**ICAEW**
REPRESENTATION 82/22

# IMPLEMENTATION OF TWO UNCITRAL MODEL LAWS

Issued 29 September 2022

ICAEW welcomes the opportunity to comment on the Implementation of two UNCITRAL Model Laws published by The Insolvency Service on 7 July 2022, a copy of which is available from this link.

For questions on this response, please contact the ICAEW Business Law department at representations@icaew.com quoting REP 82/22.

It is not clear that it would be in the UK's interests to adopt the Model Law on Recognition and Enforcement of Insolvency-Related Judgements in whole or (as proposed) in part and we recommend that government does not proceed with this proposal at this time.

We do not believe that there is a need for the UK to adopt the Model Law on Enterprise Group Insolvency and doubt that it would be used much, if at all, if adopted. We therefore suggest that government does not proceed with this either.

**ICAEW**
Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
icaew.com

This response of 29 September 2022 is made by ICAEW's Business Law Department and reflects consultation with ICAEW's Insolvency Committee. This is a technical committee largely made up of Insolvency Practitioners working within large, medium and small practices and it represents the views of ICAEW licence holders.

ICAEW the largest insolvency regulator in the UK. We license over 840 insolvency practitioners (out of a total UK population of around 1,550) as a recognised professional body (RPB) under the Insolvency Act 1986.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 165,000 chartered accountant members in over 147 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

## KEY POINTS

1. We are supportive of international initiatives to improve certainty of outcome and efficiency in cross-border insolvencies and, therefore, much of the work of UNCITRAL in this area.
2. However, in deciding whether to adopt any Model Law, government needs to consider whether it would be in the UK's interests to do so, which includes assessing which other countries have adopted it (or equivalent) and whether they are, in fact, implementing it in a way that can be expected to result in appropriate reciprocal treatment.
3. As noted in the paper, the UK's insolvency regime is widely well regarded and often the jurisdiction of choice for insolvency and restructuring arrangements (where there is a choice). However, this position cannot be taken for granted. Participants in the market will make choices based on anticipated concrete outcomes.
4. We do not believe changes in insolvency law or practice should be driven by a desire to "signal commitment to cooperation and the sponsoring of international best practice" but rather on whether there is a need to change and whether the change will be beneficial for participants in the relevant procedures (eg, creditors).
5. With this in mind, we do not believe that either proposal should be taken forward at the current time. We comment on each proposal further below and have not answered all questions raised.

### MODEL LAW ON RECOGNITION OF INSOLVENCY-RELATED JUDGMENTS (Q1, Q2)

6. The proposal is not to adopt the Model Law in full, but rather to adopt "article X" which would give the UK courts power to recognise foreign insolvency-related judgments.
7. We agree that implementing Model Law in full (which would disturb the "Rule in Gibbs") would be a major change in law requiring very careful consideration and we agree that this should be subject to a separate consultation exercise if it is being considered (as perhaps it should be).
8. The current proposal appears to be less significant and has at least a superficial attractiveness because it could enable courts to recognise foreign judgments in cases where it would be appropriate to do so. However, it could have significant impact, because it would introduce uncertainty where currently the position is clear. On balance, therefore, we do not believe the proposal should be taken forward.
9. We appreciate that if the proposal is taken forward, the circumstances in which the courts would use their new discretion would become clearer as cases are heard and precedents established. However, this could be a slow process, during which the attractiveness of the UK as a centre for restructuring and insolvency work might be under threat.
10. The proposal is to include a non-exhaustive list of factors that the court might consider. But the list cites cases where recognition might be refused, which could create an assumption recognition should otherwise be given (resulting in a material departure from current law/practice). It is unclear to us that this will be helpful in practical terms to those deciding what jurisdiction to adopt in their contracts. The list in non-prescriptive and the courts may use their discretion in ways that government does not currently anticipate.
11. It will be important that views of the judiciary and legal profession are considered, including whether the judiciary would welcome such discretion and is resourced to implement such a regime, how evolving precedent might impact matters that might be regarded as matters of government policy and the likely practical result of any guidelines given in legislation.

## UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

12. The Model Law is well-intentioned, and we understand why government would support its aims. Our concern, however, is that there is little evidence of a concrete need for it in the UK or that it would be much, if at all, used in practice.
13. It appears from the consultation document that the regime would be voluntary, and that Insolvency Practitioners in the UK and other common law jurisdictions are already able to produce similar results without the need for change of law.
14. So far as we are aware, equivalent provisions in the EU's Insolvency Regulation have been little used. Unless the Model Law is widely adopted and used in practice, there seems to be little practical purpose in taking this proposal forward.
15. On balance therefore, we do not support introduction of this Model Law into the UK regime, because it will add to the length and complexity of the regime for little tangible benefit.