UN DAY LECTURE – 2019

25 YEARS OF CROSS BORDER INSOLVENCY LAW REFORM 1994–2019

Canberra

Michael Murray[i]

The UN Day Lecture series is an annual initiative of UNCCA to highlight the work of UNCITRAL for practitioners and students.

UNCCA, the UNCITRAL National Coordination Committee for Australia, is a group of those interested in the work of UNCITRAL's six working groups, and not only in insolvency. UNCCA provides representation by Australians at UNCITRAL sessions, either as part of an official Australian delegation or as observers on behalf of LAWASIA. I was able to attend Working Group V – Insolvency in Vienna in December 2016.

This year's Lecture series yesterday and today outlines how the cross-border insolvency (CBI) framework operates, and to examine the contribution made by Australian courts and practitioners to the developments in this field over the past quarter-century.

UNCCA would like to thank the Federal Court and Federal Circuit Court for this venue, and ARITA for its sponsorship of the event.

The talk is about cross-border insolvency, where an insolvent company or person has assets or creditors in more than one jurisdiction. I will look at its history, the initial rules of comity, letters of request, the Model Law and aspects of it, some insolvency practitioner issues, the recent decision in *Halifax*, and the on-going work of UNCITRAL whose next insolvency meeting is in December 2019 in Vienna.

Insolvency

Insolvency is typically excluded from international commercial law instruments seeking to harmonize the private international law of commercial and civil law matters – it is, for example, excluded from the draft Hague Convention on the Recognition and Enforcement of Foreign Judgments.[1] It is also often on the outer in domestic law reform despite its potential wide spread of impact.

Cross-border insolvency started receiving attention within UNCITRAL 25 years ago following some years of concern about existing private international law principles to deal with its issues. For example, a liquidator may have limited access to company assets located in another country; there may be special rules providing local creditors with access to local assets before funds go to a foreign administration; there may be limited or no recognition of foreign creditors; there may be inconsistency in the priority of creditors (particularly in relation to employee claims) across jurisdictions; and there may be difficulties for foreign creditors seeking to enforce securities over local assets.

To cut a long story short, the Model Law on Cross-Border Insolvency was approved in 1997 and within 10 years, 15 countries had adopted it; with 43 now having done so. It was adopted by Australia in 2008. A rough estimate is that there have been over 100 applications made by foreign practitioners in Australian courts since then.

---

[1] As explained in *The Characterisation of Pre-Insolvency Proceedings in Private International Law,* Irit Mevorach and Adrian Walters, 2019.

Why CBI?

John Lennon's song *Imagine* provokes differing responses, I think depending on one's level of cynicism about the world and its people, which is relevant to today's topic, but putting that deep analysis aside one message of Lennon was to

'imagine there's no countries, it isn't hard to do'.

And if there were no countries, hypothetically, there would be no need for cross border insolvency, because we would all exist within the one jurisdiction, as would all assets and creditors. We would have an Insolvency Act 2020 (World).

But given world geography, there would still be those debtors who raised problems of absconding across the seas or rough terrain.

In fact, the original bankruptcy law, the 1542 Statute of Bankrupts, recited that it was focused on

'divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, [who] do suddenly flee to parts unknown … for their own pleasure and delicate living'.

The Act authorised the Lord Chancellor to pursue the debtor, bring them and their goods back from parts unknown, and distribute their assets to their creditors. At that time, England was becoming a major trading nation, and unpaid debt was a problem in cross-border trade for all nation states.

Before England came to enlist the Lord Chancellor, the Vatican's intercession was sometimes sought, whose sovereign was of course not bound by worldly frontiers. In 1302, Pope Bonafacius VIII intervened in the collapse of the Ammanati Bank which had branches all over Europe and the closure of its Rome branch caused panic, and the owners fled.[2] The Pope ensured the safe conduct of the owners back to Rome and directed the clergy around Europe to collect the bank's debts and send the funds to Rome for distribution among all the Bank' s creditors.

It was a continuing problem. In the 20th century, the Judge described the absconding tax debtor as having

"a plan both swift and simple. He would secretly dispose of all [his assets] to safe hands in Ireland … from where … he might safely snap his fingers in the face of a disgruntled Scottish Revenue."[3]

And years later, Australia had its *Skase* bankruptcy, and others besides.

Australia

As to Australia, we might be said to have been founded on cross-border insolvency, populated as we were by a certain percentage of settlers who had left large cross-border debts behind in 18th and 19th century England.

And we had cross-border difficulties domestically with our separate colonies, whose boundaries were as solid as those between countries. In one case, a firm was liquidated in NSW, but before the order was made Victorian creditors seized the company's goods. Under NSW insolvency law, while the relation-back date pre-dated the seizure, this was held not to impact Victorian creditors.

---

[2] *Cross-Border Insolvency,* Hannan, 2017
[3] *Re Ayres* [1981] FCA 45

Domestic cross-frontier insolvency

But the commencement of the 1924 *Bankruptcy Act* in 1928 put an end to state-based bankruptcy law.

So when the 1988 Harmer Report looked at what it called "Domestic cross-frontier insolvency" at [963], it noted that the Bankruptcy Act had

'application throughout Australia .... There are, therefore, no real problems when property of an insolvent individual whose affairs are being administered under the Bankruptcy Act is located in several parts of Australia'.

But as we know, corporate law harmonisation was a major issue in the 20th century. Hence, as to insolvent companies [965], the Harmer Report noted that

"The present companies legislation, under which the administration of an insolvent company is administered, is not a national law. It is State or Territorial. ... It can require an application to the relevant court to enforce recognition. ... some aspects of corporate insolvency legislation cannot be enforced outside the particular State or Territory. .... If national companies legislation were enacted, these difficulties would disappear ...".

Comity

Insolvency involves retrieving the bankrupt's assets that have been transferred to others and that it itself can be a difficult task, and costly. This is more so when assets disappear overseas. By 1990, these issues remained for insolvency law internationally.

Comity was relied upon, a common law principle whereby courts defer to foreign court proceedings. It is an embodiment of the principle of universalism in insolvency, that there should be a single insolvency proceeding in which all creditors are entitled and required to prove. Comity is subject to public policy exceptions, and tax debts can be one.

Reciprocity

One early qualifier was reciprocity, Keay[4] referring to that as a "special brand of parochialism", in particular often courts have "used it as a device to protect the interests of domestic creditors". In chasing the overseas assets of Christopher Skase, Pincus J said:

'To put this point more simply, we can hardly expect the Spanish authorities to assist Australian courts in relation to a matter of a kind in which Australia would not assist Spanish court'.[5]

More recently, *Cooksley*[6] involved the Official Assignee in NZ seeking income contributions from a NZ bankrupt working in Australia. Logan J referred to the importance of comity, which is,

"if anything, even greater in modern times when advances in science and technology have made the transfer of funds across international borders an almost instantaneous process ...

In relation to New Zealand, there is the added consideration that it is a feature of the closeness of Trans-Tasman relations that our respective citizens may live and work in each country virtually without restriction."

A letter of request was relied upon in that case, which I will later explain. But first, the Model Law.

---

[4] *International Elements in Bankruptcy* [1992] Adelaide Law Review 10
[5] [1991] FCA 465
[6] [2017] FCA 1193

Cross-Border Insolvency Act 2008 and the UNCITRAL Model Law

The Model Law was issued in 1997. Australia adopted it in 2008, under the CBI Act. NZ had adopted it in 2006. There are over 40 countries[7] – of 187 – which have done so – England, the US, Japan, Korea, Canada and most recently Singapore; but not China, and perhaps India. It is a schedule to the CBI Act.

So, where an insolvent company or person has assets or creditors in more than one jurisdiction, the Model Law:

• sets out the conditions under which foreign insolvency practitioners administering foreign insolvency proceedings have access to Australian courts

• sets out other conditions for the 'recognition' of a foreign insolvency proceeding and for granting relief to the FIPs of such a proceeding

• permits foreign creditors to participate in Australian proceedings

• permits courts and insolvency practitioners from different countries to cooperate more effectively, and

• makes provision for coordination of insolvency proceedings that are taking place concurrently in different states, for example Australia and England.

A fundamental concept is to determine the debtors centre of main interests – COMI - as that jurisdiction will govern the conduct of the insolvency. Its proceedings should be recognised as foreign main proceedings, that imposes an automatic stay on any action against the company's assets in Australia.

Some qualifications and limitations

1. the Model Law is not based on the principle of reciprocity between states. There is no requirement for a foreign representative seeking to rely upon the model law to have been appointed under the law of a state which has itself adopted the model law. Hence, Australia's courts are open to all 180+ countries in the world.

However, some countries have insisted on reciprocity in their adoption of the Model Law – either de facto or de jure, Look Chan Ho listing BVI, Mauritius, Mexico, Romania and South Africa.[8]

2. the Model Law does not determine choice of law. That is currently an item for discussion by WGV in New York in May 2020. Each country's rule of private international law applies.

3. it does not deal with group insolvencies, hence a new model law had to be devised;

---

[7] Eritrea (1998), South Africa (2000), Japan (2000), Mexico (2000), Montenegro (2002), Poland (2003), Romania (2003), Serbia (2004), British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), United States of America (2005), New Zealand (2006), Republic of Korea (2006), Colombia (2006), Great Britain (2006), Canada (2009), Mauritius (2009), Greece (2010), Chile, Seychelles, Vanuatu (2013), Gibraltar (2014), Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Kenya, Malawi, Mali, Niger, Senegal, and Togo (2015), Singapore (2017) and Israel (2018).

[8] *Cross-Border Insolvency,* Look Chan Ho, 4th ed, p 9

4. nor is it effective in allowing the recognition of foreign insolvency related judgments; hence another model law has been approved to attend to this issue.

Comparison of letters of request and model law processes

Letters of request are available under s 29 Bankruptcy Act and s 581 Corporations Act. These are statutory embodiments of comity. There are a limited number of (Commonwealth) countries to whose requests Australian courts *must* respond; requests from other countries' courts *may* be responded to.

Letters of request were for a long time the way to go, from an Australian court to a foreign court on behalf of an Australian liquidator or administrator or trustee. They remain a valid procedural tool for those countries that have not adopted the model law but also for countries that have, as an alternative to the Model Law.

However, given the requirement for a letter of request to be detailed in the scope of assistance required, applications under the Model Law in the foreign jurisdiction are generally more appropriate where the trustee is still in the process of investigating, tracing and locating assets. The Model Law gives the liquidator or trustee greater authority, for example, to examine and instigate proceedings in his or her own name, should it be necessary, without the need for further court orders.

But that will depend on the particular case. In *McGrath & Anor as Liquidators of HIH Insurance Ltd*,[9] Barrett J said:

> 15 I raised with counsel for the liquidators the question whether consideration had been given to a direct approach to the English court under the *UNCITRAL Model Law on Cross Border Insolvency* ... If an order were made under those regulations recognising the winding up of HIH as a "foreign main proceeding", the English court would have immediate and direct jurisdiction to make orders for the obtaining of information concerning HIH's "assets, affairs, rights, obligations or liabilities" (article 21(1)(d))...). The English court would not be assisting or acting in aid of this court. It would be exercising independent jurisdiction.
> 16 The answer was that the possibility of resort to the regulations had been considered and that, on advice, the liquidators preferred to adopt the letter of request procedure which had been availed of by them on several earlier occasions. .....
>
> 18 There is no reason under our law (and there appears to be none under English law) why the liquidators should not take the course they wish to take or why this court should do otherwise than assist them.

In any event, the two regimes are not mutually exclusive — recognition overseas under the Model Law does not preclude the local issue of letters of request.

In *Gainsford*,[10] the Federal Court declined to recognise a South African bankruptcy under the Model Law because the debtor had neither a COMI nor an establishment there. But the Federal Court nevertheless acted upon a letter of request from the SA High Court, under s 29, even though SA is not a prescribed country.

There is the potential for inconsistency between the Model Law and section 29 of the Bankruptcy Act. The Model Law imposes a mandatory obligation on the court to cooperate with courts or representatives of foreign jurisdictions - `shall cooperate'. But s 29 imposes a mandatory obligation on the court to assist only the courts of prescribed countries but permits the court to exercise its discretion as to whether it should assist other foreign courts. To address this potential inconsistency, s 21 provides that the CBIA will prevail.

---

[9] [2008] NSWSC 881
[10] *Gainsford v Tannenbaum* [2012] FCA 904

Which courts have jurisdiction in Australia?

Recognition may be granted in Australia by the Federal Court or a Territory or State Supreme Court. Note that the Federal Circuit Court of Australia has no CBI jurisdiction, and the State and Territory Supreme Courts no cross-border bankruptcy jurisdiction.

Recognition of a foreign proceeding commenced in a country where the debtor *has* the centre of its main interests (COMI) automatically stays any Australian proceedings, and execution and suspension of power to deal with the debtor's assets.

Recognition of a foreign proceeding in a foreign country, where the debtor *does not have* a COMI but has an 'establishment', a place of operations, does not cause an automatic stay but the Australian court *may* order a stay or suspension in exercise of its discretion to give appropriate relief for the benefit of either type of foreign proceeding once it is recognised.

Examples of orders

Examples are an order:

- authorising the foreign representative to examine witnesses in Australia;
- an order entrusting the foreign representative with the administration of Australian assets of the debtor, through an appointed local trustee or liquidator;
- an order for the delivery of documents, or
- the issue of a search warrant; or
- to appoint a receiver over both moveable and immovable assets of the bankrupt; a vesting of Australian property in the foreign trustee.

Christie v Kian [2019] FCA 1141 is a recent decision which gives a fairly standard set of orders that are made when proceedings are recognised.

The foreign proceedings – just and equitable

Apart from applying to debtor in possession proceedings, the Model Law applies to a solvent company that is subject to a court ordered winding up on just and equitable grounds: *Re Sturgeon Central Asia Balanced Fund*.[11]

Limitations

Banks, insurers etc

Banks, insurers and life companies are excluded from the Model Law regime. See reg 4 made under s 23 of the CBIA. Special protective insolvency arrangements apply to them, for example under the *Banking Act* 1959. This is the case in most jurisdictions. The assets of insurers are often 'ring-fenced'.[12]

Jurisdiction

Upon recognition of a foreign proceeding the Model Law provides that the foreign representative also acquires standing to bring voidable transaction proceedings under the Corporations Act or the Bankruptcy Act.

---

[11] *Re Bailey & Anor (As Foreign Representatives of Sturgeon Central Asia Balanced Fund Ltd)* [2019] EWHC 1215 (Ch) (17 May 2019).

[12] See *Model Law on CBI: Exclusion of Australian Banks* (2008) 20(4) A Insol J 4, Murray and Mason

There are jurisdictional limits on this confirmed in the Zetta Jet proceedings,[13] that while Art 23 gives the foreign representative "standing" to initiate claims, it does not create any cause of action that the representative can enforce if other domestic laws do not confer jurisdiction. Each country's rules of private international law determine jurisdiction.

The Model Law deliberately refrains from including choice of law rules and leaves it to the States adopting the Model Law to deal with this issue in accordance with their existing private international law rules. These are being discussed in 2020. Issues of concern raised relate to sensitive issues such as treatment of intellectual property rights, priority of claims, rights in rem and security interests in insolvency.

Maritime law

Zetta Jet involved a US trustee chasing a luxury cruiser as an asset.

Maritime law itself often conflicts with insolvency law. It recognises maritime liens – the rights of seamen to make a claim on the ship for unpaid wages - which may not be recognised as secured claims in insolvency. A Federal Court Practice note requires orders made by the court in relation to any right to arrest a vessel pursuant to such a lien to be litigated, with a view to any stay under the Model Law being varied: *Yu v STX Pan Ocean Co Ltd* [2013] FCA 680. See for example *Alari (Trustee), in the matter of Rizzo-Bottiglieri-de Carlini Armatori SpA (Trustees in Bankruptcy appointed) (No 2).*[14]

A deficiency was revealed in the Model Law in *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA*[15] where the foreign representative failed to inform the court of a change in status, under Art 18, because its own status had been terminated.

Tax debts and public policy

Tax and penal statutes are often raised as issues of 'public policy' under Art 6 of the Model Law, such that other countries will not recognise or enforce them. Earlier I cited a Judge referring to an absconding tax debtor as departing Scotland for Ireland "from where … he might safely snap his fingers in the face of a disgruntled Scottish Revenue"."

In *Akers v Saad,*[16] these comments explain the tax issues:

"The principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States": Gropper J.

That is "powerful support for the proposition that the sacrifice of the rights (or the value in the rights) of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far. The force of this proposition is to be recognised when one appreciates that the universality of the Model Law is qualified by the capacity to modify and terminate the effect of Arts 19 and 20 by Arts 20.2 and 22.3, and where the interests of local creditors are expressly protected by Art 21.2.

It was not the intention of Parliament to affect the domestic enforceability of Australian tax debts through the process of recognition of a foreign main proceeding … to the placing of foreign revenue authorities on an equal footing with local revenue authorities".

---

[13] *King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited* [2018] FCA 1979
[14] [2018] FCA 1067
[15] [2018] FCA 153
[16] *Akers as a joint foreign representative of Saad Investments Company Limited (in Off Liq) v DCT* [2014] FCAFC 57

Real property

An immovable can still present CBI issues. While the BA vests all property here and overseas in the trustee, that vesting is still subject to the land laws of the overseas jurisdiction. Conversely, that arose in a matter before the ACT Supreme Court. Australian law did not automatically recognise the title of an English trustee to the real property of the bankrupt within Australia even though under English law, as under our BA, property vests automatically without any requirement for registration and extends to property outside the jurisdiction. Hence, in the absence of orders under s 29 or the CBI Act, the foreign trustee had no immediate entitlement to have the property registered in her name or capacity to take control of it.

"Section 132 of the Land Titles Act operates … within the context of the rules of private international law and hence does not compel her registration as a proprietor": *Palmer v Registrar-General of Land Titles of the ACT* [2017] ACTSC 407.

UK Section 426

Unlike our sections 29 and 581, their UK equivalent, s 426 Insolvency Act 1986 allows the UK court to apply the foreign law of the court asking for assistance. The request must come from a court in one of a number of generally Commonwealth countries, with similar legal systems and principles to English law.

Examples of the use of s 426 include *England v Smith* [2000] BPIR 28, a Bond Corporation insolvency, allowing a request for the examination of an accountant associated with the company's former auditors, even though that examination would not have been permitted under English law.

Another example under s 426 of UK courts assisting Australian proceedings is in HIH, as to a request for the remission of the net funds held by UK provisional liquidators appointed in England to the liquidator in the main HIH liquidation in Australia.

Outside of s 426, the English High Court has questioned whether it has the power to apply foreign law when such power would not be available under their domestic law. The issues essentially come back to principles of private international law.

The foreign representative

A foreign proceeding is represented by a "foreign representative" who could be from any of the 180+ countries, not just one which has adopted the Model Law. The representative will typically be an insolvency practitioner, but they need not have been appointed by a court, and they can be a debtor in possession under US law: *Re 19 Entertainment Ltd* [2016] EWHC 1545 (Ch); or German law: *Senvion GmbH (No 2)* [2019] FCA 1732.

The substantive application made is for recognition of the proceedings under Art 17; if that is recognised, acceptance the foreign representative is said by one text to follow "almost as a matter of course".

That is, once an Australian court, for example, recognises the foreign proceedings, who the foreign law has designated to be in charge of the insolvency is not a matter of much inquiry.

But at least three issues can arise.

i. Duty of disclosure

The foreign representative must make full disclosure to the Court, including as to the impact of the automatic stay under Art 20: *Nordic Trustee v OGX*.[17] That case concerned an application to the English High Court for recognition of Brazilian insolvency proceedings specifically in order to obtain a stay of a London arbitration, where the judge was not told that the subject matter of the arbitration was not affected by the collective proceedings of which recognition was sought. The Judge's warning to litigants was subsequently issued as a practice note. This case is covered in the ARITA Journal.[18]

In *Cherkasov v Olegovich,*[19] recognition of a Russian liquidator's proceedings was revoked because of his non-disclosure of important facts about the history of dispute with the defendant to the English High Court.

ii. Misconduct

Those cases raise issues of misconduct. Australian liquidators were found to have engaged in misconduct in NZ. Their Australian proceedings had been recognised under the Model Law in NZ, and their NZ proceedings recognised in Australia. On making a finding of misconduct, Heath J said that he could not sanction them because they were officers of the Australian courts, not NZ's: *ANZ National Bank Ltd v Sheahan and Lock* [2012] NZHC 3037.

That raises the issue of what regulatory oversight is given to Australian IPs overseas; and what authority Australian courts have over foreign representatives in Australia.

Neither the Australian court rules nor ASIC nor AFSA, on inquiry, have any response to that. As to the regulation of Australian liquidators and trustees acting as foreign representatives overseas, and of foreign representatives in Australia, see *Cross-border regulation of insolvency practitioners* (2018) INSLB, Murray. See also Bankruptcy and Corporations Schedules Div 40 s 40-40(1)(l) which extend review of IP conduct to matters outside Australia.

In comparison, the UK courts have particular powers over foreign representatives. Part 8 of the English Cross Border Insolvency Regulations allows a party affected by the misfeasance or other such conduct of a foreign representative to apply to the English court for an order for compensation. There are no cases reported.

iii. Local assistance under Articles 19 and 21

On an application for recognition of a foreign proceeding the foreign representative may seek the appointment of local practitioners to assist, that is, to act as the designated persons under Arts 19 or 21.

But cost is a factor. Logan J declined to appoint an Australian trustee to act as a receiver because of the cost; the matter would lend itself to a standing electronic transfer authority. In any event, the CBIA envisages that recognised foreign representatives may directly be empowered to undertake particular functions in Australia, and these could include the functions of a receiver: *Official Assignee v Cooksley* [2017] FCA 1193.

A creditor may challenge their statement of independence. That occurred in *Slater*[20] where the Court considered the issue in terms of Article 6, finding that the challenge on the basis of

---

[17] *Nordic Trustee ASA v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch)
[18] [2016[28(1) ARITA J 56
[19] *Cherkasov v Olegovich, the Official Receiver of Danyaya Step LLC* [2017] EWHC 3153 (Ch)
[20] *Palmer (Trustee), in the matter of Slater (Bankrupt) (No 2)* [2016] FCA 960

a conflict of interest of the Australian appointees was not made out and that their appointment was not "manifestly contrary to the public policy of Australia".

Note that no such statement of independence is required to be made by the foreign representative when seeking recognition of their foreign proceedings. Compare the ARITA Code, 4th ed.

This also works the other way. In *Official Trustee in Bankruptcy of Henare v Henare* [2019] NZHC 248, it was the NZ Official Assignee who was so entrusted to assist the Australian Official Trustee.

Halifax

On 22 August 2019, the Federal Court decided in principle that it could send a letter of request to the New Zealand High Court requesting a joint hearing on pooling applications, describing it as a "classic candidate for cross-border cooperation between courts to facilitate the fair and efficient administration of the winding up. The 'letter of request' would be issued by the FCA to the NZHC pursuant to section 581 of the *Corporations Act*.

The funds of the two related companies had become extensively but it was not feasible for the pooling orders to be determined separately by the FCA and NZHC.

This is the first time that an Australian court has considered, and approved, at least in principle, the concept of a joint court hearing with a court of another jurisdiction in an insolvency context. Globally there is some precedent for this with the joint hearings of US and Canadian courts in the complex bankruptcy of the Nortel group, this is new ground in Australia.

While the case also demonstrates the ongoing relevance of section 581 of the Corporations Act despite the adoption of the Model Law, in a forthcoming article,[21] authors query the view that Halifax AU and Halifax NZ were separate corporate entities, and that the Model Law is only intended to provide assistance in cross-border insolvency matters relating to the same entity. The authors query this, saying that while the Model Law is primarily focused on "multiple proceedings concerning a single debtor", it does not necessarily follow that the scope of relief or assistance should be drawn narrowly to exclude all circumstances involving multiple debtors.

They suggest an alternative approach of joint recognition in New Zealand and Australia of their liquidations as foreign main proceedings under the Model Law, giving rise to the availability of potential relief under articles 20 and 21.

Other WGV projects, completed and on-going

Insolvency-Related Judgments

In May 2018, WGV completed its work on a Model Law on Recognition and Enforcement of Insolvency-Related Judgments. This was said to be needed following the UK Supreme Court decision *Rubin v Eurofinance* which declined to recognize judgments related to foreign insolvency proceedings.

[21] [2019] Insolvency Law Bulletin, *Classic cross-border cooperation: joint court hearings in the Halifax insolvency*, Paul Apáthy and Hongbei Li - forthcoming.

The IRJ Model Law is drafted in a form that can either be integrated into the Cross-Border Insolvency Model Law or enacted as a stand-alone statutory regime.

It should be noted that Australian courts are not necessarily bound by the decision in *Rubin* v *Eurofinance,* though Hannan suggests that it may *be* persuasive subject to appropriate facts existing. On the other hand, the High Court of Australia may rather find that "insolvency law has its own rules for recognition and are not bound by the general rules that exist for recognition of foreign judgments", an outcome that Hannan argues is desirable.[22]

Enterprise Group Insolvency

The UNCITRAL Model Law on Enterprise Group Insolvency was adopted by UNCITRAL in July 2019. It addresses situations of multinational affiliated companies being the subject of insolvency proceedings in two or more countries. It has a "focus on multiple insolvency proceedings relating to multiple debtors that are members of the same enterprise group".

This Model Law provides for the appointment of a single group representative, the development of a group insolvency solution through a single insolvency proceeding in a jurisdiction where at least one group member has its COMI.

It addresses such issues as intercompany claims, duties of directors in the period approaching insolvency, and consistency in rulings affecting the enterprise group. There is also guidance on the obligations of directors of insolvent enterprise group companies.[23]

Micro/Small/Medium-Sized Enterprises

MSMEs insolvencies present particular issues, not addressed by the CBI Model Law or otherwise. WGV is progressing a guidance commentary and proposals for a simplified insolvency regime for MSMEs with a view to allowing MSMEs to remain commercially viable and retaining the entrepreneur's or the family's know-how and skills.

One important aspect of this project is to look at MSME insolvency as combining both personal and small corporate debtors.

Working Group I – MSMEs – is a separate working group of UNCITRAL whose UNCCA chair is Dr Anne Matthew of QUT. It is working on a new entity through which MSMEs might conduct business – an 'UNLLO' - UNCITRAL Limited Liability Organisation. The work of WGI and WGV do not cross over but each maintains on-going contact.

Future Work

Two topics for future work were discussed at the May 2019 session.

- to harmonize conflict-of-law issues, New York on 15 May 2020;
- cross-border asset tracing and recovery, Vienna on 6 December 2019.

UNCCA and UNCITRAL

UNCCA has its UNLAWS scheme whereby interested lawyers and law students can attend UNCITRAL Working Group sessions, as I did, with a student, in Vienna in December 2016. Reports back from those attending feed into the collected knowledge of UNCCA and, indirectly, into presentations such as this one.

---

[22] Cross-Border Insolvency, 2018.
[23] *There's a new Model Law on the block but don't expect to see it become LAW soon*, [2019] 19(10) INSLB, Chris Symes

For some, the opportunity to observe UNCITRAL has prompted their further involvement in international law. I mention three:

- Claire Stubbe (New York, 2017), who now works for the World Bank in New York;
- Myles Bayliss, whose winning essay on virtual assets in insolvency gave him a ticket to the recent IBA Conference in Seoul 2019 (Vienna 2018); and
- Samantha Pacchiarotta, who is studying a masters in international law at Maastricht (Vienna, 2018).

Conclusion

Putting this paper in perspective, the difficulties of international agreement are revealed in the lack of universal acceptance of the provisions of the Model Law, and its numerous variations in the way it has been adopted by the various states. It is still the case that the majority of States in the world have not adopted the Model Law. Nor have the latest Model Laws been taken up with any enthusiasm, although these issues always take time.

Australia took 11 years to decide to adopt the Model Law. But many of our trading partners have adopted it, most recently Singapore. The UK, US, Canada and NZ Japan have adopted it, but not China, but potentially India.

Just as the Harmer Report said that the then proposed voluntary administration regime would be a success if it assisted only a few companies to better survive insolvency, so too might the same be said of the Model Law, in the one hundred plus cases over the last ten years where it has been usefully applied in Australia, and likewise offered Australian insolvencies access to overseas jurisdictions.

Michael Murray
Murrays Legal
www.murrayslegal.com.au
michael@murrayslegal.com.au
0402 248 353

[i] LLB Dip Crim (Syd); UNCCA Fellow; Fellow of the Australian Academy of Law; Member of INSOL Academics; Adjunct Professor, QUT Law School.