8th Multinational Judicial Colloquium
UNCITRAL - INSOL - World Bank
20-21 June 2009
Vancouver, Canada

Report

Introduction

1. The 8th Joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium was held in Vancouver, Canada on 20-21 June 2009. Over 80 judges and Government officials attended from some 40 States, representing a broad range of practical experience and perspectives, particularly with respect to cross-border insolvency, from diverse legal systems. The Colloquium provided a widely-welcomed opportunity for judges to have contact with each other and to further their understanding of the various national approaches to cross-border insolvency cases. A number of judges attending had not attended previous colloquia.

2. To a significant extent, the issues discussed identified concerns that had been raised in previous years, particularly with respect to communication between judges.

Optional workshop

3. The weekend commenced with an optional half-day workshop on cross-border insolvency, including a session on the UNCITRAL Model Law on Cross-Border Insolvency, covering the background and reasons for development of the Model Law, a short introduction to its content and a report on the policy dialogue that took place in New Zealand when it considered adoption the Model Law. That session was followed by a panel discussion on the role of courts and judges in dealing with applications in cross-border cases and the solutions that might be available in different jurisdictions.

The program

4. The Colloquium commenced after lunch on the first day with a keynote address by Justice Geoffrey Morawetz of the Ontario Superior Court of Justice, who discussed the ways in which the global financial crisis was affecting insolvency proceedings and the challenges that posed for judges. Justice Morawetz was followed by an introduction to a hypothetical case that was intended to provide a focus around which panellists in the following sessions might organize their discussion.

5. The first session considered the position and duties of judges faced with either an application for commencement of proceedings in a case with cross-border elements or an application for recognition of proceedings commenced in another jurisdiction and the need for interim protection orders. That was followed by a session examining ways of coordinating concurrent proceedings and facilitating cooperation between the

various actors, including by the use of cross-border insolvency agreements as analysed in the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings.[1] Day one closed with a panel of judges reflecting on the need for judicial cooperation and discussing their reactions to judicial cooperation.

6. Day two commenced with a discussion of the variety of applications that might come before the court once insolvency proceedings had commenced, looking at the different approaches possible in different jurisdictions. That session was followed a panel that looked at the sort of conflicts that might emerge in the insolvency of an enterprise group operating in a number of different jurisdictions where concurrent proceedings might be required and the challenges that posed for the different judges, particularly where a global solution was desirable. After lunch, judges were encouraged to participate in parallel breakout workshop sessions to consider the issues discussed and provide any feedback they wished to share. The colloquium concluded after a reporting back of the breakout sessions and concluding remarks.

7. The discussion over the two days explored several themes, including cross-border cooperation in general, the role of judges and judicial communication.

Cooperation in general

8. There was a general recognition that the number of cross-border cases is increasing around the world and that judges could assume they might encounter cases with cross-border elements, even if not direct requests to provide assistance to foreign proceedings. It was noted, however, that since many countries had not yet encountered such cases, it was difficult for many judges to see when or how they might arise. In response, and acknowledging the limited role judges might play in developing the necessary legislative framework, it was suggested that it was desirable for States to consider, at an early stage, how they might address such cross-border cases before judges were faced with actual cases in which they were required to take action. Without that necessary legislative framework, judges might have limited options available.

9. Some discussion focussed on the UNCITRAL Model Law as a means of providing that legislative framework for cooperation and coordination. One presentation outlined the study New Zealand undertook as part of the process of considering whether or not to adopt the Model Law.[2] At a general level, a number of factors pointed to the desirability of adopting a text on cross-border insolvency that was internationally developed and accepted. The study noted that, as a small country, New Zealand is reliant on foreign trade and investment. As such, the study went on to note, it is viewed as important that New Zealand respond to global trends by developing commercial laws

[1] Adopted by UNCITRAL on 1 July 2009 as the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*.
[2] *Cross-Border Insolvency - Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency*, Law Commission Report 52, February 1999.

that can respond to a borderless world where assets and money can be transferred at the push of a button and encouraging foreign investment, adopt solutions to cross-border insolvency that ensure efficiency, avoid unnecessary costs and legal argument, and facilitate local companies to transact business anywhere. The study also noted that economic analysis stresses the need for fair treatment of foreign creditors and that fair treatment of foreign creditors by New Zealand courts was likely to lead other States with which New Zealand trades to adopt a similar approach to New Zealand creditors.

10. It was noted that the Model Law's option of deference to local proceedings was a political necessity accepted as part of the UNCITRAL process to accommodate concerns about potentially over-intrusive foreign proceedings dominating local proceedings. It was also noted that there was a strong likelihood that the Model Law would be widely adopted. The study concluded that factors in favour of adoption outweighed those against and that it was preferable that the Government enact modern cross-border insolvency laws before major problems occurred.

11. The question was raised as to whether the Model Law might be enacted on a reciprocal basis. It was noted that although several States had adopted that approach, it raised questions as to how it would be implemented i.e. how a State would decide which States qualified for recognition. It was noted that various approaches might be taken (e.g. designating applicable States or providing for recognition of States that accorded equal recognition to the home State), it might not always be clear in advance of an application for recognition how it would work in practice and there was the potential to cause delay and create uncertainty as each individual case was considered.

12. A general question concerned what cooperation was seeking to achieve. Although individual cases might require different elements of cooperation, some of the general goals identified might include preventing dissipation of assets and value; avoiding unnecessary costs and delay, as well as conflicting decisions by different courts; minimizing potential conflicts between national laws; facilitating the understanding of differing legal concepts; streamlining the general administration of cross-border insolvency proceedings; facilitating the gathering and dissemination of information concerning the debtor and its assets and liabilities; and avoiding a multiplicity of proceedings in different jurisdictions.

Role of judges

13. Several speakers pointed to the increasing complexity of insolvency cases and the questions some judges are being asked to resolve, the speed at which they are expected to resolve them and the expectation that the courts could keep pace with, and respond to, developments in cross-border cases as they occurred. This placed increasing pressure upon judges to respond and to assimilate sometimes very complex issues quickly. It was noted that insolvency laws required judges to perform different roles. For example, in some States they were required to make commercial decisions, in others

they were not and were not well-placed to do so. Moreover, different solutions were available under the different laws with respect to the same issues. Those different solutions may often be hard to understand in a domestic context and in the absence of complete information concerning the debtor's affairs.

14. Where proceedings were taking place in different States, judges were asked whether they would be able to take note of those foreign proceedings in responding to the applications before them. Answers varied in practice. Some judges indicated that they could take a global view of the business of the debtor and what was occurring elsewhere with respect to insolvency, especially when an enterprise group was involved and what happened elsewhere would have a domestic impact (e.g. concerning employees and other social policy issues), although that may not necessarily give the court wider discretion with respect to what it might do in a particular situation. In some States, knowledge of or about the foreign proceedings might affect what a judge was prepared or able to order in local proceedings. The challenge, however, was for the judge to obtain the necessary information about a debtor's global operations and concurrent insolvency proceedings. It was questioned whether provision of that information could be compelled and also whether a foreign practitioner or insolvency representative could appear in a local court to provide that information. Notwithstanding the practical difficulties, the desirability of being able to take note of foreign proceedings that might affect local proceedings was generally agreed, particularly where a global solution for a business that operated globally was being sought. The difficulty of facilitating global reorganization because of the different approaches to post-commencement finance was noted.

15. In considering what actions a judge might take with respect to cooperation, a general area of concern related to the issue of authorisation and the scope of responses available. In particular, the issue of whether express authorisation was required or whether it would be sufficient that the law didn't prohibit a certain action was raised several times. It was observed that where authorisation was an issue, the Model Law mandated cooperation, not only between courts, but also between courts and insolvency representative and between insolvency representatives. It was also noted that the solutions offered by the Model Law might serve to broaden the range of options available locally with respect to various issues, for example, the stay. It was suggested that judges often took a strict view of what might or might not be permissible and that what might be required in some cross-border cases was a greater degree of flexibility.

Judicial communication

16. A key concern with respect to cross-border cooperation related to the need to protect judicial independence and impartiality. This was of particular concern when judicial communication was discussed. Many judges indicated the difficulty of discussing their cases with their fellow judges within the same jurisdiction, let alone with foreign

judges, and pointed out that such communication might in some countries give rise to constitutional issues. The question of authority to communicate was again raised; where a request for assistance was received, would I have the authority to respond and on what grounds? As to the subject matter of the communication, it was questioned whether it would relate only to matters of procedure or also of substance. Some judges were of the view that they could discuss case management issues, issues of timing, use of cross-border agreements and which court might resolve which issue, but not substantive issues that touched upon the merits of the case. They emphasized the need to preserve sovereignty and independence and, ultimately, to ensure that the decision on the matters before them had to be their decision, not a decision influenced by a judge from another jurisdiction.

17. Other questions related to the procedures available and whether they were appropriate; logistical issues concerning the language of the communication (whether interpreters might be required or available) and the means of communication (such as telephone, video-conference, writing, including both email and letter) and what happened where access to technology was limited; and the type of assistance sought or available. With respect to the latter, it was noted that since legal concepts varied not only between different legal traditions and different language groups, but also within the same legal tradition and language groups, it might not always be clear to the receiver what assistance was being sought and how it might relate to assistance available in the receiving jurisdiction. It was also suggested that some requests might be easier to respond to than others. Freezing of assets, for example, might be relatively easy, while repatriation of assets or other solutions might require a balance to be struck between local concerns with respect to creditors and global, collective considerations, which might be unfamiliar to the judge and much more difficult to assess.

18. Familiarity with the foreign judge was emphasized as an important component of how a judge might respond to a particular request, particularly in terms of determining whether the request was genuine. It was emphasized that judges should not be taken by surprise by requests for cooperation and needed to be able to trust the judges or courts from which such requests emanated. Certain mechanisms that might be available to address or avoid those issues arising were discussed, including communication being arranged via the courts or through a court-appointed officer. It was emphasized that communication may take many forms and did not necessarily need to be direct. The need for safeguards was also discussed.

19. It was generally agreed that there was a growing need to familiarize judges with the law that addresses cross-border insolvency, especially where States had adopted something new like the Model Law, which mandated cooperation. It was noted that some courts have adopted guidelines or practice notes to assist judges and raise their awareness of some of the tools that might be available, such as guidelines on court-to-court communication and the draft UNCITRAL Notes.

Future needs

20. At the conclusion of the Colloquium, judges suggested the following "wish-list" for what might be included in future colloquiums:

- More break-out sessions to cater for the varying needs of judges with experience of cross-border cases and those with less experience;
- More information on what could be expected in cross-border cases and the opportunity to work through some hypothetical examples and actual cases, such as Lehman Bros, possibly in a mock court situation or in small groups;
- Discussion of joint hearings, how they might be organized and what they might involve;
- More opportunity for judges to talk about their experiences on a regional basis and with reference to common law and civil law concerns; and
- The opportunity for more discussion of insolvency law in general and enforcement of judgements in cross-border cases.