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Evaluation Carried out by:

Hon. Justice William Gummow (Australia)
Hon. Mr. Justice James Farley (Canada)
Hon. Mr. Wisit Wisitsora-At (Thailand)
Hon. Mr. Justice Paul Heath (New Zealand)

Hon. Justice William Gummow (Australia)

If I can begin with the paper we just heard this morning from Justice Baragwanath. This surveys the field of Cross-Border Litigation as it may be observed today, with particular reference to insolvency litigation.

As we all know, the financial collapse of large organisations can lead to urgent curial and regulatory intervention in more than one national jurisdiction. Regulatory bodies exercising investigative powers also may need the effective assistance of judicial and other public authorities in several countries. So far as the common law jurisdictions are concerned, the judges, one may summarise, readily adapt their procedures to the particular cases at hand. Those judicial authorities in civil law systems may have less scope for such flexibility. But care is required here; no one system can have or claim a complete monopoly on revealed legal truth and wisdom.

Whatever the base for a particular legal system there certainly are common problems. Some involve considerations of a governmental or political nature. There are questions of what in the United States constitutional discourses is called, democratic deficit in exalting the international order above the elected elements of the nation state. Case law apart, it is for the legislatures both to enact normative structures that are binding in municipal law and also to vote the necessary funds for the administration of justice. It

is for the Executive Government to conduct external affairs involving, not the least, the giving of recognition to foreign governments and foreign legal systems. Thus the extent to which the courts of the forum can properly look beyond the interests of creditors connected with the forum and the identification of what is a sufficient connection with the forum may well involve consideration of political significance and fall within the pale of the non judicial branches of government. Only through the adoption by states of measures such as the UNCITRAL Legislative Guide on Insolvency Law, endorsed by the General Assembly last year, can there be a basis for a sound international cross-border regime to deal with the problems just indicated.

Other considerations which must influence judicial procedures in transnational litigation arise from the requirements of due process. Different legal systems may have their own formulations of what due process involves. The aversion in the common law systems to ex parte communications with the court may not be so absolute elsewhere. Likewise the requirement of full disclosure by those seeking urgently ex parte injunctive relief.

If transnational ex parte communications are to take place between judicial officers, must it be with the agreement of the parties? What if one side unreasonably refuses to agree? What is the evidentiary status of those communications? Must they be preserved in a form that becomes part of the record, for example, the record for appellate purposes. Material dealing with such questions is to be found in the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, being the guidelines adopted by the American Law Institute in Washington in 2000. I well remember being present on that occasion.

In addition to questions of institutional competence between the various branches of government, and of adjusting the substantive law to internationally agreed norms of due process, there are matters of judicial attitude to other legal systems. The common law, it seems to me, is not as parochial as is sometimes suggested. The common law choice of law rules, beginning with the work of Lord Mansfield a long time ago, provide a well-developed body of principle which in practice broadens the scope of judicial vision beyond the parochial.

Any reader of the English nineteenth century cases and of the very significant treatise by Story from the United States will appreciate the strong influence at that time of Savigny who was, after all, a great European scholar. Likewise the modern development of *lis alibi pendens* and the anti suit injunctions show judge-initiated changes of great importance. Indeed it has been said that, instead of choice of law, we are now concerned with choice of forum.

A range of international arrangements, including air navigation, shipping, extradition law, refugee law, the Hague conventions on child abduction and now on inter-country adoptions, encourages and indeed requires the judges of nation states to act upon more than parochial considerations.

Litigation upon questions of construction arising in such international arrangements as the Warsaw Convention and its supplements and the conventions respecting international shipping requires increasing attention to pending litigation elsewhere upon the issues in question. An example is the recent spate of litigation upon the deep vein thrombosis phenomenon (if it be such) in international air travel. This has involved courts of the United States, the United Kingdom, Australia and elsewhere each looking at the others' decisions on common problems. The United States in a recent decision of its Supreme Court perhaps went further than I have ever seen, actually looking at a decision of the Court of Appeal in Victoria and in fact dividing upon their reaction to that decision.

From all the above there is the prospect of further facilitation of the orderly conduct of commerce and the provision of international finance in a secure environment of legal processes and remedies.

Thank you

Hon. Mr. Justice James Farley (Canada)

You may have seen a number of people wandering around this conference centre with orange bags. With some degree of investigation I determined they were not tourists from Ukraine but in fact they were with the Australian division of the International Academy of Pathology and so they do have a commonality with insolvency. Pathology, as I understand it, is not restricted to an examination of dead bodies, although that is sometimes the case in both of our professions. Rather it is to examine the cause of disease and to see whether or not it can be prevented or put into remission or in fact cured. That of course would be the successful rehabilitation of a diseased company. Let me deal with the cross-border court practice.

Insolvency on a purely domestic basis is inherently chaotic enough with the need to maximize value and to ensure that a viable corporate enterprise can be restructured. This is with the objective of preserving the vital capital not only of plant and equipment but also a trained workforce (and incidentally minimizing social disruption) and established supply arrangements, a significant distribution chain and a loyal customer base. Dealing with insolvency in a domestic case requires that matters be dealt with on a timely basis: that's real time litigation requiring rather quick decisions on a timely basis versus autopsy litigation which can be dealt with tomorrow, or can be dealt with next month, or can be dealt with next year. Real time litigation compounds the difficulty when you get involved in a cross-border situation.

Globalization has and will continue to ensure that business enterprises will stretch across national borders. The value of the whole will always be greater than the sum of the constituent parts. That will need cooperation and communication between, or as my grammar school teacher would say when dealing with more than two, among the jurisdictions involved. An out-sourced plant in country x is not worth much if it is detached and delinked from the assembly plant in country y and vice versa. Ring fencing and going it alone would be extremely counterproductive.

How can we best deal with this?

There has been considerable advancement of ideas and concepts in this area over the past ten years, ideas and concepts which have been proven to be useful and valuable in experience. They are yours to take home with you and discuss, modify, tailor to your needs and use. Make your experience here in Sydney known to your colleagues formally and informally, advise the bar and if possible insolvency practitioner associations of the possibilities, do this on a continuing and in advance basis so that when a cross-border case hits you or comes along to your jurisdiction, the participants will know that there are tools available to achieve a superior result. Plant the seed, water it, nurture it and enjoy the cool shade of a strong tree on a hot day in a cross-border insolvency.

What are the tools?

They are referred to in the paper I co-authored in your materials: Cooperation and Coordination in Cross-Border Insolvency Cases.

1) Networking through the judicial colloquia sponsored by UNCITRAL and INSOL with an appreciation that your colleagues in other jurisdictions are grappling with similar problems and having similar commonalties and that a ripple effect of this can be achieved by discussing this appreciation with your colleagues in your own jurisdiction.

2) There is the International Bar Association Concordat which picked up on the commonalties of insolvency situations, be they of any particular legal system - developed by lawyers, academics and judges from civil code countries, common law countries and mixed approach countries. Using a menu approach to available templates, a protocol can be developed to meet the needs of the cross-border case at hand. This protocol can be proposed by the participants for approval and adoption by the courts involved

without, I stress without, any infringement of domestic substantive or procedural law nor loss of sovereignty. Please recall that in the Everfresh case, the first use of a Concordat-based protocol brought a 40% increase in value. As well that case took just over half a year from start to finish. The website of the International Insolvency Institute provides many examples of protocols, which can be used as templates to be modified for your particular case including protocols between common and civil law jurisdictions. See the website www.iiiglobal.org.

3) Websites are invaluable. They open the door to others. There is no need to remember where the photocopied report has been filed away; you will find it on the UNCITRAL website www.uncitral.org http://www.uncitralor the INSOL website www.insol.org. The Model Law on Cross-Border Insolvency as well as the report on the substantive components of an insolvency law which can be utilized on a menu approach were all developed under the auspices of UNCITRAL harnessing the contribution of scores of countries and NGOs.

In assuming that the United States passes Chapter 15 which would incorporate the UNCITRAL Model Law this year as our American colleague said, we would expect that its adoption would encourage the passage of the Model Law in other jurisdictions around the world.

Concurrently the World Bank has been working on a report on best practices, which is to harmonize with the efforts of UNCITRAL and INSOL - go to its website at www.worldbank.org.

4) Communication is key, timely communication is vital. See the views of the Third Circuit Court in the US Court of Appeal in Lernout & Hauspie. Look at the American Law Institute NAFTA project guidelines applicable to court-to-court communications in cross-border cases. These were developed by lawyers, academics and judges from Mexico, a civil code jurisdiction and the United States and Canada, two common law jurisdictions. The website is www.ali.org. You may feel comfortable informally contacting a colleague in another jurisdiction. You may also feel constrained for ethical, personal or practical reasons. However these guidelines which may be modified as necessary or desirable, provide an absolutely pristine neutral way for the courts to communicate to ensure that the judges and the participants know the status of the case and where it is going. The guidelines are now frequently incorporated to a protocol. I asked for volunteers yesterday to increase the number of cases where it has been translated; it is now in a dozen different languages. I have three volunteers already from yesterday and we are always looking for more. When it is further translated, it will be published in print and also available on the website.

5) Good fences make good neighbours, the mere presence of a protocol and the guidelines in many cases now means that the timely flow of accurate, emphasize accurate, information is ensured without the necessity of resorting to setting up a joint video conference hearing. I would say that if you do have a joint video conference you do it with a wet run and with an in-advance agenda. As well, a video conference is far preferable to a phone conference for understanding and discipline (to avoid interruptions and maintain coherence) reasons. The cost of the link should be picked up by the estate of the insolvent corporation.

6) I have given you so many websites that you can't remember them or where you have filed them. Well, remember at least one of them. Any of the websites will lead you on to links to the other websites but if you are on the triple I website see if you can use any of the many papers on international topics located there. My paper and material can be found there. Last night a colleague asked if he could use parts of it, I said "absolutely". The purpose of this site is for the dissemination of information and we are glad that these contributions can be used in any way that you and your colleagues feel appropriate. I believe that the same goes for each and every one of the other websites that I have mentioned. They are all developed by people working towards a common goal with each contributing in different areas.

Will this make your task in life simple?

Unfortunately the answer is: no. Consider the illustration we have, the difficulty of implementing in practice the EU Regulations just on the topic of centre of main interests and the views of the Italian and Irish courts and our Dutch colleague. In addition, note the advice of our German colleague that there will not only be problems on an inter-company basis for interpretation now with 24 official languages in the EU to contend with, but also intra-company divisions on this particular topic. Yes, there are certain teething problems with any baby, but with time, patience and the use of available tools even cats can be trained to be herded.

So the answer is: no, these tools will not make your life and task easy. But consider the anguish and frustration that you will experience and the loss of viable enterprises which could and should be rehabilitated and value maximized if you do not use these available tools. Any cross-border case will be much more difficult than a solely domestic case - but the tools will make that cross-border case easier and simpler.

I never fail to learn something valuable when I go to another jurisdiction or to sessions like this. I have done so again with this Judicial Colloquium and I would like to express my thanks again to UNCITRAL and INSOL. You too can contribute not only by using the tools, by spreading the word, by planting and nurturing the seed, by helping with getting the communication guidelines translated, but also by going back to your jurisdiction and sharing your experiences and by making suggestions as to the improvement in the approaches and systems. We have not finished the job; we are part way there; we need your assistance and help.

Thank you my colleagues and friends for your participation.

Hon. Mr.Wisit Wisitsora – At

Mr. Chairman, friends. I was asked to give my evaluation on Judicial Resources and my comments are as follows.

In my view it is undoubtedly accepted at this Judicial Colloquium that to have an efficient insolvency system we need both good insolvency law and strong institutional framework. The lack of either could undermine the whole system. These two elements are equally important, although some admit that putting proper legislation in place is much easier than creating the framework.

It was suggested that the failure of insolvency reform is normally caused by the fact that countries tend to put more emphasis on changing the law rather than strengthening the institutional capacity, as shown by the studies of the EBRD. With respect to judicial resources, it was pointed out that beside the general needs of a good court system, such as integrity and independence of judges and the general assistance of efficient clerks; judges do need to have a clear understanding of the language of the insolvency law and of economics. In addition, judges should also have a reasonable understanding of business practices, as this will of course help them to rule correctly and promptly.

The need for strong professionals such as lawyers and trustees to assist judges is also of great importance. How to achieve what is needed is a very important issue. It was suggested that in the long term, education and opportunities to gain experiences on the subject could be sufficient. With the inclusion of proper selection processes for judges, trustees and lawyers, the insolvency law system could be substantially developed. The suggestion of having a specialized bench and bar for insolvency matters was seen as an option, but only to the extent that the court must be really and truly specialized. Again this was shown in the study of the EBRD.

Training of judges even after their appointment was encouraged, although it was confirmed at this meeting that in some jurisdictions the training of judges may not be accepted. In most jurisdictions

training is more than welcome by judges, and therefore it is in my view that international organisations, including development banks, should continue providing assistance on this matter, as well as technical assistance on legislative reform.
Thank you

Hon. Mr. Justice Paul Heath (New Zealand)

Justice Gummow has offered some meaningful insights on the wider issues involving cross-border judicial cooperation and in the use of international materials in the interpretation of domestic legislation. Those comments have been made in the context of the paper we heard this morning from Justice Baragwanath. Justice Farley has brought that analysis down to a different level of abstraction by describing the evolution of the judicial cooperation and the resolution of real time cases involving cross-border insolvency**.** Judge Wisit has spoken of the resources needed for judges to perform their important tasks readily.

My comments will consider the relevance of the international work that has been undertaken and continues to be carried out and the impact it has on the day-to-day work that we must**,** as judges, perform when cross-border problems arise.

The starting point is that different countries have different approaches to insolvency law**. S**ome emphasize the rights of the debtor**;** others the rights of the creditor. The point was put quite starkly in a conversation that I once had with the well-known bankruptcy scholar from the United States**,** Professor Jay Westbrook. When I referred to a company as being a mere shell, he responded "Oh you mean the entrepreneur"**.** That demonstrates the difference in attitude between systems that look specifically at the corporate entity as such, and those that take a wider view, looking at the person who creates wealth behind the corporate entity.

UNCITRAL's work on insolvency law leading to the Legislative Guide recognized those different starting points. The Guide provides guidance on the rules and principles that are compatible with each other depending upon what starting point is taken for the law that is enacted.

The thoughtless mixing of rules and principles designed for a debtor-based regime with one designed for a creditor regime is a recipe for disaster. Any insolvency regime based on such a foundation may well founder quickly and be counter productive**,** so far as public policy goals of promoting investment and keeping the cost of credit as low as possible are concerned.

The Legislative Guide, coupled with the policy work undertaken by the development banks on a comparative basis, will assist those who have the obligation of framing insolvency laws and will provide guidance to judges in difficult insolvency cases requiring a weighting of competing policy goals to reach decisions which are more consistent with the globalised economy in which we now live. As Justice Farley has said globalisation is here; the Internet and the ability to transfer sums of money quickly across sovereign borders is the clear evidence of that. Globalisation is not going to go away and we must learn to function in the world as it now is.

On the other hand, judges must be aware that there are some functions that are better undertaken by the Parliamentary or Executive arms of government. They have consultative procedures and the availability of information that does not necessarily come before a court in a particular case. Courts must be mindful of those important differences when deciding how far to reach in an endeavour to ensure international compatibility of approach.

Institutional infrastructure is also important, as we were reminded by speakers from The World Bank and the European Bank of Reconstruction and Development. A good insolvency law is only as good as those who administer it and the resources available to them. For example, Chapter 11 of the United States code simply would not work in a small country with no specialist bar and insufficient work to justify a total

immersion in issues such as those dealt with on a regular basis by specialist bankruptcy judges in the Unites States.

There is also a need to recognize the different ways in which commercial activity develops. Lenders in the United States are well familiar with the Chapter 11 process and I speculate too that those in Canada will be aware of it also. Finance rates are based upon that knowledge and understand. But, if one changes those systems one risks the possibility that finance rates will change.

The Model Law on Cross-Border insolvency and the Guide to Enactment, as well as the *travaux preparatoires* of those documents are relevant to the interpretation of the Model Law as enacted in various countries. The point of this particular exercise in interpretation is international consistency of approach. Placing too much reliance on a text, at the expense of the ideas underlying the text, will inevitably dilute the value of the Model Law so far as consistency of approach is concerned. I would suggest that the legitimacy to interpret the document in that way is derived from the domestic adoption of an international instrument, which anticipates a consistent approach.

We are judges. We are the people who interpret and apply the law. In doing so, we must be mindful of the purpose of the law and its wider societal aims both at a domestic and international level. If words are clear, we must apply them. But, if they are not then choices are to be made. If our court processes are too slow, or our approach to interpretation of commercial law too idiosyncratic, the impact is detrimental to overseas investment and the cost of credit. Financiers can put a price on anything. The cost of the unpredictable application of commercial law is higher interest rates to reflect the added risk and costs associated with recovery of debt.

At its heart, insolvency law deals with the situation in which there is not enough money to go around. Someone is going to lose and insolvency law decides who will win and who will lose. Someone gets priority, someone doesn't. There is no room for compromise. Courts must be mindful not to give too much weight to the sad story they hear from a particular plaintiff because, in the general body of creditors, there are many more sad stories that have not been told. The legislation is what gives the indication to the court as to how those concerns ought best to be weighed.

What the international work teaches us is that predictability of future application of the law and the ability to deal conscientiously yet quickly with real time problems are the two issues we, as judges, must endeavour to address ourselves.

The issues we have heard discussed have been helpful to us. UNCITRAL and INSOL should be thanked for organising this opportunity for judges to exchange views on a frank basis.

There are some experienced judges; there are some less experienced. But, the speakers from whom we have heard and the contributions that have been made from the floor have raised the totality of our consciousness in the issues we need to address. They have enabled us to understand other systems better and, hopefully, to build a climate in which judges in one jurisdiction can place confidence in the Courts and judges of another.

I thank both organisations for this opportunity on your behalf and thank Justice Gummow, Justice Farley and Judge Wisit for their wise remarks in this evaluation.