14th Multinational Judicial Colloquium

21-22 May 2024, San Diego, USA

Introduction

1. The 14th Multinational Judicial Colloquium, organized by INSOL International and the World Bank Group with the official support of UNCITRAL, was held in San Diego, USA, on 21-22 May 2024. About 44 judges attended from 25 States, representing different legal systems, cultures and levels of economic development. The attendees had diverging levels of practical experience, particularly with respect to cross-border insolvency. This colloquium also had some first-time participants.

Day 1

2. Following a welcome address from the co-organizers and the official supporter - INSOL International, the World Bank Group and UNCITRAL (listed in the order of their statements) - the program started with a **peer-to-peer discussion** during which judges from Brazil, Ghana, India, Japan, Malaysia, Nigeria, Philippines and Republic of Korea looked at the period of and following the pandemic, highlighting developments in the area of insolvency law, problems that the judiciary had encountered in handling insolvency cases, and lessons learned therefrom. Judges also referred to developments in relation to UNCITRAL insolvency model laws.

3. An emphasis on a rescue of financially distressed businesses and consequential introduction of out-of-court and in-court debt restructuring options, debtor-in-possession regimes, cramdown mechanisms and the use of ADR tools in restructuring were identified as a key development across most jurisdictions represented at the colloquium. A trend towards establishing specialized insolvency courts and putting in place a simplified insolvency regime for MSEs was noted as another common development.

4. It was stressed that judges faced the increasing pressure to handle ever more complex and urgent insolvencies while ensuring transparency, due process and balanced consideration of all competing interests and issues. In addition, in insolvency proceedings, unlike other legal proceedings, a judge was required to take a forward-looking approach and assume responsibility for considerably far-reaching and wide-ranging consequences.

5. Particular difficulties arose in handling: (a) enterprise group insolvencies; (b) insolvencies in the real estate sector; (c) third-party debt releases though insolvency proceedings; (d) international commercial arbitration and secured transactions matters in conjunction with insolvency proceedings; and (e) asset tracing and recovery in insolvency proceedings.

6. It was considered necessary to increase judicial capacity-building, strengthen existing judicial networks, such as JIN, and expand them to new regions, such as Africa, in particular in the light of the growing importance of court-to-court direct communications. A limited experience with the use of the JIN guidelines by courts in some jurisdictions that adopted them and the impact of overriding public policy and other considerations on effectiveness of those guidelines were noted. The need for the judiciary to adapt to technological and other developments was highlighted. In that context, experience with using remote hearings and innovative techniques, such as AI judges, was shared.

7. **The second session on Day 1 was on case management**. It was submitted that case management had the same goals and features across jurisdictions, for example in ways courts handled: (a) ex parte proceedings; (b) confidential information; (c) disruptions in insolvency proceedings, either for good or bad reasons (e.g. challenges, appeals, disruptive litigation tactics, unprepared or unexperienced counsels); and (d) fraudsters (as opposed to honest but unfortunate debtors). It was noted that, while experienced judges have necessary skills to resolve the usual case management issues effectively and efficiently, that may not be true for novel issues (e.g. digital assets, insolvencies of crypto exchanges, sophisticated trust structures). The session concluded by suggesting some case management tips. They included the identification of, and focus on, reasonable and actionable issues and the use of court assistants, experts, technologies, the combination of in-person and online techniques and mediation. The importance of ensuring transparency and inclusiveness, of being aware of the facts, the law and people involved in the case and of aiming to achieve a better position for all concerned was recalled. Reaching out to more experienced judges on a particular matter for advice was also considered helpful. It was also considered necessary to increase awareness of UNCITRAL resources for judges, such as CLOUT, the Digest, the Judicial Perspective and the Practice Guide.

8. Day 1 concluded with **an update on the work of the Judicial Training College** run by INSOL International and the World Bank Group and with the feedback from judges who participated in that program as instructors or recipients. Judges discussed the training methods used in the program that allowed the participants to examine the domestic insolvency law in conjunction with other domestic laws of relevance to insolvency. Suggestions for future training were aimed at facilitating participation (e.g. through weekend retreats), recognizing the need for training also of the court staff and organizing a separate training for judges and insolvency representatives.

Day 2

9. Day 2 commenced with **a session on enterprise group insolvencies** (EGIs) in a domestic and cross-border contexts. It was acknowledged that many businesses operated as a group using holding companies, treasury companies and operating companies, often located in different jurisdictions. Questions posed to the panellists and audience were whether a co-ordinated approach was possible if the group itself or one or more of its companies encountered financial difficulties and whether there were any models for that.

10. References were made to MLCBI and MLEGI. It was explained that, while MLCBI was not designed for EGIs, judges creatively used it in that context although not always so efficiently and effectively as when, for example, MLEGI mechanisms would have been used, e.g. a planning proceeding, a group solution, a group representative and undertakings given to creditors to minimize the commencement of multiple parallel proceedings. Judges suggested non-legislative approaches to giving effect to MLEGI mechanisms, for example through court guidelines or agreements of interested parties.

11. Judges discussed substantive consolidation, including when it would be mandatory in their jurisdictions (e.g. when inter-group guarantees or fraudulent or inappropriate activities within the enterprise group were identified). It was acknowledged that, where substantive consolidation was optional, it was often a measure of last resort because of enormous legal and factual consequences that substantive consolidation produced. Substantial resources and

time investments were required for properly assessing all possible consequences ab initio. In comparison, procedural consolidation, which could be facilitated by online databases and technologies, was considered less problematic.

12. Alternatives to full substantive consolidation employed e.g. in *Lehman Brothers* (cross-border insolvency protocols) and *Nortel* (mediation and partial substantive consolidation) were recalled. It was recognized that each had its pros and cons. For example, court-annexed mediation might be time- and resource-intensive for a judge in charge of an insolvency case. A possible solution could be to involve a retired judge for mediation. (As linked thereto but raised in a different session, judges generally welcomed encouraging the use of mediation in complex restructuring, noting that law rarely mandated mediation (in some jurisdictions, it was mandatory when a dispute over property arose). It was suggested that, if not the judge, a court-appointed officer might encourage parties to use mediation).

13. The second session on Day 2 discussed **possible approaches to handling MSE insolvencies**, including the modular approach described in one academic writing. Specific characteristics of MSEs and their needs in financial distress were recalled. Finding an optimal legislative solution to address those needs, regardless of the MSE incorporation status, was considered important, recognizing the role of MSE in economies of many countries, in particular developing ones. The failed attempts of some countries to find such a solution were recalled. Two main reasons were given: the formal system targeted incorporated entities while MSEs were often unincorporated; and the formal system presupposed the availability of resources that MSE insolvency estates usually lacked. That experience demonstrated that the simplification alone was not sufficient: the system would attract neither intended MSE debtors nor insolvency practitioners expected to support them if the public funding for the involvement of insolvency practitioners in MSE insolvencies was not provided. At the same time, it was questioned whether such involvement would always be needed and should be required by law in all cases. Part five of the UNCITRAL Legislative Guide on Insolvency Law that addressed those matters was recalled.

14. The third session on Day 2 addressed **insolvency procedures in unusual contexts**, in particular unexpected roles that judges assumed at the time of economic or financial crises or when faced with an inadequate law framework or the need to handle mass tort cases and third-party debt releases (e.g. in asbestos or pharma cases). The session emphasized challenges that judges faced in those situations and general principles of insolvency law, such as ensuring equitable treatment of similarly situated creditors, that guided them.

15. Day 2 continued with the discussion of **the role of the court in restructuring**, including in formulating the plan and assessing procedural and substantive fairness. That discussion was put in the context of different restructuring systems (e.g. involving a stay of proceedings or without a stay, debtor-driven or creditor-driven and debtor-in-possession or full or partial debtor displacement). The discussion revealed that judges very often did not have full information, which made the assessment of procedural and substantive fairness difficult. It was acknowledged that those factors, coupled with the different understanding of procedural and substantive fairness across jurisdictions, might cause problems at the stage of cross-border recognition of the restructuring plan under MLCBI or otherwise.

16. Different safeguards for identifying and preventing possible abuses in restructuring were discussed, including the role of an observer in some jurisdictions who was responsible for reporting to the court on whether the entire restructuring process was fair.

17. In the context of procedural fairness, the session underscored the need to ensure that all creditors concerned were included from the outset of the process and were fully informed throughout. It was, however, acknowledged that, disputes regarding access to information were common and that MSE insolvencies might raise specific considerations, e.g. excessive disclosure requirements might impede MSE debtors' access to restructuring.

18. As regards substantive fairness, judges highlighted difficulties they faced in ascertaining whether classes of creditors were composed appropriately, and as linked thereto, whether voting rules and procedures were not abusive and whether the approved and confirmed plan was not only commercially sound but also fair. They acknowledged that many manipulations might take place in the composition of creditor classes and formulation of voting rules, requiring their thorough analysis by the judge. *Adler* was illustrated as a case where the need arose for the judge to assess different factors to ascertain whether classes of creditors were properly composed and whether all affected persons would be better off than in the alternative, i.e. if there was no plan. Other difficulties noted in the context of assessing substantive fairness related to a cram down and valuation for which detailed guidelines for judges were often absent. Judges also discussed issues arising from the application of the absolute priority rule, acknowledging that the rule was not uniformly understood and applied across jurisdictions, and there was a trend towards introducing a more nuanced modified absolute priority rule.

19. In the cross-border context, it was suggested that the court might condition the sanctioning of the plan on their foreign counterparts' readiness to recognize it. Court-to-court direct communication was highlighted as relevant and important in that regard but doubts were expressed whether it was always feasible and desirable to utilize that tool in this context, in particular under time pressure and in the light of arising public policy considerations (e.g. shifting or sharing the responsibility between the originating and the receiving court on the matter). The active involvement of the parties that were interested in the success of the plan was considered a more pragmatic solution. *McDermont* was recalled in that context.

20. **Day 2 and the colloquium concluded with a case study and closing remarks by the organizers. The dates and venue of the next colloquium are to be announced**.