

**10th Multinational Judicial Colloquium
UNCITRAL-INSOL-World Bank**

18-19 May 2013, The Hague

Report

Introduction

1. The 10th joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium was held in The Hague on 18-19 May 2013. Over 75 judges and Government officials attended from over 35 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 at the judicial colloquium.

Optional Morning Workshop

2. Following the approach taken at the 8th and 9th colloquia, the weekend began with an optional half-day workshop on 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, the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective¹ and the case law abstracts available under the Case Law on UNCITRAL Texts (CLOUT) system.² Two of these important resources, the Guide to Enactment and the Judicial Perspective, have been recently revised and updated: the Guide to Enactment to provide more information on what constitutes a foreign proceeding and the factors to be considered in determining the location of a company's centre of main interests, the Judicial Perspective to reflect the revisions to the Guide to Enactment as well as recent jurisprudence. Both texts are expected to be available later in 2013. Finally, it is anticipated that a digest of case law on the Model Law, following the format of other such digests prepared by UNCITRAL, will be available in 2014.

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 seven different and increasingly complex cross-border insolvency scenarios 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

¹ These 3 texts are available online at http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

² Abstracts are available online at http://www.uncitral.org/uncitral/en/case_law/abstracts.html.

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

The Program

Lessons on Complex Issues from Lehman and Nortel Insolvencies

4. Although the Lehman Brothers and Nortel cases were exceptionally large and complex insolvencies, it was noted that there were broader lessons that could be drawn from them, particularly in terms of cross-border coordination and cooperation. While many proceedings are still pending, the Lehman Brothers insolvency is quite advanced, and \$33 billion in distributions have already occurred. A settlement between Lehman Brothers International in the United States and their operation in the United Kingdom in respect of a dispute that had been unresolved in the claims process was approved without controversy in the United States court. A short time later, the United States judge received an e-mail from the English judge along with a letter from counsel in the English proceedings advising that they were in favour of an unsupervised discussion being held between the United States and English judges in respect of a hearing that the English judge would be having in the future. The discussion that subsequently took place was similar to one that might occur between colleagues on the same court. Emphasis was placed on the fact that because the two judges already knew each other professionally, that relationship proved to be a key factor in facilitating the court-to-court communication that took place.

5. Another example of the effective use of court-to-court communication illustrated by the Lehman Brothers case involved the Australian operation. When the insolvency filing of Lehman Brothers occurred, the global business (which operated in some 40 countries around the globe) fragmented, resulting in separate, and sometimes competing, insolvency proceedings in various jurisdictions with different applicable rules of law and separate trustees and administrators appointed mainly for the benefit of local creditors. The United States judge received an e-mail from the Australian judge that was about to issue a decision in the Australian insolvency, and had been authorised by the local administrators to contact the United States judge and to consider developing a protocol for communication. This contact was accomplished via telephone, and the Australian judge was able to advise the United States judge in advance of his decision of his intentions to avoid having an impact on the United States proceedings.³

6. Another scenario illustrated a different approach to the establishment of court-to-court communication, in which counsel wished to exert some control over the contact. The United States lawyers in the case prepared a letter for the agreement and signature of the US judge to be sent to his English counterpart to initiate court-to-court communication. In response, a letter agreeing to the communication was drafted by English counsel and agreed and signed by the English judge.

³ CLOUT case no. 1215. The text of the Australian decision is available on the INSOL International website at <http://www.insol.org/page/297/uncitral-model-law>.

7. In June 2009, a protocol for multilateral court-to-court communication on various matters pending in the Lehman Brothers case was established to facilitate communication between the parties in order to solve class-wide problems around the world. Again, communication and transparency were key to finding a solution for the many claims (valued at \$1.2 trillion) filed internationally. While communication between the parties might ultimately have happened without a protocol, the protocol provided the framework for it to occur.

8. In the 2009 Nortel case, which predated Canada's proclamation of the Model Law, the company had approximately 93,000 global employees in over 140 countries, as well as around 150 subsidiaries. Initial efforts to stabilise the company and refinance its operations or seek a bailout were unsuccessful, and the case became one of liquidation and selling off of assets. Proceedings were commenced in Canada, the United States and England, followed by a number of other jurisdictions; in some jurisdictions no proceedings were commenced. In the Nortel case, most creditors were unsecured, and the question was not one of priority of claims, but of how to allocate the assets among the unsecured creditors. Parties were aware that they would have to cooperate to maximize asset realization, and significant communication took place, including the establishment of a protocol. The protocol, however, did not include agreement on distribution, that issue being left for later consideration. The asset realization was very successful, resulting in approximately \$9 billion worldwide. However, the difficult question of allocation had then to be resolved and the failure to do that continues to vex settlement of the case; complicating factors include pension issues in different countries, a mismatch of revenue and expenses because the headquarters operation had paid for most of the research and development and had borne most of the expenses, and the fact that claimants, who range from high-yield vulture funds to pensioners around the world, are now playing a 'zero sum game' for individual gain rather than working together to maximize distributions. The earlier Interim Funding and Settlement Agreement suggested arbitration and mediation, but there is no agreement to arbitrate, and thus far, mediation has been tried unsuccessfully several times. A number of parallel Canada-United States motions have been successfully heard where the judges have notified each other that they have reached a decision, and have then arranged communication. The current decision (which is under appeal) for resolution of the issues is a joint Canada-United States trial, which itself raises numerous questions, such as where it would be held, which laws of evidence would be applied and how any appeal would be addressed. It was also noted that Nortel clearly illustrated that there was much work left to do in respect of establishing any concept of the centre of main interests in the case of enterprise groups.

Enterprise groups including the Colombian experience

9. While the importance of enterprise groups of all varieties in modern global commerce was reiterated, the apparent lack of connection between domestic law and the international approach in this area has created problems. The example of the Singer Sewing Machine case from the 1990s was given (pre-dating the enactment of the Model Law in Chapter 15 in the United States), where the United States insolvency filing occurred as a result of a bankruptcy filing for its Pfaff subsidiary in Germany. In the

United States Chapter 11 case, the assets were largely preserved, but by the time of the Chapter 11 filing the German company had been almost completely liquidated by the German trustee – a matter complicated by the fact that the German company could not operate without relying on US patents owned by the parent company.

10. The treatment of enterprise groups can also be a problem in a domestic setting, where a similar debate can concern whether the entire group should be rescued and which domestic court should control the process. Increasingly, countries are drafting provisions to alleviate some of these problems and to establish rules on when group insolvency should be sought, and requiring the domestic courts engaged in resolving the issues to cooperate and to communicate. Reference was made to Part three of the UNCITRAL Legislative Guide on Insolvency Law,⁴ which focuses on the treatment of enterprise groups in insolvency and has served as the inspiration for recent laws. Reference was also made to the proposed revisions to the European insolvency regulation that aim to provide solutions for enterprise groups, as well as recent revisions to the German insolvency law that are similarly focused. In Colombia, where the concept of enterprise groups has been included in legislation dating from 1995, the 2006 insolvency law deals specifically with enterprise groups. However, a large fraud case tested the 2006 system, and found it wanting in terms of handling a complex case of corporate failure. A commission was established to review the 2006 law, and a more comprehensive approach, relying heavily on Part three of the UNCITRAL Legislative Guide on Insolvency, was adopted in 2011. This new regime has been used successfully a number of times, and reference was made to three important cases, involving both cross-border and domestic groups, that had relied on the 2011 law for successful management and resolution of enterprise group issues in insolvency.⁵

Breakout groups – The role of judges in approving insolvency plans

11. The final session of the first day consisted of discussion in breakout groups of a hypothetical case intended to illustrate the role of judges in approving insolvency plans. Six breakout groups were established in advance to ensure that different legal traditions and broad geographic representation were adequately represented in each discussion group. A leader chaired the discussion in each group to initiate discussion and canvas the views of all group members. At the end of the session, a plenary session was held to allow for feedback from the breakout groups. A number of particular questions were discussed, including the type of approach usually taken by judges from the various jurisdictions and whether the reorganization plan outlined would be approved in the jurisdiction. Issues covered in the discussion included exploration of whether judges were interventionist or more formalistic in the various jurisdictions, and whether they would look to the merits of a reorganization plan, including the composition of the classes of creditors. It was noted that a number of similarities were identified amongst the diverse jurisdictions, and that generally speaking, the judge was intended to be the last check on the system to ensure that it was operating appropriately, not to present an arbitrary obstacle to its operation.

⁴ Available online at http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

⁵ These are the cases of Qbex, Americaflor and Interbolsa.

Special issues in insolvency proceedings including employment, pensions and fraud

12. The second day of the colloquium began with a panel exploring insolvency issues relating to employment, pensions and fraud. The example of the case concerning MG Rover was given, where insolvency proceedings in the shape of administration took place in England, which the English court found to be the centre of main interests of all companies of the group, notwithstanding there being operations in other European States. The plan was to avoid secondary proceedings in other States as they would have greatly increased the complexity of the insolvency and could have affected the sale value; however, many creditors in other countries had priority employment-related claims in their States and wanted secondary proceedings to secure the priority of those claims. The insolvency administrators gave undertakings to observe those priorities and pay them from local assets. The English judge decided that although such an undertaking could run counter to the principle of equal distribution, it was lawful to do so in order to ensure greater realization of value for the estate as a whole and was a fair and beneficial solution.

13. The issue of pensions is one that has become increasingly complex in some States like the United Kingdom, where the importance of financial support obligations for pension funds has increased, resulting in huge implications for the cost of pension schemes. The impact of pension schemes has not been that great in the Lehman Brothers case, but it has been huge in respect of the Nortel case. In the latter case, the pensions' regulator in the United Kingdom imposed a £2 billion support obligation on the company, but only after insolvency proceedings had commenced. Under English law, these claims are enforceable against the companies, but that is not necessarily the case in other jurisdictions. It was thought that there might be three ways to approach the issue: 1) to characterize it as a debt that the pension regulator can prove and should be paid; 2) to treat it as an expense of the administrator or liquidator (but this is illogical as it would allow the claim to be paid ahead of creditors and such expenses generally relate to the activities of the liquidator); or 3) it will never be paid unless there is a surplus or in the unlikely event that the company comes back into existence following the closing of the insolvency proceedings. The English Supreme Court heard this issue in May 2013, but has not yet rendered judgement. The court focused its attention on the precise wording of the domestic insolvency legislation as to characterization of the obligations.

14. The issue of specific domestic rules that must be applied to employment claims was also discussed. In some countries, there is quite a high maximum level for employment claims (e.g. \$60,000 in Brazil) while in others the maximum protection for workers is much lower (e.g. €1,000 for three months in South Africa). It was also noted that in many jurisdictions, workers' claims are extensively protected, particularly in countries where labour plays a predominant role in the economy. For example, in South Africa, when an application is made for winding up of a company or an individual, workers are entitled to notice of the proceedings, and can form a partnership to try to save their jobs; should a business rescue occur, workers' claims are ranked second to expenses.

15. Finally, in cases of fraud, it has been possible in at least one jurisdiction for the court to simply disregard the separate legal status of the entities so as to be able to recoup assets for the benefit of all creditors. In addition, it was noted that in most civil law jurisdictions, the identification of any fraud is the task of the liquidator and the prosecutor's office might be involved to pursue any issue of fraud, but the court is really not involved. Some discussion also took place of what occurs *after* a fraud has caused insolvency, such as in the Madoff cases, where a current issue involves entitlement to the assets of the feeder funds. In this context, there are three main types of creditors: 1) fully redeemed former members of the fund; 2) members who had submitted their request to be paid out at the time of the insolvency but who were not paid out; and 3) members who did neither. Some liquidators have brought proceedings against those in the first category on the basis that they were paid out on the basis of 'mutual mistake' due to the underlying fraud. Although it is suggested that there will be an equitable scheme for distribution, the problem would seem to be that monies will be clawed back from former members on the basis that they are 'not entitled to it' and redistributed to members who are perhaps no more entitled to it than the first group.

Breakout groups – The roles of parties and practical aspects of court-to-court applications

16. The second session of day two of the colloquium consisted of another breakout session to consider the roles of parties and the practical issues surrounding court-to-court applications. In this context, three topics were proposed for discussion in the same groups established the previous day, and then summarized for broader discussion in a plenary session: 1) how the cooperation process is commenced; 2) how requests for assistance are considered; and 3) how an appropriate response to a request for assistance is determined. Discussion on the first topic suggested several possibilities for courts to commence the cooperation process: either upon request from counsel or the parties or on its own initiative, although the latter approach was less common. In many countries, a court would be reluctant to initiate cooperation, but would react positively to such a request from the local official or liquidator. In addition, many jurisdictions would accept such a request without notice to the debtor, but some would be more reluctant to do so. Difficulties might arise where the relief sought would be most effective where the debtor was not notified of the request, such a search warrant, or where the location of the debtor was unknown and could not be readily ascertained. In such circumstances, the court might need to take special measures to ensure that nothing went wrong, such as obtaining undertakings from the insolvency representative or ensuring the search warrant, for example, was enforced in the presence of a court official. In some cases, the relief sought raised issues of public policy and could be granted - the Toft case, in which an order for interception of email was sought in a jurisdiction in which granting that relief would have had implications under criminal law, was mentioned.⁶

⁶ CLOUT case no. 1209; the text of the United States decision can be found on the INSOL International website at: <http://www.insol.org/page/297/uncitral-model-law>.

17. In terms of the second and third issues, there was general agreement among jurisdictions that such a request should be made by way of a formal application, and that once received, the court would apply the same standard as it would apply to a local liquidator, including examining information and evidence and providing notice to other parties except in cases of urgency. It was also generally agreed that the request should come not directly from a foreign court but from a foreign representative acting on the request of a foreign court. In some countries, the receipt of such a request might result in a suggestion to counsel that a protocol for communication be considered, but in general, the view was that most courts would be slow to engage in court-to-court communication, and might not do it at all. It was emphasized that judges in both initiating and receiving courts needed to be correctly apprised of the facts, as misapprehensions or misunderstanding of the facts of a case, including for example the status of proceedings in other jurisdictions, could have a significantly negative impact on cooperation and coordination. The same consideration might apply to issues of foreign law. The general view was that in such cases communication between the judges might be helpful to ensure common understanding, with the usual protections of notice and the opportunity of the parties to participate applying.

Mediation and other forms of alternative dispute resolution (ADR) in cross-border insolvency

18. The first session in the afternoon of the second day discussed the role of mediation and other forms of ADR in cross-border insolvency. It was observed that mediation can play an important role in insolvency cases, and that a court could in many jurisdictions refer any adversarial proceeding or any disputed or other contested matter to mediation. Mediation by another judge of the court seized of the main proceeding had in one jurisdiction proven to be an effective way of resolving issues – for example, 85 separate proceedings in the Enron case were referred to mediation, resulting in the settlement of 84 of them, and hundreds of the financial proceedings in Lehman were also resolved in this manner. It was noted that lists of mediators are often public, and parties as well as lawyers may also often be present in the mediation.

19. With respect to arbitration, however, although it has been used quite successfully in domestic insolvency, it is relatively rare in cross-border insolvency cases. While parties can agree to send any matter to final and binding arbitration, which is most suited for resolving inter-company disputes such as division of assets, it can be quite difficult to get all relevant parties in a cross-border case to agree to arbitration, especially in cases with considerable numbers of creditors. In addition, in some jurisdictions the stay automatically applicable on commencement of insolvency proceedings will apply to pending domestic arbitration, but it may be difficult to stay foreign arbitration proceedings, often due to the location of the foreign main proceedings and choice of law issues, for example if the law of the debtors' centre of main interests would not stay such an arbitration. There can also be questions of public policy in play in terms of arbitrations, where, for example, a court cannot send issues of a certain type for arbitration in another country as it would seriously jeopardise the domestic bankruptcy law. While the Model Law provides for cooperation and coordination to assist in the

resolution of cross-border insolvency disputes, the reality is that when issues become very difficult, cooperation and coordination often give way. In these situations, arbitration could provide a forum for neutral, impartial decision-makers to resolve controversies and to render awards, particularly in cases involving disputes among multiple affiliates that could then be heard in a single proceeding. Further, the arbitration award would be enforceable under the New York Convention in over 140 States. Although cross-border insolvency issues were often quite sensitive, they ought not be excluded from arbitration provided that parties consent, and it may be of particular use in cases where the reorganization law of the centre of main interests is weak or non-existent, or where there is no single court to take jurisdiction and control over all of the assets of a debtor company. Overall, it was thought that arbitration could have an important place in the future of cross-border insolvency issues.

INSOL Global Insolvency Practice Course

20. The colloquium next heard from two graduates of the INSOL Global Insolvency Practice Course regarding the process involved in completing it and becoming an INSOL Fellow. Both Fellows spoke very highly of the program and encouraged others to discuss it with them in more detail.

Future developments and open discussion on the challenges facing courts and judges in the light of the global financial crisis

21. The World Bank, UNCITRAL and INSOL next outlined their on-going activities aimed at supporting courts and judges faced with increasing cross-border insolvency issues. The World Bank described its continuing participation in the UNCITRAL Working Group on Insolvency, as well as work that it is pursuing in terms of personal bankruptcy, and in Mexico and Ukraine, that is generating a great deal of interest. Moreover, the World Bank has established a community or forum on law and development, and is currently developing a study on the interaction between insolvency law and company law, highlighting obstacles to reorganization stemming from inadequacies in the domestic company law framework. The World Bank described training for judges that it had organized in China in 2012, involving 160 judges from all Chinese provinces. Finally, the World Bank, UNCITRAL and INSOL are working collaboratively on organizing the Forum on Asian Insolvency Reform (FAIR) scheduled to be held in the Philippines in December 2013.

22. UNCITRAL advised participants of the on-going work in its Working Group on Insolvency, highlighting a series of upcoming publications. The Guide to Enactment of the Model Law has been revised to provide additional guidance with respect to the meaning of various elements of what constitutes a foreign proceeding and the factors to be considered in determining the location of a company's centre of main interests. As noted earlier in the colloquium, this work did not change the text of the Model Law, but simply provided more guidance for those, including courts, that look to the Guide to Enactment for assistance in interpreting the main concepts in the Model Law. UNCITRAL's Working Group has also completed preparation of an addition to the

Legislative Guide, expected to become Part four thereof, that outlines the obligations of directors in the period approaching insolvency. The revised Guide to Enactment and Part four of the Legislative Guide will be considered for approval by the Commission in July 2013, and are expected to be publicly available in the six languages of the United Nations⁷ in the months thereafter. In addition, the Judicial Perspective publication referred to in paragraph 2 above has been updated to take into account the changes made to the Guide to Enactment of the Model Law, as well as recent jurisprudence relating to interpretation and application of the Model Law in various jurisdictions around the world. Finally, a digest of case law on the Model Law (also referred to in paragraph 2 above) is being prepared with a view to finalizing it in 2014. The digest will provide a discussion of the jurisprudence in respect of each article of the Model Law in a neutral manner, including setting out the trends in interpretation.

23. INSOL noted two of its existing publications of interest that are available to the participants in the colloquium: a CD Rom on Directors in the Twilight Zone and an update to its cross-border insolvency publication.

Feedback on the Judicial Colloquium

24. The eleventh judicial colloquium is scheduled to be held in March 2015 in San Francisco. Participants in the colloquium 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 program, especially for judges who were attending for the first time, several suggested that that information might be provided before the colloquium leaving 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. The break-out sessions were thought to have been particularly productive and interactive, although some were of the view that reporting back in the plenary session might not be necessary. There was support for having a third break-out session during the course of the colloquium, possibly with smaller groups and changing the make-up of the group each time so as to further facilitate participation and networking possibilities. To allow participants to undertake some research prior to the colloquium and to present more accurate feedback from their jurisdictions, it was suggested that the facts and questions to be considered during the break-out sessions could be made available a few weeks prior to the colloquium. It was also suggested that one break-out session could deal specifically with court-to-court communication, possibly including a role-playing exercise so as to take advantage of the extensive experience of some participants in the colloquium. Topics suggested for inclusion in the next colloquium were electronic filing in insolvency proceedings and electronic communications between judges. In order to further the educational aspect of the colloquium, it was suggested that contacts be made with the various institutions for judicial education around the world, and that some sort of technological means of

⁷ The six official languages of the United Nations are English, French, Spanish, Chinese, Russian and Arabic.

creating a community of participants in the colloquium could be established to exchange ideas and obtain information. Overall, the participants in the colloquium were very satisfied with the program and content.