Mediation in the Context of Cross Border Insolvency Disputes

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As part of the Singapore Convention Week from 6-10 September 2021, INSOL International organised an event entitled "The UNCITRAL Cross Border Model Law and Mediation: Panaceas for International Restructurings?" Organised by the Singapore Ministry of Law, the Singapore Convention Week brought together top practitioners and headline makers in the international dispute resolution scene. Across the week-long series of activities, legal practitioners, business executives and government officials from around the world had the opportunity to hear from thought leaders in the field of dispute resolution, and glean practical insights on the latest innovations and trends in alternative dispute resolution to serve the fast evolving needs of businesses.

Introduction

The focus of this paper is the use of mediation as a tool to assist in the resolution of cross-border insolvency disputes. In particular, reference will be made to the use of legislation enacted by various States that has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the Model Law).

Problems have always arisen when a debtor has assets or liabilities in two or more different States, particularly if it has been placed in a collective insolvency regime in at least one of them. In such circumstances, there are strong policy reasons to co-ordinate the efficient realisation of assets for the benefit of all creditors, wherever they may be.

Historically, there have been tensions in identifying applicable law and the circumstances in which the laws of one State will prevail over those of another. Similar problems arose in identifying the most appropriate forum to deal with cross border insolvency issues. While procedures were available to assist in the resolution of such disputes, they were relatively blunt instruments. In the old British Empire days, the order in aid procedure was developed[1]. On a broader basis, the doctrine of comity gained traction[2]. The underlying policy rationale for the procedures was the "equitable, orderly, and systematic" distribution of assets of a debtor in different States. The "haphazard, erratic or piecemeal" realisation and distribution of assets was to be discouraged[3].

Over time, attempts to co-ordinate the realisation of assets and distributions to creditors in different States became more sophisticated. A series of principles were developed and statutory provisions introduced by various States with an intention to simplify the process and to promote predictability of outcome[4]. Some States began to move from a "territorialist" approach to one that has been described as "modified universalism". It is now generally accepted that there is a common law principle of "modified universalism"; at least one which provides a common law power to assist foreign winding up proceedings so far as a domestic court properly can. Recently, the Privy Council has confirmed the principle to be subject to two exceptions: first, it is subject to "local law and local public policy"; second, the court providing assistance "can only ever act within the limits of its own statutory and common law powers"[5].

In the early 1990s, attempts were made to encourage court to court communications to improve the ability to co-ordinate proceedings. The first recorded example of Judges in different States communicating with each other for that purpose seems to be the insolvency of Maxwell Group Ltd. Mr Justice Hoffmann, in London and Judge Tina Broznan, in New York, were able, with the assistance of counsel, to put together a form of protocol under which the courts in New York and London exercised specific jurisdiction. Those initial, yet tentative, steps revealed a need for something more formal to be put in place to deal with what were then large scale insolvencies arising (particularly) out of the 1987 sharemarket crashes and the enhanced ability to transfer money across borders instantaneously through digital means.

This led to work being undertaken by UNCITRAL. Using its well-tested procedures for achieving consensus on international instruments where different States were faced with common legal problems. That led to promulgation of the Model Law.

The Model Law

UNCITRAL's project was initiated in 1995. The goal was to develop a legal instrument relating to cross border insolvency. In the prelude to the first meeting of the Working Group on Insolvency Law (Working Group V), a series of judicial colloquia were held, the first in 1994. The Model Law emerged from that process. It was adopted by the Commission on 30 May 1997. As a Model Law (by contrast with a convention), it was open to States that wished to incorporate the model to adopt it completely, or to modify its terms or by deleting some provisions.

The Model Law is built on four pillars. They are:

(a) **Access**: The right for a foreign insolvency representative to access the courts of a State that provides assistance under its provisions[6].

(b) **Recognition**: Recognition of the foreign proceeding in the State providing assistance[7].

(c) **Relief**: The ability of a court in the State providing assistance to grant relief to the foreign insolvency representative to protect assets of the insolvent entity in that jurisdiction and to facilitate the orderly realisation of those assets and distributions to creditors[8].

(d) **Co-operation**: An express obligation on all insolvency representatives and courts in different States to co-operate with each other to achieve the goals of the Model Law[9].

This paper concentrates on those parts of the Model Law that mandate co-operation between

1. For example, see *Callender Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460 (PC).

2. For example, see *Hilton v Guyot* 59 US 113 (1895) and *Cunard Steamship Co Ltd v Salen Reefer Services* AB 773 F 2d 452 (1985) (2nd Cir).

3. *Cunard Steamship Co Ltd v Salen Reefer Services AB* 773 F 2d 452 (1985) (2nd Cir), at 458.

4. For example, s 304 of the US Bankruptcy Code, before adoption of Part 15 of that enactment.

5. *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2014] UKPC 36 at paras 15–19 (Lord Sumption). See, to similar effect, *Re HIH Casualty and general Insurance Ltd* [2008] 1 WLR 852 (in which Lord Phillips, Lord Hoffmann and Lord Walker accepted the principle) and *Rubin v Eurofinance SA* [2013] 1 AC 236 (UKSC), in which it was accepted by Lord Collins, Lord Walker and Lord Sumption.

6. Model Law, arts 9–14.

7. Ibid, arts 15–18.

8. Ibid, arts 19–24.

9. Ibid, arts 25–27. Articles 28–32 deal with the ancillary questions arising out of concurrent collective insolvency regimes.

the courts of the State that is being asked to provide assistance and foreign courts and representatives. Those obligations are set out in arts 25–27.

Article 25 includes the possibility of direct communication between a court of one State and the court of another. Articles 25 and 26 make it clear that co-operation is to be "the maximum extent possible". Article 27 identifies five (non-exhaustive) means by which co-operation may be implemented; namely,

(a) The appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

(c) Co-ordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the co-ordination of proceedings; and

(e) Co-ordination of concurrent proceedings regarding the same debtor.

The UNCITRAL Practice Guide on Cross border Insolvency Co-operation published in 2010, explains the purpose of art 27(a) as follows[10]:

2. Such a person or body may be appointed by a court to facilitate co-ordination of insolvency proceedings taking place in different jurisdictions concerning the same debtor. The person may have a variety of possible functions, including acting as a go-between for the courts involved, especially where issues of language are present; developing an insolvency agreement; and promoting consensual resolution of issues between parties. Where the court appoints such a person, typically the court order will indicate the terms of the appointment and the powers of the appointee. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

How can mediation (in the broadest sense of the term) be used in a manner that will promote the goals of co-operation and co-ordination to which the Model Law refers? We consider that question in conjunction with the availability in States that have ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), approved by the General Assembly of the United Nations on 20 December 2018.

The use of mediation

In an article published in 2017[11], Nina Mocheva and Angana Shah surveyed a growing use of mediation in the context of insolvency proceedings. Among other things, they considered the use of mediation in support of facilitation of a restructuring plan among the debtor and multiple creditors; and to assist resolution of contested issues within a collective insolvency proceeding.

As to the latter, the article drew on examples from well known international insolvencies. Relevantly, examples were provided from the bankruptcies of Lehman Brothers, MF Global, General Motors, and Nortel. The first three demonstrate how the mediation process worked well. Nortel is a salutary reminder of what can happen when the process fails. Gratefully adopting the summaries provided by the authors of the article, the examples given are[12]:

(a) When Lehman Brothers filed for bankruptcy in 2008, there were 1.2 million derivative transactions with 6,500 counterparties. Lehman obtained permission from the US Bankruptcy Court to mediate those disputes. According to a February 2013 report filed with the Court, Lehman was able successfully to reach settlement in 93 of 98 mediated cases.

10. *UNCITRAL Practice Guide on Cross border Insolvency Co-operation* published in 2010 at page 18, para 2.

11. Nina Mocheva and Angana Shah, *Mediation in the Context of (Approaching) Insolvency: A Review on the Global Upswing* (2017) 14 TDM 1.

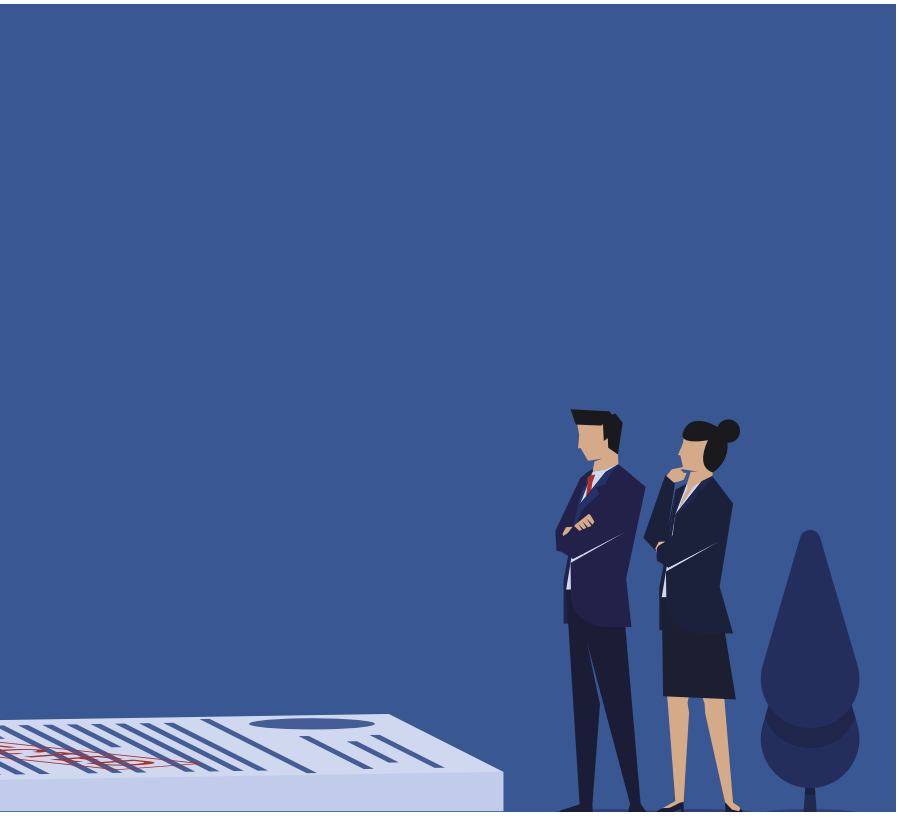
12. Ibid, at 9-10.

That resulted in a sum of $1.39 billion being made available to creditors

(b) The Bankruptcy Court judge for MF Global encouraged mediation in respect of affiliate companies in the United States and the United Kingdom that had cross claimed against each other, with the prospect of protracted litigation. The disputes were resolved following mediation with MF Global's creditors receiving a total of $1 billion in distributions.

(c) A post-bankruptcy claim by a hedge fund in the General Motors bankruptcy threatened to jeopardise an approved restructuring plan. The hedge fund creditors wished to litigate a $3 billion claim, which would have had the effect of unwinding a large transaction that occurred at the time of the bankruptcy filing. The claim was referred to mediation. The plaintiffs agreed to settle for one half of their claim, allowing an increased recovery for other creditors in a sum of about $50 million.

(d) Nortel's assets were sold for $7.5 billion but affiliates in the United States, Canada, United Kingdom and France could not agree on how the realisations should be distributed. Mediation was encouraged. Multiple attempts at mediation failed. In the end, the issues wer determined through litigation; including decisions of the Superior Court of Ontario and Bankruptcy Court for Delaware after a joint hearing had taken place. Sadly, the entire costs of the distribution dispute was something in the vicinity of $1.9 billion.



Although all of those cases involve large enterprises and sophisticated parties, similar issues can also arise in relation to micro, small and medium size enterprises. In those cases, the ability to use mediation to resolve cross-border disputes should be the preferred option. Those involved in deciding what dispute resolution mechanism will be used should always consider the need for proportionality as between the cost of determining a dispute and the amount at stake.

Mediation in aid of a Model Law proceeding

As the examples suggest, there are a number of problems that can arise in international insolvencies which involve numerous parties in many different jurisdictions with contractual arrangements subject to varied governing laws. Some contracts may require arbitration. Others may provide for access to local courts. In circumstances where it is important to corral the disputants and endeavour to achieve prompt outcomes, the appointment of someone, under art 27(a) to facilitate resolution could lead to settlements of the type identified in the Lehman Brothers and MF Global examples. To the extent that not all disputes were resolved, it is possible that issues for resolution could be narrowed and the means by which they could be resolved in court, by arbitration or any other form of binding decision-making process.

The importance of identifying an appropriate mediator or facilitator cannot be overstated. The parties are likely to have an opportunity to make representations on this topic at a hearing convened to determine that question, by reference to art 27(a) of the Model Law. Consideration should be given to the skills of a proposed mediator and whether they should be complemented by specialist knowledge that might be possessed by someone who could act in tandem with the appointee. A court may want to take into account language and cultural considerations. Developing countries may want to encourage the skill to mediate such disputes by pairing a local mediator with an experienced one from another jurisdiction. Sometimes the use of co-mediators will assist, for example, where there are disputes about what law may apply to resolve a substantive dispute (or the forum in which it may be resolved) and appointees from the jurisdictions in question may be able to assist the parties in understanding the risks involved. A slightly more nuanced situation might arise if there were a need to appoint one or more mediators/facilitators (perhaps in different States) to encourage development of an agreed plan that could be put before the Court for approval, subject to any remaining dispute resolution processes.

An unnamed commentator to whom Mocheva and Shah refer in their article put the advantages of consensual forms of dispute resolution in this area as follows[13]:

> In the field of international insolvency is ripe for intervention via mediation. The speed and flexibility of mediation makes it an idea process for multi-national companies who are seeking to avoid the costly and time consuming quagmire of trans-national litigation. Particularly in the current global economic climate [while the article was written in 2017, the point remains important in COVID-19 times], it [is] anticipated that the prominence of international mediation in cross-border insolvency cases is set to increase. It is possible that more alternate dispute resolution institutions may offer specialized rules and panels to administer the mediation of complex cross-border disputes.

The Singapore Convention

Although not yet ratified in many States, the Singapore Convention provides an added incentive to the use of mediation in international insolvencies. A purpose of the Convention is to enable settlements reached through a mediation process (as defined by the Singapore Convention) to be recognised and enforced in another State. If used judiciously, a proceeding under the Singapore Convention could enforce mediated settlement agreements in Convention States in a manner similar to the way in which arbitral awards are enforced under the New York Convention. That would avoid a problematic situation arising in which, for some reason or another, the Court exercising jurisdiction under the Model Law was unable to give effect to the negotiated arrangement.

The term "mediation" is given an extended meaning by art 2(3) of the Singapore Convention:

> … a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("**the mediator**") lacking the authority to impose a solution upon the parties to the dispute.

At the core of the definition is the need for the parties to achieve their own resolution of a dispute, albeit with the assistance of someone who has no power to make a decision. It is the lack of decision-making power that enables a mediator to use flexible processes to achieve resolution – including the ability to talk separately to individual parties or groups with common interests on terms that do not require him or her to disclose what was said to others, at least without approval from that group. This process is often called "caucusing".

Article 1 of the Singapore Convention is directed to the international and commercial elements of a dispute which are central to its scheme and purpose. Article 1(1) states:

> This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("**settlement agreement**") which, at the time of its conclusion, is international in that:
>
> (a) At least two parties to the settlement agreement have their places of businesses in different States; or
>
> (b) The State in which the parties to the settlement agreement have their places of business is different from either
>
> (i) The State in which a substantial part of the obligations under the settlement agreement is performed or
>
> (ii) The state with which the subject matter of the settlement agreement is most closely connected.

Article 1(2) and (3) expressly exclude from the scope of the Convention consumer transactions, disputes relating to family, inheritance or employment law, and settlements that have been approved by a Court that are enforceable as a judgment of the State in which that Court is situated. Further, settlements which have been recorded as consent orders in an arbitral proceeding do not fall within the scope of the Convention.

A way forward

INSOL International's Mediation Colloquium was established in 2019[14]. Although the term "Mediation" is used, the Colloquium extends to all forms of dispute resolution outside of State-established courts. One of the goals of the Colloquium is to encourage the use of mediation and other facilitated dispute resolution mechanisms to enable cross border insolvency disputes to be resolved more efficiently and effectively. That objective takes account of the pressures on State-established courts to deal with a variety of cases and the need to narrow the nature of the disputes that the court must resolve. If that objective were achieved, it is likely that court decisions could be given in a timely and more cost-effective manner.

To encourage the use of mediation (in the broad sense defined by the Singapore Convention), it will be necessary to promote trust and confidence in the process by those stakeholders who will be most affected by it. They include large banks, other finance houses and hedge funds. Without their support, it is doubtful whether a more general use of mediation could be developed.

Ultimately, the goal is to encourage a means by which the courts exercising jurisdiction in collective insolvency proceedings can act more efficiently by using parallel and complementary mediation procedures to achieve resolution of disputes without the need for extensive and costly court involvement. ■

13. Ibid, at 11, with reference to a footnote that refers to an article in the Journal of the American Bankruptcy Institute. Model Law, arts 9–14.

14. References to the Mediation Colloquium should now be to the ADR Colloquium.

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