

**CROSS-BORDER INSOLVENCY: CO-OPERATION OR
CONFLICT?**

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

INSOL INTERNATIONAL ANNUAL REGIONAL CONFERENCE

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The topic for this session asks a question: in the context of cross-border insolvency is there “conflict or co-operation”? The answer to that question is yes. There is either conflict or co-operation and little in between.

In the contemporary global economy, in which corporations engage in transnational investments and contracts to an extent that is unprecedented in human history, the way in which those involved in insolvency conduct their affairs is of critical economic significance. The task of all of us, whether lawyers, judges, administrators, accountants or other independent professionals, is to ensure the orderly, efficient and cost effective reorganisation or winding-up of a corporation, in a manner which reverses improper disposition of assets or preferences and avoids wasteful litigation, unnecessary expense and excessive delay.

Transaction Costs¹

There are many perspectives from which insolvency practice can be viewed. When dealing with transnational elements of insolvency a critical perspective is the promotion of the economic welfare of citizens of all nations, by reducing barriers to mutually advantageous exchange by trade and investment. Over recent decades the benefits of globalisation have become manifest as numerous restraints upon trade and investment, that had been imposed in the exercise of national sovereignty but which reduced the standards of living of citizens, have been modified.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment, by imposing additional and distinctive burdens including:

- Uncertainty about the ability to enforce legal rights;
- Additional layers of complexity;
- Additional costs of enforcement;
- Risks arising from unfamiliarity with foreign legal process;

- Risks arising from unknown and unpredictable legal exposure;
- Risks arising from lower levels of professional competence, including judicial competence;
- Risks arising from inefficiencies in the administration of justice, and in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. These increased transaction costs impede mutually beneficial exchange by means of trade and investment.

As recognised by the active involvement in these matters by UNCITRAL, the World Bank, the Asia Development Bank and APEC, insolvency practice plays a vital role in ensuring the efficiency of capital markets.² The availability of capital to corporations which operate in a multinational context, whether by way of direct investment or by way of corporate debt or the availability of working capital through trade credit, must be affected by the additional risks and complexities of the character I have identified. One object of co-operation between courts in the

context of transnational insolvency is to minimise these risks and transaction costs so that transnational trade and investment is not unduly burdened.³

Furthermore, the period of administration in insolvency has the adverse consequence for economic welfare that capital is to some degree frozen and unable to be put to its best entrepreneurial use. Liquidators are not entrepreneurs. Liberating frozen capital by the fair, efficient and expeditious conclusion of an insolvency is a major objective of the system. Insofar as additional delay is involved in insolvencies which have transnational elements, then the liberation of that capital takes even longer than would be the case for a corporation which operated within national boundaries.

Perhaps most significantly, the fear of the unknown inhibits creditors when dealing with multinational corporations in the absence of a significant level of assurance that the difficulties of cross-border enforcement in insolvency will not impede the collection of debts.

The history of the Asia Pulp and Paper collapse in 2001, when the company unilaterally declared a moratorium on US\$13.9 billion in debt, without substantial consequences to the company or its controllers, remains a sobering example for any creditor. The inability of international creditors to pursue assets, particularly in Indonesia but also in China, forced virtually everyone to submit to what was euphemistically called a restructuring which they had no choice but to accept.

The Need for Co-operation

Insolvency is concerned with civil rights and obligations of a commercial character. With respect to commercial disputes in which insolvency does not intervene and which are, accordingly, able to be resolved by international commercial arbitration, the adoption of the UNCITRAL Model Law on International Commercial Arbitration as enforced under the New York Convention for the Enforcement of Arbitral Awards and of the Washington Convention for Investment Disputes, is so widespread that the resolution of such disputes can be conducted in almost the same borderless manner as was the case when the rights and obligations were originally created. When insolvency intervenes, the position is entirely different. Instead of a widely accepted

international regime, there is a patchwork quilt of particular provisions of varying degrees of comprehensiveness and efficiency.

Divergences in the respective national regimes for insolvency, together with the direct intrusion of policy considerations in the statutory framework, prevent the kind of seamless regime that exists for international commercial arbitration from being replicated in the context of an insolvency or in the context of a restructuring in the shadow of insolvency.

When the official courts are engaged, as they traditionally are when insolvency intervenes, then the underlying commercial substance of the disputes that need to be resolved is often overlooked. A perspective of national sovereignty is given priority, because the courts are regarded as a manifestation of the state. This is why co-operation between courts becomes necessary in order to minimise the additional transaction costs that arise when an insolvency has cross-border elements. Such co-operation can only occur in the exercise of a court's jurisdiction which, generally, requires express statutory provision.

Co-operation between judges in transnational insolvencies arises pursuant to four different kinds of express provisions:

- For judicial assistance in civil proceedings generally;
- For judicial assistance in insolvency proceedings specifically;
- For judicial assistance in the preservation of assets;
- For judicial assistance in obtaining evidence or information.

In legal systems of the common law tradition judicial co-operation has also developed in the absence of express statutory provision as a matter of judge-made law. Legal systems in the civil legal tradition find this difficult in practice and impossible in form.

The principal focus of much of the literature is the additional costs of parallel proceedings when a particular corporation has assets in more than one jurisdiction. However, co-operation is not limited to this consideration. Provision is required for freezing and determining claims, preserving and realising assets, obtaining evidence from local residents and identifying voidable, including fraudulent, transactions.

I do not wish to enter the spirited debate between advocates of “universalism” and advocates of “territorialism” in these matters. I note, however, that “modified universalism”, depending on the degree of “modification”, may prove to be indistinguishable in practice from “co-operative territorialism”, depending on the degree of “co-operation”.⁴

The UNCITRAL Model Law

As this audience is well aware, the UNCITRAL Model Law on Cross-Border Insolvency has been the principal global initiative for establishing judicial co-operation. However, in the Asia Pacific region the Model Law has, as I understand it, only been adopted by the United States, Australia, New Zealand, Korea, Japan and is enacted, but not proclaimed in Canada. It is under consideration in India. The lack of success in this region reflects the reluctance many Asian nations have manifested with respect to other provisions for co-operation in civil and commercial litigation, e.g. the Hague Conventions.

The UNCITRAL Model Law is not based on the principle of reciprocity, which is of central significance in international negotiations on commercial matters and which is given great

weight in many Asian nations. When adopted as a law of a state, the Model Law requires the courts of that state to help liquidators appointed in another state, even though the courts of that other state would not assist liquidators appointed by the first state. This is, and remains, a step which many states are reluctant to take. Indeed some have included a reciprocity requirement when purporting to implement the Model Law.⁵ Indeed, in many nations, the Model Law has no realistic chance of adoption unless the executive retains a right to specify the nations to which it applies.

Corporate Groups

The Model Law does, of course, have its limitations which have been extensively considered in the relevant literature.

Perhaps the most significant limitation of the Model Law is that it only applies to individual corporations.⁶ I am aware that efforts are being made in UNCITRAL Working Group V to extend its application to corporate groups. Traditionally, the decision as to whether a corporation with international dealings chooses to operate in a particular jurisdiction via a branch or via a wholly-owned subsidiary is, subject to statutory requirements, generally determined by taxation considerations.

A good example of the limitations of the Model Law, even if adopted, is the position in the People's Republic of China. The emergence of China as a major commercial power, manifest in the choice of the location for this Conference, has and will raise important issues in cross-border insolvency. The flow of trade with, and capital into, China over recent decades is, in its scale and speed, unprecedented in history.

The new *Enterprise Bankruptcy Law* 2006 took effect on 1 June 2007 and for the first time introduced comprehensive provisions for corporate insolvency. It is clear that international standards played a significant role in the formulation of this new Law.

Article 5 makes provision for the People's Court to evaluate applications seeking recognition in enforcement of foreign bankruptcy judgments involving the debtor's property in China. This is to occur in accordance with international treaties to which China is a party and in accordance with the principle of reciprocity. The recognition and enforcement of such judgments is, however, subject to restrictions that protect national interests, extending as

far as not harming the “legitimate rights or interests of creditors in China”. There is no express provision for judicial assistance but there are other arrangements for such assistance.

A number of views have been expressed as to the way in which the reciprocity provision is likely to be administered and what precisely is the scope of the “recognition and enforcement” of foreign orders.⁷ The scope of this provision is, however, limited by the requirements of the three separate regimes, applicable in China, to foreign investment.⁸ In most cases, conducting business in China requires a local subsidiary.

China’s Foreign Equity Joint Venture structure requires a limited liability company to be incorporated in China. The Foreign Co-operative Joint Venture structure permits the joint venture to determine whether or not to create a separate legal entity. The Wholly Owned Enterprise structure is generally set up as a Chinese limited liability company. It appears that simple cross-border issues, when foreign companies operate within China by branches rather than in the form of a subsidiary, will arise infrequently.

Insofar as assistance may be sought from Chinese courts, with respect, for example, to obtaining evidence from Chinese residents for purposes of the winding-up of corporations in foreign nations, including perhaps subsidiaries of Chinese corporations, there is no express provision other than in general judicial assistance treaties. Because of the significance of the Chinese economy, these are matters which will require attention. I will return to this topic.

COMI

The issue of corporate groups is related to the central concept of the Model Law: the “foreign main proceedings”, being proceedings in the “centre of main interest” (COMI). The place of incorporation is the default position. It may prove to be the case that even a wholly-owned subsidiary will have a different COMI to that of its parent. Indeed that will often be the case. There is, of course, much scope for disputation in determining the COMI.

I have found particularly helpful the range of relevant considerations set out in the judgment of Lifland J, one of the most highly regarded United States bankruptcy judges, in the *Bear Stearns* case,⁹ a judgment which has engendered some

controversy. It is pertinent to note that the case was unique on its facts because of a statutory prohibition in the Cayman Islands upon an exempt company, as the hedge funds in issue were, from carrying on business there except in furtherance of their business outside the Cayman Islands. It is also relevant to note that Chapter 15 of the US Code uses the word “evidence”, rather than the word “proof” suggested in the Model Law, when stating the test for overturning the presumption that the registered office is the COMI.

The strict approach of the European Court of Justice, in the quite distinct context of *EC Regulation 1346/2000*, in the *Eurofood* case, represents the other end of the spectrum, within which each national court will have to interpret its own statutory enactment of the Model Law.¹⁰ Decisions of this Court must, however, be treated with considerable reserve because of a fundamental principle that all European courts must be treated as equal on the basis of mutual trust between member states. Accordingly, it is impermissible for a court to assume jurisdiction when a party has instituted proceedings first in another jurisdiction, even if those first proceedings are an abuse of process, for example to exploit the

excessive delay of Italian civil justice – a technique known as “the Italian torpedo”.¹¹

As this audience is well aware, the concept of COMI is derived from the European Regulation. On the basis of case law and practice in Europe, it appears there are circumstances in which the COMI concept invites venue disputation and a search for first mover advantage, of a character that has plagued other forms of international commercial litigation and has, at least in common law jurisdictions, spawned a cottage industry of anti-suit injunctions, anti-anti-suit injunctions etc, etc. It does appear that there is a degree of court competition for high profile insolvencies within Europe which has led some to question the efficacy of the Model Law.

Statutory Arrangements for Co-operation

The progressive integration of European economies, including regulatory and judicial structures, is the clearest example of regional co-operation on such matters. There are also longstanding arrangements of this character in Latin America and, more recently, in Central Africa and the NAFTA states. To similar

effect is the adoption of parallel legislation permitting co-operation amongst states in the British Commonwealth.

Australia is a participant in this arrangement, based on our historic legal ties with England. In 1988, we adopted a parallel provision to that inserted into the English legislation in 1986, conferring power on a court to issue and receive letters and requests for assistance in insolvency matters from other courts. This provision, now found in s 426 of the English *Insolvency Act* 1986 and s 581 of the *Corporations Act* 2001 of Australia, can be traced back to the mid nineteenth century in bankruptcy legislation for individual, rather than corporate, bankruptcy.¹²

This scheme permits but, unlike the UNCITRAL Model Law, does not mandate, co-operation. Furthermore, it is not applicable to every foreign insolvency proceeding. It requires the executive arm of government to promulgate a nation as one to which the scheme applies. They have generally been states within the Commonwealth of Nations or, as in case of Hong Kong, who once were. There is an element of reciprocity in these executive designations, but that is not an essential criterion.

This system has proven to be flexible and effective. Indeed, recently in my court, the liquidator in a long running cross-border insolvency has chosen to seek under this statute a letter of request to the High Court in England for that court to conduct an examination of persons resident in London, even though both Australia and England have now enacted the UNCITRAL Model Law. The applicants stated that they found the procedure under this Commonwealth scheme more efficient than the Model Law, as it did not involve obtaining an order from the English court recognising the Australian insolvency proceeding as “foreign proceedings”.¹³

This occurred in proceedings involving the liquidation of Australia’s second largest insurer, HIH Insurance Ltd. In that matter, the House of Lords earlier this year handed down a judgment which is, if I may say so with unfeigned respect, a model of international co-operation applicable to any legislative scheme, including the UNCITRAL Model Law.

These proceedings, to which the Model Law did not apply, will be well known to many participants in this conference from common law jurisdictions. The HIH group of Australian insurance

companies operated in England and had important assets, as well as creditors, there. Specifically there were claims on reinsurance contracts. A provisional liquidator had been appointed and the conduct of the provisional liquidation in England was the subject of an arrangement between the first instance judges in Sydney and London, which would answer the description of a protocol of the kind that has emerged over recent decades.

The application for assistance was made under the s 426 of the *Insolvency Act* for the remittal of funds raised in England by the provisional liquidator to the Australian liquidator. Under Australian statute law, preference is given to claimants under insurance contracts, of a character which was not consistent with the generally applicable *pari passu* principle. Accordingly, many creditors would be disadvantaged or advantaged, depending on whether the distribution occurred in England under English law or in Australia under Australian law.

This existence of differences in priorities is, of course, a frequently occurring phenomenon in cross-border insolvency. In the spirit of modified universalism, which the House of Lords found to underlie the express statutory provision for assistance, their

Lordships unanimously held that the fact that Australian public policy departed in specific respects from the *pari passu* principle, which was applicable in England, was not of sufficient significance to prevent an English court from offering assistance to what, in Model Law discourse, one would refer to as the COMI.¹⁴

Over and above such provisions which are directed to insolvency, there are numerous bilateral arrangements for judicial assistance of a general character or for specific assistance, such as for taking evidence, that may be relevant to insolvency.

For example, China has over 30 treaties with other nations for assistance in civil matters. South Korea has legislation which provides generally for court-to-court assistance (the Act on *International Mutual Assistance in Civil Matters* 2006) and has entered into a broadly based treaty with Australia. Some nations have legislation which authorises freezing orders in aid of foreign proceedings or, as in Australia, have developed such principles as judge-made law.¹⁵ Although often helpful, there is nothing systematic about these arrangements. Most significantly, a company on the eve of liquidation, seeking to prefer some credit or to favour insiders, can readily avoid them.

Judicial Arrangements for Assistance

In common law jurisdictions, with which I am most familiar, judicial co-operation has emerged over the last two decades as judge-made law, even in the absence of express statutory authority.¹⁶ Indeed, the success of such judicial co-operation has been used as an argument against the adoption of the Model Law, which appears to be more rigid. This has been suggested in Canada where proclamation of the legislation to implement the Model Law has been long delayed.¹⁷

Two of their Lordships in the recent *HIH* case held that the ability to co-operate was not confined to the express statutory power and asserted that modified universality was the longstanding policy of the common law. Two other of their Lordships held that it was so confined and the fifth found it unnecessary to decide. I note that in the *Cavell Insurance Company* case, Justice Farley of the Ontario Superior Court, who has been actively involved in cross-border insolvency debates, has acted on the basis of an inherent jurisdiction to recognise a foreign court order on the basis of comity. His approach was approved on appeal.¹⁸

The concept of an inherent jurisdiction to provide assistance to foreign courts as a matter of common law principle remains a matter of contention in a context where the artificial legal personality involved is a product of statute and is subject to detailed statutory regulation, including express provision in the relevant respect.

In civil law jurisdictions, with their different approach to the status of courts, the concept of an inherent jurisdiction would be unacceptable. There are, however, common law jurisdictions which have not adopted a general assistance provision or the UNCITRAL Model Law, for example Singapore and Hong Kong, which may have to decide whether there is such an inherent jurisdiction.

The possible existence of an inherent jurisdiction raises one of the most intractable issues in this context, namely the divergent traditions concerning the role and status of judges between, broadly, common law legal systems and civil law legal systems. Common law judges have an inheritance of judge-made law and, despite the growth in the significance of statutes, their authority is

not entirely derivative from a legislative act. Despite the process of convergence of the two systems, emphasised by comparative law scholars, significant differences remain.¹⁹

The common law judicial mindset means that co-operation with judges in other states appears natural. The dichotomy between legislative and judicial authority is not as strict. Accordingly, the emergence of co-operation between courts is not inhibited by a concern that the court's jurisdiction or competence is being exceeded. There are now numerous examples of such judicial co-operation in the absence of express statutory authority.

The helpful guidelines prepared by the American Law Institute with the International Insolvency Institute, as well as the large number of individual protocols that have been entered into, are accessible on the internet.²⁰ They have been reviewed and debated at the Judicial Colloquia organised jointly by UNCITRAL and INSOL.²¹ Judges who have had the benefit of this level of co-operation at the coalface of insolvency practice are, so far as I can determine, unanimous in concluding that such protocols are useful, although views vary as to the degree of utility. Ad hoc case-

specific protocols, usually influenced by the guidelines, appear to be regarded as most effective.

In this respect necessity, to deploy a still serviceable cliché, has been the mother of invention.

A similar process has occurred in family law, where the ease of contemporary travel has required co-operation between judges determining the custody of a child who has been taken by one parent to another nation. Operating under the *Hague Child Abduction Convention* 1980 judges have established an international network with its own newsletter and have appointed liaison judges, being a judge in each participating jurisdiction designated to serve as a channel of communications with Central Authorities and with other judges. This network has been in operation for about a decade and has overcome inhibitions based on national sovereignty considerations and concerns about natural justice, to establish a functioning system of direct judicial communications, which has saved time and costs in numerous cases.²²

It may well be that a similar network could serve a useful role in insolvency practice, particularly between jurisdictions whose judges are not familiar with each other's legal system. Perhaps the next INSOL/UNCITRAL Judicial Colloquium in Vancouver next year would be an appropriate forum to consider this idea.

Direct Communications Between Courts

As in the case of child abduction, a significant aspect of cooperation between courts in insolvency matters is the emergence, over the last decade or two, of a practice of direct communication between courts. Of course such contact must occur with the knowledge, and usually the approval, of parties to the proceedings.

It is noteworthy that there is a complete disconnect between the willingness and ability of commercial corporations to operate and interact across borders in a seamless manner, on the one hand, and the restrictions that are still imposed upon public authorities, both regulatory and judicial, from acting in a similar manner. The freedom of commercial communication must be compared with the distrust of, and inhibition upon, communications between public authorities. Anything that can be interpreted as impacting on the sovereignty of a jurisdiction, by reason of the

intrusion of any manifestation of the sovereign power of another jurisdiction, is subject to restrictions that have been abolished with respect to private actors. As I have indicated above, the comparative ease with which international commercial arbitration is conducted stands in marked contrast to any kind of commercial dispute resolution in which an official court is engaged.

Direct communication is expressly permitted by Article 25 of the Model Law, which reflects what has been happening in practice, almost exclusively in jurisdictions of the common law tradition, without formal legislative approval and without the hitherto requisite intermediation of a manifestation of the executive branch of government.

Direct court-to-court communication in the context of cross-border insolvency is a particular manifestation of the new sense of international collegiality that has emerged amongst judges of different nations, who now meet in many different multilateral, regional and bilateral contexts. This phenomenon has variously been called “judicial globalisation”,²³ a “global community of courts”,²⁴ “international judicial negotiation”.²⁵ Protocols between courts have even been characterised as “mini treaties”.²⁶

Traditionally, the communication of requests from one court to another have been required to be made through an executive government agency. International agreements on legal matters have reflected historical communication mechanisms, employing the convoluted language of traditional diplomatic communication in which one head of state presents his or her compliments to another head of state and proceeds through a series of arcane verbal formulae before getting to the point. All of this takes time, as it always has. I recollect the story of President Thomas Jefferson writing to his Secretary of State James Madison to the effect “We have not heard from our ambassador in Paris for two years. If we do not hear from him by the end of this year, let us write him a letter”.²⁷ Diplomatic communications have changed since then.

It is no longer appropriate or necessary to engage in traditional forms of diplomatic communication: a court sends a request to its ministry of justice, which forwards it to the ministry of external affairs, which communicates it to its embassy in the relevant nation, which passes the message on to the ministry of external affairs of the other nation which will in turn pass it on to its

ministry of justice, to be sent in turn to the local court. However, unless there is some form of treaty or convention or express statutory authority, this is what must be done. Surely it is sufficient that such executive agencies are informed of any direct communication between courts, without the necessity for such an agency to act as the post office.

The formalistic tradition of letters rogatory and letters of request pursuant to international arrangements for judicial assistance, is reflected in the indirect and slow mechanisms for communication in the Hague Service Convention and the Hague Evidence Convention, both of which have been widely adopted. Indeed, in the absence of adoption of the UNCITRAL Model Law, or other direct statutory authority authorising assistance, it is to conventions of this character, and bilateral arrangements, that courts have to turn in order to get such limited assistance as they can obtain for the purposes of cross-border insolvency.

A good recent example in the context of the HIH litigation, is the request for an examination of witnesses resident in Hong Kong by the New South Wales Supreme Court to the Hong Kong High Court, pursuant to Hong Kong legislation that authorises such

assistance to an overseas court.²⁸ Hong Kong has not adopted the Model Law, nor any other form of general insolvency co-operation. Reliance must be placed on specific authority of this character, subject to any future decision on the existence of an inherent jurisdiction.

The form of communication approved in these international arrangements remains old fashioned, requiring written rather than electronic communication – snail mail rather than email. It is long overdue that the Hague Conventions, and other such arrangements, should be systematically reviewed to bring the mode of communication up to date. There is some indication that this is likely, not least because the ease of other forms of communication frequently means that the Hague Conventions are simply bypassed, for example by taking evidence via video conferencing.²⁹

One of the most successful of the Hague Conventions is the Apostille Convention 1961. The Hague Conference is now undertaking an e-Apostille Pilot Programme (e-APP) which allows a Competent Authority to apply to a Certificate Authority for a digital certificate to “sign” an electronic PDF document. This

procedure, together with a new searchable e-Register of Apostilles replaces, respectively, the traditional paper and staple method and hard copy registers which are not readily accessible. In an age of what has been called “digital diplomacy” the emergence of such arrangements must be welcomed.

Practice under the Hague Conventions are also being adapted to permit direct court-to-court communications by taking advantage of provisions for appointment of an “additional authority” to the “Central Authority” that can make and receive requests. Courts in Australia have been identified as such “additional authorities”. More significantly, only last month, in England and Wales, the High Court has been identified as the Central Authority for purposes of the Hague Service and Evidence Conventions, completely substituting for any government executive agency. This precedent is more likely to be adopted by nations in the common law tradition. However, the identification of courts as “additional authorities”, with a right of override in the Central Authority, may be more widely acceptable.

A Broader Context

The difficulties of international agreement on cross-border insolvency are, in almost all respects, identical to those which arise in the course of seeking international agreement with respect to trade and investment issues generally. Negotiations for bilateral, regional or multilateral treaties and conventions gives rise to the same tensions between national self-interest, on the hand, and mutually beneficial international exchange, on the other hand. For many years, the principal focus of attention was on trade in goods and more recently, in services. However, over recent decades, multilateral and bilateral commercial arrangements have also focused on investment.

Lawyers, accountants and administrators who are involved in insolvency issues have often operated in their own separate context without being closely involved, as in my opinion they should be, with other multilateral regional and bilateral discussions about trade and investment. Insolvency practitioners must be careful that their conduct does not become self-referential to the point of becoming self-absorbed. Some degree of isolation reflects the fact that much of traditional insolvency practice is a zero sum

game. It is difficult, in an insolvency context, to focus on a mutually beneficial outcome.

However, as this audience is well aware, in the three decades since Chapter 11 was added to the United States Bankruptcy Code, corporate rescue in the form of reconstruction has moved to the forefront of insolvency practice. Insolvency practice need no longer be a zero sum game and the mutually beneficial outcomes now available are similar to the traditional outcomes of trade and investment negotiations. Furthermore, as I have indicated, liquidation practices play a critical role in capital market efficiency, including by liberating dead capital and redirecting assets to their best use.

At a regional or international level, discussion of cross-border insolvency tends to occur in special purpose organisations such as UNCITRAL Working Group V and INSOL. However, the experience of Europe has shown that much can be achieved by participating in broader based regional arrangements. In the Asia Pacific region such issues could arise, in the context of APEC or ASEAN, and in the latter, could perhaps extend to ASEAN plus 3 or the East Asian Summit. Furthermore, such issues can be

raised in the context of the numerous bilateral free trade agreements that have been, or are being, negotiated, precisely because of the failure of regional and multilateral free trade agreements.

Throughout the Asian region there appears to be a great deal of reluctance to adopt the Model Law or to enter into regional arrangements.³⁰ It appears that, in the short term, bilateral arrangements are most likely to be adopted. The principal focus in this region should remain on capacity building in the national judiciaries and the insolvency professions. Further, progress appears to me to require stepping beyond the context of insolvency itself, to engage the international clout available in negotiations on broader issues of trade and investment, where international discussions deploy diplomatic and political capital at the highest level of government.

The starting point is the recognition that imposing domestic policy priorities, or ensuring that local assets are retained for the purpose of maximising the payout to local creditors, are forms of preferential treatment, equivalent, in their commercial substance, to non-tariff barriers on trade and investment. “Ring fencing” local

assets is plainly a form of preference, equivalent to the kinds of restrictions on trade, commerce and investment which have long been the subject of international negotiations at bilateral, regional and multilateral levels. It does not seem to me that there is any reason why issues associated with cross-border insolvency could not be added to these continuing high level negotiations.

Differences between insolvency regimes of a policy character could be negotiated in such discussions. I have in mind, for example, the kinds of issues that arise where the statutes of two jurisdictions have different lists of priority creditors. Some form of individual recognition or adjustment in such a context could be negotiated. Similarly, the kinds of provisions that exist in the Model Law with respect to an automatic stay of proceedings, or express authority for the preservation of assets, or other forms of assistance to an external insolvency, could also be incorporated. Furthermore, the kinds of provisions that exist in all legislative schemes for the avoidance of past transactions, particularly fraudulent transactions, can also be the subject of international or bilateral agreement.

Provisions permitting or mandating co-operation between courts in insolvency matters could be included in any regional or bilateral free trade agreement which, in contemporary circumstances, typically go well beyond issues of trade to cover a range of issues associated with investment.

Of course there are policy differences between states as to what kinds of creditors should be the subject of preference. From the point of view of international capital markets the principal concern is with contract creditors. There are, however, other kinds of creditors, for example tort creditors or those with statutory causes of action or statutory defences.

Issues of policy and fairness arise with respect to the recognition of persons entitled to sue a corporation in tort. Many nations will find it difficult to accept claims based on the US approach to tort liability, which virtually everyone else regards as extravagant.

Similar policy issues arise with respect to those jurisdictions where, as in Australia, specific statutory rights of action against a corporation are conferred upon shareholders who can, as a matter

of substance, convert their status from a shareholder of a company, not entitled to distribution until all creditors are satisfied, into an unsecured creditor of the company, entitled to a *pari passu* distribution. (The statutory position in Australia is under review.)

Perhaps the most difficult issue with respect to cross-border insolvency is the treatment of corporate groups. It does not appear that much progress is likely in the UNCITRAL context. It may prove more rewarding to focus on bilateral arrangements, particularly between nations with similar legal systems and similar stages of development, or regional arrangements where there is a broader-based agreement about trade and commerce.

In my opinion, the problem most worthy of international attention, arises from the ease with which assets, especially intangible assets, can be moved internationally. This facilitates fraud and preferential treatment, short of fraud, of corporate insiders or of specific creditors, in a manner which insolvency regimes have always sought to control after a company can be seen to have entered a period of financial stress capable of leading to insolvency. Indeed, there are many examples of

companies moving their place of incorporation in such circumstances.

This is the aspect of insolvency practice that is most in need of international co-operation, particularly the availability of provisional measures to prevent fraud and to protect assets. The automatic stay provisions in Article 20 of the Model Law, which take effect upon recognition, could well be replicated in other arrangements by nations reluctant to adopt the Model Law. Indeed, those nations which give their courts express authority to make such orders could similarly be encouraged to extend them to ensure they are available to persons acting to stabilise the commercial situation in a construction or liquidation context.

International discussions, whether multilateral, regional or bilateral to prevent corruption, fraud or other questionable commercial conduct have been disappointing.³¹ However, all nations have an interest in regulating fraudulent dispositions and it may well be that regional or bilateral arrangements directed on the first instance to the insolvency context, could provide the basis for a more general approach.

The ability to control the use of insolvency havens is as difficult as the ability to control tax havens in revenue law or flags of convenience in shipping law. Nevertheless, we must try even if, like Sisyphus, we find ourselves rolling a stone up a hill to see it roll back as evasion techniques adjust to the new regime. Such consequences emphasise that the formulation of abstract rules – for example presumptions that the COMI is the registered office – can never be rigidly applied.

Nor can the cost advantages of a single insolvency proceeding, reflected in the “modified universalism” approach, be permitted to absolve corporations preferring particular creditors, let alone fraudulently disposing of corporate assets, in a manner which, in substance, is not able to be untangled in a subsequent insolvency proceedings in the COMI. There are both benefits and costs of formal regimes which establish presumptive rules.³²

It may be my common law background which leads me to prefer the pragmatic development of practices on the basis of case by case experience before a legal principle is formulated. In any event, I can see more value in provisions for assistance and co-

operation than in provisions which seek to establish abstract rules for what result should ensue.

Conclusion

Whether insolvency issues should be considered in broader-based international negotiations will be affected by the practical significance of the difficulties that actually arise in cross-border insolvency. Issues of priority necessarily arise when determining whether to devote negotiation resources to such issues. It is up to insolvency practitioners to convince those who participate in high level trade and diplomatic negotiations on commercial matters that their concerns are worthy of receiving attention at that level. That will not happen if insolvency practitioners only talk to each other.

Judicial assistance provisions, such as the UNCITRAL Model Law, the English legislative model, or the provisions potentially supportive of insolvency practice that exist in the Hague Conventions, for example on service and evidence, or the recent Hague Choice of Court Convention, are capable of being included in a regional or bilateral treaty or convention.

I am not suggesting that further steps directed only to insolvency are not worth pursuing. In many respects, it may be more expeditious for states to offer co-operation in this specific context, without invoking the principle of reciprocity that is critical in other areas of international commercial negotiation. However, insofar as it appears that projects such as the Model Law or equivalent co-operation provisions are unlikely to be adopted in a significant number of nations, particularly in those of growing significance in international trade and investment such as Brazil, China, Russia and India, then attempting to piggy-back on whatever bilateral or regional negotiations are being undertaken in the trade and investment area may prove to be the most fruitful course.

Indeed it is the failure in recent decades to progress multilateral negotiations that has led to the growth of “second best” bilateral free trade agreements. In this respect the slow progress in the context of cross-border insolvency is only a specific manifestation of a general difficulty.

I wish to conclude by congratulating INSOL for the substantial contribution it has made, and continues to make, to ameliorating this situation in the context of corporate insolvency.

¹ This address develops themes of two earlier addresses. J J Spigelman “Transaction Costs and International Litigation” (2006) 80 *Australian Law Journal* 438; J J Spigelman “International Commercial Litigation: An Asian Perspective” (2007) 35 *Australian Business Law Review* 318, also published in (2007) 37 *Hong Kong Law Journal* 859.

² See for example “World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, 2001” especially at pars [20]-[44] accessible at <http://go.worldbank.org/6ZX70ESCOO>.

³ A comprehensive collection of international instruments may be found in Bob Wessels (ed) *Cross-Border Insolvency Law: International Instruments and Commentaries* Kluwer.

⁴ See J L Westbrook “A Global Solution to Multinational Default” (1999-2000) 98 *Michigan Law Review* 2276; L M Lo Pucki “The Case for Co-operative Territoriality in International Bankruptcy” (1999-2000) 98 *Michigan Law Review* 2216; L M Lo Pucki “Universalism Unravels” (2005) 79 *American Bankruptcy Law Journal* 143; R K Rasmussen “Where are all the Transnational Bankruptcies?: The Puzzling Case for Universalism” (2007) 22 *Brooklyn Journal of International Law* 983; A M Kipnis “Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency” (2008) 36 *Denver Journal of International Law and Policy* 155.

⁵ For example, Romania.

⁶ See for example C G Paulus “Group Insolvencies – Some Thoughts on New Approaches” (2007) 42 *Texas International Law Journal* 819.

⁷ See J Shi “Twelve Years to Sharpen One Sword: The 2006 Enterprise Bankruptcy Law and China’s Transition to a Market Economy” [2007] 15 (5) *Journal of Bankruptcy Law and Practice* Article 2 ; S Bufford “The New Chinese Bankruptcy Law: Textual Limited Corporations Analysis” *Ibid* Article 3; M I “Bankruptcy Law in China” in P Blazey and K Chan *The Chinese Commercial Legal System* (2008) Lawbook Co.

⁸ See K Chan “Foreign Investment Law in China” in Blazey and Chan (eds) above n 7.

⁹ *In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited* 374 BR 122 (Bankr, SDNY, 2007).

¹⁰ *Re Eurofood IFSC* [2006] 1 Ch 508.

¹¹ See the cases discussed by Sir Anthony Clarke “The differing approaches to commercial litigation in the European Court of Justice and the Courts of England and Wales” 23 February 2006, accessible at www.judiciary.gov.uk/publications_media/speeches/2006/sn230206.htm.

¹² See originally s 220 *Bankruptcy Insolvency Amendment Act* 1861 (24 & 25 Vic Act c.134); s 74 *Bankruptcy Act* 1869 (UK), s 122 *Bankruptcy Act* 1914 (UK) and s 29 *Bankruptcy Act* 1966 (Cth).

¹³ See *McGrath and Honey as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881.

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- 14 *Re HIH Casualty and General Insurance Ltd; McGrath v Riddell* [2008] UKHL 21; [2008] 1 WLR 852.
- 15 See Spigelman “International Commercial Litigation” above n 1 at 332-333.
- 16 See for example *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Limited* [2006] UKPC 26; [2007] 1 AC 508.
- 17 See J Ziegel “Canada – United States Cross-Border Insolvency Relations and the UNCITRAL Model Law” (2007) 32 *Brooklyn Journal of International Law* 1042 esp at 1061-1063.
- 18 See *R v Cavell Insurance Company* [2005] 25 CCLI (4th) 230 esp at [20]; on appeal [2006] 39 CCLI (4th) 159; 269 DLR (4th) 679 at [34]-[38], [48]-[54], [60].
- 19 For a detailed analysis of the different approaches of the two systems in this respect see P Schlosser “Jurisdiction and International Judicial and Administrative Co-operation” (2001) *Recueil des Cours, Collected Courses of the Hague Academy of International Law 2000 Tome 284* Hague Academy of International Law.
- 20 Accessible at www.iiiglobal.org.
- 21 Accessible at www.insol.org.
- 22 See papers by Justice Thorpe and Justice Kay in *International Child Protection: The Judge’s Newsletter* Volume III Autumn 2001; papers by Justices Celeyron-Bouillot, Gaudet, Carl, Wall, Singer and Ding in *International Child Protection: The Judge’s Newsletter* Volume IV Summer 2002.
- 23 A Slaughter “Judicial Globalisation” (2000) 40 *Virginia Journal of International Law* 1103.
- 24 A Slaughter “A Global Community of Courts” (2003) 44 *Harvard International Law Journal* 191 at 193, 213 ff.
- 25 J L Westbrook “International Judicial Negotiation” (2003) 38 *Texas International Law Journal* 567.
- 26 See A Slaughter “A Global Community of Courts” above n 23 at 193, 213 ff.
- 27 See W P Dizard *Digital Diplomacy: US Foreign Policy in the Information Age* (2001) Praeger at 100.
- 28 See *McGrath and Honey and Liquidators of HIH Insurance Ltd* [2008] NSWSC 780.
- 29 See M Davies “Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation” (2007) 55 *American Journal of Comparative Law* 205.
- 30 See for example Spigelman “International Commercial Litigation” above n1 esp at 329-331.
- 31 See for example K Percy “Fighting Corporate and Government Wrongdoing: A Research Guide to International and US Federal Laws on White Collar Crime” 15 August 2002 <http://www.llrx.com/features/whitecollarcrime.htm>; U4 Anti-Corruption Resource Centre “Anti-Corruption Conventions and Treaties” <http://www.u4.no/document/treaties.cfm>.
- 32 See for example A M Kipnis above n4.