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Report on the 5th UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, 2003

Note by the Secretariat

1. This note contains a report of the discussion and conclusions reached at the 5th Multinational Judicial Colloquium on Cross-Border Insolvency organized on 21-23 September 2003 in Las Vegas, United States of America, by the United Nations Commission on International Trade Law and INSOL International.[1]

2. Over 32 judges and Government officials attended from 27 States, representing a broad range of practical experience and perspectives from diverse legal systems. The Colloquium heard a progress report on adoption of the Model Law and current international work on insolvency law including the UNCITRAL draft Legislative Guide on Insolvency Law, the World Bank Principles and Guidelines and the World Bank Global Judges Forum on Insolvency and Commercial Enforcement, and discussed the role of the court in reorganization, judicial capacity-building and the European Council Regulation on Insolvency Proceedings.

Conclusions

3. Participants expressed the hope that the activity currently being undertaken by international organizations in insolvency law reform would lead to better insolvency laws and institutional frameworks in the future, as well as to wider adoption of the UNCITRAL Model Law. Participants also agreed on the benefits of promoting greater understanding and appreciation of the difficulties involved in insolvency matters, particularly those which have international implications, and the various progressive methods being developed for effectively and efficiently handling them,

[1] The full transcript of the session evaluating the judicial colloquium is available on the UNCITRAL web site, www.uncitral.org under News and meetings/papers and programs from previous colloquia held in conjunction with the work of UNCITRAL/Insolvency/ UNCITRAL/INSOL Fifth Multinational Judicial Colloquium, 2003.

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not only in terms of training the judiciary, legal counsel and court officials, but also in terms of facilitating coordination and cooperation between courts, judges and other participants in insolvency proceedings. Participants acknowledged the value of continuing dialogue on these issues and the valuable role to be played by the Colloquium in facilitating exchange of views and experience. It was proposed that the various international organizations involved in insolvency law reform, including UNCITRAL, could assist that process by making available relevant information and literature, preferably on the Internet. It should be noted that the 6th UNCITRAL/INSOL Judicial Colloquium is being organized to take place in Sydney, Australia, in March, 2005.

Progress reports

4. The Colloquium heard a report on the progress of adoption of the Model Law, including those countries that had already enacted legislation and those that were actively considering adoption. It was noted that the question of reciprocity continued to be an issue for some countries and the advantages and disadvantages of including such a provision in enacting legislation were discussed. It was pointed out that in some countries local legal tradition had a strong influence on the issue. Nevertheless, there was agreement that a requirement to demonstrate reciprocity could complicate fast and easy cooperation among courts from different jurisdictions and in this way and in principle, such a requirement could contradict a key objective of the Model Law.

5. The Colloquium also heard about progress on the work of UNCITRAL on the draft Legislative Guide on Insolvency Law and the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. It was noted that in July 2003, the Commission had approved in principle the policy settings of the draft guide, with final approval expected from the Commission in June 2004. Participants were informed that the World Bank Principles and Guidelines were currently subject to a process of review in order to incorporate clarifications and additions based on the lessons and experience of the World Bank's pilot programme of assessments, and on further consultation with the international community. It was also noted that the World Bank and UNCITRAL have been working closely to ensure consistency at the level of principles.

6. Lastly, a report on the Global Judges Forum on Insolvency and Commercial Enforcement held in May 2003 at Pepperdine University (Malibu, California, United States) and sponsored by the World Bank was given. The purpose of the Forum was to discuss the application of international standards and effective practices relating to commercial enforcement and insolvency and to assist the World Bank in gathering relevant information to develop strategies to meet the challenge of institutional capacity-building in the coming decade. More than 100 judges from 65 countries attended the forum.

Role of the court in reorganization

7. Judges from several different countries participated in a panel discussion on the different roles the court might play in reorganization. It was clear from the discussion that the tasks assigned to a court having jurisdiction in respect of reorganizations vary according to the policy choices made by the legislature in the State concerned. Those policy choices affected the degree of specialized knowledge

required of judges who sat in those courts and a comparison showed that they were required to exercise considerably different levels of supervision. In some jurisdictions, judges were required to exercise predictive business judgement on the basis of expert evidence put before the court and to determine, for example, whether the form and content of a reorganization plan met certain statutory criteria, including whether the plan was feasible, both economically and from a business point of view. In other jurisdictions that matter was left to the judgement of the proposed administrator of the plan or to creditors, and judges were required to perform a supervisory function, checking on the form of proceedings and the process of ratification of the plan by creditors.

8. Participants agreed that the ability of the court to deal with questions of business judgement relied very much both on specialist judges and on the specialist bar that served those judges. It was noted that in many countries, in particular smaller and developing countries, appropriate infrastructure was not necessarily available. Often those countries could not afford, and in fact may not possess, the personnel available to work in that way, so that other approaches were required. It was also recognized that the need for different skills gave rise to different training requirements. The greater the need for evaluation of matters of business judgement, the greater the need for judicial understanding of the economics of viable business. Making a predictive assessment of the likely economic feasibility of a plan was entirely different from the traditional judicial role of determining whether action taken in the past by a particular person was within a range of options reasonably available under a general standard.

Facilitating judicial capacity-building

9. It was pointed out that the ability to deal with and cooperate in respect of a cross-border case required judges to perform an "extra" role over and above that which would be required in a purely domestic insolvency case—namely, that there be an understanding that the proceedings in the home jurisdiction were conducted with an appreciation of, and a harmonization to the greatest extent possible, with the proceeding in the foreign jurisdiction. As noted with respect to the role of the court in reorganization, the procedural and substantive law of one jurisdiction could well reflect policy considerations that were different from the policy considerations that governed the insolvency regime in another jurisdiction. To ensure the smooth conduct of cross-border cases, it was recognized that judges would find it increasingly necessary to be aware of the cultural background, economic considerations and historical setting in the other jurisdiction and to develop relevant skills in a variety of ways and on a continuing basis.

10. Participants identified a number of ways in which such skills could be developed, including through initial orientation programmes and ongoing refresher programmes; more informal but perhaps regularly held discussions and update-meetings amongst judges who would be assigned to insolvency cases; practice statements based on the experience gained in previous cases; ready access to relevant "literature" on the subject; and judicial exchange visits, which may be particularly useful when the jurisdictions involved had a significant commonality in approach.

11. With respect to the provision of information and relevant literature, it was suggested that the UNCITRAL web site could play a useful role, providing direct

and indirect commentary on relevant topics and links to other sites such as those of INSOL, the World Bank, the International Bar Association (Committee J), the International Insolvency Institute and others. It was recognized that each of those organizations is attempting to provide some of the building blocks for an efficient and effective insolvency regime domestically and internationally.

12. There was a general appreciation amongst participants that the best training is that which is readily accepted and indeed sought out by those in need of it, on the basis of a full appreciation of the issues involved. To facilitate both the development of appropriate training programmes and their delivery, it was suggested that the judiciary could be surveyed as to their training needs and preferred methods of programme delivery, with information provided as to how judges in other jurisdictions have found training helpful. In addition to a better-trained judiciary, it was noted that a better-trained insolvency bar and insolvency practitioners were invaluable in dealing with cross-border cases on a timely and coordinated basis.

13. Participants also discussed means of achieving coordination and cooperation in cross-border cases, with a number of judges describing relevant cases and the results achieved. It was noted that while courts have traditionally cooperated with each other and there has always been some form of communication between judges in different jurisdictions, the manner in which that was conducted was no longer appropriate to the types of cases being encountered and the speed with which issues needed to be resolved. It was observed that some jurisdictions, because of their economic integration and the similarity of their legal systems, have had an extensive history over the past decade of cross-border cases involving judicial communication. Consequently, they have developed procedures for addressing relevant issues and, with greater experience, those procedures are likely to be accepted as "routine". Examples of countries that have been involved in such procedures included Bermuda, Canada, Cayman Islands, Israel, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States. One significant area of discussion related to the way in which judicial cooperation could be implemented and the associated legal and ethical issues to be confronted, such as the rights of the parties to be informed about and to participate in communication between judges, the need for consent to such communication and the rights of the parties in the event of disagreement. It was suggested that one lesson that could be drawn from the discussion was the need to consider whether the objective informed observer might conclude that the procedure adopted was reasonable and of assistance in all the circumstances of the case and did not disadvantage any legitimate interest of a party.

14. It was observed by a number of judges, however, that there were significant impediments to adoption of such procedures in civil law jurisdictions. In essence the concern was that such direct communications were not permitted but rather that inefficient and ineffective methods such as the use of letters rogatory still would have to be employed. A number of judges agreed that that was one of the significant compelling reasons for adoption of the UNCITRAL Model Law to permit and facilitate direct cooperation and communication between the courts. Other judges pointed to concerns arising from rules of court procedure that might prevent direct communication and cooperation between judges. It was widely agreed that there was considerable value in continuing the dialogue on those issues.