



UNCITRAL
UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE
LAW



INSOL INTERNATIONAL
INTERNATIONAL ASSOCIATION
OF RESTRUCTURING,
INSOLVENCY & BANKRUPTCY
PROFESSIONALS

SECOND MULTINATIONAL JUDICIAL COLLOQUIUM

UNCITRAL – INSOL International

March 1997

New Orleans, USA

OPEN FORUM

Chairman – Chief Judge Tina Brozman

We are at our last open forum of this session and before we get into any kind of bantering, I would first really like to thank the evaluators. I really find it nothing short of amazing the manner in which in just a few short hours, most of which were filled with a very lovely dinner last night, they were able to synthesise all the different views that were expressed over the course of the day yesterday. And whereas I confess that I was a little worried that we did not have Lennie Hoffmann here to do his usual magician's job, notwithstanding Jim Farley's humility, I would have to say that I thought he just did a splendid job of tying together all of the different thoughts on co-operation and he is as eloquent as anyone could ask for. So please join me in a round of applause for all the evaluators.

Next I would like you to know that during this little coffee break I was active and I accomplished a couple of things on everybody's behalf. Picking up on some of the comments that were made by the evaluators, I have two bits of information to give you:

The first is that INSOL has agreed to set up a separate Judges division and so I anticipate that they will send information around to all of you who have been at this meeting asking you if you would like to join that division so that we will then have a comprehensive list of people who are interested in following all of the developments in the area of cross-border insolvency. I would strongly urge all of you to seriously consider joining the organisation.

In addition, Ralph Zulman suggested the very fine idea of a library; I conferred with INSOL about that and we have agreed that we will set up a committee and I will volunteer myself to be on that committee. Richard Gitlin has agreed and I am now going to act like the US Army and ask for volunteers from the audience to join that committee with us to consider how best we set up that library, what materials it contains and how we might all have access to it. So let me just ask before I start appointing people, whether or not there is anybody who would like to join with us on that committee.

Alright, Justice Zulman, Justice Farley, Judge Garrity and Justice Jackwig. There's our committee. Let me just write down those names.

Neil Cooper: We have not got anyone from the Civil Law countries.

That's a good thought. Is there anyone from a Civil Law country, or a hybrid country who would like to join with us? Adolfo Rouillon – wonderful – thank you so much.

Let me now open up the floor to all of you to react to anything you heard this morning.

Justice Lightman

Could I just say one thing, and this is that the prospects of the success of this project depend upon, it seems to be, confidence being installed between the various courts and trust and confidence between litigants. And that is dependant first of all upon the high degree of reciprocity between the various courts that are involved, and that means that the menu approach must be kept to a minimum. Secondly it seems to me, its dependence on a maintenance of a minimum level of standards in bankruptcy law and practice in each participating state. And thirdly it is dependant upon positive monitoring so that each court on each occasion knows that the eyes of the international organisation are upon them and there may be publication of those results.

Finally it seems to me it is very much dependant too on some clarification and limitation on the public policy limitation in article 6, because public policy can be used to achieve all sorts of different things under different legal systems. And all I want to say is that those are matters that seem to me as a practical matter, are essential to the success of this project.

Judge Brozman: Thank you. Are there any other comments?

Mr. Hal Burman

Thank you. A couple of comments. One, I would agree with the last comment on the menu approach and in that regard I would say I think the better process would be one, either it is the UNCITRAL model law or other documents that are produced, to restrain to the absolute minimum any menu approaches so that we have a relatively higher degree of standard concepts of behaviour in a cross-border insolvency matter. In that regard I would say that given the fact that UNCITRAL is preparing a model law, one might try to achieve a better standard of good business and social and legal practice rather than try to accommodate every view point. That will surely be many

of our countries who in one respect or another cannot adapt some provision of a proposed model law.

But we need to be very careful about how far one goes to accommodate every particular concern. In that regard, might I say that we in our office were involved in a recent negotiation of a different international commercial law matter and we did provide for other delegations, for their information only, certain constitutional limitations we have in our system concerning the taking of private property without compensation and that would limit in some respects what we could implement under the proposed agreement.

Having said that, we certainly did not seek to ask other delegations to change the text of what they were doing in order to accommodate our particular problem. We provided the information about our particular concerns simply for their information so that they would understand when we sought to implement that agreement, we would not be able to do so in certain respects. And I think that is a standard that we might recommend for others as far as it is possible to accommodate that so that a model law does seek to achieve a sufficient degree of progress in this field and point the way toward that progress to make it all worthwhile.

Might I add a couple of other comments now on Judge Farley's very good summary, I think, of a statement (and a progressive statement indeed) I say that only because I am sensitive to the fact that especially a meeting of members of the Bench, ex parte contacts are not appropriate in the same way. I simply mention these relatively minor issues:

One would be the reference to contact with legislative authorities through a Chief Justice. That may be appropriate in some countries, and indeed may be necessary in some. There may be others where less formal and structured contact is quite possible and something one might want to encourage, and I would hope that we do not send a signal that it is expected that that contact only be at the highest and most formal level of each judicial system. I say that in part for a practical reason. It certainly would be very beneficial to take the results of the INSOL meeting and especially the Judicial Colloquium, and to make that known to those ministry offices in each of our countries before the UNCITRAL meeting in May.

***Judge Brozman:** I thought that Justice Farley said it nicely, quite along the lines that you do, when he suggested that we ought to engage in a judicial outreach programme.*

Yes, exactly, but simply as I heard the reference to the Chief Justice, I know that if indeed in our own system if that were the only means of communication it might not be one that might be achieved very rapidly.

Secondly, I might suggest that while there was a particular concern that is very illustrative, any particular case that involved a court in our system and a court in the Bahamas, one might consider taking out references to the specific case and the particular judge so that it does not become – it takes on a somewhat different caste I think if that is the case and maybe less instructive as a general matter.

Finally the reference to the relative ease of communication between judges with a common language and a common legal system. I might suggest that might be somewhat softened because it is certainly the hope I think of many in this process, that there will be a growing sense of ease for communication between judges of different languages and in different legal systems. One might look at that a little bit more carefully to avoid making it sound like we are still all in separate regional language groups, if you will, and with certain lower expectations on co-operation.

Judge Brozman: Thank you. I had one observation of my own. During the break I conferred with Jean-Luc Vallens who made a point which I think is of some concern. That is that he felt that there might be some vagueness in some of the provision which could be sharpened up with further consideration of the UNCITRAL draft and as I thought about it and I mentioned it to him in response, it seems to me that some of what we could call the imprecision in the draft is, in a sense, its very strength because we all have such very different legal systems with different procedures. I fear that if we were to try to pin down specific procedural steps for things like judicial communication, that we would bog down in the details so that it would be impossible to fashion anything that would be successful in all jurisdictions. So it seems to me that to have more general statements of what the substance is of the model law is probably preferable, leaving to the individual countries, through their various procedures, the implementation of those more general principles.

I don't know that everyone is in accord and I certainly invite you to respond to that but it seems to me that it might be wise to try to emphasise the broadness of the model provisions in order to ensure their acceptance around the world. Are there any additional comments?

Mr. Ron Harmer

Thank you madam Chairman. I would like to join with you in congratulating the judges on the manner in which they have very succinctly summarised the deliberations over the last day or so and for the UNCITRAL project, it is going to mean a great deal. I have two observations, if I might be permitted to make them.

The first is looking to the future and the possibility that INSOL will be able to help form a judicial group. I wonder with the infancy, shall we say, of the move toward judicial co-operation, it might be possible for that group to put together at some time in the not too distant future, some type of statement of guidance or statement of principles that you think might be of assistance to judges in the many countries throughout the world to assist them in the manner in which it might be most appropriate for them to be involved in a co-operative exercise. I hesitate of course to suggest that it should be anything like a "code of conduct" because I know the judiciary frowns upon such things. It is only when people like myself come up before them that there is a code of conduct. But I seriously suggest that any type of guidance that you might be able to provide to judges in many of the developing countries would be of immense practical assistance to them. So I leave you with that possibility.

Secondly, may I get on to my hobby horse of the Paulian action. In the summation of the judges I did not hear their views about the pros and cons of including or endeavouring to include in this draft law something on that subject. We heard, you recall, that we briefly discussed it yesterday and I think everybody agrees that it is a

very difficult subject to tackle. But my concern is that if we do not at least make some effort in this initial draft to cover the possibility of the Paulian action being capable of application in countries where a main proceeding is taken for recognition, we may leave a number of bolt holes open to those entrepreneurs whom we know only too well are very much inclined to make havoc with the assets of a corporation. If we refrain from doing anything like that, we will not be sending out a signal and of course part of the great thing about the laws that deal with preferences, fraudulent conveyances, transfers that undervalue and so forth, is that they do send a signal to the commercial world and that signal is: You should perhaps not engage in this activity because there are laws that may be able to have it unravelled. If we do not send out that signal, it is almost as though we are creating a highway with no type of speed limits or any other traffic confirmation laws at all. So I wonder if there might be one or two of the judges present that might care to make a comment on that.

Thank you.

Judge Brozman: *Would anyone like to make a comment?*

Judge Clark

I can hardly resist such bait! I appreciate the difficult but I wonder if perhaps this draft of this model law, especially at this late stage of its development, is really ready for what I think is a very significant policy issue. I do understand the danger. I have seen examples of it, in fact I am sure that everyone in this room has probably seen examples of it in one way or another. But interestingly enough, even under what I think is widely perceived to be one of the more liberal approaches currently available in the area of international insolvency, and that is Section 304 of the US bankruptcy Code, there is still considerable debate with regard to whether such, we would call the avoidance actions, whether such actions could be initiated solely by the device of instituting an ancillary proceeding.

The general view seems to be I think amongst my colleagues, and I am sure I will be corrected by a couple of them who are here if I have got it wrong, but the general view seems to be that if you really truly want to pursue such avoidance actions in the United States, then you institute a full blown local proceeding and then proceed with whatever avoidance actions are available under local law. Short of that, significant questions are raised with regard to what law would be followed vis a vis an avoidance action short of instituting full blown proceedings, and to whose benefit being instituted would ultimately inure.

Consider for example the difference between pursuing an avoidance action in a Paulian action in a vacuum solely by means of some form of ancillary proceeding – a foreign main proceeding seeks the assistance of another country in order to institute an avoidance action – and the situation in which a full blown proceeding is opened up in the target state, if you will. In the latter situation the rest of the local creditors will participate it would seem vis a vis the ultimate distribution of whatever recovery might be achieved as a result of that action. If however the avoidance or Paulian action is instituted solely by extraordinary protection by the court, the recovery will inure to the benefit of the creditors in the main proceeding in the foreign jurisdiction. That may very well be the right result but one can quickly see the kinds of thorny problems that it raises and the kinds of policy concerns that it implicates. While I

appreciate the concern I simply wonder if perhaps it is too late in the game, vis a vis the current UNCITRAL model law, to bring up this issue.

Lord Justice Millett

Yes, I would align myself with the views of the last speaker. I am worried about the provisions of article 19 bis, which I think is intended to deal with this problem. Article 19 bis refers to the opening of the non main proceedings, the recognition of the foreign liquidator or representative, he appears to be given the right to pursue in the enacting state the remedies given by the enacting state for the recovery of assets. This applies the Paulian action of the enacting state. That seems to be completely wrong. It is contrary to fundamental aspects of private international law. One would have understood a regime under which anyone dealing with a company would recognise that if, for example, he lends money to the company and is repaid on the eve of insolvency, he takes the risk that under the law of the main seat of the company's business, he may be required to refund the money. But why should he be required to refund the money under any other legal system than that which is in force at the seat of the company's main place of business. The same applies to other avoidance provisions.

We are all well aware that the particular avoidance provisions in each enacting state are different and are governed by policy and social considerations. They apply, and should apply, to attempts to recover assets if they are dissipated or paid away by the company contrary to the law of the main place of its business. But not otherwise, I worry about this. Certainly under existing English law I think the general view is that the statutory provisions of the English Companies Act which entitle the liquidator to recover assets in certain situations are applicable only to companies incorporated under English law. They have no extra-territorial effect. They do not apply to the dissipation of assets of companies incorporated outside England. If we wind up in England, as an ancillary liquidation, a company whose main place of business or place of incorporation is overseas, we would not dream of permitting an avoidance action under our own legislation. Of course we would permit the foreign liquidator to come into our country and seek in a restitution claim to recover assets, no doubt applying under private international law the law of the place of incorporation, which would provide the basis for recovery. You will have a recovery action, but it will not be governed by the English statutory provisions for recoupment if the company is not incorporated in England.

I think Judge Brozman's judgment in the Maxwell case reached much the same result. The company's main seat of business was in England, an avoidance action was brought in New York and Judge Brozman held that the provisions of the American Bankruptcy Code did not apply. The relevant statutory provisions which applied to enable their recovery to be made was that of the English Companies Act. Such harmonisation as we can achieve has to be done in accordance with the principles of private international law. It cannot be achieved by the model law. To my mind Article 19 bis is fundamentally flawed.

Judge Brozman

It seems to me to confer standing to initiate actions but not to dictate choice of law. If that is its intention then I think that it is necessary in order to effectuate recognition. But frankly, having been faced with one of these decisions, I would like nothing more

than if we could have a model law which dictated choice of law. But recognising that that may be difficult to achieve, I still think that it is imperative that we recognise that there is standing in a foreign representative to commence an avoidance action under whatever law the enacting state would feel would be appropriate.

Lord Justice Millett

There are two stages in a recovery claim. First of all you set the transaction aside under whatever statutory provision for avoidance may apply. Then you bring the restitution claim to recover the property. Article 19 bis refers to the avoidance provisions according to the law of the enacting state.

Judge Brozman

I think that we may be talking on different planes because under US law you would accomplish that in one action. You would not bring a separate restitution action.

Lord Justice Millett

Of course not, nor would we, but the point is that there are two steps in the process. You invoke some statutory provision like voidable reference or avoidance which gives you the right to recover. That is the avoidance provision. You look at the Uniform Bankruptcy Code or the English Companies Act, which gives you the right to recover. That is what Article 19 bis is referring to. The second step is to recover the money. That may bring in restitutionary defences; which is a different matter.

Judge Brozman

Well, I have to ask the drafters, because I am not one of them, whether the stature was intended to deal with standing or to deal with whose law applies. Maybe Neil can help me on that.

Mr. Neil Cooper

Well, I think ideally the practitioners there would have gone for choice of law. Enabling the laws of either jurisdiction to be applied as found appropriate by the Courts. But that caused a lot of problems with many nations, in fact the majority of nations, the courts of which are not accustomed to thinking in terms of applying any law other than their own. This accounts for the very broad way in which it is phrased at the moment. Phrases used in the model law may have particular meanings in some legal systems but they are intended to be read according to a common English usage I understand is appropriate to a model law. This article is intended to be one step as opposed to two steps.

Now Judge Clark said that the American procedure at the minute requires a full blown procedure to be instituted to utilise avoidance proceedings. One of the main objectives of the model law is to achieve operational efficiency. One of the ways that you do that is to make unnecessary secondary proceedings if this action is the only purpose of the secondary proceedings being started. We are aware that in many cases this obstacle has resulted in transactions which really should be challenged not being proceeded with, simply because of the cost of starting up yet another set of proceedings.

Judge Brozman

Let me just refine what Judge Clark said one further step. I think that what he was saying is that if you wanted to utilise US law, assuming that it otherwise applied, that you would have to, in order to avoid a transfer, that you would have to commence a full blown proceeding. I don't think that he was saying that in a Section 304 proceeding you might not be able to apply foreign law and there is a distinct possibility that Section 304 could be used to allow an avoidance action to be brought using the law of the home country.

Neil Cooper

I think that the model law as phrased is an attempt to accommodate the vast majority of nations who would be happy to have their own laws of avoidance being used without the need for secondary proceedings to be commenced.

Judge Clark

I appreciate Judge Brozman's refinement of my point, and I think I agree with it for the most part although I think there is also the danger – my colleague here from Argentina, Judge Rouillon and I were discussing this just a bit, and I won't speak for him but as we were discussing it we realised that there may in fact be if not a prohibition, perhaps at least an odd sort of a feeling, if you will, about using the local proceedings as a forum with which to entertain an action, as though for example; imagine if you will a French receiver instituting an action in the United States and asking for the United States bankruptcy judge to in essence sit as a practical matter certainly not legally, but as a practical matter, to sit as a French judge applying French law for a French receiver in order to achieve a judgment and a result which would then be delivered to the French receiver for distribution to the French creditors. I suspect that some of my colleagues may find themselves shaking their heads a bit and going back to the case books to see if in fact that is what the law contemplates.

Judge Brozman

I think you are talking about choice of law though, and I know that Justice Millett....

Judge Clark

I appreciate the distinction, I surely do but if I may complete the thought, there is it seems to me a somewhat greater danger here and that is that I think we have an assumption that we all agree on the basic propriety of pursuing certain kinds of Paulian actions. As Ron put it for example, when you have (if I can use the American expression) the dead beat debtor quickly hiding assets as best he or she can in order to make sure that the long suffering creditors do not get paid a dime, or whatever the currency might be, then in that situation it is fairly easy for us to agree, just a matter of basic principle. That seems like a good idea. But the reality is that the peculiar avoidance laws of many nations do differ and the use for example of English or US preference law may yield a rather odd result if it is attempted in Thailand. I am not so sure that we are ready to say that that is an appropriate use of the law.

I do agree with the notion that the stature that the model law, so far as it goes, appropriately gives the foreign representative standing and I think that is all that the provision of Section 19 is really intended to do. Beyond that I think it leaves the door open and I would just assume for now, leave it open.

Judge Brozman

I do not think you and I are fundamentally disagreeing and in fact I would plead that we leave in the draft a provision allowing standing. I would hope we could get beyond that but if we cannot get beyond that, at least let there be a provision for standing.

Mr. Neil Cooper

I wonder whether, in the light of some of the concerns, there are any suggestions that the judges can make for improvement in the wording to accomplish what seems to be common ground.

Mr. Mazzone

The law allows a law on procedure and it is one of the main purposes of the model law to make clear that the foreign representative has access to remedies available in enacted state. So we I think put that provision, Article 19, for the purpose of making sure that particular right which is contemplated normally in the laws of the enacted state is not impossible to be obtained by the foreign representative first of all in terms of access. So as many have already pointed out, the first objective of the provision is to make clear that there is a local standing for a foreign representative.

The second step is, if there is local standing that means that the law of the enacting state will determine how substantively the possibility of action will be used. And now I think, in my opinion relatively simply, there are two solutions. Either there is reference to what the law of the enacting state provides including conflict of law rules or there is a [reference] to the substantive rules of the enacting state. I would prefer for the purpose of avoiding problems when there is a conflict, I would prefer very brutally the use of the substantive rules of the enacting state jurisdiction. I know that there are very good reasons not to do that and Justice Millett expressed them, but in my opinion we have to make a rough choice. It is either the substantive rules of the enacting jurisdiction for those who prefer a rough rule. Or a more sophisticated conceptually more attractive rule, i.e. reference to the law of the enacting state including its conflict of rules. What is important is that we do not deprive the model law of the possibility of giving a foreign representative a fundamental right of access to this remedy.

Lord Justice Millett

What I suggest 19 bis should actually say is something on these lines; that upon recognition of a foreign main proceeding, the foreign representative shall have standing to initiate proceedings to recover assets consequent upon the avoidance of a transaction under the law applicable in the main proceedings. That I think would do the trick.

Mr. Neil Cooper

I can see the chairman of the Working Party sitting behind you shaking her head and laughing. This is actually where we started two or three years ago as a preference. We lost that simply because so many countries find it very, very difficult to enforce any other nation's laws or any laws that may be incompatible with theirs.

Justice Rogers

I would have thought if this is simply a procedural point, you can do it very simply and just say that the person has a right of access. Full stop. And then it is up to each jurisdiction to decide how they are going to resolve the conflict situation, but you may end up with double action ability. I think, from what we have heard, in fact that is what most courts will end up with. You are going to have to be actionable both in the main proceeding and actionable in the country of the non-main proceeding.

Judge Brozman

You have heard me say before that I plead at least for standing, but let me just go back one more step and tell you that since I had to deal with this is Maxwell, it would be a wonderful thing if we could ensure predictability in these types of matters. And so I would echo Mr. Mazzoni's comment that if we could stretch ourselves to declare that the law of either jurisdiction would be available, it would aid tremendously in the administration of these sorts of cases.

Now I am not a legislator and I cannot say whether or not that is something which can be sold to the legislators who will ultimately have to consider this model law. But I am not sure that it is an approach that we ought to simply forsake. Maybe we have to have a fallback position of standing only if we cannot go beyond that. But if we could go beyond that, perhaps it's reaching for the moon, but we ought to try to make the effort.

Mr. Neil Cooper

If I can add to that. It has become clear over the years that many jurisdictions need far more precision than that, and that simply providing standing without specifying what the standing enable the foreign representative to do gives a meaningless model law. I think we ought to rise to the challenge that Hal Burman gave us earlier saying that a model law should not be the lowest common denominator. If our model law can show the way that we believe laws should be going, we realise that not every country may enact that, but the aspiration is valid.

Judge Brozman

That's an important point. I think we all need to remember that a country does not have to enact all provisions of the model law, so that if there is serious disagreement with a particular provision like that, it is always possible that the country will either enact the provision in a different form or drop a particular article. So I would echo Neil's comments that we ought not to aim for the lowest common denominator but rather to aspire to the best that we can.

Are there any other comments?

Mr. Evan Flaschen

An observation that at conferences like this and at UNCITRAL working sessions, where the working language is English, you can sometimes get disproportionate input from people from whom English is their primary language, both Americans and Commonwealth folks, that can lead to the impression that what the English speaking people like in their system is in fact the best approach or the proper approach. And although I myself used the phrase "lowest common denominator" yesterday, I would be very careful about talking about a certain approach that we would all agree is right

and just maybe some countries cannot do it. I fear that even within this room there are many more who would like to make comments or observations but simply don't feel as comfortable with the English language as others and that if we really could do a poll of countries if you will, and in fact at the general session of the United Nations that is in effect what it will be, there may be more voices raised on issues than we have heard today and in other positions.

And again, I know there is a great deal of discomfort about a menu approach, but I do not view that as a negative if it turns out that one third or one half of the countries in the world happen to think it is wrong to have Paulian actions under the home country in my country or whatever the situation is, or stays are right or wrong, because again I don't think there is a right or wrong ideal law. To have the idea of co-operation, to be able in your country to do things, to do it the best you can. It is less important to me whether Italy mirrors for example the provisions I would like to see in the US, than it is important to me that I can go to Italy, that their judge has a statute that says I can have standing to be heard in Italy and that I can get the maximum that is available under Italian law.

Would I prefer Italian law looked like American law? Yes. I suspect Mr. Mazzone would prefer American law looked like Italian. That is not the issue here.

Judge Brozman

I don't think we are saying that everybody has to have the same law and if you construed it that way, or anybody else did, that is a misconception. I think that what we are saying is that to limit the UNCITRAL draft only to the fact that you have access to a foreign court, is to reach too low. That is what we are saying and that we ought to try to accomplish something a little broader than that if it is within our reach.

Mr. Evan Flaschen

Perhaps what I am trying to say is that I am not sure it is within our reach because to take the next step means to say either you shall apply the laws of the enacting country or the laws in the host countries, or you apply both. And within those three choices I fear it would be very hard to come to an agreement as to what is the ideal solution.

Judge Brozman

There are three choices, it seems to me. If you have a law which says that you apply either the law of the home country or the law of the enacting state as you see fit, those are two of your choices. You can apply one law, you can apply the other one. The third choice is of course that you don't include that provision in the model law. In which case all bets are off. That is the third option. There is always that option and I think that is the point that I was trying to stress.

Are there any other comments? Any other matters than the avoidance actions?

Right, then we stand adjourned until the next INSOL judges meeting.