

First Asia Region Judicial Roundtable on Insolvency  
UNCITRAL-INSOL International-World Bank

24 March 2014, Hong Kong

The first INSOL International, UNCITRAL and the World Bank Asia Region Judicial Roundtable, comprising 20 judges and justice officials from 13 countries, was held contemporaneously with the first day of the INSOL Hong Kong conference on 24 March 2014. These organizations have sponsored the biennial judicial colloquiums now for 20 years, but the format of the Roundtable is shorter, more geographically focused and, because of the smaller numbers involved, more participative than the Colloquiums. The Roundtable was also attended by several judges from the Caribbean region who had participated in the highly successful Offshore Meeting the previous day.

Delegates considered the changing global economy, development of cross-border trading and complexity of ownership structures and how their systems would be able to respond to the court-users' needs.

The typical dilemma facing Asian judges is a Hong Kong-based group with a holding company registered in one of the international financial centres (a term preferred to "offshore financial centre") with intermediate holding companies listed in Hong Kong and trading operations in the PRC. None of these jurisdictions have adopted the UNCITRAL Model Law on Cross Border Insolvency (MLCBI) and failures of such groups present considerable challenges to the courts involved. The meeting considered the principles underlying the MLCBI and concluded that its principle achievement was to automate the recognition and relief required by the parties without affecting substantive domestic insolvency law. While the MLCBI facilitated procedural economies by reducing the need for secondary proceedings, protecting the local creditors' interests was of greater concern to many delegates. Where a request for recognition and relief came from a jurisdiction offering only liquidation, there are sufficient safeguards enabling local proceedings to be commenced where, for example, there was a domestic commercial operation capable of reorganization under domestic insolvency law. On balance, the MLCBI represented an important tool for the courts to use.

While a minority of jurisdictions represented at the Roundtable have the MLCBI, all delegates encountered cross-border insolvency problems and delegates discussed the bases on which judicial cooperation was offered absent the MLCBI. This varied from specific statutory provisions, inherent jurisdiction under the Common Law and broadly-defined comity, recognizing that a legal entity may have a right of access to the courts simply by registration or the presence of assets. There was no universal agreement as to the most appropriate party to make such application.

The problems arising from multiple proceedings were greater in some jurisdictions than others - while some jurisdictions had found the UNCITRAL Practice Guide dealing with cross-border agreements of considerable value, the majority of judges took the view that while they do not run cases, they are prepared to facilitate office-holders entering into any protocols they consider appropriate. While all jurisdictions represented accept that all creditors, wherever situated, participate pari passu, the meeting considered the problem of managing the tension that arises between "local good" and "common good" where creditors perceive that they will recover more if local proceedings are commenced. There was no consensus as to the criteria for determining when local proceedings should be opened.

A number of countries in the region are currently reforming their restructuring and insolvency laws and several are probably going to adopt the MLCBI or very similar provisions. Delegates were advised of the recent progress made by UNCITRAL Working Group V clarifying the bases on which the presumption of COMI being the state of incorporation could be challenged.

For the final session, the judges joined the main conference for the debate as to whether Asia would benefit from adopting the MLCBI. The debate was carried by a substantial margin but the opponents to the motion put up a strong defence and the proponents did not necessarily have it all their own way.

In conclusion, the Roundtable was considered to be extremely useful by all delegates attending, with requests for follow up meetings.

The next INSOL / UNCITRAL / World Bank Judicial Colloquium will be held in San Francisco on the 21st and 22nd of March 2015 in conjunction with the INSOL International Annual Conference.