



UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW



INSOL International



SEVENTH MULTINATIONAL JUDICIAL COLLOQUIUM

UNCITRAL – INSOL International – The World Bank

17th & 18th March 2007

CAPE TOWN

EVALUATION SESSION

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At the outset of the Colloquium a brief statement was made regarding the importance of judicial co-operation to ensure the preservation of value and parties rights in insolvency proceedings. The programme then began with an update on UNCITRAL's protocols project on the basis of the report included in the materials. Certain principles were noted from a meeting held in Vienna in October 2006, including a recognition that although protocols are case specific, a common framework could be identified to address procedural and substantive issues that would provide guidance and assistance to practitioners in drafting and judges in considering protocols.

A panel discussion then commenced, with participants addressing aspects of judicial co-operation in a number of different jurisdictions. In the first, a common law jurisdiction soon to adopt the Model Law, it was indicated that currently direct communications are not entertained, any communication being subject to a formal request for assistance to the court. Whether that would change after the adoption of

the Model Law remained to be seen. In a second jurisdiction, it was indicated that most success in cross-border cooperation between courts occurred in the family law area, rather than in commercial matters. Where it did occur in commercial matters, it was pursuant to conventions applicable in those areas.

In the third jurisdiction, we heard that protocols continued to be widely used and accepted, and were recognized by Courts of Appeal in that jurisdiction. Progress had also been made with respect to court-to-court communication with civil law countries where certain creative means had been used to accomplish many of the goals of court-to-court communication and protocols in general.

A speaker from another jurisdiction, which had not adopted the Model Law, indicated that there was certain flexibility in creating a court-to-court type of communication or at least a modification of that with the Judges commission. It was indicated, however, that there could be no direct communication with the insolvency chambers. At the conclusion, the panel received many comments from the judges in the audience ranging from discussion of creative approaches to court-to-court communications to efforts to overcome obstacles to the appropriateness of court-to-court direct communications where one jurisdiction might possibly influence another. One preference was for direct communications to be authorised only after more traditional methods had proved to be ineffective. This view was not shared by some of the other judges who later outlined the benefits of direct court-to-court communications without first exhausting traditional means. In that context, the rules adopted by the United States to implement Chapter 15 were mentioned, those rules addressing some of the concerns raised by judges regarding direct court-to-court communication. It was further stated that direct court-to-court communication enabled certain positions that parties were taking to be clarified, greatly aiding judges in their understanding of the status of the case before them.

A number of Judges expressed the belief that an international convention was needed to address the concerns. The discussion of that topic in the context of development of the Model Law was explained, noting that UNCITRAL and others had adopted the Model Law approach because it was thought to be the most efficient and effective means of available at that time for developing court-to-court communications. It was added that the Model Law really did address many of the concerns if adopted by a particular jurisdiction.

As both a panellist and a participant it seems to me that the principle of judicial co-operation is alive and well. The mechanisms needed to achieve such co-operation that would be both acceptable and consistent with a particular jurisdiction remain an evolving issue.

As a response to the comment that an inappropriate unwanted direct communication may be made, it has been my experience that unless a jurisdiction has adopted the Model Law or otherwise expressed the willingness to accept such communication, no direct communication is attempted and I have not been advised of any contrary experiences. Judicial co-operation, court-to-court communications and protocols present in a context where issues regarding the preservation of value and parties rights in cross-border insolvency are difficult to address. The topics discussed may provide structure, guidance and some suggestions to address these challenges in a timely and efficient manner to achieve the goals of preservation of value and parties rights.

Ian Kawaley

In the afternoon we had two panels that discussed when the restructuring crosses the economic divide and they both gave us an interesting flavour of how the various jurisdictions dealt with cross-border cases. The first panel gave us an example of a cross-border case in which a protocol was established at the outset and, although the protocol contained elaborate provisions facilitating direct telephone contact between the courts of the two jurisdictions involved, those provisions were actually never used in practice. Nevertheless, it was a mechanism that was available and it was indicated that the principle of co-operation was valuable, being set in stone in a protocol at the outset. Examples of issues to be decided in one court involved substantive consolidation and equitable subordination, concepts that

were not known in the second jurisdiction. Accordingly, it was considered to be useful to have those issues decided in the jurisdiction in which the legal concepts were known, with the courts of the second jurisdiction determining the effect of those decisions in its jurisdiction.

The second speaker gave us the prospective from the second jurisdiction and indicated that there was a major challenge in making decisions at an early stage and then realizing later that perhaps unintended consequences had ensued. An example was given of pulling a thread out of your sleeve and discovering that your whole sweater falls apart as an illustration of the difficulties of dealing with cross-border cases and cases literally unravelling. It was indicated that although the second jurisdiction had not yet formally adopted the Model Law, court-to-court communications had received statutory blessings and the spirit of the Model Law was in fact honoured in practice even if it had not formally been adopted.

A further speaker gave the perspective from another jurisdiction where insolvency was governed by legislation dating from 1948. It was indicated that as far as local restructuring regimes were concerned the only way restructuring could really be done was through a scheme of arrangement. And one of the main issues that arose from the perspective of that jurisdiction was how to get locally appointed liquidators recognized overseas. It was suggested that that jurisdiction might benefit from insolvency law that permitted restructurings in a way that is possible under more modern laws.

We then moved on to the second panel to get a flavour of jurisdictions in other parts of the world. The first speaker indicated that the Civil Law position is really very nationalistic. I thought that was interesting because my concept of the history of the Civil Law is of the Roman Empire spreading and taking this comprehensive code across national boundaries and anyone who was Roman was subject to Roman law. Napoleon carried it on in the 19th Century and it then spread through Europe but, interestingly the Civil Law in the modern world of separate nation states does not apparently cope very easily with cross-border situations. Nevertheless, the speaker told us of attempts that are being made to increase the flexibility of bankruptcy law in some of those civil law systems to deal with modern cross-border trends.

The second speaker made a plea for recognition of the importance of insolvency law regimes for helping emerging economies to join the rest of the World. Having insolvency law regimes that allow developing economies, which in the years ahead will be some of the leading economies, to interface with the wider world in an effective way is an important part of economic development and it is a mission that we should all join.

Another speaker indicated that the law of their jurisdiction was presently not equipped to deal with international insolvency. A picture was painted of an insular system in which the concept of co-operation was very difficult because recognition of foreign judgements was only possible if a bi-lateral treaty relationship existed between that jurisdiction and the jurisdiction of the foreign company. INSOL was invited to help promote insolvency law change in that country. A few observations of my own on this general theme of emerging economies and developing insolvency structures. It seems to me that it is not necessarily simply matter of countries being enlightened as to the need for insolvency law reform. It is also a question, to a certain extent, of economic necessity. In countries that supply commodities much in demand on the world market, there may be no pressing need for insolvency law reform as the commodities will be purchased irrespective of that reform. By way of contrast, in other jurisdictions that have absolutely no resources whatsoever, and are very dependant on international business, ways may be found to actually develop mechanisms on the basis of judge-made law, even if not accompanied by insolvency law reform. That may lead, for example, to restructurings that have taken place without statutory sanction at all. In those jurisdictions, the common law has been used to create judicial co-operation frameworks without waiting for the legislators to act. Perhaps from a civil law prospective that might sound like heresy or treason - the idea of judges actually doing things that they don't have statutory authority to do. But while waiting to convert those people who are not yet converted to the ideal of the UNCITRAL Model Law, common law jurisdictions may be able to use judge-made law to fill the gap.

Sarmad Osmany, India

The legal reform and development programme of the World Bank depends upon a number of things, firstly the legal framework of a particular country and then the regulatory framework and finally the institutional framework. With respect to law reform in the area of cross-border insolvency, we heard reservations vis-à-vis the implementation of the Model Law, perhaps because traditionally courts have been rather conceivably. A number of comments focused on this particular aspect and how, in the absence of the implementation of the Model Law into domestic legislation, judges could instruct each other and a protocol could be formulated and what would be the value of a protocol in a court of law. The consensus of opinion seemed to be that perhaps the Model Law needed to be legislated as part of municipal law in developing countries solely for the purpose of attractive foreign investment.

Sir Gavin Lightman

I shall now evaluate on two topics, firstly, alternative dispute resolution and then I shall add a few words on direct communication between judges.

The role of ADR in insolvency was the topic, which attracted the contributions of a number of participants who expressed varying viewpoints. ADR means methods of resolving disputes otherwise than by rulings of the court and the methods addressed were arbitration and mediation. These are totally distinct processes; arbitration is an adversary process leading to a decision on a dispute by an arbitrator instead of the court. Mediation is a process by which a third party, a mediator, attempts to facilitate the achievement of a settlement by the parties. The starting point of the discussion was that it was a role of the court to resolve disputes between the insolvent company and the various creditors and debtors that it had and disputes regarding its property. Where appropriate, mediation and arbitration may have a beneficial role. Mediation, if successful and resulting in a settlement, saves the parties' costs and court time and, most importantly, secures a conclusion of the dispute in a short time. If unsuccessful, it may achieve little if anything and increase the parties' costs and cause delay. The case will still require determination where it is unsettled and arbitration will settle the dispute finally when the arbitration is completed and it secures confidentiality for the parties. It is often a swifter process than court proceedings, but it may be far more expensive because arbitrators tend to be expensive.

The matters discussed included varying practices in the countries of the participants regarding public acceptability of these alternative processes and as to the power of the court to order that disputes proceed to mediation and arbitration and the desirability of exercising that power. The course of directing that disputes go to mediation or arbitration may only be appropriate, it appears, where there are issues effecting a limited number of participants who can be represented before the mediator or the arbitrator. Different approaches have become apparent in regard to the power of the courts of the participants to, first of all, make an order for mediation and arbitration and secondly, where such power exists, make an order against the wishes or without consent of the parties to the dispute. In some jurisdictions there is a deeply ingrained cultural objection to the existence or exercise of any such power of appointment. In others there is a statutory or inherent power to do it, but in many countries there is insistence on other requirements before the court can exercise the power. There is a difference of view with respect to whether that power should be exercised without consent and as to whether or not the judge trying the proceedings or some other sitting judge should be the arbitrator or mediator. In some countries the latter is quite a common practice, in others it is regarded as a fundamentally objectionable.

One advantage put forward for appointing a judge, in particular the judge hearing the case, is that he does not charge, he is free, unlike a professional mediator or arbitrator. On the other side, there is the argument that you get what you pay for, and that the process of mediation or arbitration should be detached from the court process. In the case of mediation in particular, a judge's training prepares him less for facilitating the parties reaching their own solution than enforcing his decision on the parties. The discussion concluded that there was a valuable role for ADR and in particular arbitration and mediation in insolvency, but that it is no substitute or justification for the absence of an efficient, timely and cost

efficient court process for resolving disputes, which is essential in all states to attract international trade and investment.

I turn onto the topic of direct communication and I would like to add a few words to what has been said just now by Judge Gonzalez. In days gone by, the occasions for communications between courts in different countries were rare and they need only be leisurely and letters of request were ample for the purpose. The occasions for communications have increased and the need for urgency requires a reconsideration of this practice. The question has arisen whether the judges in the different jurisdictions can and should speak directly to each other when the occasion for such communication arises. A cultural divide was apparent here in the responses of speakers from Civil Law and Common Law countries to such communications. Speaking generally, Common Law countries have felt able and willing to respond to the change in forms of communication and in response to the needs of commerce and litigation to embrace a practice of direct communication, though subject in practice to various conditions. The Civil Law countries have, on the other hand, speaking generally, found the issue far more difficult. They have deep cultural objections to adopting this course and they require a change in their law to allow judges to act in this way. It may well be that this will be achieved if their countries adopt the UNCITRAL Model Law, which in its normal form specifically provides for this.

The European Regulation, which is based on the Model Law, and the Model Law seek to bridge this divide by including provisions specifically for direct communication. The full impact of these provisions has yet to be worked out. What I think is of some importance is to consider not merely the question of the power to authorize direct communication, but the question of the safeguards which ought to be imposed. There is undoubtedly a very substantial difference in approach between, for example the USA and the United Kingdom. In the USA, first of all, the occasion for such communication is regarded in many ways in insolvency matters as a matter of course. The judge may, if it is thought by him to be expeditious and a method of achieving proper communication and a sensible result, phone up another judge. On the other hand, in the United Kingdom, the general view is that direct communications are an exceptional course, a course of last resort only to be adopted where other conventional means of communication, for example letters, are for any substantial reason inapplicable. I add that that divide may, at the end of the day, turn on the interpretation of the word “reasonably necessary”; that direct communication should be available where reasonably necessary would be interpreted perhaps in some countries much more broadly than in others. The other area of difference is in relation to the relevant safeguards. In the United Kingdom and, I expect in many other Common Law countries, there will be insistence, which appears to me from listening to speakers here, that there be open justice and due process and therefore the parties should be consulted before any such communication takes place, they should be invited to take part in those consultations, for example through a conference call, a tape recording should be made and a transcript made available. The US does not apparently, so we were told, insist on these safeguards in particular where judges wish to discuss with each other matters on procedure and timetables. In Canada, as we have been told, the parties can agree themselves to the judges in cases in parallel jurisdictions talking together privately on their own and agreeing to the terms and formulations of their judgements. In other jurisdictions that would be regarded as fundamentally objectionable.

In a word, the law and practice in this field is in a state of flux and development and there are wide options available to the various countries to follow. It may well be that they will find it further assisted by the authority of appellate judgement in the various jurisdictions on this question. I should only add one caution at the end; excessive enthusiasm in all areas of a judge’s experience must on any basis be curbed. One judge got so intoxicated by the spirit of co-operation and communication that they went on a frolic of their own and turned up without reference to anyone else unannounced in a foreign court where the foreign court was hearing their equivalent of the proceedings for that judge’s own court. This excessive enthusiasm was not appreciated and the judge later left the case.

The lesson for us all is, I think, that all judges have a natural desire to get close to each other, but that urge must be kept under control and within limits.

Willie Seriti, High Court Judge and South African Law Reform Commission

I do not pretend to be an expert in Bankruptcy Law nor do I pretend to have done a lot of cases that deal with this area of the law. Since my appointment as a judge, I have never dealt with any matter involving cross-border insolvency. We do get very few matters dealing with that area of the law. One of the reasons is that we do have provision in our law where the liquidator or trustee with permission of the Master of the High Court can refer a dispute between parties in a liquidation matter to arbitration, it does not necessarily have to go to court in order for that matter to be referred to arbitration and/or mediation.

Secondly the other thing that I would like to point out is that in South Africa we do have an insolvency practitioners association but unfortunately there is no legal framework to control or oversee those practitioners or to which they should belong in order to become insolvency practitioners. Unfortunately the law states that virtually any person who is a fit and proper person can become an insolvency practitioner.

Prior to my appointment to the bench, I was involved in an insolvency practice and was also the co-chairperson of the local organization. We have tried on several occasions to influence the policy makers to recognize the insolvency practice as a profession and regulate it. We went to the extent of even giving the department a draft of the legal framework to control the insolvency practice and to recognize it as a profession. Last time I tried to enquire how far that piece of legislation had progressed I was told that it is already at Bill stage and probably in the coming 18 months or so it may come before parliament. That is where we are now.

As far as the discussions over the past one and half days are concerned, I have made the following notes. We have heard from different speakers that the UNCITRAL Model Law on Cross-border Insolvency is a well thought out and well-drafted document, which can be useful. We also heard that we might improve conditions conducive to foreign investment, which is required particularly in the developing countries. There was also an emerging consensus to encourage more countries to adopt the Model Law and this calls for the adoption of a strategy. In my view one of the methods that can be adopted in order to facilitate the adoption of the Model Law is to invite, to seminars and workshops of this nature, policy makers and law reform agencies from different countries. I don't think that it will serve any purpose if we are trying to get the policy makers to include Model Law in the legislation to invite only judges; we as judges have no power whatsoever to influence the policy makers. There are certain agencies and certain organizations which are in a position to influence the policy makers and I think those are the agencies and organizations that should be invited to seminars and workshops of this nature.

Another organization that I thought might be important in seminars and workshops of this nature is an organization of law reform agencies. There is this type of organization on which most of the southern African countries' law reform agencies are represented and that might be an important organization to invite to seminars and workshops of this nature because firstly, they assist in determining the policies in the different countries and secondly, they also assist in determining what laws and policies to take into account when formulating policies. So it might be an important organization to invite to occasions of this nature, unlike inviting people like me or city judges who have no influence whatsoever on the policy makers.

A view that was expressed by some of the participants was that probably there is a need to discuss an international convention to deal with international cooperation in cross-border insolvencies and I also heard some suggestions that judges should also be invited to that type of discussion. In my view, again, within this type of conference where you are going to deal with the question of how courts and the judges should communicate with each other in order to assist and facilitate cross-border insolvency cases, I think the important organizations and policy makers should be invited, instead of inviting only judges.

Lastly I would also like to mention that I think it is important to try and identify a suitable organization that can host such seminars. For instance, in our case, in my honest opinion, it does not

make sense at all to get the local insolvency practitioners to host the conference. If some of the policy makers and some of the agencies that are in a position to influence the policy makers have been invited, I think we would have achieved much more than we are going to achieve. Therefore I think that if the Department of Justice was invited, those are the people who determine policy, who make law and who, I think, would have benefited from getting first hand information from the participants, rather than them being told by other people what the outcome of this conference was.

Another issue that was discussed yesterday was the question of judicial training. I think judicial training is very important, but it is also very important how it is being organized. In certain jurisdictions, certain judges either rightly or wrongly believe that as a judge you do not require any judicial training. In South Africa we have tried to organize judicial training, and it is still being done but at a very low level. At the moment there is a piece of legislation that Parliament is trying to push through which deals with judicial training. At the same time, when you organize judicial training I think that it is important that the judiciary should be involved right at the beginning and the judges should be the ones who are offering that judicial training. Otherwise, if you end up getting people from outside to lead, particularly the politicians, it might be seen as judicial interference. Judicial training is very critical but then we should try and make certain that when it is organized, the judiciary is involved right at the beginning and I believe it must be done by the judiciary itself in order to preserve the independence of the judiciary.