INSOL Africa Round Table 2012

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“The policy makers are in fact actively listening to the ongoing debate, and are taking the issues on board”. This comment by the Solicitor General in the Ministry of Justice of Zambia, Mr Musa Mwenye, characterised the success of one of the main aims of the INSOL Africa Round Table (ART) project. It elevated the ART from being merely a discussion forum, to being a knowledge resource for the participant jurisdictions regarding best practices for the Region.

ART 2012, supported by the World Bank Group, was extremely successful, attended by more than 70 delegates representing more than 20 jurisdictions from across the African continent. This project has grown in stature, and is now firmly entrenched.

The meeting was opened by the Attorney General of Kenya, Professor Githu Muigai. He spoke in strong support of the forum, to being a knowledge resource for the participant aims and importance of the ART, particularly taking account of the fact that on that very day two major bills – a new Insolvency Bill and a new Companies Bill – were to be introduced to the Kenyan Parliament. Amongst other reforms and innovations, the Attorney General reported that a form of business rescue was to be introduced as part of the new legislation. The ART project, focusing on “best practices” was therefore extremely well timed.

The Deputy Solicitor General in the State Law Office in Kenya, Ms Christine Agimba, reported that the Kenyan Government had considered the international regimes of amongst others the UK, Australia, Canada and New Zealand, and she expressed the view that the ART was extremely useful in observing African experiences. It was, as Ms Agimba put it, an opportunity to interrogate regional best practices with a view to designing legislation that fitted within the intended context.

Ms Agimba expressed concerns which were echoed by other speakers about IPs maximising fees and eventually “leaving for dead” the business that they were supposed to be administering. The regulation and licensing of IPs was important, and it was essential to ensure a minimum level of professional standards. Thus, training institutions had to be made to create programmes for skills development with a view to ensuring that there would be a professional group of insolvency practitioners. For this reason, the ART, which was intended to draw out and highlight experiences in other African jurisdictions, was extremely valuable.

The importance of converging best practices with their implementation in the African context was dealt with by the Registrar General and Official Receiver in the State Law Office in Kenya, Ms Bernice Gachegu. Ms Gachegu emphasised the need to modernise and to improve insolvency practice. In a phrase often quoted by speakers thereafter, her view was that “one size fits all” did not apply in the insolvency context. However, the approach of punishing, embarrassing and stigmatising debtors in the insolvency process was seen to be inappropriate. Modification and reform of the insolvency laws would be necessary.

Ms Gachegu noted that although there had previously been little emphasis on the reform of commercial laws in Kenya, this had now gained momentum. The new insolvency bill introduced a company voluntary arrangement procedure, along with the concept of administration. The insolvency practitioner would be required to be qualified and the aim of the legislation was to “help the profession to clean up its act”. Challenges to implementation were, amongst other things:

- Legislating for a modern insolvency legal framework;
- The acceptance of that framework by society;
- Explaining to stakeholders how the system would function;
- Ensuring that the laws were passed by Parliament and then establishing the institutions necessary to implement them;
- The presence of sufficient legal and economic expertise to implement the new regime.

The role of the IP was one of the most regularly revisited topics throughout the ART. Fidelis Odita QC of 3-4 South Square, London, in an interactive session, took the lead in viewing the IP as the key, in whatever framework he or she operated. It was essential to ensure that the IPs were in terms of objective and verifiable criteria, suitably qualified and had basic skills in:

- Knowledge of procedure;
- A minimum experience threshold;
- Personal attributes such as integrity;
- Suitability for their tasks;
- The physical capacity to be able to deal with matters entrusted to them;
- Independence in the matter; and
- To have acquired the confidence and the trust of all stakeholders.

The pivotal role of the Courts and the time taken to resolve matters was another key aspect of best practice identified at the ART, and Justice Daniel Musinga of the Commercial Court in Kenya gave the background to the establishment and functioning of the Commercial Court, which had been...
particularly successful in reducing the backlog of cases. Judge Musinga emphasised the need for specialised knowledge and training in this field. Additional training would be required once the new Kenyan legislation became law.

The session dealing with the deployment of alternative dispute resolution (ADR) in facilitating informal corporate workouts was moderated by Fidelis Oditah QC who pointed out the advantages of such workouts not being constrained either by the Courts or by statute but only by the “imagination and expertise of the participants”. Some of the advantages of ADR were in regard to the speed with which matters could be attended to, the lower cost and concomitant higher recovery. Judge Geoffrey Kinyabwire, Head of the Commercial Court in Uganda, emphasised the need to reform insolvency laws, and reported that the Ugandan courts had in fact adopted and embraced ADR. But, to ensure that the settlement be given efficacy, it was possible to immediately have the settlement made a judgment of the court.

The ART achieved particular success attributable in part to the stature of the participants, the quality of the presentations and the enthusiasm of the debate, there is no doubt that the INSOL ART has been firmly established as an important mechanism to facilitate interaction and debate. The theme of the INSOL ART 2012 in dealing with various aspects of best practice was both timely and appropriate. As the one session was aptly named – the project has become “a state of ART.”

Panellists of the “Building institutional, technological and human capacity” session