



UNCITRAL
UNITED NATIONS COMMISSION
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INSOL INTERNATIONAL
INTERNATIONAL ASSOCIATION
OF RESTRUCTURING,
INSOLVENCY & BANKRUPTCY
PROFESSIONALS

FIFTH MULTINATIONAL JUDICIAL COLLOQUIUM

UNCITRAL - INSOL International

21-23 September 2003

Four Seasons Hotel, Las Vegas

EVALUATION SESSION

Evaluation carried out by:

Hon. Mr. Adolfo Rouillon (Argentina)

Hon. Justice Paul Heath (New Zealand)

Hon. Mr. Justice James Farley (Canada)

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I have the privilege of chairing the evaluation session. I would ask Justice Rouillon to lead off the discussion dealing with yesterday morning's matters and then Justice Heath to deal with the discussion that involved the courts of the USA, Denmark and Canada. I will then discuss judicial capacity building and judicial cooperation in cross-border cases, the discussions of which were so admirably led by Justices Heath and Lightman respectively. Before we do that though, I would say that I was fascinated by this morning's discussion of the teething exercise that was going on concerning the EU Regulations and we look with great anticipation to those being resolved with due despatch. It will require considerable discussion, particularly when 5 professors cannot agree on anything.

Hon. Mr. Adolfo Rouillon (Argentina)

I will try to summarise what we heard on the first morning and reflect some of the reactions of the attendees. In the first part of the session, participants to this Fifth Multinational Judicial Colloquium received information on recent progress of several international initiatives in the insolvency area.

The UNCITRAL Model Law on Cross-Border Insolvency establishes the basic principles judges need for international communication and cooperation in insolvency proceedings. These basic principles are simple but extremely important: *the court shall cooperate to the maximum extent possible, and, the court is entitled to communicate directly, and by any appropriate means, with foreign courts and foreign representatives.*

At present, we have heard that the Model Law on Cross-Border Insolvency has been adopted by various countries: Eritrea, Mexico, Japan, Montenegro, Romania, Poland and South Africa (in South Africa the Model Law has been approved by legislative authorities although some steps are still required for it to be fully operational. Several countries are also considering enacting the Model Law – such as the United Kingdom, Australia and New Zealand - whereas other countries have made different progress preparing projects for the local adoption of the Model Law (this group includes Argentina). In some other cases, the adoption of the Model Law is currently being debated in Parliament or Congress (this is the case in the US and Canada). Finally, other countries have recently enacted insolvency laws including rules for cross-border insolvency following several aspects of the Model Law (this is the case of the new Insolvency Law of Spain of July 2003).

Although the Model Law neither contemplates nor recommends a reciprocity provision, some local bills for enactment of the Model Law, or a few of the already enacted laws adopting it, include reciprocity provisions. The Judicial Colloquium discussed advantages and disadvantages of the inclusion of a reciprocity provision where enacting the Model Law. It was pointed out that even when local legal traditions have strong influence on this issue, having to demonstrate reciprocity could complicate fast and easy cooperation among courts from different jurisdictions. In this way and in principle, reciprocity may contradict a key objective of the Model Law.

The Judges Group received detailed information about significant progress in the work of both UNCITRAL (draft Legislative Guide on Insolvency) and The World Bank (Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, April 2001) in the area of insolvency.

UNCITRAL is developing its Legislative Guide, planning to finalize it soon so as to be able to satisfy a demand for it as a law reform tool. In July 2003, the Commission approved the draft Guide in principle. Final approval by UNCITRAL is expected by June 2004.

The World Bank Principles and Guidelines (April 2001) document is currently subject to a process of review in order to incorporate clarifications and additions based on the lessons and experience of the World Bank's pilot program of assessments, and based on further consultation with the international community. In the coming months, the new

version of the Principles will be circulated for comments before submission to the World Bank's board for final consideration and approval.

The World Bank and UNCITRAL have been working closely to ensure consistency at the level of principles, as consistency in principles is the foundation on which a coherent and uniform set of international standards and methodologies can evolve.

The World Bank Principles and Guidelines consider that strong institutions are crucial to an effective insolvency system. Six of the Principles deal with the judicial implementation of the insolvency system: Principle 27 "The Role of Courts", Principle 28 "Performance Standards of the Court, Qualification and Training of Judges", Principle 29 "Court Organization", Principle 30 "Transparency and Accountability", Principle 31 "Judicial Decision Making and Enforcement", and Principle 32 "Integrity of the Court". It was reported that the most common institutional problems identified as lessons of the pilot program of assessments conducted by the World Bank in 2001-2003 are the result of: inadequate training among judges and insolvency administrators; inefficient case administration practices and procedures; lack of transparency and inconsistency in decision-making; and ineffective regulation to redress problems of corruption and undue influence on the courts, administrators and trustees and other stakeholders.

The WB Principles on Implementation of the Insolvency System are also subject to review at present. In the Judicial Colloquium the current phrasing of the last sentence of Principle 27 – *"The court/tribunal or regulatory authority should be obliged to accept the decision reached by the creditors that a plan be approved or that the debtor be liquidated"* - was observed as being excessively rigid.

The Judges Group was briefed on the Global Judges Forum on Insolvency and Commercial Enforcement held on May 2003 at Pepperdine University (Malibu, California), sponsored by the World Bank to discuss the application of international standards and effective practices related to commercial enforcement and insolvency. This forum, attended by than 100 judges from 65 countries, was designed in part to assist the World Bank in gathering relevant information and to develop strategies for meeting the challenge of institutional capacity building in the coming decade. The Global Judges Forum provided an opportunity for judges to exchange information on their country systems and ideas on ways to promote greater effectiveness and efficiency in court practices and procedures. It is clear from this forum that the cost of training and strengthening the court systems solely in the areas of insolvency and creditor rights will require enormous resources in the years to come. The World Bank hopes to make the Global Judges Forum a regular event.

Attendees to the Global Judges Forum responded to a questionnaire on several judicial aspects of insolvency proceedings. The comparative study of the responses to the questionnaire, including 50 countries of different regions of the world, was reported during the Colloquium, and some conclusions were explained. Several participants in the Colloquium expressed their interest in having access to all relevant information gathered on occasion of the Global Forum, including the contact details of the colleagues that attended both events. It was agreed that a list of names and email addresses of all participants would be available soon.

In connection with the mentioned interest and concern to have access to updated global information on insolvency matters, the World Bank is currently redesigning and will soon

launch the new Global Insolvency Law Database (GILD), through which it will be possible to promote awareness of best practice, foster knowledge sharing and learning, and help build capacity by providing access to resources and research. The GILD will offer on-line access to a wide range of information and data on the world's insolvency laws and systems and provide the international community with a forum for research, dialogue and transparency in the fields of insolvency and debtor-creditor systems. One objective of the GILD is to help bridge the gap in institutional capacity that exists in many developing and emerging economies, by providing a broad base of fundamental training and other materials for local officials, judges and professionals. Participants to the Judicial Colloquium expressed their interest in having a judicial chat room or a judicial page in the new version of the GILD.

To sum up, a great deal of activity is being undertaken by international organizations in the insolvency area. Hopefully this will result in better insolvency legal and institutional frameworks in many countries in the years to come. Although the roles of the courts in insolvency proceedings may be somewhat different throughout various jurisdictions, in almost all of them –if not in all of them– courts are more and more called to assume relevant roles in insolvency cases. As judges, I believe we cannot ignore this global trend. We have to assume that our role in insolvency cases is, or soon will be, significant. We have also to be aware that nowadays insolvency cases tend to involve foreign elements such as foreign creditors, assets located beyond the borders of the country where the process is being conducted, insolvency proceedings commenced simultaneously in respect of companies which are members of a single economic group or of a company with business in various countries. This is the new world of insolvency. We had better be prepared to perform our functions and duties in such a challenging environment in the interconnected world of these times. International organizations such as UNCITRAL, INSOL, The World Bank and others, through their intensive work on Model Laws, Legislative Guides, Principles and Guidelines, databases, judicial workshops and meetings such as this Fifth Multinational Colloquium are providing us with valuable resources to better perform our judicial functions. Judges attending the Fifth Multinational Colloquium are most grateful to its organizers for all the information received and for the chance to get together and discuss important issues of common interest and for this repeated opportunity that we hope will be followed in the years to come. Thank you very much.

Hon. Justice Paul Heath (New Zealand)

It's my privilege to report on the session that took place yesterday afternoon involving the role of the court in reorganizations and chaired by Neil Cooper and in which three distinguished judges from Canada, Denmark and USA participated. The rendering of a judgement is also inappropriate. What is required is a synthesis. There are different approaches. It is necessary to establish how those different approaches can be reconciled in a world in which we have to live together. Some of the themes on which I draw will be other matters discussed at other sessions that touch upon this issue.

The core ideas that lie behind re-organisation procedures are relatively simple. There is a desire to promote maximum returns to creditors by salvaging the business of an entity as a going concern with, in many cases, consequential preservation of employment. The need for participation by creditors along the lines of a democratic model is also a common goal. Many countries will have rules dealing with the majorities needed to meet

threshold requirements, eg., 50% in number, 75% in value, or a mixture of these. So far, there is consistency in the basic issues addressed. With so much in common how can there be such divergence in approach and such different roles required to judges?

The devil lies in the detail, the tasks assigned to a Court having jurisdiction in respect of re-organisations will vary according to the policy choices made by the legislature in the State concerned. Those policy choices affect the degree of specialised knowledge required of judges who sit in those courts.

Policy choices will also reflect economic and societal needs of the State concerned. Ideally those choices are based on social or cultural ideas that have full community support.

The level of supervision exercised by courts differs considerably. We heard from Judge Adler that the US approach involves the exercise of predictive business judgment formulated on the basis of expert evidence put before the Court.

In addition, the bankruptcy court judges in the US apply legal principle to determine whether the form and content of a re-organisation plan meets the statutory criteria. The extent of the business judgment required is reflected in one of the test that is applicable: is the plan feasible? In many jurisdictions that is a matter left to the judgment of the proposed administrator of the plan, but in some jurisdictions the responsibility for determining the economic feasibility, such as in the US, rests ultimately with the court. This raises some key infrastructural issues concerning countries which may wish to make a choice as to where they sit on the line. The ability to have a court dealing with business judgement in this way is very much reliant both on specialist judges and on the specialist bar that serves those judges. Many countries, in particular smaller countries and developing countries, do not have that infrastructure available. They cannot afford or indeed do not have the personnel available to work in that way, so other choices may be required for those States.

Justice Tysoe informed us of the Canadian approach – one of “informal specialisation” through the assignment of specific cases and the exercise of wide discretions by Canadian judges.

Re-organisation procedures often involve a healthy mix of principle and pragmatism. The Canadian approach provides flexibility by permitting the judges to exercise wide discretions to do what is appropriate in the circumstances, having regard to what is proposed in the plan and the interests of creditors. Unlike the US, there is no automatic stay on filing a plan in Canada and the Canadian system uses a monitor to supervise compliance rather than the Court exercising an investigative function.

Judge Melchior then described what might be termed light-handed regulation in Denmark. Danish courts exercise a supervisory role but generally leave the substance of the arrangements primarily to creditors. Danish judges check on the form of proceedings and ratify compositions entered into after the creditors have voted upon it. They do not actively monitor whether a plan has been implemented in accordance with its terms.

The roles of the Judges sitting in the US Bankruptcy Court, a Canadian Court or a Danish Court require different skills. The greater the need for evaluation of matters of business

judgment, the greater the need for judicial understanding of the economics of viable business. Making a predictive assessment of likely economic feasibility of a plan is entirely different in character from the traditional judicial role of determining whether action taken in the past by a person was within a range of options reasonably available to the relevant business person: eg., a task courts are frequently asked to undertake in the context of a negligence claim. There is a need to recognise that different skills are required to make predictive assessments of economic feasibility are included in the reorganization laws of particular countries and to train judges for that purpose.

I complete my remarks by reference to an education point raised in the session that I chaired yesterday afternoon. The point is allied to reorganization issues, but is a world away from the world of insolvency. I focus entirely on cultural and societal needs. An example is the provision of a governance structure in relation to receiving assets from claims made under the Treaty of Waitangi Act 1975 in New Zealand. Recommendations from the Law Commission focus on core concepts in Maori and European terms which have been more readily accepted having been expressed primarily in Maori terms.¹ That is something that could helpfully be considered by the responsible for dealing with developing countries, particularly those with differing cultural backgrounds to the Western countries that from which many of the reorganization statutes come.

Hon. Mr. Justice James Farley (Canada)

Domestic insolvency is a matter which is inherently chaotic. It needs to be dealt with efficiently and effectively otherwise the enterprise and its value will quickly erode. That problem of chaos is even more important to deal with in cross-border international cases. As was pointed out the ability to deal with and cooperate in respect of a cross-border case requires that the judge have an “extra” role over and above that which would be required in a purely domestic insolvency case – namely, that there be an understanding that the proceedings in the home jurisdiction are conducted so that there may be an appreciation of and a harmonization to the extent possible with the proceeding in the foreign jurisdiction. There usually are significant commonalities between insolvency regimes, although as pointed out, different means may be employed to achieve the appropriate end result.

The procedural and substantive law of one jurisdiction may well reflect policy considerations that are different from the policy considerations which govern the insolvency regime in another jurisdiction. A cross-border case which proceeds smoothly with a view towards maximization of value for all concerned will require that the judges in each jurisdiction respect, in the sense of understand and appreciate, the basis of the activities in the other jurisdictions, subject of course to the overriding exception as provided in the UNCITRAL Model Law that relief for assistance need not be given if such would be manifestly against public policy.

Respect, appreciation, harmonization and, of course, adjustment may be required. Two examples illustrate the need for understanding. Firstly, the payments out of an insolvency estate may be governed by different priority rules in the two jurisdictions. Secondly, let

¹New Zealand Law Commission: Treaty of Waitangi claims: addressing the post-settlement phase: An advisory report for Te Puni Kōwhiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court, Study Paper 13. The paper can be found at www.lawcom.govt.nz under “publications” and then “Study Papers”.

us assume that a reorganization plan has been approved by a creditor vote in each jurisdiction, notwithstanding that the continuing management has been shown to have committed some serious offences which the plan absolves. One jurisdiction may provide that a creditor vote is determinative, whereas the other may emphasize that the court must have an overriding concern about illegal activities being pursued.

The judiciary in cross-border cases will find it necessary to be aware of the cultural background, economic considerations and historical setting in the other jurisdiction. This was well illustrated by the Indonesian and New Zealand examples. In the case of Indonesia, the IMF requirements for financial assistance in the late 90s may not have fully appreciated that the infrastructure in place in Indonesia would not support those requirements – the courts and the bar were not then capable of handling the task imposed on them. In the case of New Zealand, its insolvency regime is geared toward the type of economy which has developed; some 98% of its companies have 50 or fewer employees, and therefore the insolvency regime cannot afford to have significant supervision and procedural requirements as a general rule, large cases being the exception.

The demands upon the judiciary in a strictly domestic insolvency are significant. Cross-border cases place even heavier burdens upon a judge's skills. Judges in cross-border cases will have to develop those skills in a variety of ways and on a continuing basis. These methods may include the following:

- initial orientation programs when first appointed, together with ongoing refresher programs;
- more informal but perhaps regularly held discussion and update-meetings amongst judges who would be assigned such cases;
- practice statements as a result of experience in previous cases as to what is expected of counsel so that they may in turn assist the judge;
- ready access to the "literature" on the subject through website identification. It would likely be of great assistance if, say, the UNCITRAL website provided direct and indirect commentary on these topics, including links to other sites such as INSOL, The World Bank, The International Bar Association (Committee J), the International Insolvency Institute and other sites. It should be recognized that each of these organizations is attempting to provide some of the building blocks for an efficient and effective insolvency regime domestically and internationally;
- judicial exchange visits may be of assistance, particularly when the two jurisdictions have a significant commonality in approach, perhaps most readily appreciated in the case of, say, a common law jurisdiction being able to discuss matters with another common law jurisdiction, and similarly civil law to civil law jurisdictions.

It is important to appreciate that the best training is the one which is readily accepted and indeed sought out by those in need of such training - but where such choice is made on a basis of full knowledge. Surveys taken of the judiciary where various choices are presented may provide valuable information as to how to build a training program. It may be helpful to include information as to how the judiciary in other jurisdictions have found that training helpful – for example, there may be a reticence to receive training using experienced practitioners but this reluctance may be somehow overcome if it is appreciated that recently many industrialized jurisdictions have found this to be helpful.

A better-trained judiciary, together with a better-trained insolvency bar and insolvency practitioners will be invaluable in dealing with cross-border cases. Predictability of the result is important for the courts, for counsel, for the parties and for the public generally. It will be appreciated that with increasing international trade and investment, the overall wealth of the world will increase. However, with any economic activity there will be risk – if there is no risk, then economic activity will tend to stagnate for lack of innovation and competition. This risk will result in insolvency in certain instances; that is if the plans do not turn out as well as had been anticipated. The end result is that we should anticipate an ever-increasing volume of insolvencies cross one, or possibly more, borders. How to deal with these on a timely and coordinated basis will increase public confidence in the economic system on a realistic basis.

Courts have traditionally cooperated with each other and there has always been some form of communication between judges and different jurisdictions - essentially by one court giving a ruling and that ruling being forwarded to the other court's jurisdiction. Such an arrangement may have been satisfactory a century or so ago. The letters rogatory example described by Justice Rouillon may have been the limit of technology and satisfactory in the then prevailing economic and legal state, but as indicated, by the time these letters are exchanged, even today, it is likely that the enterprise in question and the insolvency proceedings would have been long dead.

Justice Lightman gave a good example of the necessity to implement judicial cooperation through effective and timely communication so as to deal with the direct conflict between the orders given by him and the U.S. judge. Judge Adler recounted similar difficulties in a U.S. - Canada situation. In the former case, there was no protocol apparently, in the latter there was. In each case it was recognized that it was desirable for the judges on either side to discuss the difficulty that had arisen in such a way that there could be questions, answers and clarifications. This was accomplished by a telephone conference call and a video conference respectively. Counsel were able to participate, although in Justice Lightman's situation, once the judges had indicated what their general concerns were, counsel did not find it necessary to intervene as it appears that a practical solution was obvious to everyone as a result of the initial judicial discussion. Transcripts for an ongoing record were thought helpful.

Canada and the U.S. because of their heavily integrated economies and secondly, because their insolvency regimes are overlaid on a common law background, have had an extensive history of cross-border cases involving judicial communication over the past decade. Given past experience to build on, it is fairly usual practice for counsel to submit a cross-border protocol which incorporates the American Law Institute's Guidelines on Court-to-Court Communications as part of the initial proceedings or shortly thereafter. The ALI Guidelines came about as a result of the NAFTA (U.S., Canada and Mexico) insolvency project and were the result of the joint contributions of practitioners, academics and judges from the U.S. and Canada dealing with the communications guidelines – Mexico because of civil law concerns was not active here.

The procedures adopted in the cases put forward by Justice Lightman and Judge Adler were compatible with these Guidelines. With greater experience with these concepts and procedures it is likely that they will be accepted as "routine". Indeed it seems now that "good fences make good neighbours" as protocols incorporating the ALI Guidelines on communications are approved by the judges and then the cases seem to proceed so

smoothly recently that there is no necessity for communication as the parties conduct themselves appropriately, recognizing that there could be a cross-border communication fairly readily invoked, if necessary.

In Justice Lightman's case, he asked for the consent of all parties to engage in the communication which consent was given, but he wondered about a case where a consent was not given. It would seem to me, personally, that if the parties have a right to participate in the discussion, then it would not be absolutely necessary to get unanimous consent. Indeed, although not in the communications aspect or concept, in the Nakash case interestingly involving the common law jurisdiction of the U.S. and the civil law one of Israel, there was a protocol adopted by both jurisdictions, notwithstanding the vehement objection of the debtor.

While it appears that there is the basis for a template which could be adapted for communication amongst common law jurisdictions, there is a significant impediment with civil law jurisdictions. In essence the concern is that such direct communications are not permitted but rather the inefficient and ineffective letters rogatory method would have to be employed. Here is one of the significant compelling reasons for the UNCITRAL Model Law to be enacted as it directs cooperation between the courts and permits such direct communication, employing up-to-date technology as it advances in development.

It seems that the watchword as to communication should be - would the objective informed observer conclude that the procedure adopted was reasonable and of assistance in all circumstances and did not disadvantage any legitimate interest of a party.

We should all go forward from this valuable judicial colloquium with a dedication to relay on to our judicial colleagues and indeed to our governments the benefit of having a greater understanding and appreciation of the difficulties involved in insolvency matters, particularly those which have international implications and the various progressive methods being developed so that they may be efficiently and effectively handled. This will result in a greater public confidence in the insolvency regime and in the judiciary and have the specific benefit of minimizing loss but rather maximizing value, recycling of scarce resources, including the saving of jobs and the avoidance of social disruption.

I too wish to express my sincere appreciation for the continuing efforts of UNCITRAL and INSOL in sponsoring these judicial colloquia.