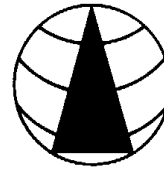




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INSOL INTERNATIONAL
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OF RESTRUCTURING,
INSOLVENCY & BANKRUPTCY
PROFESSIONALS

FOURTH MULTINATIONAL JUDICIAL COLLOQUIUM

UNCITRAL – INSOL International

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EVALUATION SESSION

Evaluation Carried out by:

Hon. Mr. Justice James Farley (Canada)

Lord Peter Millett (England)

Hon. Mr. Adolfo Rouillon (Argentina)

Hon. Mr. Jean Luc Vallens (France)

Hon. Mr. Wisit Wisitsora-At (Thailand)

Hon. Mr. Justice James Farley

It falls to me then to complete the evaluation on judicial education and training together with support therefor. There is a recognised need for judicial education and training on an assessed needs basis so that the programme and its delivery may be clearly to the needs of the local jurisdiction and compatible with that local jurisdiction's budget and any international assistance available.

I would make the general proposition that no one and particularly a judge is immune from the need for education and particularly education on a continuing basis. This proposition has been supported in comments made at this Colloquium whether the judges be from common law, civil law or mixed jurisdictions. I was appointed as a common law judge a dozen years ago from a corporate background. I can confirm that I needed education then and I have continued to pursue education from every available source. In particular Canadian judges have access to educational programmes put on by practitioners (both legal counsel and insolvency practitioners who have a very good grounding in Canada in insolvency matters). Claire Wee in her presentation indicated earlier how important this is when she described the situation where some of the judges in the training programme did not know the difference between shares and bonds. I can assure you that that is not limited to any particular jurisdiction. I have had colleagues in my jurisdiction come up to me and discuss cases, saying: "Isn't that marvellous what

you are doing in the Commercial List" and admitting specifically that they would not know the difference between a share and a bond despite the fact that they are experienced common law judges. So no one in any jurisdiction should feel that there is some particular mystique involved in the level of training and education of any judges who are appointed, with the objective of achieving an appropriate standard.

As discussed this morning, there have been a number of delivery programmes identified. It might well be of assistance for there to be a centralised facility which would identify those programmes which are being delivered in various jurisdictions so that those programmes may be either taken over basically "as is" or modified as required.

Certainly as technology develops, it is very important to know what can be developed, what can be delivered and at what particular cost. Programmes should be developed on a long-term horizon and co-ordinated to avoid wasteful duplication.

Canada has recognised that direct personal programmes are beneficial. I will give you a very substantial example: There is a Canada-China programme for 90 younger Chinese judges a year to come to Montreal to study at the University Law Schools there in both the common law and the civil law. This involves 10 months of intensive study together with multiple exposure to members of the judiciary and of the bar. Another example would be two-way video conferencing. As well there are conferences such as INSOL, which aside from the specialised content, allow for the development of continuing interrelationships and attendant resource access. There must also be developed delivery systems which have an extended shelf life capable of repeated access by judges such as videos, CD-ROMs and internet. Specifically this should be access at times and at remote places convenient to those judges being trained.

The development of any programme requires an assessment through survey and otherwise of the prevailing general level of the knowledge together with the monitoring of results to ensure that what is being delivered is providing value to the recipients, with or without modification. Knowledge cannot be assumed.

Any programme must be adjusted to the local social and cultural parameters. It must be sensitive to those for the jurisdiction and compatible with the caseload demands upon that level of judiciary. The programme must take into account the specific role of the judge involved in insolvency matters in that particular jurisdiction, recognising that most countries do not have specialised bankruptcy courts and recognising that in some jurisdictions the judicial role is more of supervising the reorganisation process, with specific judicial involvement usually restricted to unresolved disputes, whereas in others there is a more hands-on role. The training should match the function of the judge. Also the training as well as any adoption of legislation must be tailored to the local jurisdiction's needs and not merely be the simple export of the generic local model in the generating jurisdiction.

The training should be delivered concentrating on the level of the judiciary which will most benefit from it and the most engaged in the multiple decision making process of the court. Notice should be taken of all technological developments as they come along, ranging from the written bench book to what I would call the loose-leaf updated bench book available on the internet, videos, the World Bank GILD project and the World Bank best practices principles. Of course, there is a need for translation of the materials so that access is not restricted to those judges who have a facility in the English or other major foreign language.

Lastly I would indicate that there must be a co-ordinated training programme. Ideally this would be co-ordinated between the judiciary and those of the insolvency practitioners/counsel who appear in your courts and this needs to be co-ordinated in such a way that each is supportive of the other. There should not be any restriction with respect to judges training judges; there should be the facility for judges to assist in training the practitioners and for the practitioners to assist in training the judges. I would observe that in many of our countries there are professional associations in which judges can join as

liaison members. Those judges can participate in their programmes, both as resource people and as people who enjoy the benefits of the programmes that are being put on.

It is difficult but important to co-ordinate these matters to guard against things being done on an ad hoc basis. Rather it should be a continuing education process and not be restricted to a one shot situation where the judges are educated at one particular time and then never return to further training. Nothing changes like change itself; judges need repeated access to training.

Lord Peter Millett

We commenced the evaluation considering judicial cooperation. We all confirmed our support for facilitating co-operation. Like the bishops, we are all in favour of virtue and against sin. But a number of the judges did express their difficulties, particularly those faced by judges in civil law countries.

The distinction is not between common law and civil law. The difference is between countries which have codified systems of law and countries within the common law tradition which don't have subsystems. And it's the difference of judicial culture. A judge in a codified system will tend to say: "Show me where it says I can do it"; and a judge in an uncoded system will say: "Show me why I can't do it". When I expressed that distinction people have said to me: "That's very odd because the United States and the United Kingdom, which are common law countries, do have statutory powers to co-operate with other countries." That confuses two different things.

We were concerned yesterday primarily with the power to recognise a foreign insolvency administrator and power to allow one's own domestic insolvency administrator to go abroad and make applications to foreign courts, and the need to get rid of unnecessary formalities, proof of foreign laws and so on, which clog up the systems in some areas. But the English and American statutes go very much further than merely empowering our own professionals and recognising foreign professionals. The English Act, for example, authorises the court when lending its assistance to a foreign bankruptcy court, to make orders which it has no power to make in a domestic situation. The Australian court has asked for our assistance, and we've made an order, which neither the Australian nor the English court could have made in a domestic situation. That is a step beyond anything which is authorised by the Model Law. This is a very first tentative step in allowing a degree of co-operation to make our own domestic processes available to foreign courts by allowing recognition and by abolishing formalities. One issue that surfaced was the need for reciprocity. Some countries feel that they can only extend their assistance if there's reciprocity, others don't take that view. One answer to that is to say it's a two-stage process. It must be easier to persuade your legislature to introduce the Model Law on the basis of reciprocity, and then a few years down the line you might say: "Let's extend it even when there's no reciprocity."

I don't think this matters very much even if everyone demands reciprocity. The fact is, once the first steps have been taken, the rest will follow. Mexico and the United Kingdom, for example, have both enacted the Model Law. That means that any other country in the world which has a policy of reciprocity will have Mexico and the United Kingdom as partners in the enterprise. More and more countries will introduce the Model Law even on the basis of reciprocity. The number of countries which adopt the Model Law will grow, and eventually those countries, which have refused to enact the Model Law, will virtually be forced to do so.

Two major problems were touched on. One was the protection of the territoriality of insolvency. Now, many countries do have that view; the United Kingdom and the United States do not. Common law countries believe in the worldwide effects of an insolvency order. This difference in approach reflects not only a difference in culture, but differences based on economic and policy considerations.

There is no escape from the fact that ideas about insolvency differ. The distinction, I think, is between international trading countries (like United States and United Kingdom for example) where the creditors are likely to reside and countries where the assets are being developed and the debtors are more likely to reside. The latter countries are much more likely to insist on the territorial integrity of the insolvency process and the former to insist on the global unity of an insolvency process; the difference between ring fencing the assets and not ring fencing the assets. That cannot be resolved by international convention. It is a reason why it is difficult to harmonise insolvency law. But with increased globalisation of trade and the need to attract foreign investors, I think in the end it is likely that economic and political pressure will compel most countries to subscribe to the global view of insolvency.

Jean Luc Vallens raised an important point when he said one difficulty that he faces is that he simply does not know about foreign insolvency law; what powers the foreign administrator will have, what residual powers the debtor will have, whether the foreign insolvency law ring fences the assets or not. He needs to know a lot more before he can co-operate. We are already making progress in that field. Most of the major insolvency firms have produced booklets for their own staff which contain summaries of the insolvency laws of the major trading nations and other countries with which insolvency practitioners are likely to become involved. I must have at least three of such booklets in my room. If I want to know what Vietnam's Insolvency law is like I can at look it up and get a half page. It is a short summary but I can discover the bare outlines of the insolvency law. The World Bank is engaged on a similar project. I hope that in a few years time there will be no excuse for a judge saying: "I don't know what the foreign insolvency law is." He will be able to find out.

We then turned to the guidelines. We heard a number of criticisms of them. If we took all the criticisms on board we would repeal the lot and have nothing in their place. Most of the criticisms were of the drafting; the main criticism was that the guidelines were too detailed. I suggest that this was probably a misunderstanding. These are not rules, they are not meant to be regulations or rules, they are what they are described as – guidelines. That is to say they are goals; they indicate what the best practice is. They are of course, in every case, subject to the domestic rules of procedure. But they do give a judge a guideline. This is what he should aspire to in so far as the local rules of procedure allow him. It should give him some confidence that is also what his opposite number will be trying to achieve. It would certainly help an English judge to know, if he is asked to co-operate, say, with a judge from Thailand that the Thai judge has the same guidelines and in so as far as he can this is what he will also be trying to achieve.

What if the rules of procedure locally prevent best practice? Well, that depends on the national system. Can you change your rules of procedure? To what extent are the judges masters of their own procedures? In England an individual judge can't change the rules of procedure. They bind him but they are adaptable. They are changed from time to time if they are found to be impractical. They are not changed formally by the judges, but the judges have a huge input into changing them. If the bankruptcy judges agree that particular rule is needed or a particular rule needs modifying then they can ask for and if there's sufficient agreement the rules are usually modified. I don't know what other systems in other countries are like, but rules of procedure are not substantive laws and ought to be capable of modification.

One difficulty that arose when looking at the guidelines lay in the word communication. It soon became apparent that there was a degree of confusion between two entirely different concepts. When we are talking about court to court communication, we are talking about discussions between the judges in very general terms trying to agree on objective, trying to agree on agendas, trying to reschedule hearings and so on. I think everybody agreed that this was a good idea but there should be some guidelines. One needed of course the prior agreement of the parties. There must be transparency. That meant that there should be transcripts available and proper records kept. There should be no possibility of any dispute later as to what one judge in one jurisdiction has said to the other. So, openness, transparency, recording, all that is necessary and the prior agreement to the parties is highly desirable.

When it came to communications with the insolvency professionals, that's a different matter, because the court must at all times maintain its impartiality and its independence of and from the parties and even an insolvency practitioner who will be representing the company. Possibly the company is in a foreign jurisdiction and to a degree he's still a party and one can't deal with him in the absence of the other parties without compromising the impartiality and the independence of the court itself and that must be avoided at all costs.

So, there is a distinction between applications and communications. Of course, emergency procedures need to be in place in every country, particularly in bankruptcy because things move very fast. Sometimes there isn't simply time to get all parties together in order to make an application to the court in the presence of all other parties. Most countries I imagine, certainly United States and United Kingdom, have a possibility of *ex parte* applications where one party applies to the court for an order in the absence of any other competing parties. There are stringent rules in place to protect the position of the absent parties and orders made *ex parte* are of very limited duration. They normally last only until the other parties can be brought together in order to agree or object. There are also very stringent rules of procedure in many countries under which a party who is applying in the absence of any other party is obliged to make full disclosure. If he doesn't make full disclosure then serious penalties can be imposed. All that needs to be provided for by the local rules of procedure, but we must not confuse the need to allow *ex parte* applications to the court with discussions and out of court communications between the court itself and one or more of the parties. That compromises the independence of the court.

We then went on to discuss how to organise joint hearings. James Farley explained in considerable detail that we must not think of this as joint hearings. They are not joint hearings at all but are separate and independent hearings which are carried on in each individual jurisdiction but in the sight and presence electronically of the other court. Instead of sequential independent hearings where the second jurisdiction has to take on board what the first one has done, and then the first has to reconvene in order to find out what the second court has done, they can both be heard together. But they are still independent hearings in which each court maintains its independence and integrity. We can exaggerate the extent to which this is a revolutionary idea. It is merely a step which is made possible by advances in information technology. We will still be having independent hearings, but it is a huge step forward in judicial co-operation.

Hon. Mr. Adolfo Rouillon

The number of cross-border insolvency cases is increasing all over the world. This has been the tendency in the recent past and this will certainly be the tendency in the years to come. We judges have to assume that sooner or later we will be involved in an increasing number of insolvency proceedings with foreign elements.

International commerce is growing; the tendency to globalisation in a common financial relation seems to be irreversible. No matter the size of the company there is a current and wider spread tendency to do business across the national borders. At the same time, we can see the universal concern. In order to avoid the liquidation of insolvent but viable companies there must be a general recognition of the advantages of reorganisation proceedings over liquidations. In this context and in different ways and levels, we recognise the necessity of cross-border, judicial communication and co-operation in order to:

- Gather information about liability's and assets located in foreign countries
- To prevent dissipation of assets
- To prevent fraudulent conduct by the debtor, creditors and third parties

- To maximise the value of assets
- To allow the access and recognition of foreign creditors
- To facilitate the administration of cross-border insolvency proceedings
- To find the best solutions for the reorganisations of the enterprise, and in brief to increase the efficiency, the effectiveness and fairness of all kinds of insolvency proceedings.

Insolvency cases are somewhat chaotic; James Farley discussed this yesterday. My evaluation has been somewhat chaotic due to the fire alarm of this morning! But they are also mainly business problems and as business problems, decisions have to be taken under the pressure of time. Urgency is always present. In cross-border insolvency cases judicial co-operation is important and sensitive. We judges of the 21st Century cannot be indifferent to this necessity. However, and although we are connoisseurs of these needs and persuaded about the peculiarities of communication and co-operation in this special field, we also have to recognise the existence of problems and obstacles for effective co-operation and communication.

How can we overcome these problems? We should be persuaded and we should convince our colleagues about the particulars of the new context where we have to act to its necessities and its challenges. We have to recognise the advantages of fast and direct communication, preserving at the same time the transparency of the process. We have also to take advantage of the extraordinary possibilities of new technical means for communication. We should not invoke cultural or language difficulties as excuses to avoid direct communication. Our legal cultures and our languages may differ but, above all, we do have common problems and the way we think as judges is similar all over the world.

1. In many countries we still do not have an equal legislative framework for judicial co-operation and direct communication among judges in cross-border insolvency cases. This is particularly relevant in civil law countries where the discretion given to judges to operate outside areas of express statutory authorisation is limited.
2. In some way it is also an obstacle that so far, except in a few areas and cases, judges are not used to communicating directly and orally with their colleagues in foreign countries. Direct communication usually raises concerns about ethical questions, mainly the question of how to preserve equality among the parties and transparency of the process.
3. There is the problem of confidence and the fear to act in a different way as we usually do. Judges tend to be somewhat reluctant to changes because we have been trained and we are used to respect the precedence; by nature and indication we tend to be conservatives.
4. We must recognise the existing problems in our respective countries and identify the difficulties in the field of legislation. We should call the attention of the legislators as to the amount of changes in legal rules which are necessary to facilitate and to encourage judicial co-operation and communication.
5. We have to establish relation of confidence among judges of different countries. If we personally meet each other it will be easier to overcome cultural barriers. I am convinced that after knowing other judges from different countries and different legal systems we will realise, in the new context of trust and friendship, that we have more aspects in common than barriers and differences.

We do not live in an ideal environment for cross-border judicial communication yet. Our real world still has numerous problems but in order to overcome the problems we must utilize what we have at hand. In the technical field there are marvellous advances in communication. In the legal field we have the

possibility, I would better say the urgent necessity, of adopting the UNCITRAL Model Law on cross-border insolvency which, a simple and at the same time highly effective way, establishes the basic principles we need. The court shall co-operate to the maximum extent possible and the court is entitled to communicate directly and by any proper means with foreign courts and foreign representatives. We also have the possibility of developing guidelines for judicial co-operation. We analysed some of these guidelines yesterday (perhaps simplifying some guidelines, eliminating others or adding new guidelines but recognising that these guidelines are also helpful tools for judicial co-operation and communication).

In the favour of personal relationship, we have these valuable meetings. They also allow us to meet each other, to exchange ideas and experiences, to know about the difficulties we face and to share our concerns. These meetings should continue and be increased and complemented perhaps with regional forms and with permanent discussions and virtual forums as well.

We have to deepen our understanding and to consolidate our relationships. To face new challenges is not controversial but it is highly exciting; besides we have no choice. We must face the challenges of our present times in the 21st Century, in the field of cross-border judicial co-operation and communication among insolvency judges.

As in many other fields allow me to express these first in my own language: "Mañana Estoy" - this meaning: Now a day's tomorrow is not what tomorrow used to be, today's tomorrow is right now.

Hon. Mr. Jean Luc Vallens

Thank you very much. We go back to the meeting of yesterday afternoon: With one topic to another one, but there are links of course between all these topics. For example, we need well-trained judges to deal with any sophisticated cross-border insolvency as we had the possibility to see during this exciting panel led by Ron Harmer. The panel provided a lot of information about the visibility of new regulation and the limits of such an exercise. It has focused on some mistakes of enactment of the Model Law on cross-border insolvency adopted by UNCITRAL and INSOL a few years ago. Let me express four or five short remarks on these topics.

Firstly, I want to really know if the differences between common law countries and civil law countries is as deep as we saw it before. For the purpose of improving administration of international insolvency, maybe these differences are not so big as we previously saw it. By enacting the Model Law, a common law country as the U.S. system make a small step towards the civil law countries as we heard yesterday afternoon.

Mandatory regulation, as provided by chapter 15, will in my opinion push American judges towards a very restrictive way of dealing with cross-border cases - maybe more than with article section 304 of the U.S. Code. But practitioners will find, with such new chapter of the U.S. Code, very clear rules to deal with cross-border insolvency, which may be more useful than the vague notion of comity.

The interesting lesson of yesterday afternoon is the compatibility of the Model Law on cross-border insolvency with the group of civil law countries. The example of Mexico is very interesting in this respect. The sole negative point is that we probably need a financial crisis to reform this. I'm not sure if that is the best way to do, but anyway, the result is there. If the crisis can be useful to move on and reform the legislation, then maybe we can hope for that.

I could make the same point that can be found in the South African law of last year. It seems possible to associate the Model Law and a bit of reciprocity. It's quite a new approach for me to mix such very different and opposite ideas because Model Law is not a treaty and treaties are based on reciprocity. But it's a very practical way to grant foreign practitioners coming from countries specified in the new regulation recognition and provide for enforcement of foreign orders.

In fact we shall have for every country, if such treatment is applied by other countries, three classes of foreign countries: those without any treaty; those without a treaty and those who are on a specific list adopted by each country to be able to work with the Model Law and cross-border insolvency.

My fourth remark could address some practical aspect. The Model Law looks sometimes like a menu to the lawmakers. There are of course advantages in such solution but limits too. We saw recently a lot of advantages: to grant a better legal settlement to practitioners and to courts acting in insolvency field and to refer a fair resolution of debts and to increase economic benefits. But it is only proposed to the rule makers, like in a shop, if I may say.

As Ron Harmer showed us clearly yesterday afternoon, all the provisions of the Model Law are not in the same shape in all countries enacting the Model Law. Maybe there are some risks to believe that the rules provided for the Model Law on cross-border insolvency have the same sense in all the countries. Practitioners, and courts too, will have to be very careful with such an aspect. Maybe before asking for recognition, it will be necessary to know exactly which kind of provisions coming from the Model Law has been enacted in the country which wants assistance.

And now I would finish by reminding you that at the beginning of our meeting, we wondered how to improve the exchange of information and judicial cooperation among us. The Model Law will be successful without any doubt, if it comes into force by courts that cause them to work together and to be confident together. Of course, such cooperation will be more efficient among well-trained judges with confidence because they will know how to work together.

Parallel works undertaken by UNCITRAL and INSOL during this year and next year, and maybe for two years before us, towards a common insolvency regulation will improve the way of dealing with cross-border insolvency as well.

If we have experience in two years of dealing with foreign proceedings under this new regime, it will be of course easier for us, for our court and for our practitioners to be confident with foreign proceedings because there will be something like very clear examples of dealings and how they work and are effective.

I am at the end of my speech. Thank you.

Hon. Mr. Wisit Wisitsora-At

My responsibility is the same as Jean Luc Vallens as to evaluate the programme on yesterday afternoon. In my point of view, it is clearly seen that one of the good works of the UNCITRAL is the so called the 'UNCITRAL Model Law on Cross-Border Insolvency' which has started to show itself to the world.

We learned from yesterday that many countries are now considering the adoption of the Model Law. Some already passed laws to be essentially enacted in the same way as the Model Law is, and we know that some are still pending the consideration of the parliament. One interesting point is that even though we learned about that fact, it seems that various jurisdictions do not wholly in full adopt the Model Law. We were told that there are countries (e.g. the USA, South Africa, New Zealand, Mexico and Japan) that adopted it with modifications. For example; South Africa adopted the Model Law with the concept of reciprocity. We also learned from Japan that Japan does not explicitly provide for rules on concurrent proceedings if foreign proceedings are inconsistent with Japanese law. We also found that there could be some difficulty in interpreting on some points in bankruptcy when it came to the U.S.

Having learned that, we came to study the hypothetical question put by Ron Harmer, which of course was very difficult indeed. However, we learned that with the new laws we can use those laws to tackle the problems. Although, in some part we would have to go back to apply other legislation like in the case of South Africa that if there is no reciprocity, then the law based on the Model Law does not apply. We may be able to use another piece of legislation to solve the problem.

Still with those complex problems, any delay in implementing the Model Law with or without modification causes a problem in terms of application. If you look back at previous judicial colloquiums we dealt with this type of hypothetical question before and at that time there was no country with the experience of the Model Law. Things were very difficult at the time. With the progress in many countries accepting the Model Law it seems to me that we have come to achieve something. Questions like hypothetical questions put by Ron Harmer seem to be more easily answered.

We note the fact that the legislation endorsing the Model Law in many countries is still different due to modification. Of course, the Model Law is a Model Law. You can pick what you like to become the law in your own country. I believe, this will cause a problem in the future. If we can't keep up and try to maintain the universality of the Model Law, then the problems of application begins to exist.

We also heard that to adopt the Model Law perhaps we should keep the language as it is with experience in terms of legislation. I would think that it is very difficult to do because once the law is proposed to the parliament, the custom and the culture of the country plays a big role and somehow the parliament will change the words as used in this Model Law to become something else.

My thought lastly is that I think we have achieved something with this Model Law. If we can keep our hope on this part and try to solve the thing in the future without large modification from the Model Law, the work for the practitioners and judges when they come to deal with cross-boarder insolvency will be much easier.