

**9th Multinational Judicial Colloquium
UNCITRAL-INSOL-World Bank**

12-13 March 2011, Singapore

Report

Introduction

1. The 9th joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium was held in Singapore on 12-13 March 2011. Over 80 judges and Government officials attended from over 40 States, representing a broad range of practical experience and perspectives, particularly with respect to cross-border insolvency, from diverse legal systems and legal traditions. A significant number of attendees were first time participants at the judicial colloquium.

Optional workshop

2. Following its introduction at the 8th colloquium, the weekend commenced with an optional half-day workshop on cross-border insolvency. This first session provided an introduction to cross-border insolvency and the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), covering the background and reasons for development of the Model Law, a short introduction to the issues it addresses and an update on its use and application.

3. The second session involved judges from different jurisdictions who reviewed the roles and responsibilities of judges dealing with cross-border insolvency cases. They looked, firstly, at how a cross-border case might come before a judge and, in particular, how it might be recognized as having cross-border elements. The second issue to be considered was the procedural steps to be taken in such a case and the challenges that might confront the judge, especially with respect to the possibility of cross-border cooperation. If the UNCITRAL Model Law had been adopted, the judge could resort to a legal framework that supported and encouraged cooperation. If not, the questions to be considered included whether or not the judge could cooperate with foreign counterparts and if so, whether they should do so, the issues that could be coordinated, i.e. procedural or substantive issues, and the practical aspects of cooperation and coordination, such as how the judge could go about reaching out to foreign counterparts, the forms cooperation might take and the safeguards that might be needed. It was noted that the key goal of cooperation was to coordinate proceedings in order to resolve issues effectively and efficiently, with a resulting benefit to all participants. The resources available to assist judges in addressing cross-border cases were noted, including the

UNCITRAL Model Law on Cross-Border Insolvency and its Guide to Enactment,¹ the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation,² the draft judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency (to be finalised in June 2011)³ and the case law abstracts available under the Case Law on UNCITRAL texts system (CLOUT).⁴

The program

4. The Colloquium commenced after lunch on the first day with a keynote address by the Chief Justice Chan Sek Keong of Singapore,. The Chief Justice discussed the situation with respect to insolvency law in Singapore and ASEAN, noting that the member countries included a mix of civil and common law jurisdictions, which were largely unfamiliar with each others insolvency laws. Although there was considerable discussion of trade and commerce issues, insolvency law had not figured in those discussions, notwithstanding its central role in commercial activity. He went on to consider the manner in which the UNCITRAL Model Law was viewed in the region and Singapore's approach to cross-border issues, noting a number of international cases in which their courts had been involved.

5. The first session provided an update on efforts to develop standards and practices to facilitate co-operation in cross-border insolvency cases and examine the lessons learned from recent cross-border cases.

6. That was followed by a session examining the treatment of enterprise groups in insolvency and the solutions that might be available, both domestically and internationally, taking into consideration the economic reality of how the group operated before the onset of insolvency. Since business in both emerging and developed markets is increasingly conducted through groups of enterprises (known as "corporate" or "enterprise groups") that are linked together in various ways, such as through ownership or some form of control, and given that most insolvency laws focus on individual debtors, the onset of insolvency in a group, where some or potentially all members of the group may be affected, raises significant challenges.

7. The second day commenced with two "mock court" sessions based upon hypothetical scenarios, one looking at the issues arising in a domestic insolvency context, the second at issues in a cross-border situation. These sessions identified some of the questions arising in cross-border cases and the solutions available in different jurisdictions to address those issues.

¹ Available online at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html

² Available online at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html

³ A draft of this text is available online at <http://www.uncitral.org/uncitral/commission/sessions/44th.html> as document A/CN.9/732 and addenda 1-3.

⁴ Available online at http://www.uncitral.org/uncitral/en/case_law.html

8. Those sessions were followed by an introduction to the judicial materials being prepared by UNCITRAL to provide guidance on the processes for cross-border recognition, relief and cooperation provided under the UNCITRAL Model Law and parallel break-out workshops for participants to discuss both the judicial materials and other issues raised in the course of the colloquium and to provide any feedback they wished to share. The colloquium closed after reports of the breakout sessions and concluding remarks.

9. The discussion over the two days explored several themes, including cross-border cooperation in general, the role of judges in cross-border cases, dealing with the insolvency of enterprise groups and the UNCITRAL draft judicial materials on the Model Law on Cross-Border Insolvency.

Cooperation in general

10. At the outset there was discussion of how a judge might recognize a case as having a cross-border element. Indicators of a cross-border case might include a foreign place of registration for the debtor making the application for commencement (or the subject of the application where it is made by a creditor); the existence of foreign assets; the size of the case (many such cases are very large); or the evidence accompanying the application, which generally described the debtor and the nature of its business. It was noted that the existence of foreign creditors by itself might not be sufficient to indicate a cross-border element, but that ultimately it would depend on the specific details of the actual case.

11. Where cooperation was required, it was noted that it might be pursued in different ways. One example was through direct communication, but that was not always the desirable approach and there was always a question of whether the foreign judge could or would respond to such communication. Other, more formal means, such as letters of request to the foreign court, sharing of transcripts, and setting out relevant information in court orders, as well as indirect communication through the insolvency representatives might be preferred in some jurisdictions and in cases where, for example, there were language issues or where it was not clear who, in the other jurisdiction, might have the competence to communicate. The importance of the courts' attitude to cooperation was emphasized, as well as the desirability of ensuring that what you as a judge are doing in the case before you meshes with what the judge in the foreign proceedings is doing. Several participants noted that enactment of the UNCITRAL Model Law would provide a framework for cross-border cooperation and simplify how they approached the various related issues.

12. A number of cross-border insolvency cases, including Lehman Brothers, Betcorp,⁵ Rubin,⁶ Manhattan Investment,⁷ Fairfield Sentry⁸, Eurofoods⁹ and MG Rover, were referred to in order to illustrate some of the issues arising and how they had been addressed. It was noted that the majority of cross-border requests for recognition that had been made under the UNCITRAL Model Law in adopting jurisdictions were relatively straight forward, involving only the question of whether the foreign proceedings met the applicable criteria; problematic issues tended to arise mostly in the larger cases. Where the Model Law was not available, however, requests for assistance appeared to be more complicated to address, especially since there was often no legal framework supporting cooperation.

13. One issue that had not yet been addressed in any of the participating jurisdictions related to what would occur where decisions that were the result of coordination between different courts were appealed in the different jurisdictions; the issue was about to be addressed in several cases involving the USA and Canada and the USA and the UK. It was questioned whether it might be possible for the appeal courts to also coordinate their approach to the issues involved. Another issue concerned competing jurisdictions, especially where there were a number of courts involved in a case and you were the judge in the second or third court; what could be done to ensure coordination between multiple jurisdictions. One solution suggested was to adjourn the case until matters were clearer or invite parties from other jurisdictions to provide information to ensure that no irretrievable damage was done between the different proceedings.

Role of judges

14. Several judges indicated that there was limited experience in their jurisdictions with respect to cross-border cooperation. Nevertheless, it was suggested that even where judges had little experience with cross-border cooperation and communication or they were unsure as to the exact extent of their ability to cooperate or communicate with foreign courts, they should be able to generally support streamlining of the proceedings and cooperation by insolvency representatives and practitioners, possibly through a cross-border insolvency agreement. General concerns about how judges might react to cross-border cases involved treatment of local creditors, especially in cases of liquidation; dealing with differences in preferential rights, especially those of

⁵ *Re Betcorp Ltd (in liquidation)*, 400 B.R. 266 at 284 (Bankr. D. Nev 2009) [CLOUT case no. 927]

⁶ *Rubin v Eurofinance SA*, [2009] EWHC 2129 ; on appeal [2010] EWCA CIV 895.

⁷ *Manhattan Investment Fund Limited*, Case no. 00-10922, United States Bankruptcy Court, Southern District of New York (April 2000); case no. 2000/37, High Court of The British Virgin Islands.

⁸ *In re Fairfield Sentry Limited, et al*, Case no. 10-13164, United States Bankruptcy Court, Southern District of New York, 22 July 2010.

⁹ *Re Eurofood IFSC Ltd*, [2006] Ch 508 (ECJ).

employees; and reluctance on the part of the country where assets are located to agree to dilution in favour of the overall benefit of all creditors, wherever located. It was suggested that a detailed study of the Lehman Brothers case could provide useful information on how cooperation could work to the advantage of all stakeholders and participants.

15. Where it became apparent that a case involved cross-border elements, the role of the judge was essentially to react to what was brought before them by the insolvency representative and by counsel, although in some jurisdictions preliminary matters, such as investigation of assets and determination of the location of the centre of main interests (COMI), might require a more active approach. Even if their role was largely reactive, a judge should be aware of the issues raised by cross-border cases and have some idea of the manner in which they could address issues of cooperation and coordination if those issues proved to be relevant i.e. what they could do and how they could do it. In that regard, it was emphasized that judges needed to be aware of the various resources available to them, which would also prove useful to practitioners, particularly in preparing applications to the court. It was noted that cooperation and coordination are not always appropriate or required, depending on what the application was seeking to achieve. If, for example, assistance with realization and reporting on assets was required, there may be no need for cooperation, but if the assistance sought related to recognition and processing of claims, then cooperation might be appropriate.

16. With respect to how judges could cooperate, it was suggested that it would largely occur through counsel, who might indicate whether or not the other court would be prepared to cooperate. Forums like the judicial colloquium helped to identify which countries would support cooperation in these cases and, by providing an opportunity for judges from different jurisdictions to meet, could facilitate cooperation when those judges found themselves on the opposite sides of an actual case. These forums could also facilitate cooperation by enabling judges to share information on different approaches to cross-border cooperation and encouraging them to question and consider what might be possible in their own jurisdictions, as well as improving levels of confidence with respect to cross-border cooperation.

Dealing with enterprise groups

17. The discussion highlighted some of the difficulties encountered with respect to the insolvency of groups and in particular the tension between treating the insolvency of each group member separately or treating the group as a whole in a manner that reflects, for example, the funding and management of the group when it was solvent. The mock court sessions showed that while judges would generally focus on the application before them for commencement

or proceedings for a locally incorporated entity, proceedings in other jurisdictions being ancillary, they would nevertheless try to take a pragmatic view of those other proceedings (especially where they related to other members of the same enterprise group), and seek the most effective course of action. From a jurisdictional point of view, some courts took a broad view and would exercise their jurisdiction where there was an appropriate connection, provided that in so doing they could be effective, for example, with respect to foreign assets. If issues of forum shopping arose or there was evidence that the COMI of the debtor was elsewhere or if the debtor had made an application for commencement of proceedings elsewhere, further consideration would need to be given to how the application was addressed.

18. The issues and solutions addressed in part three of the UNCITRAL Legislative Guide on Insolvency Law were introduced. Some participants advised that, at least with respect to domestic groups, their laws did provide for group members to apply for commencement together, for multiple proceedings to be coordinated and for substantive consolidation in limited circumstances. It was pointed out that in so doing, these jurisdictions provided means for the court to facilitate the treatment of groups, both in the interests of justice and for the convenience of the parties. It was suggested that in very large cases, it was very often necessary to facilitate coordination or consolidation to address the complexity of the case; too much concern was often expressed as to the effect of such measures on creditors, when more attention might be given to their utility in complex cases. Another issue was the appointment of a single or the same insolvency representative to administer a number of group members or the possibility of having a single reorganization plan. Where there were a large number of group members, for example, it could be very cumbersome to appoint a different trustee for each group member and have a very large number of individual reorganization plans.

19. While provisions such as these may be used domestically, there was little in domestic legislation that facilitated the coordinated treatment of multinational groups. It was suggested that while might be possible, domestically, to establish a single court for dealing with group insolvency or jurisdiction for the group in the (federal) State in which the parent was registered, such measures were not available internationally, placing the focus on coordination and cooperation.

20. A further issue discussed related to the treatment of preferential claims across borders, for example, whether a court in country A could recognize the order of priorities applicable in country B and order payment accordingly. In some jurisdictions, this approach would not be possible in liquidation, although it might be possible to remit funds to country B for distribution in accordance with the priorities of that jurisdiction. It might, however, be possible in a number of jurisdictions in reorganization, where there was an agreed plan. It was noted

that there was often tension between what the strict letter of the law provided and what could be achieved through negotiation in reorganization. Cases were cited in which the result achieved differed from what would have occurred had the court applied the law strictly. One situation in which compromise might be desirable concerned the priorities of preferential creditors, e.g. secured creditors. Although those priorities should generally be respected, to do so might, in many cases, make the prospects for reorganization rather bleak. Accordingly, they might need to be weighed against continuing the business, recognizing the rights of employees and finding ways of paying them for their labour in order to preserve going concern value and ultimately provide a better result for all creditors.

UNCITRAL draft judicial materials

21. Feedback provided on the draft judicial materials indicated that there was general support for making them widely available and as to their potential usefulness for both UNCITRAL Model Law and non-Model Law countries, especially where the latter were interacting with Model Law countries. It was felt that in terms of uniform application of the Model Law, issuance of the guidelines by UNCITRAL would assist judges in implementing article 8, which deals with interpretation having regard to the international origin of the text and the need to promote uniformity in its application. Wide availability and ready accessibility of the case law referred to in the guidelines was desirable and it could usefully be organized according to a headnote or by reference to the relevant articles of the Model Law addressed. The guidelines should be updated, preferably by an editorial board or secretariat that included judges, as well as academics and professionals. Maintenance of the current balanced tone was also desirable, and translation of the judgements into various languages was especially important to support wide usage of the materials. It was noted, however, that ensuring a wide representation of decisions might be difficult as not all jurisdictions or judges published their decisions and translation into numerous languages, especially in addition to the six United Nations languages, might be very difficult to facilitate.

22. A suggested addition to the materials was information on how to set up a coordinated hearing. Judges who had engaged in such hearings could provide a brief description of the court-to-court communication involved, which could then be made available for reference by other judges. The information should not be too fact-specific or too detailed. It was questioned whether there was room for contrary views or different interpretations in the judicial materials, to avoid a situation of the first case being decided on a particular issue establishing a precedent or being persuasive simply because it was the first case.