By Ian G. Williams and Prof. Adrian J. Walters

The Model Law: Is It Time for the U.K. to Change Tack?

Ian G. Williams
RSM Restructuring Advisory LLP; London

Prof. Adrian J. Walters
Chicago-Kent College of Law; Chicago

Ian Williams, LL.B is a director with RSM Restructuring Advisory LLP in London and is a former member of ABI's Board of Directors. Adrian Walters is the Ralph L. Brill Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology and a solicitor of the Senior Courts of England and Wales.

It has never been an easy matter for judges. The judiciary, an independent branch of government, dealing with, applying or even just considering law from another country evokes strong emotions. U.S. Supreme Court Justice Stephen G. Breyer's latest book, *The Court and the World: American Law and the New Global Realities* (Deckle Edge 2015), is expected to ignite the politically sensitive topic of the role that foreign law should play in American judicial decisions.

Justice Breyer firmly believes that taking cognizance of what goes on elsewhere is very important. "The world we're operating in is one in which by and large everyone believes [that] you have to know something about what is going on abroad."[1] This is clearly a very enlightened view, but it is not one that is widely shared in the U.S. However, it rests on the dual premise that global problems require global coordination and that effective judicial cooperation depends on increasing judicial engagement with foreign law. The engagement that Justice Breyer envisions is, of course, fundamental to the resolution of cross-border insolvencies. It will need to deepen further if the internationalist vision associated with universalism — which, where practicable, favors a global "one court, one law" approach to cross-border insolvencies and restructurings — is to gain momentum.

It has been the better part of 10 years now since the U.K. adopted the United Nations Commission on International Trade (UNCITRAL) Model Law on Cross-Border Insolvency (the "Model Law") by the Cross-Border Insolvency Regulations 2006 (CBIR).[2] Its impact in the U.K. has not lived up to the expectations of some and is probably best described as underwhelming.

Outside of the British Commonwealth, few appreciate that CBIR is not a single statutory gateway to judicial assistance in cross-border insolvency matters. It was added to a pre-existing menu of options available to foreign representatives in need of judicial assistance in the U.K. Having options is often a good thing, but a single workable point of entry such as chapter 15[3] might arguably be better. In addition, the complexity of the U.K.'s menu approach might actually be part of its problem.

CBIR coexists with the EU Regulation on Insolvency Proceedings (EUReg)[4] (which prevails over CBIR when there is conflict),[5] section 426 of the Insolvency Act 1986, and historic forms of assistance available under the common law. These various regimes are discrete, yet they sometimes overlap. They effectively divide the world up in ways that reflect the rise of the U.K. as an imperial power in previous centuries, and its more recent evolution to the status of a participating member state of the European Union (EU).

> **[T]he Model Law appears to be a bad fit for the U.K. By enacting it, the U.K. has signaled its willingness to cooperate unilaterally, but cooperation in practice under CBIR has been patchy.**

EUReg only applies where the debtor has its center of main interests (COMI) in the EU. Section 426 applies to a number of specially designated nations from outside the EU, largely consisting of former British Commonwealth countries.[6] The common law of judicial cooperation in cross-border insolvency also continues to be available to foreign representatives from non-EU countries. Moreover the three non-EU gateways are not entirely exclusive. A foreign representative from a country that has "favored nation" status under section 426 (*e.g.*, a Canadian liquidator) will have access to all three non-EU gateways. However, foreign representatives from so-called "third" countries outside the "section 426 club" depend on CBIR and the common law.

1 *See* Adam Liptak, "Justice Breyer Sees Value in a Global View of Law," *New York Times*, Sept. 12, 2015, *available at* www.nytimes.com/2015/09/13/us/politics/justice-breyer-sees-value-in-a-global-view-of-law.html?_r=0 (last visited Dec. 4, 2015).

2 The Cross-Border Insolvency Regulations 2006 (SI 2006/1030). Strictly, CBIR only apply in Scotland, England and Wales. Identical legislation is in effect for Northern Ireland.

3 11 U.S.C. § 1509(b) (foreign representative granted recognition under chapter 15 has direct access to U.S. legal system). *See also* H.R. Rep. No. 109-31 (2005), p. 110.

4 Council Regulation (EC) No. 1346/2000, which has been revised with effect from June 26, 2017, by Regulation (EU) 2015/848 on insolvency proceedings (recast). EUReg applies to all EU countries apart from Denmark.

5 Article 3 of the U.K.'s version of the Model Law states that EUReg prevails in the event of a conflict between EUReg and domestic U.K. law. This simply memorializes the position under EU law that, by virtue of the U.K.'s obligations under the EU's founding treaties, pre-empts inconsistent domestic laws in any event.

6 These countries include Anguilla, Australia, The Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Malaysia, Montserrat, New Zealand, South Africa, St. Helena, Turks and Caicos Islands, Tuvalu and the British Virgin Islands. The Channel Islands and the Isle of Man are also eligible for assistance.

What has become increasingly clear with the efflux-ion of time is that foreign representatives from third countries for whom CBIR is critically important can be at a significant disadvantage. Included among these third countries is the U.S.

CBIR offers foreign representatives in proceedings emanating from the country where the debtor has its COMI with a straightforward route to recognition of those proceedings in a much more streamlined way than is available under the common law. Recognition of foreign main proceedings also carries with it an automatic stay on proceedings in the U.K.[7] However, issues appear to arise where the foreign representative requires more expansive assistance involving, for example, exporting the effects of local insolvency law into the U.K.[8] This could also be a problem that is prevalent in the U.S. as well.[9]

It is well known that attempts under CBIR to domesticate a default judgment from a U.S. avoidance action[10] and to use the insolvency law of the COMI jurisdiction to modify English law-governed rights have failed.[11] There is also a very good chance that the U.K. courts would be unlikely to automatically extend the effects of a foreign reorganization plan into the U.K. without parallel proceedings being instituted.[12]

By contrast, EUReg and section 426 embody a commitment to reciprocal dealing that demands a large measure of deference to foreign insolvency law meaning that the things that CBIR seems not to deliver to foreign representatives relying solely on it could very well be available to foreign representatives who have access to U.K. courts under EUReg and section 426. There is a two-tier system that cannot be desirable if the goal is to promote judicial cooperation in cross-border insolvencies.

While the concept of modified universalism[13] is generally supported by the British judiciary,[14] it does come with the need or requirement to defer to the insolvency law of the home country, and this is where things seem to come undone. Both EUReg and section 426 are underpinned by treaty-driven bonds of mutual trust or historic ties going back centuries. CBIR lacks these features, so it is less potent. This is of material importance to countries that must solely rely on it and it is submitted that this is unsatisfactory.

Part of the problem might be the ease with which foreign representatives from any country can gain access to the U.K. if they satisfy the minimum recognition criteria. Judges in the U.K. (and perhaps also in the U.S.) may worry that if they take a generous view of the scope of their discretionary powers in cases coming from countries with high-quality legal systems, they might be pre-committing themselves to providing comparable assistance to countries whose legal systems are of lower quality. Perhaps the public policy ground for denial of recognition in Article 6 of the Model Law could be used as a filter. However, U.K. judges who are used to statutory regimes underpinned by international treaty (EUReg) or executive branch accreditation of favored nations (section 426) may not be comfortable exercising an ill-defined standard to approve or discredit a foreign legal system.

Currently, the Model Law appears to be a bad fit for the U.K. By enacting it, the U.K. has signaled its willingness to cooperate unilaterally, but cooperation in practice under CBIR has been patchy. Urgent consideration should be given to developing a more unified approach to the granting of assistance under the current tripartite regime for non-EU countries. However, to align the assistance available under section 426 (which includes the possibility of assistance under the requesting country's own insolvency law) with the assistance available under CBIR may require the U.K. to move toward a country-accreditation model for CBIR akin to the section 426 designated-country model. Otherwise, the risk is that U.K. judges will continue to give preference to softer forms of cooperation that involve U.K. parallel proceedings and the application of U.K. law and that are not so progressive in advancing the cause of modified universalism. abi

7 Though the automatic stay under Article 20 of the U.K.'s version of the Model Law is coextensive with the stay in a U.K. winding-up proceeding, it does not operate to stay enforcement of secured claims.
8 *See* A. Walters, "Giving Effect to Foreign Restructuring Plans in Anglo-U.S. Private International Law," (2015) 3 *NIBLeJ* 375.
9 "The Model Law Is Dead. Long Live the Model Law!," *Recovery*, Spring 2014, 30-32.
10 *Rubin v. Eurofinance SA* [2013] 1 A.C. 236 Supreme Court.
11 *Fibria Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC 2124.
12 *Ibid.* at 5.
13 The concept of avoiding duplication of cost of multiple insolvency proceedings in cases of multinational debtors with countries assisting the home country's insolvency proceeding.
14 *Singularis Holdings Ltd. v. PricewaterhouseCoopers* [2014] UKPC 36.