

## **12<sup>th</sup> Multinational Judicial Colloquium UNCITRAL-INSOL-World Bank**

18-19 March 2017, Sydney

### ***Report***

#### ***Introduction***

1. The 12<sup>th</sup> joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium was held in Sydney on 18-19 March 2017. Over 90 judges and government officials attended from 36 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 participating for the first time.

#### **Day 1**

2. Following a welcome from the co-organizers - UNCITRAL, INSOL International and the World Bank - the program started with a session to introduce cross-border insolvency to those without an extensive knowledge of the subject.

#### ***Session 1: Bases of cross-border cooperation***

3. The first session provided participants with an overview of the characteristics and variety of cross-border cases that are occurring, the traditional approaches to dealing with those cases and the resources available to assist judges and practitioners, including the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), which has now been enacted in 43 States (45 jurisdictions), covering the background and reasons for development of the Model Law and a short introduction to the content of the Model Law. In addition, the resources available to assist judges in their consideration of cross-border insolvency issues were noted, including the Guide to Enactment and Interpretation of the Model Law, the UNCITRAL Practice Guide on Cross-border Insolvency Cooperation (which analyzes cross-border insolvency agreements or protocols), the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective and the case law abstracts available under the Case Law on UNCITRAL Texts (CLOUT) system.<sup>1</sup>

#### ***Session 2: Judicial aspects of cross-border insolvency for emerging and developed economies***

4. The second session addressed key issues faced by adjudicators in cross-border insolvency cases and the resources at their disposal in their own jurisdictions to respond to

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<sup>1</sup> These texts are available from the UNCITRAL website [www.uncitral.org](http://www.uncitral.org) in the 6 United Nations languages.

those issues. In particular, it contrasted developed and emerging economies, both that have and have not enacted the UNCITRAL Model Law.

5. With respect to the manner in which cases arose in different jurisdictions and the number of cases encountered, in one Model Law jurisdiction, it was noted that the cases were typically small and routine, not raising any particular issues and a request for recognition could be resolved in a few hours. Maybe 100 or so cases were received per year. It was suggested that what was needed to deal with these cases was a structured approach based upon identifying who was seeking what relief and the legislative framework within which the application must be considered, as well as the provision of a speedy answer with a reasoned decision, especially because of third party effects. In another jurisdiction which did not have the Model Law, the number of applications for business reorganization had increased dramatically, many of the cases involving enterprise groups based in the jurisdiction, but with cross-border elements because of group members located outside the jurisdiction. Other cross-border cases involved asset tracing and requests for recognition of foreign proceedings. Another jurisdiction pointed to about 15-20 cases per year involving requests for recognition under the Model Law from a variety of other jurisdictions. It was noted that there were few cases originating in that jurisdiction seeking recognition in other States. Another State had recently completed a process of insolvency reform and although it had enacted the Model Law, there was little experience with it, although one case involving concurrent proceedings had been received.

6. The variety of orders typically sought included discretionary relief relating to examination of persons resident in the receiving State, authorization for the foreign representative to administer local assets or appointment of a local representative to do so, application or modification of the stay, and anti-suit injunctions. Areas of complexity encountered included tax and maritime issues, relating particularly to the arrest of ships; recognition and enforcement of judgments other than the judgment commencing the proceedings; the scope of the relief that could be ordered, in particular whether the court could grant relief that was broader than the relief available under the insolvency law of the receiving State (it was noted that some States were limited to ordering the types of relief available to an insolvency representative in a domestic proceeding, while other States took the view that the recognizing court could grant something broader than local law and extend relief to what might be available under the law of the originating State); addressing concurrent proceedings where the case raised issues of COMI (e.g. where recognition of foreign main proceedings was sought, but the majority of the debtor's operations were conducted in the receiving State) or coordination between the concurrent proceedings (e.g. was appropriate for the receiving State to commence a parallel local proceeding in a situation where the COMI had been moved to another jurisdiction to use the insolvency law of that jurisdiction, but there had been little progress in those proceedings); issues of jurisdiction (e.g. was the receiving State the headquarters of the group or of individual members of a group); how to address allegations of fraud in the originating State; and issues of "insolvency tourism" of individual debtors.

7. The need for experienced insolvency practitioners and lawyers to assist the courts in considering these matters was noted, as well as the need to expand judicial experience and expertise in relevant matters; training was regarded as a priority. Where there were

few cross-border cases, it might be difficult for the professionals and the judges to gain the necessary experience. It was observed that the professionals were the innovators, not the judges, but the courts had to know what the boundaries were for themselves and for the professionals. While that might be easier in jurisdictions with a body of highly trained and regulated professionals who could be entrusted with many of the necessary insolvency decisions, it was noted that not all jurisdictions had that resource and that judges in some States were expected to make complex commercial decisions.

8. It was suggested that the internationalization of case law and the ability of courts to refer to those other cases had been of great benefit, particularly with respect to the issue of COMI. Judicial cooperation was an issue of increasing interest. Reference was made to Guidelines developed by the Judicial Insolvency Network, established to help forge bonds and understanding of insolvency processes, and to facilitate communication and cooperation (the JIN Guidelines - available online at [http://www.insol.org/emailer/January\\_2017\\_downloads/doc1a.pdf](http://www.insol.org/emailer/January_2017_downloads/doc1a.pdf)). With respect to joint hearings, it was suggested that the need for them doesn't often arise under the Model Law because it addresses only single entities. Where the need did arise, however, time zone differences were thought to create a potential problem.

### *Session 3: Lessons from recent cases*

9. It was noted that one of the effects of the Model Law had been to galvanize common law judges to recognize what was already available and to synthesize notions of modified universalism in order to solidify common law doctrine. The Model Law provided an organizing structure for dealing with cross-border insolvency, but also an organizing pressure that was reflected in the approach of some jurisdictions that were not enacting States. It was further noted that the international framework of the Model Law had encouraged various kinds of international cooperation, including the formation of the Judicial Insolvency Network and a project to develop principles of restructuring for use in the Asian context.

10. The panel considered several cases from the People's Republic of China (PRC), Australia and Hong Kong.

11. With respect to the PRC, it was suggested that, while in the absence of the Model Law cooperation, communication and comity may be the most important principles between common law jurisdictions, those principles were not available in China. Reciprocity was essential and had been emphasized in recent cases. In one case,<sup>2</sup> recognition of, and assistance for, a PRC insolvency had been sought and granted in the United States, establishing a basis for cases originating in the United States to be recognized and assisted in the PRC. In another case involving Hong Kong, coordination was being sought with the liquidator appointed in Hong Kong. It was noted that the Supreme People's Court of the PRC had established a website to list insolvency filings and make the documents filed electronically available.

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<sup>2</sup> In re Zhejiang Topoint Photovoltaic Co., Ltd. 2015 No. 14-24549, (Bankr. D.N.J. Mar. 12, 2015).

12. In Hong Kong, it was observed that courts were working within the established framework to exploit the tools that are available - which did not include the Model Law. It was suggested that while there was no procedure in the PRC for recognition of foreign liquidators, if the legal representative of the PRC subsidiary was a liquidator, they could exercise powers over the debtor company.

13. The principles for dealing with restructuring in Hong Kong were explained by reference to decisions taken in a number of cases; Hong Kong was a major centre for listing of companies operating in the PRC; the holding companies were incorporated in offshore jurisdictions such as the British Virgin Islands, Cayman or Bermuda with operating entities in PRC. Finance was raised through Hong Kong, so Hong Kong was concerned with restructuring of debt raised outside the PRC, using parallel schemes. Several court decisions suggested that if a company was listed in Hong Kong, that listing provided sufficient connection for courts in Hong Kong to approve a scheme and then recognition of that scheme could be sought in other jurisdictions, such as New York. It was noted that in 2015 Hong Kong, Shanghai and Shenzhen together formed the largest market for raising capital in IPOs, with further expansion of the market in 2016. That suggested, it was observed, that there was likely to be a large increase in the number of PRC companies requiring assistance with restructuring in the future.

14. An Australian case referred to concerned duration of the automatic stay under article 20 of the Model Law in a restructuring.<sup>3</sup> A debtor wanted to relist a case to deal with some issues where the foreign representative had completed its job and was no longer in place. The question to be considered was the effect of the article 20 stay on such an application. A US case had considered the duration of the article 20 stay, concluding that it was coterminous with the proceedings. While that approach might be clear in liquidation, it did not necessarily lead to a clear cut determination in reorganization. The Australian court vacated the article 20 order to allow the debtor to proceed with its application.

#### ***Session 4: Nortel - lessons learnt***

15. The Nortel Networks cases involved proceedings in Canada, the USA and the UK, as well as in France. Assets had been liquidated, raising \$7.3 billion, but the issue that remained unresolved was how to distribute those proceeds. Relevant considerations included that the bulk of the property did not reside in any one jurisdiction because it was intellectual property; there were no territorial assets; Nortel was organized across lines of business, not by jurisdiction; and profits were allocated across the group according to the amount spent in five different locations on research and development. It turned on interpretation of the license agreements and who had owned what. It was noted that academic opinion suggested that a multinational insolvency should lead to a *pro rata* distribution, an approach that was argued by the UK pension funds, but disputed by some creditor groups. In the absence of any agreement to arbitrate and after the failure of several attempts at mediation, a joint hearing was held between the courts in Canada and the USA.

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<sup>3</sup> *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170.

16. A protocol was developed between the parties and agreed by the courts with respect to organization of the joint trial between the courts in Toronto and Delaware, covering allocation of time at trial to avoid argument and to address discovery. Each court had a video screen; witnesses were generally cross-examined in the court in which they appeared, although some were cross-examined online; objections were ruled on by the court in which the objections were made (there was only 1 such ruling); the judges disagreed on what the transfer pricing agreement meant, but agreed that it was not intended to apply to allocation; the courts were independent, but the protocol enabled the judges to talk together and discuss whether they could come to consistent decisions.

17. Lessons learned included that it was key for the judges to be allowed to discuss whether they could come to consistent decisions - direct judicial communication without the parties being present was key for efficiency - and that the protocols were critical. In that regard, it was noted that the JIN was working to develop some standard clauses for protocols. Resolution of the case was facilitated by the common language, similar legal traditions, and the courts being in the same time zones. No conflicting decisions were made. There was some discussion of what would happen if the two judges did disagree, as well as how the process could be handled between common and civil law jurisdictions. It was observed that civil law judges would have difficulty speaking to each other and that a protocol providing for judges to discuss matters with each other might not be efficient as it was likely that all parties, including creditors, would need to approve such communication and be present during it. In response to an observation that the protocol appeared to address matters close to the border between procedure and substance, it was noted that no objection had been raised on that basis.

***Session 5: Breakout groups - the role of judges in considering whether to grant applications for assistance***

18. The last session on Saturday involved delegates working in discussion groups, using the hypothetical below, to consider the role of judges in determining whether it is appropriate to grant applications for assistance from foreign courts and insolvency representatives. Practices vary enormously in both emerging and developed markets, varying from a purely passive role to one in which the judge plays an extremely important role in assisting the parties. Delegates were asked to consider ways in which they could provide assistance to foreign courts and practitioners. The need for prior recognition of foreign proceedings was also to be discussed.

*Hypothetical 1*

*Manufacturer International Limited has gone into an insolvency proceeding in another State in which its head office is domiciled. An insolvency practitioner has been appointed. To keep things simple at this stage, it is a single entity rather than a group.*

*Stage 1. You are advised that the insolvency practitioner through local lawyers intends to make an application to your court to allow him to take possession of assets including an aircraft, real estate and cash at a bank in your jurisdiction. The local lawyers have not*

*made an application of this sort before and informally they enquire as to what other information you would expect to receive before granting such an order.*

*Do you give them a shopping list of what should go in their application or suggest that a more experienced lawyer is instructed?*

*Stage 2. It now transpires that there are local creditors who want to oppose such an order as they feel that they should be paid in full out of local assets before anything goes back to the foreign insolvency practitioner. While the real estate is clearly local, you have noticed that the aircraft is registered in the main jurisdiction. You wonder why no-one has attempted to seize the assets or commence local proceedings, but the lawyers have now prepared their case and the application mentioned in stage 1 is listed for tomorrow. Does your approach to the hearing and the relief sought alter? The application apparently contains information as to the eligibility of foreign creditors to rank for dividends in the main proceedings.*

## **Day 2**

### ***Session 1: Court to court communication***

19. In the first session on Sunday, a panel of judges discussed practical aspects of providing assistance to foreign representatives and their courts in the absence of any treaty obligations, the EU Regulation or adoption of the Model Law. In those circumstances, cooperation and coordination could take place, indirectly through seeking recognition and assistance, through parallel proceedings (e.g. schemes of arrangement in different places), through judge to judge communications (unthinkable in some jurisdictions and rare in others) and joint hearings (also unusual, but providing great scope for use in reorganization, provided the proceedings were carefully coordinated to ensure a speedy and efficient outcome. One case discussed involved a business (Homburg Invest Inc.) involving 100 companies and partnership, with 85% of its assets in the US and Europe. Proceedings commenced only in Canada. It was noted that Canadian insolvency law is a Federal jurisdiction with only one supervising judge, irrespective of the location of assets or applicable law in terms of State law. In those circumstances, the monitor appointed by the court plays a very important role as the eyes and ears of the court, reporting directly to the court and providing information upon which the judge can rely. The case concerned a registered investment fund in the Netherlands, which was subject to investigation and likely subject to licensing cancellation; in the Netherlands it is possible to appoint a silent monitor who has powers over the company and sits on the board. Proceedings were commenced in Canada and the Canadian court issued orders to provide an explanation of the role of the Canadian monitor, to authorize the monitor to speak with the European parties, to organize meetings, and to orchestrate what should happen in order to address Dutch concerns. Although cancellation of the licence was avoided, it was a complex matter with over 60 orders being given and very expensive. It was emphasized that restructuring was a business, in which the monitor played a key role and the court was required to be fully involved and

responsive. Protocols had been used and proven to be very useful; they had included provision for judicial communication.

20. The JIN Guidelines were again discussed. The Guidelines, which reflect the combined views of the participating judges as to best practice, have been adopted by Delaware, Singapore, Bermuda and in the Southern District of New York; other jurisdictions are in the process of adoption. The Guidelines aim to facilitate the efficient and timely coordination of parallel cross-border proceedings and ensure relevant stakeholder interests are protected. The focus is upon issues that will trouble the courts at an early stage. They provide a powerful statement of intent by judges to the business community that judges are prepared to communicate, establish principles as to the way in which such communication should be structured and diminish jurisdictional arbitrage through communication. The default position is that communication should take place in the presence of parties. Guideline 8 deals with joint hearings and modalities.

### *Session 2: Abuse of process*

21. This session focused on the role of the judge in insolvency cases where there appeared to be an abuse of process by one of the parties, including forum shopping, and the techniques that might be employed to find out how to approach those issue in any given case.

22. Forum abuse under the EU Insolvency Regulation was discussed, noting that there was a close connection between forum shopping and abuse in the form of bankruptcy tourism where the COMI of the debtor was moved in order to direct the insolvency case towards one of a small, select number of jurisdictions. Restrictions on such forum shopping have to be balanced with the freedom of establishment in the EU. Revisions to the EU Insolvency Regulation (the recast Regulation)<sup>4</sup> now address the case where COMI has moved within a specified number of months before commencement of insolvency proceedings. It was pointed out that although it was difficult sometimes to distinguish between good and bad forum shopping, the European Court of Justice has said that since forum shopping can create uncertainty, it is generally undesirable. Reference was made to a case in which the court decided the need for certainty prevailed over the desirability of being able to seek a more favourable insolvency regime. The connection between forum shopping and abuse of process related, it was suggested, to the manner in which facts were presented in order to achieve a better result.

23. Another issue discussed related to the use of delaying tactics. The court should examine the motivation for the delay, especially where it seems that the debtor has the money or knows where it is and therefore delay is in their interests; practitioners don't always have funds at their disposal to address delaying tactics. In one case involving a UK insolvency, the UK trustee wanted access to assets they thought were in New Zealand. As the debtor lived in Australia, a stay of the proceedings in New Zealand was sought by the debtor so that the matter could be addressed under relevant Trans-Tasman legislation in

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<sup>4</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

Australia. This seemed to the New Zealand court to be clearly aimed at delay. There were questions of who held certain interests in trusts and whether they were subject to privilege or not; the debtor had also raised questions about the validity of an English bankruptcy order, as well as other questions about the role of the trustee and possible conflicts. The debtor had applied for annulment of the English bankruptcy order; the application had been dismissed and the debtor had appealed. The debtor was seeking to hinder the trustee from getting access to information that was prejudicial to his interests. The case raised public interest questions and questions about the interests of others who may have had an interest in gaining access to the information.

24. Another case involved the operator of a small enterprise in Liberia, who defaulted on a loan, giving reasons related to Ebola. The debtor then sought insolvency relief. In Liberia, Ebola had severely interrupted business activity and seemed to provide a basis for the insolvency relief. The debtor's intention, however, was to avoid insolvency by negotiating with the petitioner. New insolvency legislation in Liberia has included appropriate sanctions for such abuse.

25. Situations where the judge believes there may be abuse of process can be addressed by appointment of an officer who may assist in ascertaining what is going on and report back to the court (an example was given of a case that had involved 97 applications being made over 3 years, resulting in a waste of significant amounts of time before the court appointed an officer to examine what was occurring). Some jurisdictions provided sanctions for lawyers who engaged in this type of behaviour. Other examples of abuse included use of discovery to cause delay and unnecessary expense. This had been addressed by making parties focus on the essentials of the dispute and tailoring orders accordingly. Rule changes had also assisted and some courts could require counsel to cooperate and talk to each other about discovery.

### ***Session 3: Breakout groups – The role of judges in considering the relief to be given in more complex court-to-court applications***

26. This discussion group followed on from the preceding discussion session. In many parts of the world, insolvency proceedings are either avoided altogether by parties or they are not regarded as providing protection for creditors and in some cases debtors due to overt delaying tactics. The result is that the insolvency legislation fails to have the intended result and that the supply of credit on which the economy might grow is stifled. Delegates were invited to discuss the extent to which abuse of process firstly, is recognized within their courts and secondly, the manner in which such abuse is assessed and the sanctions if the court decides that the court is being used improperly. Delegates were also invited to consider where the court should find the dividing line between abuse and the justifiable rights of appeal and review, and the need for a party to have time to prepare, especially in cases of insolvency where time is an important element of returning value to creditors. Judges from courts with guidelines on these issues were invited to share them with participants. Furthermore, should the court on its own initiative identify abuse or simply respond to submissions by one of the parties? If there was time, delegates were invited to

consider the extent to which they were obliged to maintain respect for judgments of other courts both in their own legal system or abroad.

### ***Feedback on the breakout sessions***

27. Various observations were made about the different kinds of abuse encountered and how they might be addressed, bearing in mind that there might often be a fine line between the use of rights (such as the rights of parties to approach the court) and abuse of process. Delay by the debtor was seen as being a key problem. Such delays might be occasioned by unnecessary interlocutory applications, appeals against judgments, persistent failure to comply with court orders or vexatious use of discovery procedures. Abuse might also relate to the proposal of a reorganization plan that was not feasible.

28. Solutions suggested for addressing delay included that judges could provide for timetabling and case management, involving proactive management of the timetable, setting of hard deadlines and access to the judge at short notice, combined with sanctions along the lines of striking out applications if debtors did not comply with orders within specified time limits, or the imposition of fines (which were permissible in some jurisdictions). Where delays were occasioned by appeals, it was possible in some cases for interlocutory orders not to be stayed by the appeal. It was also suggested that timely, reasoned judgments that were well written and argued could help to avoid abuse. Some laws provided that the insolvency procedure had to be completed within a specified time in order to avoid unnecessary delay; others for summary dismissal of vexatious proceedings or criminal charges where the abuse was designed to defeat creditor claims. Where the abuse related to discovery, solutions might include developing rules to make discovery available only on application to the court and not as of right, coupled with a requirement to show the relevance of the discovery sought to the particular case and use of proportionality rules. With respect to reorganization plans, it was suggested the court might use an expert to test the validity of a plan, and use disclosure to identify the types of creditor supporting the proposed arrangement and whether they were insiders friendly to the debtor or had a legitimate interest in the proposed plan.

29. Other types of abuse mentioned included misuse of political influence to obtain certain outcomes before the courts, which could be difficult to address if there was no clear evidence to show that it was abusive; misuse of the insolvency process (e.g. where winding up was used as debt recovery process rather than for its proper purpose); manufactured urgency; misleading the court; improper relations between debtor and some creditors; and lack of transparency as to who was before the court and what their interests actually were (e.g. investment funds trading in the background of the insolvency process). Some of those types of abuse might be addressed by having specialized insolvency judges; using mediation to resolve disputes; appointing an officer of the court to investigate; dealing with applications and issues quickly as they arose; holding hearings in private (e.g. judge's chambers) to anonymize proceedings, especially where there was a threat to a company that was genuinely disputing the debt; provisions for perjury; or even imprisonment for misleading the court.

30. In cases where no local mechanism was available to deal with the insolvency issue in question - e.g. to restructure a bond - forum shopping using the choice of law clauses in the bond to choose a different location might be regarded as good forum shopping.

#### ***Session 4: Secured lending and enforcement of collateral in insolvency***

31. This panel considered the widening gulf between the practices encountered in different jurisdictions and how to balance the rights of secured creditors with the potential for an enhanced outcome for creditors as a whole in collective proceedings without eroding the importance of access to credit. Some research suggested that the amount of finance available was related to the quality of a country's secured transaction and insolvency regimes. At the country level, the evidence examined the level of credit available before and after reform of those regimes and indicated that a greater amount of credit could become available and for longer loan periods after reform.

32. In some jurisdictions, secured creditors were able to exercise their rights over collateral notwithstanding insolvency. In those jurisdictions, the overall approach tended to be very respectful of secured creditor rights and they were left outside the insolvency regime/estate to enforce their collateral, returning any surplus to the insolvency estate. If a secured creditor thought they should participate in the insolvency they could do so, provided they gave up their security. In some of those jurisdictions, however, there had been inroads into the rights of secured creditors, particularly in respect of floating charge holders, to reserve a percentage of the assets for unsecured creditors. There were also trends towards reducing the numbers of priorities, especially government priorities, such as tax and to applying a stay on commencement of insolvency proceedings to secured creditors, in some cases for a specified period of time, unless, under some laws, the secured creditor could show that that would prejudice their interests, especially in reorganization. While there were differences as to the detail of the treatment of secured creditors in reorganization, where their rights were affected their approval was typically required and under some laws, the reorganization plan had to provide that secured creditors would get at least what they would have received in the event of liquidation. It was noted that under that approach there were a number of ways of providing that equivalent value.

#### ***Session 5: Maritime insolvency law***

33. Against the background of an increase in the number of shipping companies facing insolvency, this panel considered the exercise of the rights of secured creditors in maritime cases, including matters of jurisdiction.

34. Reference was made to a number of recent cases concerning the insolvency of shipping lines and the issues that had arisen in the context of recognition under the Model Law and the interaction of the Model Law with maritime law, especially with respect to the treatment of maritime liens. In one jurisdiction, maritime liens were secured rights that could be enforced in liquidation, but not in reorganization. Problems had occurred in the cross-border context, where recognition of proceedings commenced in that jurisdiction had been sought in a number of different foreign jurisdictions in order to prevent the arrest of

ships entering foreign ports, with different results. This became particularly problematic where the ships had deteriorating cargoes, but couldn't enter the foreign ports because of the likelihood of arrest.

35. From the maritime law point of view, maritime claims for supply of services and maritime liens were inchoate rights and only enforceable when a ship came into port. The maritime lien supplanted changes of ownership and mortgages and rose above an ordinary right. However, these issues were not addressed in the Model Law; it was suggested that there was nothing in the Model Law that would justify stripping local creditors of their rights by virtue of recognition of foreign proceedings, especially in the light of article 22 and the requirement that creditor interests be protected in ordering relief. Several cases had considered how to accommodate such liens under the Model Law regime, particularly where the lien related to protection of crew wages.

36. One jurisdiction had addressed the issue by requiring notice before a ship could be arrested; if arrested, the foreign representative could defend their position and the court could deal with the situation. One problem identified was a potential for the commercial judges addressing cross-border recognition to lack relevant knowledge of maritime law. In addition, different countries had different regimes of maritime liens; in some, maritime liens could apply to a wide variety of claims, in others they might be limited to, for example, collision, salvage and wages. Some views suggested that wages might deserve to be treated differently to salvage and collision.

37. It was suggested that while in some situations it might be desirable to send an asset back to the centre of the debtor's main interests (COMI), in the shipping context the assets were peripatetic assets and there was little point in sending a ship back to the COMI to be dealt with by the debtor who was not paying the crew. It was noted that in some cases the problems encountered in the shipping insolvencies had arisen because of the need to commence insolvency proceedings without proper planning, including as to how crews would be paid on an ongoing basis. After consideration, the general view was that maritime law should prevail over the Model Law regime.

#### ***Session 6: Open discussion on the challenges facing courts and judges***

38. One issue of concern was the availability of judicial education in insolvency and cross-border issues in particular. Some judiciaries were well-resourced and able to support judicial education through judicial colleges, attendance at specialized insolvency conferences and seminars, and through working with the Bar to develop practice on various issues, including for example, publication of model orders in simple matters, such as uncontested recognition of foreign main proceedings. Some jurisdictions had addressed the need for specialist education in insolvency by concentrating cases in one city of the State, but there was still not always the necessary degree of preparation in insolvency and little training or education provided and it could be very difficult to learn "on the job" in complicated cases. In some countries, courts had taken an active role in streamlining procedures to address large caseloads and in developing expedited procedures.

39. One particular challenge noted was the approach to interpretation of the Model Law following local enactment. While it was possible to draw on the existing body of largely common law interpretation, there was a question of how far the courts could go in developing the law on issues such as COMI shifting and adequate protection. While the Law was essentially procedural, it was suggested that many questions arose where procedure and substance interacted, which involved group insolvency (which was not specifically addressed) or the insolvency of regulated entities, and which raised questions of choice of law or application of the stay (especially where it might extinguish rights). One common law judge noted that the courts played a reconciling role as people entrusted with power to make law, but had to exercise that power within the constraints of the common law system. One suggestion was that UNCITRAL might be able to draw helpful principles to address the differences between civil and common law approaches to the Model Law.

40. The importance to investment of insolvency law and the supporting regime was noted. It was suggested that a country's law indicated what sort of country it was and if the country wanted investment, it had to address exit strategies.

41. It was noted that the thirteenth judicial colloquium is scheduled to be held on 15-16 March 2019 in Cape Town, South Africa.