



INSOL International



The World Bank

***FIRST CARIBBEAN REGION
JUDICIAL COLLOQUIUM
ON INSOLVENCY***

*Marriott Beach Resort, Grand Cayman
Wednesday 6th November 2013*

First Caribbean Judicial Colloquium on Insolvency - 6th November 2013
 Delegate List

Name	Company	Country	Accompanying Person
David Abednego	Official Receiver	British Virgin Islands	
Justice Courtney Abel	Supreme Court of Belize	Belize	
Sir Anthony Campbell	Court of Appeal	Cayman Islands	
Jenny Clift	UNCITRAL		
Sir John Chadwick	Court of Appeal	Cayman Islands	
Neil Cooper	INSOL International		
Justice Angus Foster	Grand Court of the Cayman Islands	Cayman Islands	
Hon. Sir Marston Gibson	Chief Justice of Supreme Court of Barbados	Barbados	
Acting Justice Nova Hall	Grand Court of the Cayman Islands	Cayman Islands	
Justice David Hayton	Caribbean Court of Justice	Trinidad	Linda Hayton
Justice Stephen Hellman	Supreme Court of Bermuda	Bermuda	
Justice Alex Henderson	Grand Court of the Cayman Islands	Cayman Islands	
Judge Cheryl Mathurin	Eastern Caribbean Supreme Court	Anguilla	
Justice of Appeal Allan Mendonça	Supreme Court of Trinidad & Tobago	Trinidad	
Rt. Hon. Sir Andrew Morritt		UK	
Justice Elliott Mottley	Court of Appeal	Cayman Islands	
Justice Rolston Nelson	Caribbean Court of Justice	Trinidad	
Justice Frank Newbould	Ontario Superior Court of Justice	Canada	
Judge James Peck	US Bankruptcy Court, Southern District of New York	USA	Janis Peck
Justice Charles Quin	Grand Court of the Cayman Islands	Cayman Islands	
Peter Rajkumar	High Court Trinidad & Tobago	Trinidad	
Mrs Justice Ramsay-Hale	Supreme Court Turks and Caicos Islands	Turks and Caicos Islands	
Judge Almarie Sinclair-Haynes	Supreme Court of Jamaica	Jamaica	

Hon Anthony Smellie	Chief Justice of the Cayman Islands	Cayman Islands
Diana Talero	Superintendency of Companies	Colombia
Luis Guillermo Vélez	Superintendency of Companies	Colombia
Justice Richard Williams	Grand Court of the Cayman Islands	Cayman Islands

Caribbean Region Judicial Colloquium on Insolvency, Marriott Beach Resort

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Since 1995, INSOL International and UNCITRAL have jointly sponsored a series of unique and important international Judicial Colloquiums. In 2007, The World Bank joined INSOL and UNCITRAL to present the Seventh Judicial Colloquium and has continued to collaborate jointly on all subsequent Colloquia. These Colloquiums have brought together judges, regulators and judicial officials from around the world to consider a wide range of insolvency-related issues. These issues have included judicial co-operation in cases of cross-border insolvency, access to courts by insolvency practitioners and recognition of insolvency administrations by foreign courts. The Tenth Joint Multinational Judicial Colloquium on Insolvency was held in The Hague, 18-19th May 2013.

To complement these biennial Colloquia, INSOL, UNCITRAL and the World Bank collaborate to organise regional Colloquia to encourage discussion at a regional level and enable a greater number of judges and justice officials to participate. At the invitation of Hon. Anthony Smellie, Chief Justice of the Cayman Islands, we propose to hold the first Caribbean Region Judicial Colloquium in Grand Cayman on Wednesday 6th November prior to the INSOL International Cayman Islands Seminar on 7th November 2013. We are delighted to have participants from many of the island judiciaries in the region as well as representation from the regional courts and judges from other jurisdictions with a particular interest in the region.

With the growth of cross-border trade, the number of insolvency cases where there are assets in more than one jurisdiction, or where there are cross-border groups, is continually increasing. This growth has implications for the demands placed on courts, not only with respect to numbers of cases, but also to their complexity and the need for an understanding of cross-border issues.

This Colloquium is for judges, officials of justice ministries and regulators who hear insolvency or restructuring cases or who are involved in the development of insolvency laws and systems.

The Colloquium will assist participants to understand the issues that arise in the handling of such cases. It will compare the judicial and juridical practice in dealing with practical and theoretical issues arising in cross-border insolvency cases in the different jurisdictions in the region with input from other jurisdictions involved in cases in that region such as the US and UK.

Judicial Colloquium Program

Wednesday 6th November 2013

9.00am-5.00pm

8.15 a.m. – 9.00 a.m. Delegate Registration

Educational Program

9.00 a.m. –9.15 a.m. **Welcome & Opening Remarks**
Chief Justice Anthony Smellie of the Cayman Islands
Neil Cooper, Past-President, INSOL International

9.15 a.m. – 9.45 a.m. **Keynote Address: Rt. Hon. Andrew Morritt**

9.45 a.m. – 10.45 a.m. **Introduction to judicial aspects of cross-border insolvency**
The issues and the resources that are available to judges (including the UNCITRAL Model Law on Cross-Border Insolvency and associated texts).
Moderators: Justice Frank Newbould, Superior Court of Ontario
Judge James Peck, US Bankruptcy Court, Southern District of New York

10.45 a.m. – 11.15 a.m. Networking Coffee Break

11.15 a.m. – 12.15 p.m. **Bases of co-operation**
Use of cross-border protocols (UNCITRAL Practice Guide) and common law judicial co-operation in a post-Cambridge Gas/post-Rubin world (comity and co-operation at common law).
Moderators: Justice Frank Newbould, Superior Court of Ontario
Judge James Peck, US Bankruptcy Court, Southern District of New York

12.15 p.m. – 1.30 p.m. Lunch

1.30 p.m. – 2.15 p.m. **Developments in international insolvency law**
An explanation of recent developments at UNCITRAL to revise the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency to address, inter alia, issues relating to center of main interests
Moderators: Jenny Clift, UNCITRAL
Neil Cooper, Past-President, INSOL International

2.15 p.m. – 3.15 p.m. **Overview of approaches within the region**
Round table contributions by delegates and comparisons of the treatments available in courts of the region.
Moderators: Rt. Hon. Sir Marston Gibson, Chief Justice, Supreme Court of Barbados
Justice Alex Henderson, Grand Court of the Cayman Islands

3.15 p.m. – 3.45 p.m.	Coffee Break
3.45 p.m. – 4.45 p.m.	<p>Lessons from recent Caribbean cross-border cases A consideration of some of the more headline cases that have been heard recently in the region with questions from delegates. Moderator: Chief Justice Anthony Smellie of the Cayman Islands</p>
4.45 p.m. – 5.00 p.m.	Wrap up and colloquium close

The Educational Program may be subject to change.

Participants should note

- *The program is subject to alteration depending on the ability of judges to attend.*
- *Chatham House Rules apply to all discussions at the Colloquium.*
- *Only registered delegates and translators are permitted in the meeting rooms.*
- *Only registered delegates and accompanying persons who are registered with the organisers will be catered for at the reception and dinner. Lunches are only for delegates.*

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 2007
Eighth Judicial Colloquium – Vancouver 2009
Ninth Judicial Colloquium – Singapore 2011
Tenth Judicial Colloquium – The Hague 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

United Nations Commission on International Trade Law

Working Group V (Insolvency Law): update on recent developments and future work “Centre of main interests” and the directors’ responsibilities in the twilight zone¹

On 18 July 2013, UNCITRAL approved several texts on insolvency law. The first, the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), is a revision of the 1997 Guide to Enactment. The purpose of the revision is to provide more information and guidance on the interpretation and application of selected aspects of the Model Law, particularly the concept of the debtor's "centre of main interests" or, more commonly, "COMI", as well as various elements of the definition of "foreign proceeding" under article 2 of the Model Law. These revisions do not in any way affect the text of the Model Law as drafted. The second text is a new part (four) of the 2004 UNCITRAL Legislative Guide on Insolvency Law that addresses directors' obligations in the period approaching insolvency. These two texts were developed between 2010 and 2013 by UNCITRAL's Working Group V (Insolvency Law). The Commission also noted a new edition of the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective, which is to be updated on a regular basis to ensure its current relevance. These updates include cases decided between July 2011 and April 2013, as well as the new text from the Guide to Enactment and Interpretation of the Model Law.

1. Revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency

Revision of the Guide to Enactment was based upon a 2010 proposal by the United States to address the lack of predictability in the interpretation and application of COMI by providing specific guidance on various aspects of that concept as used in the Model Law. The revisions adopted include:

(a) A shorter, more focused introduction to the Model Law and its key concepts;

(b) Clarification of the use of the term “insolvency” in the Model Law; and

(c) Provision of more information on (i) the elements of what constitutes a “foreign proceeding” for the purposes of article 2, (ii) the characteristics of “main” and “non-main” proceedings, and (iii) the articles dealing with recognition of a foreign proceeding, in particular article 16 and the factors that are relevant to rebuttal of the presumption that the debtor's centre of main interests is its place of registration, as well as the time by reference to which COMI is to be considered in deciding on recognition under article 17.

Use of the word “insolvency” in the Model Law

The word "insolvency" is used in the Model Law to refer to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The revisions confirm that a judicial or administrative proceeding to wind up a solvent entity where the goal is simply to dissolve the legal entity is not regarded as likely to fall within the definition of a foreign proceeding in article 2(a). Where a proceeding serves several purposes, including the winding up of a solvent entity, it would fall under article 2(a) only if the debtor was insolvent or in severe financial distress and the other requirements of the definition were satisfied.²

¹ Prepared by Jenny Clift, Senior Legal Officer, ITLD/OLA (UNCITRAL Secretariat).

² Guide to Enactment and Interpretation, para. 48.

Article 2(a)³ - collective proceeding

A key consideration in evaluating whether a particular proceeding is a collective proceeding (and thus a proceeding subject to the regime provided by the Model Law) within the meaning of article 2(a) is whether substantially all of the assets and liabilities of the debtor are to be dealt with in that proceeding, subject to local priorities and statutory exceptions and local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it. Examples of the manner in which a collective proceeding might deal with creditors include, providing adversely affected creditors with a right to submit claims, to participate in the proceedings and to receive notice of the proceeding.⁴

It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that it serve as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purposes of liquidation or reorganization.

Article 2 (a) - control or supervision by a foreign court

The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. A proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession, would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.

Foreign main and non-main proceedings

The Guide to Enactment and Interpretation now includes explanatory material taken from the Virgos Schmit Report,⁵ which is generally regarded as an aid to interpretation of the concepts of COMI and establishment as those terms are used in the EC insolvency regulation.

Rebutting the presumption in article 16(3)

Article 16(3) provides a rebuttable presumption that the debtor's registered office is presumed to be its centre of main interests.

The Guide notes that where the debtor's centre of main interests is at the same location as its place of registration, no issue concerning rebuttal of the presumption is likely to arise. It is likely that the majority of applications for recognition made under the Model Law fall into this category.

³ Article 2(a) defines a foreign proceeding as meaning "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

⁴ Ibid, para. 70.

⁵ M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels 3 May 1996. The report was published in July 1996 and is available from <http://aei.pitt.edu/952> (last visited 1 August 2013).

However, when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its alleged centre of main interests, the party alleging the centre of main interests is not at the place of registration will be required to satisfy the court as to the location of the centre of main interests. In those circumstances, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. The essential attributes of the debtor's centre of main interests correspond to the attributes that will enable those who deal with the debtor (especially creditors) to ascertain the place where an insolvency proceeding concerning the debtor is likely to commence. The court of the enacting State will be required to consider independently where the debtor's centre of main interests is located.

It was agreed that two principal factors will tend to indicate whether the location in which the foreign proceeding commenced is (or was at the time the proceeding commenced) the debtor's centre of main interests. The factors are the location:

- (a) Where the central administration of the debtor takes place, and
- (b) Which is readily ascertainable by creditors.

When these principal factors do not yield a ready answer, the court may consider any number of additional factors, some of which are listed in the Guide.⁶ A court might need to give greater or less weight to a given factor, depending on the individual circumstances of the particular case. It is noted that in all cases the endeavour "is an holistic one, designed to determine that the location of the proceeding in fact corresponds to the actual location of the debtor's COMI as readily ascertainable by creditors".⁷

Date at which to determine centre of main interests and establishment

As to the date relevant to the determination of the debtor's COMI (or establishment), courts have adopted one of two alternatives - the date of commencement of the foreign proceeding seeking recognition or the date of the application for recognition. Having considered the case in support of each of those dates, the Commission adopted the solution proposed by Working Group V that the question be considered by reference to the date of commencement of the foreign insolvency proceeding, not the date of the application for recognition of that proceeding.⁸

The Guide notes that where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the centre of the debtor's main interests by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings.

Movement of COMI

The Guide acknowledges that a debtor's centre of main interests may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and

⁶ Ibid, para. 147.

⁷ Ibid, para. 146.

⁸ Ibid, paras. 157-160.

even between the time of the application for commencement and the actual commencement of those proceedings. Whenever there is evidence of such a move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the additional factors identified in the Guide more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable by third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings.

2. Legislative Guide on Insolvency Law, part four

The second text adopted by the Commission deals with the obligations that would apply to a director of a company when (a) insolvency was likely or unavoidable; and (b) the person owing the obligation knew, or ought reasonably to have known, that insolvency was likely or unavoidable. This new part four of the Legislative Guide, developed in response to proposals by the United Kingdom, INSOL and the III, follows the format of that text, including commentary and a set of legislative recommendations.

Two obligations would apply: to have due regard to the interests of creditors and other stakeholders and to take reasonable steps to avoid insolvency or to minimize the extent of insolvency where it is unavoidable. A number of the steps that might be taken are listed in the recommendations and include: directors ensuring that they are fully informed about the affairs of the company; seeking professional advice where appropriate; and ensuring the assets of the company are protected. Liability for breach of such an obligation would be limited to the harm caused, with remedies including payment in full to the insolvency estate of any damages assessed.

The obligations would be owed by any person defined under national law as fulfilling the role of a director, such as a formally appointed director. The text relies upon the commentary identifying the types of functions that might lead to other persons being considered a director, for example, those exercising factual control, performing the functions or undertaking the responsibilities of a director.

3. Future work

Working Group V will now return to the remaining elements of its current mandate, i.e. (a) the applicability of "centre of main interests" to enterprise groups as a means of facilitating the conduct of group insolvencies, (b) the possible development of a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, (c) the insolvency of large and complex financial institutions, and (d) obligations of directors of enterprise group companies in the period approaching insolvency.

The December 2013 session of the Working Group will start with a colloquium (open to participants not generally attending working group sessions)⁹ to consider how best to approach that work, as well as topics for possible future work, after which the Working Group will convene to decide (a) how to proceed on the enterprise groups topics; and (b) the topics it will recommend to the Commission as possible future work. Topics proposed include: insolvency treatment of financial contracts and netting; regulation of insolvency practitioners; enforcement of insolvency-derived judgements; insolvency treatment of intellectual property; and a number of issues relating to creditors and claims, including global standards for claims adjudication; ranking of creditors claims and dealing with unusual creditors; relative voting rights of debt and equity holders; and coordinating creditor access to information and collective representation. Since the Working Group has been tasked with assessing, at its Spring 2014 session, the suitability of the UNCITRAL Legislative Guide for addressing micro, small and medium enterprise (MSME) insolvencies, MSME insolvency issues will also be a topic for discussion at the colloquium.

⁹ More information is available at <http://www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013.html>

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