

First Caribbean Region Judicial Colloquium on Insolvency
UNCITRAL-INSOL-World Bank

6 November 2013, Grand Cayman

Report

Introduction

1. At the invitation of the Hon. Anthony Smellie, Chief Justice of the Cayman Islands, the first Caribbean region judicial colloquium on insolvency law was held in Grand Cayman on 6 November 2013. 23 participants from 14 different jurisdictions attended, including most of the island judiciaries, as well as representatives from the regional courts and several judges from other jurisdictions with a particular interest in the region.

2. The colloquium was designed to compare judicial and juridical practice in dealing with practical and theoretical issues arising in cross-border insolvency cases in the jurisdictions in the region, with input from other jurisdictions involved in cases in that region such as the USA, Canada and the UK.

The program

Introduction to judicial aspects of cross-border insolvency

3. The first session addressed some of the issues and the resources that are available to judges, including the UNCITRAL Model Law on Cross-Border Insolvency and associated texts.

4. The impact of several judgements in cross-border cases was considered, particularly a series of judgements in the English courts starting with *Cambridge Gas*¹ and ending with the recent case of *Rubin v Eurofinance*,² which overturned the decision of the Privy Council in *Cambridge Gas*, that an order of the court in New York should be recognised and enforced in the Isle of Man without further process. These decisions have led to some conflict and created uncertainty. It was noted that while a judge sitting in England would be bound by the *Rubin* judgement, a judge sitting in the Caribbean might be in different position – would a judge sitting in a court from which the final appeal was to the Privy Council be bound to follow *Cambridge Gas*? In reaching its decision, the court in *Rubin* appears to have disapproved the extent of effect of the principle of modified universalism espoused in *Cambridge Gas*, but it was suggested that there is some uncertainty as to whether the decision can be accepted without those wider consequences.

¹ Cambridge Gas Transportation Corp v Unsecured Creditors of Navigator Holdings [2007] 1 AC 508

² Rubin v Eurofinance SA [2012] UKSC 46

5. Decisions of Caribbean courts were noted: of the Grand Court in cases involving Bernard L. Madoff Investment Services and the Bermudan High Court in *Saad Investments*. In each case it appeared that the decision of the Supreme Court in *Rubin* was narrowly construed so as to permit the Caribbean courts to assist a United States liquidator to pursue avoidance claims in their respective jurisdictions by applying United States law. That assistance was provided under the common law, by reference to the modified universalism referred to in *Cambridge Gas*; appeals in both cases are currently pending.

6. It was observed that problems arising in cross-border cases give rise to delay and expense and the procedures by which those problems are resolved need to be improved. The four means of dealing with cross-border cases in England were noted: (a) The Insolvency Regulation, which is limited to the European Union and has little relevance to cases arising in the Caribbean; (b) section 426 of the Insolvency Act 1986, which is limited to cases arising in designated countries. Some six Caribbean jurisdictions are designated, but the others are not, the reason for which is not clear; (c) the common law, under which the debate on modified universalism and the impact of the *Rubin* decision arises; and (d) the Model Law on Cross-Border Insolvency, which may not go so far as to recognize the enforceability of insolvency-derived judgements under article 21. The question was raised as to why the Model Law had not been adopted in the Caribbean, beyond enactment by the BVI (whose legislation is not yet in force).

7. Problems in cross-border cases arise from the potential for each court having jurisdiction over an insolvent debtor to claim that it is entitled to deal with all assets and creditors, wherever located. The Model Law confers priority for the jurisdiction of the main proceedings based on the debtor's centre of main interests or COMI. But the concept is not without problem. One is that it is not hard to imagine a situation in which a debtor has a registered office in state A with separate businesses in states B, C and D; if none of those states can be recognized as the centre of the debtor's main interests, state A, which actually has less connection with the business than the other States, will be its COMI. Such a result can be viewed as the refuge of last resort and conferring priority on the court of the state least suitable for that purpose. It was observed that as a concept COMI may be too ingrained in both the Model Law and the EU Regulation to accommodate change.

8. As to the enforcement of insolvency-derived judgements, it was suggested that one of the basic goals of the Model Law of encouraging coordination and cooperation might be achieved, noting that the forms of coordination listed in article 27 are not exhaustive, by recognizing foreign judgements as a means of cooperation with the foreign court. Such an approach might avoid the problems exposed by the *Rubin* judgement. Cooperation may be formal or informal, the latter clearly being envisaged by article 27. Informal communication might involve communication between judges, but in some jurisdictions there are few examples; the *Lehman* cases may be one of the few examples of such cooperation; the case concerning the *Bank of Credit and Commerce International (BCCI)* might be another although there the communication was between the judge in one jurisdiction and the liquidator in another. Cooperation mostly occurs

between liquidators. It was suggested that perhaps there should be a greater attempt at judicial cooperation than currently occurs.

Bases for cross-border cooperation

9. The second session looked at the use of cross-border protocols and common law judicial co-operation in a post-*Cambridge Gas*/post-*Rubin* world, exploring comity and co-operation at common law.

10. It was observed that judges have to deal with the cases presented to them, and when considering cases that raise cross-border issues, judges might need to fine tune their usual approach and, for example, request the parties to consider developing a protocol or seek information that might better enable them to better deal with the issues raised.

11. It was noted that while it is not always necessary to have a protocol or to have anything documented for cooperation between jurisdictions to work, nevertheless agreement between stakeholders on different ways of proceeding, including making provision for cooperation, both between the parties and the judges, could usefully be reduced to writing. The negotiation of a protocol might not always go smoothly, given the diversity of interests represented by the parties and stakeholders. It was observed that such negotiation is much more about the parties than about the courts and parties must have a constructive collaborative dialogue in order to design a protocol, although over time protocols have taken on a certain familiarity.

12. Several cases in which protocols had been negotiated were discussed as examples of how such protocols might assist the proceedings. In one case, a protocol was successfully negotiated, but the proceedings did not go smoothly and no agreement on exit-financing could be reached, without which nothing could go forward. The two judges involved talked on the phone and came up with an idea as to how to proceed. It was observed that a judge may end up having a closer working relationship with a judge sitting in another jurisdiction on a cross-border case than they might have with any judge sitting on the same court; in a cross-border setting, judges have a different job description where problems cannot always be solved by one person acting alone.

13. In another case, the judges did not get together to consider whether they could make consistent rulings, but they did indicate to each other that they had changed their minds on what they were going to rule and ultimately it transpired that they agreed with each other. It was observed, however, that problems might arise where judges in that position disagreed or there were appeals against both decisions and the appellate courts disagreed. No mechanisms existed to deal with such differences and in such a situation, the best one might hope for was maybe a settlement.

14. In a further case cited, joint liquidators were appointed to proceedings in two jurisdictions and a protocol to ensure close coordination of the proceedings was negotiated and approved by the two courts. That protocol set out the key areas where immediate coordination was required, including procedures for approval of the sale of

various business units, regular reporting to the courts, use of creditor committees, and weekly meetings to share information with creditors and directors of the debtor. The protocol was subsequently revised to address additional issues, such as procedures for filing and adjudication of unsecured claims. It was revised again when it became clear that the debtor would have to be liquidated. The protocols were essential to the conduct of the proceedings and joint telephone hearings were used and worked well and constructively, assisted by attorneys and insolvency representatives.

15. It was noted that close cooperation might work better in some jurisdictions than in others, especially where judges might have less discretion or less experience with cooperation. The experience with the *Lehman* case suggests it can work if the parties are prepared to discuss issues with each other and set up a protocol to deal with difficult questions, such as claims reconciliation, and if judges are able to share information with and seek information from other judges involved in the same multinational cases. In one example cited, a judge received information from a judge in another jurisdiction hearing a related case about difficulties being encountered with a third jurisdiction; the first judge was able to attempt mediation between the parties without a protocol, although ultimately the issue could not be resolved as it was not possible to get the cooperation of the parties in the third jurisdiction. An another example was given of the helpfulness of the cross-appointment liquidators between the different jurisdictions involved in the case and how such as measure can assist in resolving cross-border issues.

16. Where a protocol authorizes judges to speak to one another, it was observed that it may not always be necessary to keep a record of any communication that takes place. Such communication can be a matter of personality of the judges, whether they know each other, how they approach the conversation, and whether the parties will also participate. Judges are only supposed to be influenced by what is before them; potential difficulties may arise if in the course of the communication one judge seeks to impose their view on the other judge, or if one judge raises an idea that the other judge had not thought of. The protection for the judge comes from exposing that idea to the parties and allowing them to consider it. Protection also comes from providing notice to the parties of an intention to communicate. The same considerations might also apply to facts concerning the case before you that are learned from another judge. It was observed that a judge would have to have a pretty clear view of the issues in question or to be discussed before engaging in any contact with another judge. As an alternative, contact could occur through, for example, court officials, who could negotiate protocols and pursue coordination or who could prepare the ground for contact between the judges. An example of a case from the region where contact with the foreign judge might have aided coordination of the proceedings and avoided a waste of time and money was cited. In that case there was clear obstruction by the foreign insolvency representative, who opposed appointment of a local liquidator and foreign recognition of the local proceedings.

Developments in international insolvency law

17. This session provided an update on recent work undertaken by UNCITRAL including (a) revision of the Guide to Enactment of the Model Law on Cross-Border

Insolvency to provide more information on what constitutes a foreign proceeding for the purposes of article 2 of the Model Law and the factors to be considered in determining the location of a company's centre of main interests and rebutting the presumption that it is the debtor's registered office, and (b) updating of the Judicial Perspective on the Model Law to reflect the revisions to the Guide to Enactment as well as recent jurisprudence applying and interpreting the Model Law. The session also touched upon other resources available to assist judges in their consideration of cross-border insolvency issues, including the UNCITRAL Practice Guide on Cross-border Insolvency Cooperation and the case law abstracts available under the Case Law on UNCITRAL Texts (CLOUT) system.³ It was noted that a digest of the case law on the Model Law is anticipated for 2014.

Overview of approaches in the region and lessons from recent Caribbean cross-border cases

18. The program continued with a discussion of the situation with respect to the insolvency laws of the region and the scope for cross-border cooperation and coordination, as well as lessons learned from recent cases in the region. A number of jurisdictions indicated they did not have insolvency regimes that provided for corporate rescue or cross-border cooperation powers and in general there were a number of jurisdictions that had little practical experience with insolvency law and none with cross-border cases.

19. With respect to cross-border cooperation, it was emphasized that at least in common law jurisdictions much could be done without a statutory framework by way of comity. Several examples were given of cases in which cooperation in cross-border cases in the region had been achieved by way of comity allowing for recognition of foreign liquidators and the participation of foreign creditors in local distributions.

20. Although it was noted that direct communication might be important in some cases, it was not the only available mechanism and more use could be made, for example, of joint appointments of insolvency representatives and disclosure of information in aid of foreign proceedings. The *BCCI* case was referred to as it had involved a Cayman Islands entity with assets in a number of countries, including in the region. In each case, those assets were ring fenced, while assets in other parts of the Bank were pooled, with distribution ultimately in the vicinity of 90 cents. The question was what to do with the ring fenced assets? Ultimately a pooling arrangement was agreed that allowed sharing with customers of the ring fenced branches. Ring fencing was regarded as a classic example of a lack of communication and often the result of a political response. The case, however, was considered to be a very effective example of cooperation, especially the pooling arrangement. Another example cited was of an Icelandic bank in administration with assets in the Cayman Islands. The Icelandic court directed the insolvency representative to apply for recognition in Cayman and for a stay. Those orders were made and not appealed. What was needed to achieve these results, it was suggested, was an understanding of the powers that are available and the discretion to exercise them in

³ All of these texts are available from the UNCITRAL website www.uncitral.org.

favour of foreign courts. It was also suggested that this would be easier in cases coming from a recognized court in a country with which regional countries had political and diplomatic relations.

21. In at least one jurisdiction, despite a new insolvency law having been developed, it had not been proclaimed. Nevertheless, it was being used in practice. In other jurisdictions that did not have modern insolvency laws, insolvency rules could be used, but often those rules were inadequate, for example, because they didn't provide for a stay or moratorium. In a number of jurisdictions, insolvency law was not seen as being a priority, especially in those jurisdictions that were not financial centres. When cases did arise in those jurisdictions, judges were faced with the difficulty of determining what law or rules to apply.

22. With respect to the Model Law, the question was raised as to whether recognition of foreign proceedings would mean that foreign practitioners could come into the jurisdiction and conduct cases. That would be of concern where those foreign practitioners were not subject to a regulatory regime in their home jurisdiction and would potentially take work away from local regulated practitioners. It was noted that the Model Law did not mandate control for foreign representatives; rather one aspect of the discretionary relief available under article 21 was that the administration or realization of assets could be entrusted to the foreign representative or to another person designated by the recognizing court. A further concern related to applicable law and the expectations of local creditors that local law would apply to local proceedings. The use of the concept of centre of main interests in the Model Law had also created some distinct uncertainty in the region and although in some jurisdictions the Model Law had been given serious consideration, it was felt that place of incorporation might provide a clearer test or that there might be a simpler way of achieving the same objectives. It was noted, however, that adopting the Model Law would provide a clear statement by an enacting state of the relief that was available if recognition was sought and granted.

MATERIALS ON CROSS-BORDER INSOLVENCY

UNCITRAL texts and materials

The following texts can be found on the UNCITRAL website (in the 6 United Nations languages) at: http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html

- *UNCITRAL Model Law on Cross-Border Insolvency (1997)*
Guide to Enactment and Interpretation of the UNCITRAL Model Law (2013)
(published version should become available in November 2013)

- *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)*.
This text provides a general introduction to cross-border insolvency cooperation and discusses a number of cross-border insolvency agreements (protocols).

- *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective (2011)* (the second updated version should be available in December 2013/January 2014). This text includes references and discussion of a number of cases, as well as summaries of the facts of those cases.

Abstracts of case law interpreting the UNCITRAL Model Law can be found at: http://www.uncitral.org/uncitral/en/case_law/abstracts.html

The fastest way to find cases is to search under the Model Law or to look specifically at A/CN.9/Series.C/Abstracts 72, 73, 76, 92, 101, 125, 126, and 133 (for cases published up to August 2013).

Full text judgements

The full original language version of a number of these judgements is available at: <https://www.insol.org/page/297/uncitral-model-law>.

Where available, an English translation of judgments given in other languages is also posted. The INSOL page links to the UNCITRAL website.

The following evaluations are available on the INSOL website at www.insol.org:

First Judicial Colloquium – Toronto, March 1995
Second Judicial Colloquium – New Orleans, March 1997
Third Judicial Colloquium – Munich, October 1999
Fourth Judicial Colloquium – London, July 2001
Fifth Judicial Colloquium – Las Vegas, September 2003
Sixth Judicial Colloquium – Sydney, March 2005
Seventh Judicial Colloquium – Cape Town, March 2007
Eighth Judicial Colloquium – Vancouver, June 2009
Ninth Judicial Colloquium – Singapore, March 2011

Tenth Judicial Colloquium – The Hague, May 2013

The following reports of the World Bank Global Judges Forum are available on the World Bank Global Insolvency Law Database at www.worldbank.org/gild:

Global Judges Forum 2003, Malibu, USA, May 2003

Global Judges Forum 2004, Rio de Janeiro, Brazil, June 2004

Global Judges Forum 2005, Washington, USA, November 2004

Global Judges Forum 2006, Buenos Aires, Argentina, June 2006