operation, but only requires officeholders to co-operate to the extent that doing so "is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest."

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?

3.13 We agree with the implied concern contained in the Consultation that funding issues could prove a significant barrier to the use of the MLEG, as:

(i) it may prove difficult for anyone proposing to use the MLEG procedure to accurately estimate the direct and indirect costs of doing so;

(ii) it may not be possible to devise a suitable group plan, or a group plan which delivered materially better returns. Stakeholders may therefore be deterred by the risk that the costs of the process could significantly exceed the benefits of a group proceeding (if any);

(iii) allocating costs between group companies may present a further challenge, given that there are several possible ways of approaching this, each of which would be likely to have a different outcome for the companies in question – for example, costs could be allocated by reference to the value of assets, the amount of liabilities or eventual recoveries; and

(iv) individual companies could delay or dispute payments if they lose interest in, or opt out from, the group coordination proceedings.

3.14 We note that Article 10(g) of MLEG refers to "cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication", but it is unclear how courts could co-operate without clear guidelines as to the approach to be adopted when allocating costs.

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?

3.15 There are three points that may be worth further consideration:

(i) **Relationship with statutory duties**: The first is that Article 14 of the MLEG requires a UK administrator or liquidator to "co-operate to the maximum extent possible with other courts, insolvency representatives of other enterprise group members and any group representative appointed". Article 15 envisages that such co-operation may extend to the co-ordination of "the administration and supervision of the affairs of the enterprise group members."

The use of the "to the maximum extent possible" formulation could cause potential issues, unless it is made clear that this formulation does not require a UK officeholder to take any action that would be inconsistent with their statutory duties. We note, in this context, that Article 56 of the EIR, which contains similar provisions, only requires officeholders to co-operate to the extent that doing so "is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest." The inclusion of similar wording in the UK implementation of the MLEG would increase certainty and help to make it clear that UK statutory creditor protections would not be overridden.

(ii) **Time Limits:** The second point relates to timing. Under Article 60 of the EIR, the coordinator may obtain a stay for up to six months while a group solution is being pursued. It does not appear that there is a similar time limit under the MLEG. A potentially unlimited stay could have a detrimental effect on creditor rights.

(iii) **Protection for dissenting minority creditors**: The July 2022 Consultation notes that "where there are insolvency proceedings in the UK, the interests of minority dissenting creditors are protected against unfair prejudice or harm arising from those proceedings … and we expect similar consideration would be required as regards the available relief under the Model Law." There may be some doubt as to whether this is actually the case, given that Article 27 of the MLEG focusses on the "interests of the creditors of each enterprise group member", a formulation that does not immediately suggest that the Court would focus on the interests of the dissenting minority creditors of one group member.

4. Point of contact

4.1 Should you have any queries or require any clarification in respect of our response, please feel free to contact our chairperson or any of the members of the working group set out below:

Jennifer Marshall (Allen & Overy LLP),
Jennifer.marshall@allenovery.com
Chair, City of London Law Society Insolvency Law Committee

Other working group members:

David Ereira (Paul Hastings), davidereira@paulhastings.com
Ian Fox (Dentons), ian.fox@dentons.com
Simon Thomas (Goodwin), SThomas@goodwinlaw.com
Jo Windsor (Linklaters), jo.windsor@linklaters.com

4.2 Other members of the Insolvency law Committee are listed here:

https://www.citysolicitors.org.uk/clls/committees/insolvency-law/insolvency-law-committee-members/