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Please Recognize Me: The United Kingdom Should Enact the UNCITRAL Model Lawon Recognition and Enforcement of Insolvency-Related Judgments

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PLEASE RECOGNIZE ME: THE UNITED KINGDOM SHOULD ENACT THE UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS

INTRODUCTION

Insolvency in a single country can involve many stakeholders, from debtors to creditors such as banks, noteholders, stockholders, suppliers, employees, and legal professionals.[1] In the global economy, the challenge is ramped up given that debtors and creditors may span multiple sovereign jurisdictions.[2] Cross-border insolvency occurs when two or more different countries' legal systems become intertwined through a bankruptcy proceeding.[3] Most often these proceedings arise because a bankruptcy case is opened in one country while at least some of the debtor's subsidiaries, assets, and creditors are located in other countries.[4]

Since 1995, the United Nations Commission on International Trade Law (UNCITRAL) has been developing tools to meet the challenges of having different insolvency laws managing a single cross-border insolvency.[5] By 1997, UNCITRAL's Working Group V (WG V) completed the Model Law on Cross-Border In-

1. Andrew B. Dawson, *Modularity in Cross-Border Insolvency*, 93 CHI.-KENT L. REV. 678, 682 (2018).

2. *Id.*; Ralph L. Brill, *Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law*, 93 AM. BANKR. L. J. 47, 48 (2019).

3. Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L. Q. 931, 931 (1994).

4. *Id.*

5. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Rep. of the Working Group on Insolvency Law on the Work of Its Eighteenth Session, ¶ 1, U.N. Doc A/CN.9/419 (1995) (the mandate to develop legal tools to assist in the resolution of cross-border insolvencies was given to UNCITRAL's WG V in May 1995); Dawson, *supra* note 1, at 682 ("If a debtor has assets and creditors in more than one nation, there will be no single jurisdiction that can administer the entire bankruptcy estate or bind all creditors.").

solvency (ML-CBI or original model law).[6] By September 2020, the original model law has been adopted by 48 countries.[7] In July of 2018, UNCITRAL approved a second model law,[8] the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (ML-IRJ or new model law).[9] The genesis for the original model law was an increase in cross-border insolvency proceedings that necessitated the development of tools utilizing a modified-universalist[10] approach to these cases.[11] The genesis for the new[12] model law was one particular case in the UK that did not follow the modified-universalist approach, *Rubin v. Eurofinance SA.*[13] This case created a risk that is not just limited to the UK, as other countries may use *Rubin* as persuasive authority.[14]

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6. *See* UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2013) [hereinafter ML-CBI].

7. *Status: UNCITRAL Model Law on Cross-Border Insolvency* (2020), UNCITRAL, https://uncitral.un.org/ar/texts/insolvency/modellaw/cross-border_insolvency/status (last visited July 4, 2020) [hereinafter ML-CBI STATUS]; *see* John A. E. Pottow, *The Dialogic Aspect of Soft Law in International Insolvency: Discord, Digression, and Development*, 40 MICH. J. INT'L L. 479, 484 (2019).

8. *See* UNCITRAL, Rep. on the Work of Its Fifty-First Session, ¶ 131, U.N. Doc A/73/17 (2018).

9. *See* UNCITRAL, RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS WITH GUIDE TO ENACTMENT, U.N. Sales No. E.19.V.8. (2019) [hereinafter ML-IRJ].

10. Modified-universalism "accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors." Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 517 (1991).

11. Lia Metreveli, *Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to its Model Law on Cross-Border Insolvency*, 51 COLUM. J.L. & SOC. PROBS. 315, 317 (2017); Irit Mevorich, *Modified Universalism as Customary International Law¸* 96 TEX. L. REV. 1403, 1404 (2018).

12. While the new Model Law on Recognition and Enforcement of Insolvency Related Judgments is still new, since the adoption of this model law in 2018, WG V finished work on a third model law in 2019, the UNCITRAL Model Law on Enterprise Group Insolvency. *See* UNCITRAL, Rep. on the Work of Its Fifty-Second Session, ¶ 110, U.N. Doc A/74/17 (2019).

13. Rubin v. Eurofinance SA*,* [2012] UKSC 46 (appeal taken from Eng.).

14. Pottow, *supra* note 7, at 485 (noting Korean delegate's concern of the applicability of *Rubin* in Korea).

In *Rubin*, the UK Supreme Court cited a lack of authority to recognize a US insolvency-related judgment[15] in the ML-CBI and issued a ruling with the effect of pulling the UK away from the benefits of the modified-universalist approach in insolvency.[16] In particular, the Court held that the ML-CBI did not provide a mechanism to recognize an insolvency judgment from an avoidance proceeding outside the UK; therefore, in order to review the applicability of this foreign judgment, the Court could not use the original model law and instead turned to a common law doctrine, the *Dicey* Rule, for the recognition of foreign judgments.[17] The UK court determined that the US court did

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15. Here it is important to note the subtle distinction being made between an insolvency proceeding and an insolvency-related judgment. For example, when the original bankruptcy case in *Rubin* was opened in the US under Chapter 11 to reorganize TCT, that action is a bankruptcy proceeding. *Rubin*, [2012] UKSC 46, [60]. When the representatives wished to claw back payments made from TCT to Roman and Eurofinance SA, the representatives opened a distinct case under the umbrella of the larger insolvency proceeding. *Id.* [62]. This was the adversary proceeding that resulted in an insolvency-related judgment. Brill *supra* note 2, at 96.

16. ML-IRJ, *supra* note 9, pt. 2, ¶ 2 ("The work on this topic had its origin, in part, in certain judicial decisions . . ."); Dawson, *supra* note 1, at 684-85; Metreveli, *supra* note 11, at 317; Pottow, *supra* note 7, 488; Varoon Sachdev, *Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism*, 93 AM BANKR L. J. 343, 372 (2019) ("This rebuke of the narrow English interpretation of Article 21 is a rather remarkable step from a diplomatic working group."); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2282–83 (2000).

17. In *Rubin*, Lord Collins referred to the common law standard as laid out in Rule 43 in *Dicey, Morris & Collins on Conflict of Laws* (15th edn. 2012) as the *Dicey* Rule, so shall this Note. This *Dicey* Rule states:

> A court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases: First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. Second Case—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court. Third Case—If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings. Fourth Case—If the person against whom the judgment was given had before the commencement of the

not have the personal jurisdiction necessary to make a judgment against the UK parties, Roman and Eurofinance SA, when those parties did not voluntarily submit to the jurisdiction of the Bankruptcy Court of the Southern District of New York (SDNY).[18]

The new model law was designed to be implemented either as a full law, or as a single article "patch" updating a state's existing implementation of the original model law.[19] As of the September 2020, no jurisdiction has adopted the new model law in either form.[20] This Note intends to address the following question: does the ML-IRJ provide a statutory basis to reverse the case law established by *Rubin* in the UK? This Note will demonstrate, through an analysis of the new model law, that a full implementation of the ML-IRJ could potentially, but not definitely, provide such a basis. There is a small risk that a judge rejecting modified-universalism, as Lord Collins did in *Rubin*, will not apply the new model law as designed to fix *Rubin,* leading to another *Dicey* result.[21] Further, this Note will provide suggestions on where the new model law needs further direction or clarification in order to more assuredly bring the UK and other relevant jurisdictions back in line with a modified-universalist approach that UNCITRAL is targeting.[22]

Part I of this Note breaks down key principles of the original model law. Part II will survey judicial decisions in the UK prior to and including *Rubin,* demonstrating a move towards modi-

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> proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

Rubin, [2012] UKSC 46, [7].

18. *Id.* [128].

19. ML-IRJ, *supra* note 9, pt. 2, ¶ 41.

20. It took approximately three years for the ML-CBI to be enacted; therefore, it is still early to make any judgements on the efficacy of new model law. ML-CBI STATUS, *supra* note 7.

21. Pun intended.

22. ML-IRJ, *supra* note 9, pt. 2, ¶ 2 ("Moreover, there was a concern that decisions by foreign courts determining the lack of such explicit authority in the [ML-CBI] for recognition and enforcement of insolvency-related judgments might have been regarded as persuasive authority in those States with legislation based upon Article 8, [ML-CBI], which relates to international effect."); INSOL, UNCITRAL and World Bank, REPORT ON THE 13TH MULTINATIONAL JUDICIAL COLLOQUIUM, ¶ 7 (April 1–2, 2019), https://www.insol.org/library/opendownload/1277.

fied-universalism, which was then pulled back. Part III will explore key components of the new model law and how several of the articles might help reverse the decision in *Rubin*. Part IV will carefully apply an interpretation of the combined full model laws to the facts behind *Rubin* to demonstrate that *Rubin* could be overturned, but that a risk remains that it will not be overturned. Finally, Part V will suggest enhancements to the new model law that will mitigate the risk of it being sliced and diced by a narrow interpretation of the new model law.[23]

I. Modern Cross-Border Insolvency

To understand the work products that UNCITRAL WG V has created with both model laws, it is important to understand the various theories of cross-border insolvency that existed at the time UNCITRAL began its work on insolvency.[24] Once reviewed, the remainder of this section will review key aspects of the original model law most pertinent to *Rubin.*

A. Territorialism to Universalism

The theories behind efforts to improve cross-border insolvency are best described as a continuum with territorialism on one end and universalism on the other.[25] The differences between these theories is centered around the balance of power between the sovereignty of each state and the efficiency of a centrally administered proceeding.[26] There is a general pull towards universalism over time, and while many academics disagree on the best solution for today, those same academics suggest that universalism is the end goal.[27]

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23. Again, pun very much intended.

24. *See* Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 Tul. J. Int'l & Comp. L. 309, 313 (1998).

25. Nigel John Howcroft, *Universal v. Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails*, 8 U. C. Davis Bus. L. J. 366, 369–70 (2008).

26. Berends, *supra* note 24, at 313-14; Lynn M LoPucki, *The Case for Cooperative Territorial in International Bankruptcy*, 98 Mich. L. Rev. 2216, 2217 (2000); Westbrook, *supra* note 16, at 2277.

27. Reinhart Bork, Principles of Cross-Border Insolvency Law, 28 (2017); Brill, *supra* note 2, at 51; Howcraft, *supra* note 25, at 373 (opponents of universalism accept that a universalist approach would be preferable); LoPucki, *supra* note 26, at 2217 ("it is likely that the globalization of business eventually will harmonize the now-divergent debt collection and insolvency

There are generally four defined areas of rules along the continuum: territorialism, cooperative-territorialism, modified-universalism, and universalism.[28] Under territorialism, courts assert control over a debtor's assets within its jurisdiction for the primary benefit of resolving claims from creditors within that jurisdiction.[29] Cooperative-territorialism is a model that increases cooperation between courts in different jurisdictions.[30] In this system, each country is responsible for the assets that it has the "sovereign power to marshal" and where the company's plan is to liquidate, the priority rules in effect would be the local rules.[31] Universalism is generally viewed to be the ideal model.[32] The basic concept of universalism is two-fold. First, the theory holds it is optimal that there be a single proceeding and location to deal with the liquidation or reorganization of a debtor's business.[33] Second, that the debtor's center of its main interests should determine the legal rules in effect for

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systems of the countries of the world, making conditions ripe for universalism."); Westbrook, *supra* note 16, at 2299 ("I have argued that the proper long-term, theoretical solution to the problem of multinational insolvency is universalism, whether or not such a solution is achievable in the foreseeable future.").

28. Howcroft, *supra* note 25, at 369–70. *See also* Brill *supra* note 2, at n.20 (listing several seminal articles on the various models). Additionally, there are offshoots of this continuum as different alternative ideas were espoused in academic papers; however, since the impact of *Rubin* and the new model law arises along the territorialism – universalism continuum, we will limit our discussion here. For examples of other theories see generally Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819 (2007); Edward J. Janger, *Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcies*, 9 BROOK. J. CORP. FIN & COM. L. 85 (2014); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992); Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252 (2000).

29. Westbrook, *supra* note 16, at 2282; Howcroft, *supra* note 25, at 371.

30. Lynn M LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 701 (1999).

31. *Id.* at 743.

32. John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 947 (2005).

33. Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV., 2177, 2178 (2000) (citing John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 HARV. L. REV., 259, 264 (1888) "It is obvious that . . . it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place.").

the insolvency.[34] The main argument against universalism is political; effectively, a single global law is not ready to be agreed upon by the various sovereign states.[35] Modified-universalism is "universalism tempered by a sense of what is practical at the current stage of international legal development."[36] Modified-universalism operates by distinguishing between a single primary proceeding, called a main proceeding, held at a debtor's center of its main interests and one to many secondary proceedings, or non-main proceedings, held in other forums.[37] These secondary forums do not default to accepting the decisions of other jurisdictions without some level of review.[38] While the debate over different solutions is not necessarily over, the path that UNCITRAL set out on with its original model law was one of modified-universalism.[39] One of the major challenges in *Rubin* is how that decision affects not just the UK, but other countries with the original model law.[40]

B. UNCITRAL Model Law on Cross-Border Insolvency

In May 1997, UNCITRAL adopted the text of the Model Law on Cross-Border Insolvency.[41] The ML-CBI is not a collection of substantive rules but instead, systematic or procedural rules[42] with aspirations of comity.[43] In creating the original

34. *Id.*; *see* Westbrook, *supra* note 16, at 2317; UNCITRAL, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE, ¶ 98, U.N. Sales No. V.14-00242 (updated 2013), [hereinafter "Judicial"] ("The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.")

35. Westbrook, *supra* note 16, at 2298.

36. *Id.* at 2299.

37. *Id.* at 2230.

38. Howcroft, *supra* note 25, at 370.

39. *Id.* at 413; Metreveli, *supra* note 11, at 317.

40. *Rubin*, [2012] UKSC 46, [128]; ML-IRJ, *supra* note 9, pt. 2, ¶ 2; ML-CBI, *supra* note 6, pt. 1, art 8, pt. 2, ¶ 106 (harmonizing interpretation).

41. ML-CBI, *supra* note 6, pt. 1, at pmbl.

42. Westbrook, *supra* note 16, at 2279; Judicial, *supra* note 34, ¶ 9.

43. *See also Hilton v. Guyot*, 159 U.S. 113 (1895) ("'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.").

model law, WG V defined four principles: (1) "Access Principle", to allow a foreign representative rapid access to the judicial system; (2) "Recognition Principle", to recognize an insolvency proceeding in another state; (3) "Relief Principle", to provide either interim, automatic or discretionary relief; and (4) "Cooperation Principle", to communicate and to generally recognize court orders from other countries,[44] based on comity. [45] In support of these principles, WG V laid out the specific public policy objectives the original model law should achieve.[46] For this analysis, the principles of "Recognition" and "Relief" are most germane to analyzing the *Rubin* case.

1. The Recognition Principle

This principle defines the process by which courts recognize the foreign proceeding once a foreign representative is granted access.[47] In support of recognition, the ML-CBI makes a distinction between recognizing a foreign main proceeding and a foreign non-main proceeding.[48] The original model law requires

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44. Judicial, *supra* note 34, ¶ 14.

45. Bruce A. Markell, *Infinite Jest: The Otiose Quest for Completeness in Validating Insolvency Judgments*, 93 CHI.-KENT L. REV. 751, 751 - 52 (2018).

46. The Preamble of ML-CBI states:

> The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of: (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; (b) Greater legal certainty for trade and investment; (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) Protection and maximization of the value of the debtor's assets; and (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

ML-CBI, *supra* note 6, pt. 1, at pmbl; Judicial, *supra* note 34, ¶ 15.

47. Berends, *supra* note 24, at 350.

48. Article 2 of ML-CBI states:

> Definitions For the purposes of this Law: (a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or

that a foreign representative must provide certain basic information, or evidence, in order for a foreign proceeding to be recognized.[49] The court is then permitted to presume the documents provided are authentic.[50]

Article 17 of the model law provides courts the power of recognition.[51] The chapeau of this Article makes it clear that

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> supervision by a foreign court, for the purpose of reorganization or liquidation; (b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests; (c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article.

ML-CBI, *supra* note 6, pt. 1, art. 2 (subparagraphs d–f omitted).

49. Article 15 of ML-CBI states:

> Application for recognition of a foreign proceeding: 1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. 2. An application for recognition shall be accompanied by: (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

Id. pt. 1, art. 15 (paragraphs 3 & 4 omitted); *see* Judicial, *supra* note 34, ¶ 41.

50. Article 16 of ML-CBI states:

> Presumptions concerning recognition: 1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume. 2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

ML-CBI, *supra* note 6, pt. 1, art. 16 (paragraph 3 omitted).

51. Judicial, *supra* note 34, ¶ 42.

this Article is not discretionary by its use of "shall."[52] Recognition will be granted if the proceedings, foreign representatives, court, and application materials meet the definitions specified for each in the relevant articles.[53] These articles are meant to expedite recognition.[54] For example, allowing the court to presume the documents provided by the representative are authentic speeds up recognition.[55] This allows the court and foreign representative to move into the relief phase.[56]

2. The Relief Principle

Once recognition has been granted, the next phase is relief where a set of rules automatically go into effect once a foreign main proceeding has been recognized.[57] The specific rules are

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52. Article 17 of ML-CBI states:

> Decision to recognize a foreign proceeding: 1. Subject to article 6, a foreign proceeding shall be recognized if: (a) The foreign proceeding is a proceeding within the meaning of Subparagraph (a) of article 2; (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2; (c) The application meets the requirements of paragraph 2 of article 15; and (d) The application has been submitted to the court referred to in article 4. 2. The foreign proceeding shall be recognized: (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.

ML-CBI, *supra* note 6, pt. 1, art. 17 (paragraphs 3 & 4 omitted).

53. *Id.*

54. *Id.* pt. 2, ¶ 127; Berends, *supra* note 24, at 322.

55. Judicial, *supra* note 34, ¶ 43.

56. The types of relief available includes interim relief; therefore, it is feasible for relief to commence prior to the completion of recognition. The other types of relief available, and relevant for *Rubin*, are automatic and discretionary relief. *Id.* ¶ 144.

57. Article 20 of ML-CBI states:

> Effects of recognition of a foreign main proceeding: 1. Upon recognition of a foreign proceeding that is a foreign main proceeding: (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) Execution

laid out in Article 20 and include an automatic stay.[58] While an automatic stay is a prevalent practice, the model law specifies the rules for the stay.[59] It is important to understand that, while the relief in Article 20 is automatic, such relief is only applied if the foreign proceeding is recognized as a foreign main proceeding.[60]

Article 21 defines additional discretionary relief that is available.[61] First, the court can apply any of the relief that is auto-

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> against the debtor's assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

ML-CBI, *supra* note 6, pt. 1, art. 20 (paragraphs 2–4 omitted).

58. *Id.*
59. Judicial, *supra* note 34, ¶ 145.
60. ML-CBI, *supra* note 6, pt. 1, art. 17.
61. Article 21 of ML-CBI states:

> Relief that may be granted upon recognition of a foreign proceeding: 1. Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including: (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20; (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20; (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20; (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court; (f) Extending relief granted under paragraph 1 of article 19; (g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State. 2. Upon recognition of a foreign proceeding, whether main or nonmain the court may, at the request of

matic for a foreign main proceeding discretionally to a foreign non-main proceeding.[62] Second, the foreign representative can be granted access to conduct investigations and to administer the estate within that jurisdiction.[63] Third, the court can make available any relief that is generally available for insolvency administrators, as defined for that state.[64] These are the specific tools that are granted in the article; however, the original model law also provides that this list is not exhaustive or meant to limit a court in terms of providing discretionary relief.[65] Finally, upon request, the court can grant the power to distribute the assets of the bankruptcy estate, including remitting the assets out of the jurisdiction by the foreign representative.[66]

The powers of relief granted in these Articles is only limited by the condition that the court be satisfied that the interests of local creditors, debtors and other interested parties are adequately protected.[67] This creates an important check on the ac-

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> the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Id. pt. 1, art. 21 (paragraph 3 omitted).

62. *Id.*
63. *Id.*
64. *Id.*
65. Judicial, *supra* note 34, ¶ 169.
66. ML-CBI, *supra* note 6, pt. 1, art. 21.
67. Article 22 of ML-CBI states:

> Protection of creditors and other interested persons 1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. 2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate. 3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief

Id. pt. 1, art. 22.

tivities of the foreign representative and the court by taking into consideration interests of creditors and third parties.[68]

While there is broad assistance available under the available discretionary relief, there is broader additional assistance allowed under Article 7.[69] This article allows a court to aid a foreign representative utilizing any other law of the enacting state.[70] This is another example of the principle of comity embodied in the original model law.[71] This article does not limit the assistance available to only that which is defined in the ML-CBI.[72]

There is important interplay between Articles 21 and 7 to determine if the requested relief is available.[73] Article 21 provides a list of specific discretionary relief available, and therefore, it should be the starting point for any analysis of such relief.[74] If the relief is not specifically mentioned as available discretionary relief in Article 21, the next step is to determine if general "appropriate relief" is available under Article 21(1).[75] If the relief still cannot be supported, then Article 7 opens up general relief under the laws of that jurisdiction.[76] In the US, *In Re Vitro* defined this roadmap; that court looked for the relief in the most specific form first, expanding outwards.[77]

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68. *Id.* pt. 2, ¶ 196.

69. *In re Vitro S.A.B. de CV*, 701 F.3d, 1031, 1056– 57 (2012).

70. Article 7 of ML-CBI states:

> Additional assistance under other laws: Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.

ML-CBI, *supra* note 6, pt. 1, art. 7.

71. *In re Vitro*, 701 F.3d, at 1055– 56.

72. Judicial, *supra* note 34, ¶ 181.

73. *In re Vitro*, 701 F.3d, at 1054 (providing a detailed breakdown and roadmap for the statutory construction and interplay between Articles 21 and 7).

74. *Id.* at 1056.

75. *Id.*

76. *Id.* at 1057; The UK has implemented the Article 8 of the ML-CBI, as such, the *In re Vitro* interpretation is available to the UK Courts, under the concept of promoting "uniformity in [ML-CBI's] application." ML-CBI, *supra* note 6, pt. 1, art. 8.

77. *In re Vitro*, 701 F.3d, at 1053–57.

In summary, the intent of WG V in building the ML-CBI was to create a modified-universalism model law that would provide guidance and suggestions for implementing procedural rules, but not substantive rules, in order to facilitate the efficient distribution of a debtor's estate in liquidation or restructuring.[78] Additionally, the model law would implicitly push for cooperation, or at least comity, between jurisdictions and perhaps drive a consolidation of substantive law in the future.[79] At least that was the concept, but *Rubin* was not in alignment with this goal.[80] Before analyzing that case, it is prudent to set the stage with two key UK Cases that led up to *Rubin*, both more in line with modified-universalism.

II. UK CROSS-BORDER INSOLVENCY

In 2006, the UK enacted legislation based on the ML-CBI dubbed the Cross-Border Insolvency Regulations.[81] Following the enactment of this law, there are two key cases that follow the rationale of modified-universalism. Those cases were followed by *Rubin*, pulling the UK away from modified-universalism.

A. Cambridge Gas

Cambridge Gas Transport Corporation was a shipping venture that was highly leveraged on the New York Bond Market.[82] When shipping rates did not meet expectations, the company lacked the liquidity to make interest payments.[83] The company subsequently filed for Chapter 11 bankruptcy in the SDNY.[84] The complication to this bankruptcy arose out of the corporate structure of the investment, with each of five ships being owned by a holding company, Navigator, which itself was owned by a number of other off-shore corporations, including Cambridge Gas.[85]

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78. Westbrook, *supra* note 16, at 2279.
79. *Id.* at 2299.
80. *Rubin*, [2012] UKSC 46, [1].
81. *Id.*
82. Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings Plc, [2006] UKPC 26, [1] (appeal taken from Isle of Man).
83. *Id.*
84. *Id.*
85. *Id.* [2–3]

In the SDNY Bankruptcy Court, both the debtor and the creditors put forward plans, with the court eventually choosing the creditors' plan.[86] In essence, the creditors' proposal was that they would become the owners of the Navigator holding company. [87] While the court approved the plan, the nature of the corporate structure required the approval of the courts in the Isle of Man.[88] The argument before the court in the Isle of Man, made by Cambridge Gas, the owner of Navigator, was that it did not participate in the bankruptcy proceeding in the US courts and that therefore, those courts did not have the personal jurisdiction necessary to "affect its rights of property in shares" of Navigator.[89]

In the final decision of *Cambridge Gas*, Lord Hoffman of the Privy Council considered that if one considers the US Bankruptcy Court's judgment to be either in personam or in rem, then the US court would not be able to transfer ownership of Navigator from Cambridge Gas to the creditors.[90] Lord Hoffman, however, reasoned that bankruptcy proceedings do "not . . . determine or establish the existence of rights, but . . . provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."[91]

> The ships, registered in Liberia, were owned and managed by a group of Isle of Man companies, each ship owned by a separate subsidiary of a management company and all the shares in the management company held by a holding company, Navigator Holdings plc. . . . Navigator was in turn held through a web of companies incorporated in other offshore jurisdictions, of which it is for present purposes necessary to mention only two: Cambridge Gas Transport Corporation ("Cambridge"), a Cayman company which owns, directly or indirectly, at least 70% of the issued share capital of Navigator, and Vela Energy Holdings Ltd ("Vela"), a Bahamian company which (through an intermediate wholly owned Bahamian subsidiary) owns all the issued share capital in Cambridge.

86. *Id.* [4].
87. *Id.*
88. *Id.* [5–6].
89. *Id.* [7].
90. *Id.* [13].
91. *Id.* [14].

As a result, the US judgment was enforced.[92] Additionally, in *Cambridge Gas*, Lord Hoffman made an argument for supporting modified-universalism based on a tradition of cross-border insolvency cases in the UK.[93] His assertions of the benefits of universalism are in-line with the work of Professor Westbrook, known as one of the most fervent supporters of universalism.[94]

B. HIH Casualty

This case involved a group of Australian insurance companies with assets located in London.[95] HIH Casualty opened insolvency proceedings in Australia.[96] The Australian court requested that the assets available in the UK be remitted to Australia for distribution under the rules of priority in Australia.[97] Again, Lord Hoffman, in support of modified-universalism, stated that "[a]pplicable to this case is the principle of (modified) universalism . . . . That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation."[98] Based on that reasoning, the court held that the assets should be remitted to Australia, regardless of the fact that Australia and UK had different laws regarding the prioritization of creditors.[99]

92. *Id.*

93. *Id.* [16] (noting a cross-border insolvency case from 1764).

94. *Compare id.* ("There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated") *with* Westbrook, *supra* note 16, at 2284 ("virtually all theorists have agreed that bankruptcy requires a single proceeding in which all of the debtor's assets and claims are administered under a single set of rules . . . ")

95. McGrath v. Riddell (In re HIH Cas. and Gen.Ins.Ltd.), [2008] UKHL 21 (appeal taken from Eng.).

96. *Id.* [1].

97. *Id.*; Judicial, *supra* note 34, at 90 (the UK and Australia had different priority rules that governed the assets and creditors in the UK).

98. *In re HIH Cas.*, [2008] UKHL 21, [30].

99. *Id.* [36].

C. Rubin

In 2012, the UK Supreme Court made a ruling in *Rubin* that caused a stir.[100] To understand *Rubin* in full, it is necessary to understand the parties to this bankruptcy. Adrian Roman established a British Virgin Islands company, Eurofinance SA; this entity created a trust in the UK, The Consumers Trust (TCT), with two lawyers and two accountants as trustees and with Eurofinance SA as the beneficiary.[101] The trust's purpose was to create a cash voucher program in the US and Canada. [102] This program worked by allowing vendors to give their consumers a 100% redeemable cash voucher, conditioned on the individual consumer completing certain steps over a three-year period. [103] Merchants would pay TCT 15% of the total purchase price. [104] TCT split that merchant payment as follows: 30% to Eurofinance SA, 30% to Roman and others, with the trust keeping the final 40%.[105] From that 40% TCT would pay a consumer who met all the required steps in the promotion.[106] TCT encountered a problem when the state of Missouri sued TCT for violations of the state consumer protection law and other states started to investigate the company.[107] TCT, at the direction of Roman and Eurofinance SA, sought bankruptcy protection under Chapter 11 in the SDNY as the threat of more lawsuits increased.[108]

A liquidation plan for TCT was submitted to the US Court in September of 2007.[109] Later in 2007, Rubin and Lan brought an adversary proceeding in the US Bankruptcy court to avoid

100. Sachdev, *supra* note 16, at 371 (noting that *Rubin* created an "uproar"); *see also* Markell, *supra* note 45, at 752 ("Rubin came as somewhat of a surprise . . . "); Metreveli, *supra* note 11, at 332 ("The U.K. Supreme Court's holding introduces uncertainty into Cross-Border insolvency proceedings . . . "); Pottow, *supra* note 7, at 484-85 (referring to *Rubin* as a "renegade opinion", and stating "*Rubin* suffered some deservedly withering criticism.").

101. *In re HIH Cas.*, [2008] UKHL 21, [54].

102. *Id.* [55].

103. *Id.* [56].

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* [57–58] (TCT and the Missouri AG settled their case for over $1.8 Million).

108. *Id.* [59].

109. *Id.* [61]; ML-CBI, *supra* note 6, pt. 1, art. 2.

transfers of money from TCT to Eurofinance SA and Roman.[110] Upon Eurofinance SA and Roman's failure to appear in the SDNY Bankruptcy Court, the court ordered a default and summary judgment against them.[111] Rubin and Lan then applied for and received recognition as foreign representatives and the US case as a foreign main proceeding under the UK implementation of the model law.[112]

At the trial level in the UK, after recognizing the US proceedings, Deputy Judge Strauss QC did not enforce the judgment brought to the court by Rubin and Lan, under reasoning echoed by Lord Collins in the final appeal.[113] Strauss specifically noted that the SDNY has established rights in the debtor against a third party; thus, by implication the judgment was in personam.[114] At the first appellate level, however, the court found that, by the nature of an insolvency proceeding, rules around judgments in rem or in personam do not apply, and that the tools of insolvency, such as avoidance against third parties, requires the ability to take collective action for the benefit of creditors.[115] The appellate court found for Rubin and Lan, relying on *HIH Casualty* and *Cambridge Gas*.[116]

At the UK Supreme Court, Lord Collins noted that there are potentially four methods in which a foreign insolvency judgment might be recognized in the UK, but that the first two did not apply to any judgment from a US Court.[117] The third method was the UK implementation of the UNCITRAL Model Law on Cross-Border Insolvency, and the fourth method was via common law.[118] The UK common law *Dicey* Rule provides four

110. *Rubin*, [2012] UKSC 46, [62].
111. *Id.* [64].
112. *Id.* [65–66].
113. *Id.* [66].
114. Rubin v. Eurofinance SA, [2010] EWCA (Civ) 895, [29].
115. *Id.* [61] (referring to bankruptcy proceedings as a *sui generis*).
116. *Id.* [62].
117. *Rubin*, [2012] UKSC 46, [25]–[26] (the first two options are the Insolvency Act of 1986, provides for recognition of judgments from certain countries, which presumably did not include the US and the EC Insolvency Regulation, which requires the Centre of Main Interests to be based in the European Union).
118. *Id.* [27–29].

methods by which a UK court can give effect to a foreign court's judgment in personam.[119]

In analyzing the option of using the ML-CBI to enforce the US judgment, the UK Supreme Court first confirmed that the US bankruptcy action was a foreign main proceeding, including the adversary proceeding specifically related to the avoidance claims.[120] Next, the UK court analyzed if relief was available under ML-CBI Article 21 (discretionary relief).[121] The UK court noted that "recognition and enforcement of foreign judgments is not specifically mentioned" and should not be implied against third parties.[122] The court then determined that relief was not available under Article 21 as that article is "concerned with procedural matters."[123]

In analyzing the possibility of recognizing the avoidance judgment under common law, the UK court first noted the decision in the appeal.[124] The appellate court considered the avoidance action to be an in personam judgment but considered that the "Dicey Rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules."[125] The appellate court employed similar but distinct logic from *Cambridge Gas*, where the court noted that insolvency proceedings were neither in personam or in rem.[126]

Looking at the possibility that insolvency was governed by special rules, Lord Collins noted that it certainly was feasible to determine a category or list of insolvency judgments, including a few examples of lists used in other jurisdictions;[127] however, Lord Collins then balked at the idea that it is for the UK Supreme Court to determine such a list.[128]

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119. Tristan G. Alexrod, *UK Supreme Court Highlights Parochial Roadblocks to Cooperative Crossborder Insolvency in Rubin v. Eurofinance SA*, 31 WIS. INT'L L.J. 818, 834 (2014).

120. *Rubin*, [2012] UKSC 46, [134].

121. *Id.* [136].

122. *Id.* [141–43].

123. *Id.* [143].

124. *Id.* [89–90].

125. *Id.* [90].

126. *Cambridge Gas*, [2006] UKPC 26, [14] (Lord Hoffman noted that if the judgment in question was found to be *in personam* that the outcome of the case would have been different.).

127. *Rubin*, [2012] UKSC 46, [100].

128. *Id.* [93–101], [115–17].

Finally, after determining that there was, as of yet, no special reason given by Parliament for insolvency judgments to ignore the *Dicey* Rule, the court then applied it.[129] Given that *Dicey* Rule applied, the US judgment could not be enforced as a foreign judgment in the UK since Eurofinance SA and Roman did not submit to foreign jurisdiction, in particular the adversary proceeding that resulted in the avoidance judgment as required by the *Dicey* Rule.[130] In ruling against modified-universalism, Lord Collins overturned the rulings in *Cambridge Gas* and HIH *Casualty*.[131]

III. THE UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS

The UNCITRAL Model Law on the Recognition of Insolvency-Related Judgments does not replace the original model law; rather, it is designed to be implemented either as an adjunct to the ML-CBI or as a stand-alone in jurisdictions that have not adopted the original model law.[132] The enactment guide specifically notes that *Rubin* was one of the cases serving as a genesis for the model law.[133] The *Rubin* decision called into question whether courts had authority to grant recognition of avoidance proceedings, or bankruptcy judgments in general, under the original model law.[134]

In 2014, UNCITRAL WG V, dedicated to insolvency, was given the mandate "to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments."[135] WG V developed the model law over the course of eight biannual sessions.[136] A final draft emerged in June 2018 and was adopted by consensus by UNCITRAL in July 2018.[137] The scope of the new model law encompasses insolvency judgments that are issued in a foreign

129. *Id.* [106–7].
130. *Id.* [169].
131. *Id.* [128].
132. ML-IRJ, *supra* note 9, pt. 2, ¶ 41.
133. *Id.* pt. 2, ¶ 2, n.1.
134. *Id.* pt. 2, ¶ 2.
135. UNCITRAL, Rep. of Working Group V (Insolvency Law) on the Work of Its Fifty-Third Session, ¶ 2, U.N. Doc A/CN.9/937 (2018).
136. *See Id.*
137. *Id.* at ¶ 11.

state that are being brought into the enacting state for purpose of enforcement.[138]

WG V defined the object and purpose of the ML-IRJ as "creating greater certainty," to "minimize duplication" while "maximizing value," and "promote cooperation and comity" related to insolvency judgments.[139] In building a new model law that can stand alone, WG V made it possible for jurisdictions to use the ML-IRJ without having first implemented the original model law; however, the WG V, by building a new stand-alone model law, has unfortunately not prescribed how to integrate the ML-IRJ into countries that have adopted the ML-CBI.[140] Hopefully, WG V will see their error and correct it in the future, but until then, this Note will make suggestions on how the key articles can be integrated.

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138. ML-IRJ, *supra* note 9, pt. 1, art. 1.

139. The Preamble of ML-IRJ states:

> 1. The purpose of this Law is: (a) To create greater certainty in regard to rights and remedies for recognition and enforcement of insolvency-related judgments; (b) To avoid the duplication of insolvency proceedings; (c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments; (d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments; (e) To protect and maximize the value of insolvency estates; and (f) Where legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation. 2. This Law is not intended: (a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment; (b) To replace legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency or limit the application of that legislation; (c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or (d) To apply to the judgment commencing the insolvency proceeding.

Id. pt. 1, at pmbl.

140. *Id.* pt. 2.

A. Article X — Recognition of Insolvency-Related Judgment

The clear purpose of Article X[141] is to quickly eliminate the hole Lord Collins created in *Rubin* when he stated that "Articles 21, 25 and 27 are concerned with procedural matters. . . . There is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties."[142] Article X was named specifically so that it might be grafted into existing law where states have already enacted the ML-CBI without going through the process of analyzing and enacting the entirety of the ML-IRJ.[143] As a stopgap measure, it potentially has its uses, but this Note recommends states implement all the language that is specific to recognition of insolvency-related judgments without Article X for two reasons. First, the new model law is a fuller definition of a process that is focused on insolvency-related judgments, and that has the benefit of being more fully considered. Second, implementing Article X with the remainder of the new model law has the potential to create a conflict between the recognition Articles 19 to 22 in the original model law and the recognition Articles 13 and 14 in the new model law.[144]

B. Insolvency-Related Judgment Definition

Both the original model law and the new model law define important terms in Article 2.[145] The new model law defines the very important term "Insolvency-Related Judgment" as excluding any order opening an insolvency proceeding,[146] and one that

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141. Article X of ML-IRJ states:

> Recognition of an insolvency-related judgment under [ML-CBI]: Notwithstanding any prior interpretation to the contrary, the relief available under [insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency] includes recognition and enforcement of a judgment.

Id. pt. 1, art. X.

142. *Rubin*, [2012] UKSC 46, [143].

143. ML-IRJ, *supra* note 9, pt. 2, ¶ 126–27.

144. Buried at the end of the guide to enactment is a statement that Article X should not be implemented with the remainder of the new model law. *Id.* pt. 2, ¶ 127.

145. ML-CBI, *supra* note 6, pt. 1, art. 2; ML-IRJ, *supra* note 9, art. 2.

146. ML-IRJ, *supra* note 9, pt. 1, art. 2 (d)(ii).

is a "consequence of" or "materially associated" to an insolvency proceeding.[147] This is vague language. The guide to enactment does help somewhat by listing non-exhaustive examples "the types of judgment that *might* be considered insolvency-related judgments."[148] Professor Pottow analyzed the creation of the new model law by UNCITRAL and noted three articles that garnered the most interesting discourse.[149] In particular, WG V struggled with the definition of "insolvency-related judgment."[150] Ultimately a broad set of neutral words were agreed upon for this definition.[151] Unfortunately, this vague language has the potential to be quite problematic.

One important thing to note is that the new model law creates the definition for an "Insolvency Representative,"[152] but does not cross-reference this definition with the definition in the original model law of "Foreign Representative."[153] While the definitions of the two representatives are very similar, confusion is created by not addressing how the statutory language should be merged. There are several potential drafting solutions to this issue. [154] For purposes of this Note, it be will as-

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147. *Id.* pt. 1, art. 2 (d)(i).

148. *Id.* pt. 2, ¶ 60.

149. Pottow, *supra* note 7, at 488.

150. *Id.* at 489. ("[W]hen it came time to start filling in the details, dissension arose over the initial definitional question of just what is an insolvency-related judgment. Specifically, discord developed over what actions could and could not be properly deemed insolvency-related.") (Internal quotations omitted).

151. *Id.* at 493.

152. Insolvency Representative "means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding . . . " ML-IRJ, *supra* note 9, pt. 1, art. 2 (b).

153. *Compare* Insolvency Representative "means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding . . . " *Id.* pt. 1, art. 2 (b)., *with* Foreign Representative "means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding . . . " ML-CBI, *supra* note 6, pt. 1, art. 2 (d).

154. One example, would be to adjust Article 13 in the new model law to read: "The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of arti-

sumed that there is a statement of equivalency between the two terms defined in the implementation.

C. Decision to Recognize and Enforce Judgment

Article 13 gets to the heart of recognition and enforcement.[155] This Article lays out a series of checks, starting with verifying that the judgment is enforceable.[156] Next, it must be verified that the representative and judgment is valid.[157] The following step is to confirm if the judgment was brought to the proper court in that jurisdiction.[158] Finally, it must be confirmed that the judgment sought to be recognized does not raise either a public policy exception or any specific exception under article 14.[159] In the new model law, Article 13 performs a similar function to Article 17 in the original model law.[160] Article 17 is a series of checks that move a court towards the recognition of a

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cle 2, subparagraph (b), *a foreign representative within the meaning of [ML-CBI] article 2 subparagraph (d),* or another person entitled to seek recognition and enforcement of the judgment under article 11, paragraph 1;" ML-IRJ, *supra* note 9, pt. 1, art. 13 (addition emphasized).

155. Article 13 of ML-IRJ states:

> Decision to recognize and enforce an insolvency-related judgment: Subject to articles 7 and 14, an insolvency-related judgment shall be recognized and enforced provided: (a) The requirements of article 9 with respect to effect and enforceability are met; (b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2, subparagraph (b), or another person entitled to seek recognition and enforcement of the judgment under article 11, paragraph 1; (c) The application meets the requirements of article 11, paragraph 2; and (d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defense or as an incidental question before such a court.

ML-IRJ, *supra* note 9, pt. 1, art. 13; ML-IRJ, *supra* note 9, pt. 2, ¶ 9.

156. *Id.* pt. 1, art. 13 (a) (referencing that Article 9 must be met).

157. *Id.* pt. 1, art. 13 (b)–(c) (referencing that Article 11 must be met).

158. *Id.* pt. 1, art. 13 (d) (referencing that Article 4 must be met).

159. *Id.* pt. 1, art. 13 (referencing Article 7 and Article 14 must be met).

160. *Compare* ML-IRJ, *supra* note 9, pt. 1, art. 13, *with* ML-CBI, *supra* note 6, pt. 1, art. 17.

foreign proceeding, where Article 13 does the same for an insolvency-related judgment.[161]

Article 14 provides the list of reasons that a court can refuse to enforce an insolvency judgment, and while this list is exhaustive, it is also discretionary.[162] First, as defined in subpar-

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161. The Articles related to recognition in the original model law, art. 15–17, were specifically noted in the original model law's guide to enactment as designed to make "expedited action possible." ML-CBI, *supra* note 6, pt. 2, ¶ 127. Given the similarities between the key recognition provision in the new model law it is logical to assume the new model law was also designed for expediency.

162. Article 14 of ML-IRJ states:

> Grounds to refuse recognition and enforcement of an insolvency-related judgment: In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if: (a) The party against whom the proceeding giving rise to the judgment was instituted: (i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defense to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or (ii) Was notified in this State of the institution of that proceeding in a manner that is incompatible with the rules of this State concerning service of documents; . . . (f) The judgment: (i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and (ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued; (g) The originating court did not satisfy one of the following conditions: (i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued; (ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that

agraph (a), a court can refuse enforcement due to lack of proper notification.[163] Subparagraph (f) details the rights of creditors, debtors, and other interest parties, and that a judgment may be refused if these rights were not adequately protected in the proceeding that led to the judgment.[164]

Subparagraph (g) provides the list of reasons to refuse a judgment based on personal jurisdiction.[165] This subparagraph works counter to the methods of the prior subsections.[166] In this subparagraph, the judgment should not be refused if one of four jurisdictional tests are met, but again, the entirety of Article 14 is discretionary.[167] Per subparagraph (g)(i), the originating court can exercise jurisdiction based on explicit consent, and per subparagraph (g)(ii), after hearing an objection to personal jurisdiction.[168] Article 14(g)(iii) states "the court exercised jurisdiction on a basis on which a court in this state could have exercised jurisdiction."[169] This confounding statement is explained in the guide to enactment as:

> Subparagraph (g)(iii) provides that the originating court's exercise of jurisdiction must be seen as adequate if exercised on a basis on which the receiving Court could have exercised jurisdiction if an analogous dispute had taken place in the receiving State. If the law of the receiving State would have permitted a court to exercise jurisdiction in parallel circumstances, the receiving court cannot refuse recognition and enforcement on the basis that the originating court did not properly exercise jurisdiction.[170]

> law; (iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or (iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State.

Id. pt. 1, art. 14 (omitted subparagraphs (b) through (e) and (h)); ML-IRJ, *supra* note 9, pt. 2, ¶ 98.

163. *Id.* pt. 1, art. 14 (a)–(b).
164. *Id.* pt. 1, art. 14 (f).
165. *Id.* pt. 1, art. 14 (g).
166. *Id.* pt. 2, ¶ 110.
167. *Id.*; Pottow, *supra* note 7, at 499.
168. ML-IRJ, *supra* note 9, pt. 1, art. 14 (g).
169. *Id.*
170. *Id.* pt. 2, ¶ 114.

Article 14(g)(iv) goes even farther and is meant to be another nod to comity.[171] The message of this provision, paraphrased from the guide to enactment, is to allow recognition if the originating court was behaving reasonably, providing that the "exercise was not incompatible [sic.] with the central tenants of procedural fairness."[172] Article 14 is completely new language specific to insolvency-related judgments, and therefore should be implemented in its entirety.

IV. Application of the New Model Law

Before relitigating *Rubin* a few comments on assumptions. [173] Using *In Re Vitro* as a starting point, this Note suggests the analysis the court should use, and the representative should apply for, is to start with the recognition of the foreign proceeding under ML-CBI Article 17. Then the court should determine if relief can be granted using ML-CBI Article 21 narrowly, ML-CBI Article 21 broadly, or ML-CBI Article 7.[174] If the answer to all of these is no—as was the case in *Rubin*[175]—take the judgment through ML-IRJ Article 13; i.e., this is a mandatory recognition if the checks are met, unless there is a specific exclusion listed in Article 14 or there is a public policy basis for not recognizing the insolvency related judgment.[176]

A. Relitigating Rubin with a Broad Interpretation of the New Model Law

In *Rubin*, a judgment was rendered in the US and brought to the UK.[177] David Rubin and Henry Lan applied for and received approval for recognition of the US proceeding as a foreign main proceeding.[178] They were also granted recognition as foreign representatives.[179] Relief was not granted under the

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171. Pottow, *supra* note 7, at 500.
172. ML-IRJ, *supra* note 9, pt. 2, ¶ 115.
173. Since there is no implementation of the new model law, there is no specific case law to guide this analysis.
174. *In re Vitro*, 701 F.3d., at 1053–57.
175. *Rubin*, [2012] UKSC 46.
176. ML-IRJ, *supra* note 9, pt. 1, art. 13.
177. *Rubin*, [2012] UKSC 46, [65].
178. *Id.* [134].
179. *Id.* I will also assume this designation is sufficient to name the respondents in *Rubin* as Insolvency Representatives per ML-IRJ Article 2.

original model law when Article 21, discretionary relief, was employed.[180]

Reviewing the new model law, starting with Article 13, recognition shall be granted, if the conditions of Article 13 are met and there are no exceptions arising from Article 14 or Article 7, the public policy exception.[181] There is no reason to believe that these Article 13 conditions could not be met by *Rubin*.[182] The next step in the analysis is to see if there are any exclusions from Article 14 or Article 7. [183] It is prudent to begin with the more specific list from Article 14.

Rubin's facts quickly eliminate a few of the rationales not to enforce the judgment. There is no evidence that the judgment was obtained by fraud, that the judgment is or would potentially be inconsistent with any other judgments, or that enforcing the judgment would interfere with insolvency proceedings in the UK.[184] In addition, since the insolvency judgment comes from the US, the condition checking if the judgment is recognizable under the ML-CBI is met.[185] Finally, there is a condition related to the protection of the interests of the debtor, creditor and third parties.[186]

One of the key points of the *Rubin* decision is that Eurofinance SA and Roman did not submit to the jurisdiction of the SDNY Bankruptcy Court during the avoidance proceeding. Since these parties did not submit or make an appearance to that court, and since the avoidance judgment was not controlled by the ML-CBI, the UK Supreme Court turned to the *Dicey* Rule and determined that the US Court did not have jurisdiction.[187] Article 14(a)(ii) provides the fix for this particular point in *Rubin,* by allowing for UK service of process.[188] There-

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180. *Rubin*, [2012] UKSC 46.

181. ML-IRJ, *supra* note 9, pt. 1, art. 13.

182. While I cannot say for certain, it is a fair assumption that if the foreign representatives can meet the requirements of the original model law Article 17, that the same representatives would have the capability of meeting the similar requirements of the new model law Article 13.

183. ML-IRJ, *supra* note 9, pt. 1, art. 13.

184. *Id.* pt. 1, art. 14 (b)–(e).

185. *Id.* pt. 1, art. 14 (h).

186. *Id.* pt. 1, art. 14 (f).

187. *Rubin*, [2012] UKSC 46, [169].

188. Metreveli, *supra* note 11, at 342–43 (Note, at the time that this source was created what would become Article 14, was structured as Article 13).

fore, upon relitigating *Rubin*, the court should find that Eurofinance SA and Roman were served properly.

Similar to service of process, Article 14 also addresses the issues in *Rubin*, related to personal jurisdiction, in subparagraph (g).[189] This subparagraph is confusing as it effectively works in reverse to all the other subparagraphs that list the possible exclusion by listing the jurisdictional reasons that are acceptable for enforcement of judgment, as opposed to the other conditions that are reasons not acceptable for enforcement of judgment.[190] There is agreement that this part of the new model law is directly related to *Rubin*, and is meant to overturn that decision.[191] There is some disagreement over which part of the conditions for jurisdiction are specifically meant to overturn *Rubin*.[192] This Note therefore takes it that this article is successful.

B. Relitigating Rubin with a Narrow Interpretation of the New Model Law

While one might like to think the analysis of a reconsidered *Rubin* under the new model law will be a simple and easy matter, some would suggest that the UK Courts do not feel compelled to follow the new model laws just because UNCITRAL designed the model law to overturn *Rubin*.[193] Therefore, this Note will take a more narrow reading to point out three areas in which the new model law could fail to bring about the change that was advertised.[194]

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189. *See* Pottow, *supra* note 7, at 499–503.

190. ML-IRJ, *supra* note 9, pt. 2, ¶ 110.

191. Metreveli, *supra* note 11, at 344–45; Pottow, *supra* note 7, at 499–503 (noting that the language in the guide to enactment related to art. 14 (g) is "a thinly veiled (if veiled at all) rebuke of *Rubin*.").

192. *See* Markell, *supra* note 45, at 758 (noting it is clause iii that is key to *Rubin*.); *but see* Pottow, *supra* note 7, at 500 (highlighting that it was the fourth clause that fixes *Rubin*).

193. Jay Lawrence Westbrook, *Interpretation Internationale*, 87 TEMP. L. REV. 739, 746 (2015) ("In the United Kingdom, alas, we find . . . a judicial attitude that now hovers between hostility and indifference to the Model Law and perhaps to internationalism in general.").

194. ML-IRJ, *supra* note 9, pt. 2, ¶ 2; *see also* Alexrod, *supra* note 119, at 850 ("the idea of overturning long-established, narrow common law in favor of a broad, toothless model law passed through Parliament with the vague goal of international 'cooperation,' and which would require judicial subordination to foreign trial courts, is abhorrent to the Court's institutional motives.").

In *Rubin*, Lord Collins noted that it was not up to judges to make a list of what might be considered an insolvency-related judgment.[195] Unfortunately, when defining a specific list of what is and is not an insolvency-related judgment, WG V punted.[196] The best that WG V could agree upon was a list of examples documented in the guide to enactment.[197] The question becomes: is that sufficient for a future judge revisiting a case with similar facts as *Rubin?* Recalling the position of the UK Supreme Court that judges should not produce a specific list of insolvency-related judgments, this Note recommends this is one area to fix by implementing the model law.

The purpose of the new model law, effected by Article 13, is to push countries to recognize foreign insolvency-related judgments.[198] The challenge in *Rubin* is that the original model law did not account for insolvency-related judgments and therefore, the UK Supreme Court had to turn to domestic case law in order to determine whether or not to enforce the US avoidance judgment.[199] That court used the *Dicey* Rule, which required jurisdiction based on presence, and found that notice and ties to the SDNY were not sufficient.[200] Now that the new model law concerns foreign insolvency-related judgments, the result should be that the *Dicey* rule would not be utilized.[201]

The new model law does, however, specifically address two related jurisdictional issues, the consideration of notice and the consideration of personal jurisdiction.[202] Related to notice, *Rubin*, should be fixed by the statement in Article 14(a)(ii) that the party "was notified . . . in a manner that is incompatible with the rules of this state".[203] According to Professor Pottow, this subparagraph fixes a part of *Rubin*;[204] however, Lia Me-

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195. *Rubin*, [2012] UKSC 46, [129].
196. Pottow, *supra* note 7, at 489.
197. ML-IRJ, *supra* note 9, pt. 2, ¶ 60.
198. *Id.* pt. 1, art. 13.
199. *Rubin*, [2012] UKSC 46, [156].
200. *Id.* [129].
201. This is under the logical presumption that given the four methods of enforcement listed in *Rubin*, if the model law had provided a method to enforce the judgment, then the court would not have undertaken the analysis to review the common law.
202. ML-IRJ, *supra* note 9, pt. 1, art. 14.
203. *Id.*
204. Pottow, *supra* note 7, at 500.

treveli disagrees.[205] The key seems to be the notion "incompatible with the rules of this state." If this phrase encompasses all possible rules applying to both local and foreign judgments, then *Rubin* is fixed; however, if this phrase is interpreted as only the rules that apply to foreign judgments, then the *Dicey* rule may still be in play. The second challenge is that the direct "rebuke" to *Rubin* in Article 14(g)(iv) contains the exact same vague phrase "incompatible with the rules of this state."[206]

It is challenging to come up with language upon which all the parties involved in the process of creating model laws can agree.[207] It is also challenging for judges who must interpret this vague language to follow the path the creators intended.[208] Vagueness creates opportunities for havoc. For example, "the [*Rubin*] opinion went to pains to disparage the vague language of the [ML-CBI] and to note that, rather than provide flexibility to facilitate progressive development of remedies, its text provided a lack of clarity that should be construed strictly."[209]

While the new model likely is very likely to reverse *Rubin*, as this section suggests, there could be a few potential holes. The next section will deal with these areas directly.

V. RECOMMENDATIONS

There are two areas in the new model law that would benefit from reconsideration. One area, if not addressed by the legislature, could result in the *Rubin* decision being left undisturbed despite the express intent of the model law to overturn that decision. The other area, if addressed by UNCITRAL WG V would simplify the effort of the UK in implementing the ML-IRJ and reduce the risk of misinterpretation.[210] This section will begin with the work for UNCITRAL.

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205. Metreveli, *supra* note 11, at 342 ("On its face, the text seems to suggest that rather than deter inconsistent enforcement, [14](a)(ii) codifies the holding in *Rubin*, where American service of process on the British defendant violated both British common law and the Foreign Judgments (Reciprocal Enforcement) Act of 1933.").

206. Pottow, *supra* note 7, at 500.

207. *Id.*, at 489.

208. *See Rubin*, [2012] UKSC 46.

209. Pottow, *supra* note 7, at 485.

210. It would also assist all the countries that have already implemented the original model law, or any country contemplating implementing both the ML-CBI and ML-IRJ in the future.

A. Recommendation 1 — New Guide to Enactment

UNCITRAL WG V did countries that implemented the ML-CBI a disservice by ignoring the need for a guide to enactment in the model law that specifically addresses how to merge the two model laws together.[211] There are only a few places in the new model law that serve as pointers to the original model law,[212] yet there is significant overlap between the two model laws that are not addressed.[213] For example, here are two places of overlap that should have been addressed in the guide to enactment: First, the public policy articles are different, and the difference is only mentioned, but no guidance is given on reconciling the two.[214] Second, the original model law defines a foreign representative, and with a very similar definition, the new model law defines an insolvency representative, yet there is no reconciliation between these two terms.[215]

These two points are not exhaustive and simply demonstrate that there needs to be additional work done on the guide to enactment. This Note recommends that WG V explicitly spell out the merger of the two model laws in the guide to enactment of the new model law.

B. Recommendation 2 — Specific Legislative Intent

Lord Collins highlighted in Rubin that it should not be up to the judiciary to make the law where the legislature can be more specific.[216] Therefore, the second recommendation is to

211. *See* ML-IRJ, *supra* note 9, pt. 2.

212. *See, e.g. Id.* pt. 1, art. 14(h); *Id.* pt. 1, art. X.

213. *Compare* ML-CBI, *supra* note 6, pt. 1, art. 3–8, *with* ML-IRJ, *supra* note 9, pt. 1, art. 3–8 (each of these articles has substantively identical titles, yet the guide to enactment is silent to the question – are both needed?)

214. *Compare* ML-CBI, *supra* note 6, pt. 1, art. 6 ("Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State"), *with* ML-IRJ, *supra* note 9, pt. 1, art. 7 ("Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.") (difference emphasized); ML-IRJ, *supra* note 9, pt. 2, ¶ 74.

215. *Compare* ML-CBI, *supra* note 6, pt. 1, art. 2 (defining foreign representative), *with* ML-IRJ, *supra* note 9, pt. 1, art. 2 (defining insolvency representative).

216. *Rubin*, [2012] UKSC 46, [129] ("The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not

make the intent to overturn Rubin more explicit. There are a few ways within the enactment of this model law that intent can be accomplished. In general, a nod to positive aspects of Cambridge Gas or negative aspects of Rubin, would convey a message to future cases. Parliament could even go further and take language directly from Cambridge Gas, perhaps about insolvency judgements being neither in personam or in rem.[217] There are signals that can be made at the country level that perhaps are not available in the overall construction of the model law.[218]

There are areas that should be addressed with more direct phrasing than provided by the model law. For example, when enacting the model law, Parliament should put together a definitive list of insolvency related judgments directly into the law. Also, the wording of the model law in Article 14 (a) and 14 (g), is vague. The language needs to be more clearly defined as accepting the jurisdictional determination of the US Court in Rubin.

In summary, there is a lot for the UK and other countries to like about the model law; however, in order to be certain that the intent of the model law, to fix Rubin, is ensured, during enactment there needs to be some careful consideration in the language used. In addition, WG V should get to work on improving the enactment guide to better held countries that have already implemented the original model law to add the tools of the new model law to their code.

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areas of the law which have in recent times been left to be developed by judge-made law.").

217. *Cambridge Gas*, [2006] UKPC 26, [14].

218. *See* Pottow, *supra* note 7.

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