13th Multinational Judicial Colloquium
UNCITRAL - INSOL International - World Bank Group

1st and 2nd April 2019, Singapore

Report

Introduction

1. The 13th joint UNCITRAL/INSOL International /World Bank Group Multinational Judicial Colloquium was held in Singapore on 1st and 2nd April 2019. About 110 judges and government officials attended from 45 States, representing different legal systems, cultures and levels of economic development. The attendees had widely diverging levels of practical experience, particularly with respect to cross-border insolvency. This colloquium also had a significant number of first-time participants and more delegations from States that had not attended previous colloquia.

Day 1

2. Following a welcome address from the co-organizers - INSOL International, UNCITRAL and the World Bank Group - the program started, as has become the practice, with sessions that introduced the participants to basic aspects and objectives of modern insolvency and restructuring processes, including cross-border insolvency. Those sessions were of particular benefit to participants that had not attended a previous judicial colloquium and those who had not much experience with cross-border insolvency cases.

3. During the first session, it was emphasized that insolvency was a global concept, known to all jurisdictions, and raised such common issues as commencement standards, a stay and the principle of pari passu. Although public interests, which differed from jurisdiction to jurisdiction, might dictate different solutions, certain considerations, such as the need for expeditious insolvency proceedings, were universally applicable. Establishing a sound insolvency regime was not an easy task, it was acknowledged, and judges played an important role in the fulfilment of that task. The value of the colloquium in encouraging frank discussion of difficult issues faced by judges, sharing best practices and identifying similarities and differences between civil and common law jurisdictions was highlighted.

4. During the second session, various reasons why an insolvency might have a cross-border dimension were discussed, which showed that not all cross-border insolvency cases were complex or large, involving multinationals. Some cross-border insolvency may arise because financial agreements were made subject to a foreign law.

5. As regards a choice between liquidation and reorganization, it was noted that insolvency “patients” might be terminally doomed or capable of financial resuscitation. Restructuring has the possibility of added value of bringing together assets that would have little value if they were sold off piecemeal but the judge may need the views of a professional that the objectives of a restructuring stand a reasonable prospect of

achievement. It was highlighted that, in the cross-border context, the benefits of keeping a business going were the same but with the additional question of who shared in what pot of assets.

6. Principles of territorialism, universalism and modified universalism in cross-border insolvency were analysed, It was explained that application of the principle of territorialism often resulted in negative consequences for employees and variable results for creditors, while application of the principle of universalism, which applied one law to all aspects of insolvency, although attractive in theory, raised substantive problems in practice. The principle of modified universalism, which allows each jurisdiction to apply its own laws to support the objectives of main proceedings, has proved to be workable.

7. The important role of the 1997 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), which is premised on that latter principle, was highlighted; by not importing foreign law and not suggesting a single law for global application, it provided a widely acceptable procedural framework for courts to deal with cross-border insolvency. It was pointed out that the MLCBI addressed main and non-main proceedings with reference to the location of the centre of main interests (COMI). Departing from that approach, it was suggested that legislation enacting the MLCBI might also address cases when foreign insolvency proceeding would not fall under one or the other category.

8. The judges considered the bases of allowing an application for recognition of foreign insolvency proceedings; the timescale within which it would be appropriate to grant relief to a foreign representative; the options in jurisdictions with and without the MLCBI and whether the relief should be constrained by domestic law or the law of the applicant for relief. Public policy exceptions were generally recognized as important but exclusions on these grounds should be limited and should not require that laws of foreign and recognizing States be a complete match. The application of the MLCBI to receivership was discussed: generally, receivership will fail the required test of being a procedure for the benefit of all creditors (i.e., collective insolvency proceeding).

9. Panellists addressed differences between common and civil law countries in handling cross-border insolvency cases, including as regards court-to-court communications. Ways of achieving recognition of foreign insolvency proceedings in countries that have not adopted the MLCBI and handling court-to-court communications in the absence of specific regulations on the subject were discussed. While no concept of recognition of foreign insolvency proceedings and foreign representatives existed in some countries, obtaining local assistance or relief for such proceedings and representatives was still possible. It was admitted that the enactment of the MLCBI could considerably facilitate and expedite the process. For example, it was explained that no relief was automatic in common law countries absent the MLCBI; specific relief including access to information needed to be sought; and, following the decision in Singularis, that relief could be granted provided it could have been sought in the originating jurisdiction. Practice in civil law countries was similar with a greater emphasis placed on the jurisdiction where debtor was incorporated.

10. As regards court-to-court communications, it was explained that not only the absence of an appropriate legal basis, but such practical issues as different language,

time zones, procedures, legal traditions and systems and confidentiality and transparency concerns may make such direct court-to-court communications problematic. Features of the formal processes most likely utilized in civil law jurisdictions for court-to-court communications were compared with those present in common law jurisdictions. Views differed on whether parties or courts should initiate such communication and on proper limits to avoid potential manipulation of courts by parties, conflicts and inconsistent rulings.

11. The third session introduced the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment,[1] and features of the upcoming model law on enterprise group insolvency, expected to be adopted by UNCITRAL in July 2019. It was explained that the 2018 Model Law complemented the MLCBI by allowing any qualifying foreign insolvency-related judgment to be recognized and enforced, including a judgment relating to the recovery of assets of the debtor located in a jurisdiction whose insolvency proceedings would be neither a main nor a non-main proceeding under the MLCBI. It also provided certainty as regards recognition and enforcement of insolvency-related judgments clarifying that, notwithstanding any prior interpretation to the contrary, the relief available under article 21 of the MLCBI includes recognition and enforcement of a judgment. Like the MLCBI, it respects public policy considerations. It highlights specifically the fundamental principles of procedural fairness and provides various grounds to refuse recognition and enforcement of a foreign insolvency-related judgment. The upcoming model law on enterprise group insolvency, it was noted, would also complement the MLCBI by addressing ways of dealing with the insolvency of multiple debtor companies belonging to the same enterprise group rather than a single debtor, introducing the new concepts of planning proceedings, a group insolvency solution and a group representative as well as various measures aimed at centralisation of insolvency proceedings, including the treatment of foreign creditor claims in the jurisdiction that commenced insolvency proceedings in accordance with the law applicable to those claims (often referred to as “synthetic” measures).

12. The fourth session addressed the theory and practice of restructuring enterprise groups, taking the Nortel and Agrocor cases as examples. Speakers considered the extent to which those cases would have benefited from what will become the UNCITRAL model law on enterprise group insolvency. The Nortel case, which started in 2009 and was still ongoing, saw the destruction of value and of the entitlements of many people, in particular retirees. The case started in the United States and Canada; a week later in the United Kingdom; and ultimately involved 28 different jurisdictions. The peculiar features of the case were that there were no secured creditors and the value of the group assets exceeded expectations by a factor of more than two. There was a lack of trust among various creditor groups that they would obtain their fair share of the assets. For that reason in particular, no worldwide stay was possible and some jurisdictions decided not to cooperate. The insolvency professionals representing various creditor groups concluded that it was expedient to deal with sales of the businesses before agreeing on the distribution of funds. The absence of any agreement on that distribution resulted in three attempts to mediate before a consensual approach resolved the impasse. The sale of assets took two years to complete. By then, total professional fees exceeded $1.15 billion. Upon

[1] Available at https://uncitral.un.org/en/texts/insolvency/modellaw/mlij

analysis of that case, it was concluded that the upcoming UNCITRAL model law on enterprise group insolvency would have been of considerable benefit in enabling a group solution to be developed and enforced and in promoting communications and cooperation among creditor groups located in various jurisdictions.

13. The panellists analyzed the other case – Agrocor – and the answer was not clear whether the upcoming model law would have helped since some issues with the restructuring of the enterprise group (e.g., legal personality of the group and the likely impact of the collapse of the company on the Croatian economy and local employees) were addressed by enacting a case-specific insolvency law in 2016, which provided for central administration by the Government of Croatia. Agrokor is referred to as the "40,000 page case". It involved the insolvency of the largest privately-owned company in Croatia (a single natural person held 96% of shares) operating through subsidiaries in 13 jurisdictions. The law enacted in 2016 imposed a general stay and provided a mechanism for restructuring the entire group. An insolvency representative nominated by the Government was appointed. A settlement agreement was reached in August 2018 with the completion of implementation scheduled for 2021. Under that agreement, approved by the commercial court (all appeals were rejected by the Supreme Court of Croatia), new companies owned by creditors were created. The proceedings were recognized as the main proceedings by Switzerland, the United Kingdom and the United States, but not by the neighbouring countries that declined to participate in the group reorganisation because Agrocor's subsidiaries in those jurisdictions were solvent. Reference was made to the ongoing arbitration in London involving that case. The speakers discussed the relevance of the Gibbs Rule, which states that the discharge of a debt of an insolvent company is only recognisable if the discharge is enforceable under the law of the debt: in this case, a substantial amount of the debt was subject to English law and ultimately, more than 80% of creditors approved a scheme proposed in the court of the United Kingdom.

14. The speakers subsequently discussed other recent cross-border insolvency cases involving reorganisations. In an Australian case, a dispute arose as to whether creditors should vote on a proposal for a scheme as one body or in separate classes. Ultimately, after extended litigation, the court ordered mediation during which the parties reached an agreement on an amended scheme. The court considered liquidation would be disastrous for all the parties and accepted the proposed changes.

15. Day 1 concluded with a discussion in breakout groups of an insolvency case involving application of UNCITRAL texts. In a detailed case study, most judges agreed with the decision in the case on which the study was based, but there was also considered argument as to why a different approach might have been taken in other regions of the world.

Day 2

16. Day 2 opened with a review of current practices on court to court communication, a perennial topic of the colloquium. It was noted that an increasing number of judges were required, as opposed to being given permission, to cooperate with other courts. The problem that remains is the uncertainty as to manner of communication.

17. The session highlighted differences between common and civil law jurisdictions in that respect: whereas common law judges, in the absence of any specific statute permitting them to enter into communication with a foreign court, could rely on local rules, the existence of such a statute would be an essential pre-condition for civil law judges to initiate such communication. In the EU context, it was noted, the rules based on the ELI principles impose an obligation on EU judges to communicate with judges within the EU but not outside.

18. Speakers referred to recent cases where cross-border insolvency cooperation agreements or protocols helped judges to clarify procedural differences in their respective systems. While acknowledging that practical problems in court-to-communication will most likely arise for reasons explained in para. 10 above, standard forms and explanatory notes helped to handle them. The fact that many of the judges attending the colloquium know each other provides a firm foundation of use of protocols – supporting the value of platforms and fora for judicial exchanges, such as the colloquium.

19. During the session on reciprocity, different meanings of the term were discussed. It was pointed out that the term is frequently found in legislation in the context of recognition of judgments rather than recognition of insolvency proceedings. It was noted that reciprocity was not relevant to the MLCBI, in the EU when dealing with other EU member States and in common law jurisdictions with the well-established case law extending comity to foreign proceedings and judgments regardless of whether they involve insolvency or other contexts. It was recalled that Lord Collins defined comity in the Rubin case as providing a philosophical underpinning of insolvency law by encouraging other countries to recognise your court's orders. In some jurisdictions, reciprocity would be one of the matters considered by a judge hearing an application for recognition of proceedings, a foreign judgment or a foreign representative. This may prove to be a cumbersome process involving the highest court and demonstrating the advantages of according recognition without reference to reciprocity.

20. During the session on judicial training, it was widely accepted that there is a shortage of appropriate training available for judges hearing insolvency matters in many jurisdictions. To meet this need, the Judicial Training College was set up by the INSOL International and the World Bank Group. It delivers judicial training to local judges upon request of the State. The training consists of three components: (a) a pre-training manual, which was developed with the assistance of INSOL Fellows and is now being extended into an online system; (b) an online survey of judges' knowledge of their own insolvency law; and (c) a three to four day training course based on the insolvency law and practice of the State, delivered by experienced judges and legal and insolvency experts from other similar jurisdictions. Judges who had been involved in delivering the training and judges who had been trained by the Judicial Training College shared their experience and suggestions for improvement of future training courses. In particular they suggested holding longer sessions, introducing a "train the trainers" component, involving more local trainers and offering a menu of options for judges with different levels of experience. Participatory sessions (Q&A, case studies and group exercises) were considered more beneficial than lectures on theory. Buy-in by policy-makers was considered essential for the success of such training. The audience was also informed about developments in the

Singapore Judicial College, which is delivering training, research and qualifications up to the level of LLM.

21. The session on ADR in insolvency cases discussed various understandings among judges as regards their role in mediation and authority to mediate. Mediation may be mandatory or encouraged because the alternative is expensive and time-consuming. Where mediation was not a mandatory stage, much depended on the style of the judge handling the case. It was noted that some jurisdictions have specific rules on mediation in insolvency proceedings and court-annexed mediation and arbitration centres or officials who promote mediation. Courts may direct the appointment of a mediator or provide a list of trained mediators from which the parties can select. In some countries, another judge will act as mediator, which has the advantage of being without cost to the parties.

22. Greater risks arising from the ADR stage in cross-border insolvency context were highlighted, especially where that stage was protracted, abused by parties and did not lead to binding settlement agreements. It was acknowledged that the same practical issues present in court-to-court communications would be present in cross-border mediations efforts (e.g., different time zones and languages, which may make mediation possible only in writing with translation). The value of direct interaction between the judge and clients rather than through their legal representatives was emphasized.

23. The participants were informed about the developments in the INSOL Mediation project, details of which are available on the INSOL website.

24. The last session addressed recent developments of likely interest to judges handling insolvency cases, including the use of a “light-touch” provisional liquidator with limited powers, enabling the board of directors stay in power and the provisional liquidator oversee a scheme or agreement. Views were exchanged on court practice of handling demands of foreign courts and resolving outstanding issues under time pressure. It was thought that what ultimately mattered was support for a particular course of action by all or by the required majority of interested stakeholders and, under those circumstances, it would be correct to sanction that course of action.

25. A separate sub-session was dedicated to maritime insolvency issues. It was explained that cross-border aspects were inherent in shipping, with special rights to seize or arrest ships prior to judgment, in cases of proprietary claims, maritime liens, and statutory claims. Such features of maritime law as the secrecy of maritime liens and ease of forum shopping made handling maritime insolvency particularly difficult. It was noted that maritime liens were not common in all jurisdictions, but where they are used, they are a powerful instrument surviving a change of ownership and having the highest priority above mortgages. Obtaining a clean title to a ship in such cases was possible only through a judicial sale, which may be a time consuming and expensive process; in the absence of requirements to register a maritime lien, a buyer could buy a ship without knowing about any liens attached thereto. Forum shopping is made easy in maritime insolvency because any jurisdiction which a vessel entered during its journey could arrest and claim jurisdiction over it. The MLCBI, article 20 (2) envisages exemptions from an automatic stay upon recognition of foreign main proceedings. In those jurisdictions in which the MLCBI was enacted with exemptions

encompassing maritime liens, that article would not prevent the arrest and sale of the ship even though the foreign main proceeding concerning that ship was recognized in the arresting jurisdiction. To preserve any prospect of recovery and restructuring in such cases, a judge would have to refuse to issue a writ for arrest of the vessel, which is usually required to effectuate the arrest.

26. The colloquium concluded with an exchange of views about the colloquium and ways of improving it. Suggestions included making sessions more interactive, allocating sufficient time for Q&A and follow-up discussions and providing pre-session materials to allow preparation and meaningful discussion. Generally, it was considered essential to encourage more interaction among judges from various jurisdictions. The following themes were suggested for discussion at future colloquiums: technology in insolvency proceedings (beyond its use for electronic discovery), mediation (in addition to pre-insolvency stages) and separate specialized sessions on insolvency involving vessels, aircrafts, houses and land.

27. It was announced that the next colloquium would take place in San Diego, California, United States of America, in March 2021.