11th Multinational Judicial Colloquium
UNCITRAL-INSOL-World Bank

21-22 March 2015, San Francisco

Report

Introduction

1. The 11th joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium was held in San Francisco on 21-22 March 2015. About 80 judges and government officials attended from over 40 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 first time participants.

Day 1

Optional Morning Workshop – Bases of cross-border cooperation

2. Following the approach taken at previous colloquia, the weekend began with an optional half-day workshop on the basics of cross-border insolvency. The first session provided an introduction to cross-border insolvency and to the UNCITRAL Model Law on Cross- Border Insolvency (the UNCITRAL Model Law), covering the background and reasons for development of the Model Law, a short introduction to the issues it addresses and an update on its enactment and use and application. In addition, the resources available to assist judges in their consideration of cross-border insolvency issues were noted, including the Guide to Enactment 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. [1]

3. The second session of the morning workshop provided an introduction to judicial aspects of cross-border insolvency. This was accomplished by way of a panel analyzing different cross-border insolvency scenarios[2] from three different perspectives: that of a judge in a country that has adopted the Model Law; that of a judge in a common law jurisdiction; and that of a judge in a civil law jurisdiction. In this manner, similarities and differences in terms of the judicial approach taken to the scenarios in each system were highlighted; care was taken, however, to emphasize that the treatment of the different

[1] These texts are available from the UNCITRAL website www.uncitral.org in the 6 United Nations languages.
[2] See questions for the breakout sessions below.

scenarios was to be illustrative only, and not to prescribe a template of how every judge should approach the issues presented.

4. While different jurisdictions had different approaches to the various issues, it was clear that irrespective of the law being applied, the judge would have to address the same questions when considering an application relating to a cross-border insolvency - access for the foreign representative, recognition of the foreign representative and the foreign proceedings and the relief that might be granted; the only real difference between jurisdictions was the tools available and the ease of their use. It was suggested by judges that have experience of using the Model Law that it provides a straight forward, predictable and speedy way of getting to a result.

The Programme

Lessons from recent cases

5. The panel considered several cases from Hong Kong, Australia and the Nortel cases involving Canada, USA and the UK.

6. The first Hong Kong case (*China Medical Technologies*[3]) concerned a group of companies with members incorporated in PRC, Cayman Islands, and Hong Kong. The holding company was wound up in the Cayman Islands where it was incorporated and subsequently, the liquidators sought to open winding up proceedings in Hong Kong, principally to enable the liquidators to obtain documents and examine certain persons with knowledge of the company's affairs. While statutory authority to wind up an unregistered company existed in Hong Kong, the exercise of judicial discretion to make that order was governed by certain principles (there must be a sufficient connection with Hong Kong; there was a reasonable possibility that the winding up order would benefit those applying for it; and there must be persons with a sufficient connection with Hong Kong and a sufficient economic interest in the winding up of the company. The latter requirement could be satisfied by the presence of a creditor or a number of creditors holding a material portion of the debt locally). The court found none of the three conditions was met. The petition was dismissed. Subsequently, a letter from the Cayman Islands court requesting assistance was provided concerning the production of documents and an order for the production duly granted on the basis that the law of the Cayman Islands was similar with respect to production of documents as the law of Hong Kong. Examination of witnesses could be addressed in the same manner, if requested. The case (and the Bermudan case of *Singularis*[4] noted below) indicated that obtaining a letter of request was an effective means of obtaining the assistance required and avoiding the need to commence local proceedings.

[3] *Re China Medical Technologies Inc*. [2014] 2 HKLRD 997
[4] *Singularis Holdings Limited v PriceWaterhouseCoopers* [2014] UKPC 36

7. The second Hong Kong case (*LDK Solar*[5]) concerned a group of companies with members incorporated in the PRC, Cayman Islands, Hong Kong, and several European and other jurisdictions. As part of a unitary restructuring exercise, two schemes of arrangement were proposed and sanctioned in the Cayman Islands with respect to the two Cayman incorporated entities and three were proposed in Hong Kong (concerning the two Cayman incorporated entities and the Hong Kong incorporated entity); the two concerning the Cayman incorporated entities were materially identical to the schemes sanctioned in Cayman. One creditor objected to approval of the scheme and questioned the jurisdiction of the Hong Kong court to sanction schemes of arrangement in respect of foreign companies. The schemes of arrangement in Hong Kong were sanctioned on the basis that there was a sufficient connection with Hong Kong so that the scheme as approved would have a substantial effect; if not sanctioned the creditors affected by the schemes could perhaps petition the Hong Kong court for liquidation of at least one of the entities on the basis that their debt had not been discharged by any scheme recognized in Hong Kong as having that effect. For that reason and because the Hong Kong schemes formed part of a larger cross-border restructuring that included the Cayman schemes, with which they were materially identical and inter-conditional (in the sense that each would take effect only if the others were sanctioned and became effective), the court approved the Hong Kong schemes.

8. The *Nortel Networks* cases involved proceedings in Canada, the USA and UK at the same time, as well as proceedings in France. Assets have been liquidated, raising $7.3 billion, but the issue that remains unresolved is 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 5 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 an 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. Decisions are yet to be issued. It is unclear whether there will be one joint judgment or two separate judgments; if two, there is a concern as to what will happen if those judgments are not consistent. It is also unclear how any appeal process would work. This matter is unprecedented with little case law to assist the courts.

9. A second case involved the UK pension fund against Nortel. English law provides that if the pension fund of a UK company is insufficiently resourced and there is an associated company that has controlled the UK company, that company can be pursued to contribute to the resources even if it is outside the UK. The pensions' regulator in the United Kingdom imposed a £2 billion support obligation on the company, enforceable against the company. The UK pension fund filed such a claim in Canada arguing that the

[5] *In the matter of LDK Solar Co Ltd (in provisional liquidation)* [2015] 1 HKLRD 458

sum claimed was what they would have obtained had they gone before the regulator in the UK. The Canadian court dismissed the claim holding that since the UK legislation was new, it was unclear what the result in the UK would have been and the claim was therefore too speculative.

10. The last cases discussed concerned several Australian decisions. Most cross-border cases in Australia were incoming applications for recognition. The approach taken to centre of main interests (COMI) mostly followed English authority, giving weight to the debtor's registered office or domicile. The first case concerned the COMI of an individual debtor[6] and in particular the time at which COMI is to be determined - the date of commencement of the foreign proceeding or the date of the application for recognition under the Model Law. The court held that the better view is the date of commencement of the foreign main proceeding; if the date to be taken were the date of the application for recognition and the debtor had, in the period following commencement of the foreign proceeding, moved around several different locations away from the location that in which the foreign main proceeding commenced, applications for recognition of that proceeding in different locations could lead to a diversity of outcomes. In some jurisdictions the foreign proceeding might be treated as a main proceeding and in others as a non-main proceeding or a proceeding that was neither. The court questioned why the recognition of the foreign proceeding should be so dependent upon such collateral, ad hoc and adventitious movements of the debtor *post* the commencement of the foreign proceeding. The court analyzed the facts and found the debtor's habitual residence to be in Australia and the foreign proceedings therefore to be non-main proceedings.

11. The second case[7] concerned proceedings in the Cayman Islands that had been recognized as foreign main proceedings in Australia, where there was a significant unpaid tax debt that could not be claimed in the Cayman proceedings, subject to provision of notice on removal of assets located in Australia to the Cayman Islands. That notice was subsequently given. The case raised issues about application of articles 20, 21 and 22 (1) of the Model Law. At first instance and on appeal, it was held that the Australian Taxation Office should have leave to enforce its claim on the assets in Australia. The universalist approach was questioned. The court held that that principle did not necessarily require the sacrifice of rights of local creditors where they couldn't prove in the foreign proceedings. The meaning of the hotchpot rules was discussed.

12. A third case[8] concerned examination and production of documents sought in aid of foreign proceedings that were recognized as main proceedings. Relief was sought under the Model Law and the foreign court had also issued a letter of request to the same effect. The court found that article 21 of the Model Law provided the requisite power to grant the orders sought. Having regard to the letter of request, the powers under the Model Law were supplemented by relevant provisions of the Corporations Act.

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[6] *Kapila, in the matter of Edelsten* [2014] FCA 1112
[7] *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57
[8] *Crumpler v Global Tradewaves (in liquidation), in the matter of Global Tradewaves Ltd (in liquidation)* [2013] FCA 1127

COMI (centre of main interests)

13. The last session on Saturday involved a discussion of the concept of COMI and how it had developed under the European Insolvency Regulation (EIR)[9] and the Model Law for both companies and individual debtors.

14. Under the EIR, a debtor's COMI determined jurisdiction for commencement of insolvency proceedings and was therefore a preliminary issue, while under the Model Law it determined only the consequences of recognition of a foreign proceeding. Several judges observed that it was interesting to note the extent to which the EIR had influenced interpretation of the concept under the Model Law. Factors relevant to its interpretation under the EIR were established in the decisions of the European Court of Justice (ECJ) in *Eurofood*[10] and *Interedil*.[11] In the *MG Rover* case in the UK, the factors considered included the location of billing arrangements, bank accounts, and of board meetings, although the latter was not really ascertainable by third parties. It was noted that once a decision is made under the EIR as to COMI and commencement of proceedings, it is binding unless in flagrant breach of fundamental rights.

15. It was observed that in 95% of cases under the Model Law the identification of COMI was straightforward, although what was often lacking in court decisions, presumably as a result of urgency, was a record of the judicial analysis that would help to establish jurisprudence on the issue; judges often did not set out their reasons. The importance of developing jurisprudence for certainty and predictability was emphasized.

16. It was noted that under the Model Law the analysis of COMI had to be carried out at the time of recognition, not at the time of commencement as under the EIR and that a commencing court can't make a finding of COMI that will have any effect on a recognizing court in another jurisdiction, although counsel sometimes seek that decision in anticipation of subsequent foreign proceedings. It was also noted that the factors to be considered by the court usually depended solely on counsel for the debtor and the evidence they brought forward - and that generally the judge is only hearing one side. Many practitioners appear unaware of the materials supporting the Model Law (Guide to Enactment and Interpretation and the Judicial Perspective). Practice directions for counsel might be helpful in this regard. The UK has such practice directions and the function performed by the CCAA Monitor in Canada was found to be quite helpful in addressing some of these issues. In some jurisdictions, it was suggested that practice directions might be of limited assistance, as the judge has to assess the relevant factors on each individual application. It was pointed out that because article 18 of the Model Law allowed the recognition decision to be revisited for the reasons specified, not so much turned on the decision on COMI.

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[9] European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings.
[10] *Eurofood IFSC Ltd* (Re) [2006] Ch 508 (ECJ)
[11] *Interedil Srl*, [2011] EUECJ C-396/09 [2012] Bus LR 1582

17. In Canada, model orders have been developed for mandatory and supplemental relief; these have worked very well and applicants will have to indicate why they want the judge to depart from those models.

Personal insolvency - COMI

18. The basis of COMI for individual debtors is professional domicile or habitual residence. The availability of a discharge and the varying lengths of the time before the discharge could be obtained across jurisdictions had led to what is termed bankruptcy tourism. The significance of some of the factors relevant to individual COMI was discussed on the basis of the following example: a German debtor moves to England, obtains a job in England and is therefore registered as a taxpayer in England, opens a bank account in England, has a house in England with a mortgage, and is separated from his family who continue to live in Germany. The fact of living in England can be discounted as it involved a recent move; the bank account in this case is insignificant and can be disregarded; the separation from the family can probably be disregarded as it would be hard to be satisfied, in the circumstances, that it was real, especially since the debtor continues to have regular contact with them and in any event, that factor is not one that is ascertainable by third parties; the debtor continues to have substantial assets in Germany; there are creditors in Germany and the debtor maintains his membership of professional associations in Germany. Taken together, the factors suggest the debtor's COMI remains in Germany.

19. In response to several questions, it was indicated that evidence as to COMI will often come from creditors, who typically will be aware of the application even though it is made *ex parte* and will contest the application or make submissions. It was noted that the revisions to the EIR establish a 3 month rule for movement of COMI (6 months in the case of an individual). Whether the court would be influenced by factors such as the lack of a personal insolvency regime in the jurisdiction that is the debtor's COMI is a question that can only be resolved on an analysis of the facts.

Breakout groups – The role of judges in considering whether to grant applications for assistance

20. Since practices vary enormously in both emerging and developed markets, ranging from a purely passive role to one in which the judge plays an extremely important role in assisting the parties, judges were asked to discuss in the break out groups, the way in which they would approach, in their jurisdiction, a series of scenarios involving applications for assistance from foreign courts and insolvency representatives.

21. Each application is for an order that the funds in a bank account in the debtor company's name in a bank account in your jurisdiction be remitted to the applicant who is outside of your jurisdiction.

Assumed facts

1. *The company directors had deposited the money in the bank account for bone fide business purposes – a proposed expansion into your country;*
2. *The funds are unencumbered debtor-company assets;*
3. *There is no suggestion of fraud;*
4. *The foreign representative has satisfied the court that court orders are final and that the proceedings are in order;*
5. *The parties before you have appropriate rights of appearance; and*
6. *That there are no irregularities which would prevent you from hearing the application and deciding it on its merits.*

Scenario 1 -- inbound application from common-law jurisdiction
You hear an application for recognition and relief presented by local lawyer acting for an insolvency practitioner who has been appointed office holder of an English company by the High Court in London. The application is in the form of a request for assistance from the High Court. The nature of the application is quite straightforward -- there is a bank account in the company's name in a bank in your jurisdiction. From information provided by the office holder's lawyer, there are no known creditors in your jurisdiction nor has there been any trading activity in your jurisdiction likely to give rise to tax liabilities.

Scenario 2 -- inbound application from a civil law jurisdiction
In similar circumstances to the first application, you hear a lawyer acting for an officeholder appointed in Germany, a civil law jurisdiction, in respect of a company incorporated in Germany. There is no formal request for assistance from the German court that appointed the office holder but simply sufficient evidence that the court has properly appointed the officeholder.

Scenario 3 -- inbound application from a jurisdiction that may not be the centre of main interest
In this scenario, the application is by an English officeholder appointed in respect of a US corporation that is also in Chapter 11 proceedings in New York. The assets in your jurisdiction had historically been administered from the English office and the English office holder is seeking to recover them. In this case, there is no letter of request for assistance from the High Court but there is no reason to doubt the validity of the office holder's appointment.

Scenario 4 -- inbound application by the debtor in possession
In this case, and unconnected to the previous scenario, the US Corporation that is the subject of Chapter 11 proceedings in the United States makes an application via local

counsel for delivery of the funds in the bank account. There is no court-appointed officeholder in this case but there is adequate evidence that the US court has commenced Chapter 11 proceedings.

Following suggestions made at the 10th Colloquium (2013), the discussion in these sessions was not reported back to the plenary.

Day 2

Court to court communication

22. The first session on Sunday addressed issues of court to court communication. Communication is often dealt with in cross-border protocols, identifying the potential need for it and often referring to the American Law Institute Guidelines[12] as the guiding principles, which clarify the procedures and safeguards. Communication has moved beyond formal means of communication and could now include, for example, texting and email, depending on how comfortable the court would be with those means of communication. If a protocol provided for communication without notice, that might be acceptable provided that if the court approved the protocol, parties were heard and due process followed in the approval process, although it was noted that in some jurisdictions it was possible for the court could approve a protocol that included provisions to which parties objected. With respect to the protocol in the *Lehman Brothers* case,[13] it was observed that many meetings took place under the protocol and led to agreements that ultimately provided building blocks for developing a plan. The lesson was that it is a good idea to work on enhancing the ability of the court to coordinate and cooperate with other courts and insolvency representatives.

23. In one jurisdiction that did not have statutory cross-border provisions, dependence on international business has meant that courts are more frequently confronted with cross-border cases and the courts have developed practice applying common law principles, which overlap to some extent with the principles of the Model Law. Cases often involve parallel proceedings with the COMI being in the location of the foreign proceedings. The need for direct communication generally doesn't arise unless there is a problem. A personal example was cited in which contact with the foreign judge was sought to try to work out a compromise on a particular issue. Whilst the matter was resolved, on further reflection, it was thought that a slightly more restrained approach involving consultation with the parties might have been appropriate. Since that time, the ALI court-to-court guidelines had been adopted (which could be adopted independently of enacting the Model Law), but no further opportunities where communication would have been appropriate had arisen. It was suggested that where experienced counsel are involved, it might not be necessary for the judge to communicate with another judge.

[12] *Guidelines applicable to court-to-court communications in cross-border cases*, American Law Institute (16 May 2000).
[13] The protocol is described in the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, pp123-124.

24. In considering court-to-court communication, a judge needs to consider limitations that apply to communication in domestic matters, where it is assumed that the judge cannot reach out to sources of information beyond what is brought to the court. Some jurisdictions have rules requiring notice to parties and the provision of an opportunity for them to be heard. Direct communication on procedural matters might be appropriate e.g. on scheduling of hearings in another court, but often there is a clear prohibition on judges communicating on substance. Article 25 of the Model Law needs to be considered in the context of each jurisdiction's framework of law and custom.

25. With respect to joint hearings, it was emphasized that those hearings were usually not joint but rather parallel hearings. In a typical Model Law case with main and non-main proceedings, joint hearings wouldn't be required; court 1 would make its order and that order would be taken to court 2 for recognition. The example was given of a Canadian order approving asset sales, which would then be taken to a US court for recognition in a chapter 15 proceeding. That recognition is easy to grant because, for example, the Canadian order is generally based on reasoning set out in the order. If parties object in the chapter 15 proceedings, but bring no new evidence before the chapter 15 court, they are unlikely to be effective in blocking recognition of the order.

26. However, where there are enterprise groups with more than one primary proceeding or an entity that has filed in more than one jurisdiction, a joint hearing might be considered.

27. The *Sino-Forest* case[14] involving CCAA proceedings in Canada and a chapter 11 in New York was mentioned. The parties requested a joint hearing on the basis that it would expedite the proceedings. It was decided that it was not necessary as it was up to the Canadian court to make the orders and then to the US court to approve those orders, subject to the Model Law protections for creditors etc. It was emphasized that these steps cannot be conflated just to save time.

28. A key issue of concern with respect to joint hearings relates to the making of decisions on substantive issues and what happens when the judges disagree. This is a very real possibility because the "joint" hearing is really parallel hearings. When cross-border protocols are used,[15] they typically place emphasis on the independence of each side, but also provide that the judges can communicate to see if they can come to consistent decisions. The process won't work if they disagree. If they do disagree, it is unclear what will happen and even if they agree, what happens if there is an appeal is unclear.

[14] *Sino-Forest Corporation (Re)* 2012 ONSC 4377 (27 July 2102); *In re Sino-Forest Corporation*, 501 B.R. 655 (Bankr. SDNY 2013)
[15] See generally *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*.

29. Even where a protocol provides for joint hearings, it is nevertheless up to the judges to decide if a joint hearing would be appropriate. The technology to set up such a hearing is expensive (the very high costs in the *Nortel* joint hearings were noted) and they may not be the most efficient way of dealing with the issues. Much is involved and many issues need to be considered, for example, planning for the hearing, coordinating argument and decision-making - will decisions be given orally or be reserved and what is the potential for appeal; scheduling the hearing; coordinating court staff and ensuring they have been trained to run the technology (not all courts will have the technical or technological capabilities), and deal with time zone issues. Often the technology is not fully effective and this can result in delays, bad pictures, breakdowns and so forth. Tests need to be run to make sure the technology needed for the joint hearing works fully. The parties need to demonstrate they have the resources to pay for such hearing. With respect to the presentation of argument, the procedures need to be agreed – including the order of appearance, what is the sequence between the jurisdictions, what relief is being sought, who is going to present the argument, how are reply arguments to be handled, is the time for making oral arguments to be limited, will written submissions to be restricted, how will inconsistent decisions be handled, and who would rule on any objection (the answer may depend on where it arises). Additional questions include what happens if one of the rulings is appealed; what constitutes the record of the hearing; is it possible to have a joint hearing on appeal; and what is the appellate review test? Producing a transcript of the hearings is also challenging and depends largely on the quality of the technology. It was noted that a number of these issues can be negotiated in trial management conferences (usually by conference call with both judges and all parties). Many of these questions remain open and present a significant challenge, but it is likely that there will be an increasing number of joint hearings. Moreover, a more progressive approach to communication has developed; while previously the question would have been "why" you would need to communicate, perhaps now it is more, "why not and how could we do it".

30. In response to a question as to whether courts could agree, in the cross-border context, that certain issues will be dealt with in A while others would be dealt with in B, it was suggested that while there may be certain advantages in such an approach, the difficulty might be that because insolvency addresses class remedies as opposed to civil actions, class agreement might be difficult to obtain and local judges are obliged to decide according to their own law. For that reason, they aren't likely to hand the decisions over to someone else. Other questions included:

a. Whether it might possible for judges to discuss, after a hearing on procedural matters, whether or not each had reached a decision and possibly communicate the decision privately before communicating with the parties, so that each judge would know whether they had reached consistent decisions. Some judges agreed that might be acceptable;

b. Whether it might be possible for one judge to hold a hearing and develop a record that the other judge could use as the basis for a decision. It was suggested that such an approach could cause problems if there was opposition;

c. Whether it would be possible to adopt an approach like certification in the US, where a US court can certify to a foreign court how US law works. It was suggested that might work in some jurisdictions only if all key stakeholders agreed. It was reported that some courts already had agreements with the courts of other countries on a process similar to certification.

Breakout groups – The role of judges in considering the relief to be given in more complex court-to-court applications

31. In the second breakout group, judges were asked to discuss the relief they would grant in the following scenarios.

Scenario 5 -- inbound application where there are local creditors
In this case, in fundamentally the same circumstances as scenario one, it transpires that there are at least two local creditors for professional fees in respect of the proposed expansion. These creditors wish to attach the funds in the bank account in satisfaction of their claims. The English officeholder has confirmed that the claims of these creditors would be admissible claims in the UK proceedings, albeit that there are clearly insufficient assets to meet all of the creditors' claims in full.

Scenario 6 -- inbound application where there are local priority creditors
In circumstances very similar to the above case, it appears that the local claims are from creditors who would be entitled to priority in the event that insolvency proceedings were to be commenced in your jurisdiction.

Scenario 7 -- application for relief from foreign officeholder where the COMI is in your jurisdiction but there are no insolvency proceedings extant.
In this case insolvency proceedings have been commenced in England in respect of a corporation with substantial operations in your country. Evidence suggests that the company almost certainly has its centre of main interest in your jurisdiction and although there has been speculation in the press regarding the fortunes of this corporation, no insolvency proceedings have yet been commenced. The English officeholder has indicated to the court, through his lawyer, that he has therefore commenced this action in order to ensure that the funds in your country are secured for the benefit of creditors generally.

Scenario 8 -- competitive applications
In a situation similar to scenario one above, the English administrator is seeking the return of the funds in a bank account. The centre of main interest of the corporation is in England but there is also a subsidiary in your jurisdiction and an officeholder has been appointed to this subsidiary by your court. Although the bank account is clearly in the name of the parent company, the officeholder appointed in respect of the subsidiary opposes the application on the basis that some or all of the funds may have come from the insolvent local subsidiary.

The role of the UNCITRAL Model Law in ensuring effective cross-border insolvencies

32. This panel considered three issues: (i) what the UNCITRAL Model Law provides that is really helpful in the cross-border context and not provided by other laws; (ii) how the Model Law fits with other laws (if any) that may be applicable in each jurisdiction in the cross-border context; and (iii) what additional tools could be provided to supplement the Model Law and address gaps or uncertainties that exist in the Model Law, including any issues of interpretation that have arisen.

33. The panel agreed that among the key benefits provided by the Model Law were streamlined, simple procedures, the provision of automatic relief that helped to move proceedings along and preservation of the powers and integrity of ancillary jurisdictions. The Model Law is simply expressed, well understood, easily learned and retained; it can be applied consistently with appropriate discretions; provides a well-understood framework for foreign parties and reduces the need for foreign representatives to have to seek advice on domestic law.

34. The second question was discussed by reference to the position in Australia, acknowledging that it might be different in other countries. In Australia, the Model Law is not materially different to the underlying position and simply enacts existing principles of modified universalism. Australia added the Model Law to the existing legislation – the corporations law, the law on personal bankruptcy and on reciprocal/mutual recognition of judgments for common law countries. The utility of these regimes is that if there are gaps in the Model Law, the court can fall back on other statutory provisions. Examples of cases where the court did fall back on those provisions include the *Williams v Simpson*[16] decisions in New Zealand and the *Tannenbaum*[17] decision in Australia, the latter of which turned on the issue of the COMI of the debtor and relief that was granted under the Bankruptcy Act rather than under the Model Law. Conflicts between the different regimes were avoided in Australia by provisions that the Model Law supervened. One consequence of the Australian approach is that while foreigners might know about the Model Law, they might be unaware of the possibilities provided by the other options. It was observed that common law jurisprudence was being enriched by, for example, decisions of the Privy Council (relevant to several Commonwealth countries) and that it would be interesting to see how the Model Law enriched the common law and vice versa.

[16] *Williams v Simpson* [2011] NZHC 1631 (17 September 2010).
[17] *Re Gainsford, in the matter of Tannenbaum v Tannenbaum*, [2012] FCA 904.

35. With respect to the third issue, two key areas were mentioned. The first concerned recognition of the discharge of a debtor or the approval of a reorganization plan. Such orders might not be recognized in some jurisdictions and in the absence of comity, this might lead to some difficulties. The second, concerning the reorganization of shipping companies, related to the application of the automatic stay to claims in rem. In the *STX v Pan Ocean*[18] reorganization, foreign courts have recognized the ROK reorganization as foreign main proceedings, but there have been inconsistent approaches in different jurisdictions to the question of attachment or arrest of the ships.

36. In response to a question as to the meaning of "direct access" in article 9 of the Model Law, it was suggested that it was a matter for local law – in some jurisdictions, locally admitted counsel would have to be retained to represent the foreign representative; in others, there may be no requirement for the debtor or the foreign representative to be represented by local counsel.

"Forum shopping is bad – choice of forum is good"

37. This session compared the approaches to the issue in the EU and in other jurisdictions. Under the European Insolvency Regulation (EIR), the decision to commence insolvency proceedings cannot be reviewed by other courts and the proceedings must be automatically recognized within the EU, except for reasons of public policy, which include forum shopping. Recital 4 of the preamble to the EIR denounces the practice of moving assets to improve a company's position (the revision of the EIR hasn't changed that position – new recital 5 uses the language "necessary to avoid incentives … to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the general detriment of general body of creditors).[19] But discussions indicated that the need for choice of forum is generally favoured, the distinction being between good forum shopping linked to freedom of establishment especially where this permits the interests of creditors to be preserved and bad forum shopping, which typically involves the selection of a jurisdiction by the directors to avoid paying certain creditors, certain priorities, avoidance actions, directors' obligations, and so forth. Sometimes it is hard to distinguish between these two motivations. Examples were cited of cases involving the transfer of a company's seat from Germany to London. In the first case (*Schefenacker*[20]), the move was made with

[18] Australia: Yu v STX Pan Ocean Co. Ltd (South Korea) in the matter of STX Pan Ocean Co. Ltd, [2013] FCA 680; New Zealand: *Kim and Yu v STX Pan Ocean Co. Ltd* [2014] NZHC 845

[19] As set out in the 15414/14 Addendum to the Interinstitutional File 2012/0360 (COD) dated 20 Nov. 2014 by the Council of the European Union.

[20] *Schefenacker* AG. Recognition of the English CVA as a main proceeding was granted in the USA under chapter 15 in 2007: *In re Schefenacker PLC*, case no. 07-11482, order of June 14, 2007 (SDNY) unreported.

the agreement of creditors and not challenged; in a second case, the move was challenged twice; both in England and Germany, and the proceedings ultimately opened in Germany. A further requirement under recital 28 of the revisions to the EIR relates to safeguards aimed at preventing fraudulent or abusive forum shopping. Recital 30 will establish a three month rule – the presumption that the debtor's centre of main interests is the place of the registered office does not apply if the debtor has relocated that registered office to another State within a period of three months prior to the application to commence insolvency proceedings (six months for movement of an individual's habitual place of residence).

38. In the common law jurisdiction discussed, choice of forum was acceptable provided the objective of the choice was neither fraudulent nor abusive, in much the same way as the EIR; jurisdiction is governed by common law rules that can be quite strict. A number of cases involving analysis of the location of COMI were raised and the importance of the ascertainability of the location of proceedings for investors stressed. It was suggested that parties investing in a particular jurisdiction are entitled to assume that cases involving insolvency will be resolved in that jurisdiction. A finding as to the existence of COMI elsewhere might be a mere happenstance. It was acknowledged that a legitimate reason for choosing a particular forum might be the availability of a more favourable reorganization regime or a regime providing more favourable access to information. Several cases were cited (*Fairfield Sentry,*[21] *Soundview*[22], *Singularis*[23]) that had raised difficult issues of choice of forum and cooperation between courts.

Cross border aspects of the bankruptcy of natural persons

39. The final session focused on the approaches of several jurisdictions to natural person insolvency, a topic addressed in the World Bank's comparative report *Treatment of the Insolvency of Natural Persons*[24] that covers some 59 countries.

40. Common considerations included the complexity and cost of relevant procedures; availability of a discharge and the length of time before it is available (and associated issues of insolvency tourism and debt that might be excluded from the discharge); the distinction between household and small business debt and the availability of mechanisms for the insolvency of micro, small and medium-sized enterprises; cultural issues and stigma associated with insolvency; punitive elements of applicable laws; need for education on available laws and procedures; and the level of success amongst those that had been given a fresh start following bankruptcy.

[21] *Stichting Shell Pensioenfonds v Krys and another* [2014] UKPC 41.
[22] *In re Soundview Elite, Ltd*., 503 B.R. 571 (Bankr. S.D.N.Y. 2014).
[23] *Singularis Holdings Limited v PriceWaterhouseCoopers* [2014] UKPC 36.
[24] Available at http://go.worldbank.org/6NEL6E0A10.

41. Some jurisdictions had made considerable recent reforms to natural person insolvency procedures reducing costs and complexity, removing stigma and reducing the time before a discharge becomes available; others acknowledged that more needed to be done.

Open discussion

42. Participants were asked to express their views on how to make the content of the colloquium easier to share with colleagues at home and on the general structure and length of the program. Although there was general agreement on the usefulness of the optional introductory workshop during the first morning of the programme, especially for judges who were attending for the first time, several suggested that that information might be provided before the colloquium or by way of distance learning in order to leave more time for discussion of other issues on Saturday morning. There was general agreement that the colloquium should continue to be held over the weekend prior to the INSOL World Congress so as to facilitate travel to and participation in the Congress.

43. The break-out sessions were thought to have been particularly productive and interactive, and had worked well without having them report back to the plenary. Some liked the fact that the composition of the break out groups remained the same over the 2 days, facilitating more open and active discussion; others felt it might be better to change the composition so that each judge had the opportunity to get to know more than one group of participants.

44. As to suggestions for future colloquia, one was to introduce maybe one or two parallel sessions in order to accommodate some more intensive sessions for those judges who were more experienced or who had attended a number of colloquia. Sessions providing updates on new issues and topics were welcomed. Overall, the participants in the colloquium were very satisfied with the program and content.

45. The twelfth judicial colloquium is scheduled to be held on 18-19 March 2017 in Sydney.