**UNCITRAL National Coordination Committee for Australia**
**Annual May Seminar 2022**

On 27 May 2022, UNCCA hosted its annual May Seminar, this year celebrating the 25th anniversary of the 1997 UNCITRAL Model Law on Cross-border Insolvency (MLCBI).

This hybrid event was held during the afternoon of 27 May and was kindly hosted by Norton Rose Fulbright in Sydney, who also provided online access. UNCCA was therefore able to welcome those who attended in person and those from various locations in Australia and overseas. Refreshments after the session provided an opportunity for discussion of the many issues raised during the seminar.

The MLCBI was drafted over numerous sessions by Working Group V - Insolvency of UNCITRAL leading up to its release in 1997, and WGV has since issued further Model Laws and legislative guidance and has a number of projects pending. The UNCCA Expert Advisory Committee for WGV monitors the activities of the working group, and arranges attendance at its biannual sessions, in New York and Vienna, the last session being New York in April 2022. UNCCA attends the sessions on behalf of and by arrangement with LAWASIA.

Australia itself has separate membership and representation at UNCITRAL sessions. On 15 March 2022, the United Nations General Assembly elected a number of nations including Australia as members of UNCITRAL for a six-year term beginning on 27 June 2022.

This May 2022 seminar covered both the MLCBI and its operation over the last 25 years, and the on-going and future work of WGV.

**Welcome from the Chair of UNCCA, Justice Brigitte Markovic**

Justice Markovic welcomed all those in attendance in Sydney, and those attending online, at UNCCA's annual May seminar. Cross-border insolvency was selected as the topic for the seminar given that 2022 marked the 25th anniversary of the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) which was issued in 1997 and which was adopted by Australia in 2008. UNCCA had gathered a range of speakers with expertise in the work of UNCITRAL and in the theory and practice of cross-border insolvency.

The afternoon comprised two presentations on behalf of UNCITRAL, followed by two panel sessions of experts.

**Samira Musayeva, a Senior Legal Officer, UNCITRAL**

The first presentation was pre-recorded by **Samira Musayeva,** a lawyer with the UNCITRAL Secretariat in Vienna. She reported on the current progress of application of the MLCBI, and its adoption by new jurisdictions, now totalling 55; and well as the more recent work of WGV,

including its Legislative Recommendations on Insolvency of Micro- and Small Enterprises (MSEs). UNCITRAL has also issued a Consolidated Text of the MLCBI and the more recent Model Laws on Recognition and Enforcement of Insolvency-related Judgments, and on Enterprise Group Insolvency.

**Jenny Clift, former Principal Legal Officer, UNCITRAL**

**Jenny Clift,** who was formerly a long-time lawyer at the UNCITRAL Secretariat in Vienna, and who had an instrumental role in the drafting of the MLCBI, gave an insightful presentation on the application and interpretation of the MLCBI since its inception. She has also been working on the UNCITRAL *MLCBI: Judicial Perspective*, designed to assist judges and others with latest case law and other commentary on the MLCBI, and on the *Digest of Case La*w on the UNCITRAL MLCBI which contains a number of decisions of Australian courts.

Jenny acknowledged the limitations of the MLCBI, including its case law limited to mainly common law jurisdictions, with its use among other jurisdictions difficult to locate and translate. Also, while it has been adopted by over 50 jurisdictions, among those yet to adopt the MLCBI are China and India, as well as Malaysia, Thailand and Indonesia and most EU members including Germany, France and Italy. Jenny also raised a particular issue about the relevant date for determination of the debtor's centre of main interests (COMI). While some jurisdictions prefer the date of application or date on which the court considers the issue, others such as Japan, Australia and the United Kingdom prefer to use the date at which the foreign proceeding commenced. Jenny articulated how these differences in interpretation can lead to different and therefore unsatisfactory outcomes.

**First expert panel – the MLCBI over 25 years**

This was followed by the first expert panel, composed of **Scott Atkins** (Norton Rose Fulbright), **Emma Beechy** (Barrister, New Chambers), **Morgan Kelly** (Partner, Restructuring Services at KPMG Australia) and **Stewart Maiden QC** (Victorian Bar) and chaired by **Justice Markovic**.

**Emma Beechey** spoke on the limits on the scope of the MLCBI in Australia, explaining that case law thus far is mainly based on procedural, rather than substantive, relief. She also addressed the other Model Laws available to Australia - the more recent Model Laws on Recognition and Enforcement of Insolvency-related Judgments, and on Enterprise Group Insolvency - and whether they would provide useful additions to our insolvency system. Emma noted that the traditional mechanisms under the Bankruptcy Act and the Corporations Act remain as options, in particular where the relevant overseas jurisdiction has not adopted the MLCBI.

**Stewart Maiden QC** examined particular issues concerning the centre of main interests (COMI) and what level of certainty exists as to whether any given foreign proceeding will be accorded main or non-main recognition. He also spoke on Article 6 of the MLCBI which has been the subject of less judicial consideration - the public policy exception – and whether or where it is likely to be applied in Australia.

**Scott Atkins** explained Chapters IV and V of the Model Law which respectively concern *co-operation* between foreign courts and foreign representatives, and *concurrent proceedings*. However, the precise means of that cooperation is left for specific protocols outside the MLCBI, including the ALI-III Global Principles (2017), the EU-based CoCo Guidelines (2007) and JudgeCo Principles and Guidelines (2014) and the Guidelines (2016) and Modalities (2019) of the Judicial Insolvency Network (JIN). Scott explained there is need for the continued delineation and adoption of specific court-to-court cooperation protocols, setting out clear guidelines on matters such as the manner of communication, information sharing and joint hearings.

Scott Atkins also spoke on the role that mediation has to play in cross-border restructurings and insolvencies, the appointment of a mediator being one way in which the cooperation framework set out in articles 25 to 27 of the MLCBI may be implemented in practice. This is assisted by the fact that in September 2021, Australia announced it had signed the Singapore Convention which establishes a uniform framework for the enforcement of international commercial settlement agreements resulting from private mediation. The government is now proceeding to implement the Convention in Australia.

As to concurrent proceedings, a recent example was the joint-hearing concerning the Australian incorporated and New Zealand incorporated Halifax companies. These proceeded not under the Model Law, but by way of a letter of request. **Morgan Kelly**, as one of the liquidators of the group, commenced proceedings in both the Federal Court of Australia and the High Court of New Zealand, seeking in each court directions and/or judicial advice in relation to the distribution of funds held by them having regard to the interests of different classes of investors. A letter of request under s 581 of the Corporations Act was used because the liquidators were of the view that, although the New Zealand company was a subsidiary of the Australian company, they were separate corporate entities and thus the MLCBI had no application: see *Kelly, in the matter of Halifax Investment Services Pty Ltd (in liq) (No 5)* [2019] FCA 1341 at [54]. A joint hearing therefore proceeded between the two Courts, Justice Markovic in Sydney and Justice Venning in New Zealand. The hearing took 8 days and proceeded via an electronic platform connecting the two Courts, with the same evidence being given and submissions made in each. An appeal was similarly heard by the two countries' appeal courts.

Morgan Kelly spoke favourably of how the joint arrangement assisted in dealing with the complex issues in the liquidations. Conversely, he also explained what difficulties would have existed had had the two Courts not been able to hear the two applications in that way. The potential for such hearings in other suitable matters was discussed.

**Second expert panel – current and future work of WGV**

The second expert panel consisted of a discussion on UNCITRAL's recent work by **Michael Murray** (Murrays Legal and Working Group V Chair), **Tony Ryan** (Partner, Ashurst) and **John Martin** (Partner, Norton Rose Fulbright). Unfortunately, **Professor Chris Symes** from the University of Adelaide was unable to chair the session due to catching Covid; Michael filled in.

**Tony Ryan** spoke of his online attendance at the sitting of WGV in New York in April 2022. He explained the three streams on which WGV is currently working: (i) the Judicial Perspective (touched upon by Jenny Clift in her presentation); (ii) civil asset-tracing and recovery initiatives, a topic requested by the United States given the lack of adequate tools or uniform procedures available to foreign parties to proceedings; and (iii) a project examining the current applicable law for cross-border insolvency disputes, which was a result of a proposal made to UNCITRAL by the European Union.
The objective of the asset tracing project is to develop a policy to strengthen regimes/provide tools and/or model language to assist practitioners by way of a "tool box" approach for insolvency professionals. There is need to keep in mind other projects being undertaken in this space and the availability of existing asset tracing mechanisms. There is also the need to include interim relief measures to secure assets but with safeguards to avoid abuse. A preliminary draft of the text will be prepared by the Secretariat in terms of the guidance from WGV.

As to applicable law, Working Group V is currently developing draft legislative provisions intended to reinforce that the *lex fori concursus* ought to apply to all aspects of insolvency proceedings, subject only to limited and clearly defined exceptions (as in the European Insolvency Regulation (Recast)). The lack of consistency across jurisdictions creates complications for proceedings with multiple international parties. In essence, this is a project to encourage jurisdictions to adopt a harmonised approach towards recognising, as a matter of private international law, that the laws of the place where an insolvency proceeding is "opened" or commenced applies to determine the effects of the insolvency proceedings on rights or claims, and also to define and agree on consistent exceptions where the jurisdictions own laws will continue to apply.

***Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ)***

**John Martin** then explained some key cases where difficulties have arisen in relation to the recognition of insolvency judgments. While the MLCBI provides a framework regarding restructuring and insolvency procedures, it does not of itself automatically allow the recognition of foreign judgments arising out of those procedures; neither article 7 nor article 21 explicitly provide the necessary authority for recognition.

This is an important distinction because without a common process to enforce judgments, it may be possible for a creditor to enforce a claim against assets in a foreign jurisdiction outside the scope of a multi-jurisdictional restructuring plan endorsed by a foreign court judgment, potentially ending the end of the attempt at business rescue. At present, there is inconsistency globally on the approach taken to the recognition and enforcement of insolvency-related judgments. For example, despite being seen as anomalous, English courts still apply the so-called 'rule in *Gibbs*, so that a debt governed by English law cannot be discharged or altered by a foreign law (including a foreign restructuring plan). This means that debts of creditors whose contracts with the insolvent debtor are covered by English law may remain outside of any international restructuring plan. In contrast, United States courts take the approach that the discretionary relief provisions in article 21 of the MLCBI facilitate the recognition and enforcement of a foreign restructuring plan.

These inconsistent approaches led to UNCITRAL issuing, through WGV, the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ) in July 2018 as a framework for uniform recognition and enforcement of judgments arising from insolvency proceedings. As John explained, the MLIRJ would assist in negotiating and implementing an effective multi-jurisdictional restructuring plan binding on all creditors without the risk of individual enforcement action being taken.

***Model Law on Enterprise Group Insolvency (MLEGI)***

Nor is the MLCBI specifically tailored to deal with group restructurings, it applies only to insolvency proceedings concerning a single debtor. To that end, another UNCITRAL instrument, the Model Law on Enterprise Group Insolvency (MLEGI), was adopted by UNCITRAL in July 2019. It is intended to operate in a complementary manner with the MLCBI, by way of addressing the specific needs of insolvency proceedings affecting multiple enterprise group members. Part 3 of the UNCITRAL Legislative Guide on Insolvency Law also assists, being focused exclusively on the treatment of enterprise groups in insolvency. The MLEGI nevertheless respects that each company within the group remains a separate legal entity.

***Post-script - UK***

Following the May 2022 seminar, on 7 July 2022, the UK government opened a consultation proposing the implementation into UK law of these two model laws, that is, the MLIRJ and the MLEGI, saying that "by being amongst the first countries to consider their implementation, the UK will signal its ongoing commitment to mutual cooperation and international best practice". These two model laws would join and complement the MLCBI which the UK implemented in 2006 and 2007.

***UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (2021)***

**Michael Murray** shared his insights regarding micro- and small enterprises (MSEs) and how the insolvency issues they face are assisted by the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (2021), which have become Part 5 of the UNCITRAL Legislative Guide on Insolvency Law, and also as part of the UNCITRAL texts series on MSMEs, a project of Working Group I.

Although MSEs constitute a majority of businesses worldwide, current insolvency regimes are focused on larger enterprises and do not adequately address the issues faced by MSEs. The Recommendations seek to address these issues by providing greater accessibility, less court involvement, early discharge options, and options for streamlined restructuring/liquidation etc. In particular, corporate insolvency is less relevant given that many MSEs are either sole traders or personal and business debts are intermingled within a corporate structure. UNCITRAL is suggesting that governments should frame corporate and personal insolvency law in tandem to address the realities of MSEs, rather than, as in Australia for example, having separate approaches and agencies for each of personal and corporate insolvency law.

**Thanks**

UNCCA would like to thank Norton Rose Fulbright for hosting the event, as well as Michael Murray, the Chair of the Expert Advisory Committee for Working Group V, and Dr Dalma Demeter, UNCCA's acting Deputy Chair at the time, who assisted immensely in the organisation of the event.

Of course, the event would not have been possible without the attendance of our members and others attending, whom UNCCA thanks for their support of the event.

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