

Insolvency Law in the Channel Islands:
Modern Themes and Reform Perspectives Friday 14 October 2011



International Trends in Law Reform and Soft-Law Benchmarking

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Soft law in development

With particular reference to laws on cooperation and collaboration of practitioners and courts.

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Stage 1

UNCITRAL Model Law on Cross-Border Insolvency

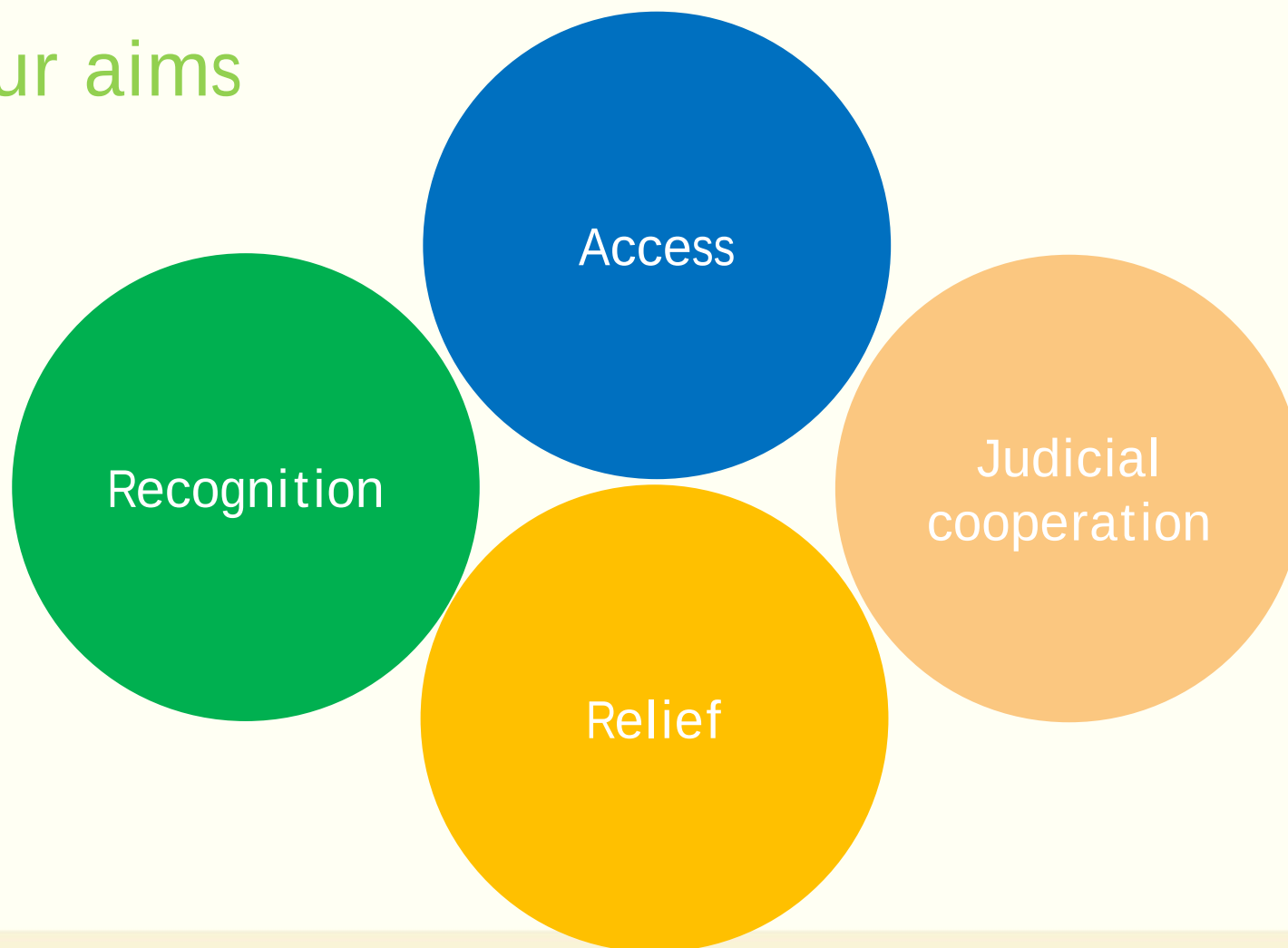
- Adopted by UN General Assembly Resolution 52/158 of 15 December 1997, Model Law provides:
 - unilateral legislative framework for cross-border insolvency that:
 - focuses upon facilitation of administration of cross-border insolvency cases; and
 - relies on enactment by States for its effect.
 - interface between jurisdictions:
 - does not attempt unification of substantive law; and
 - respects differences in procedural law.

Adoption of the Model Law

Legislation based on the Model Law has been enacted by:

- Australia (2008)
 - British Virgin Islands (2005)*
 - Canada (2009)
 - Colombia (2006)
 - Eritrea (1998)
 - Great Britain (2006)
 - Greece (2010)
 - Japan (2000)
 - Mauritius (2009)
 - Mexico (2000)
 - Montenegro (2002)
 - New Zealand (2006)
 - Poland (2003)
 - Republic of Korea (2006)
 - Romania (2003)
 - Slovenia (2008)
 - Serbia (2004)
 - South Africa (2000)*
 - United States of America (2005)
- * Enacting legislation not yet in force

Four aims



Interpretation – article 8

- Provides that in interpreting the Model Law “regard to be had to international origin & need to promote uniformity in its application and the observance of good faith”.
- Should facilitate consideration of case law outside the enacting State. CLOUT includes cases from enacting States that interpret Model Law.
- Cases under EU Insolvency Regulation may also be relevant, e.g. on interpretation of COMI.

Cooperation & coordination provisions

- Express but vague legislative authority for judicial cooperation "to facilitate communication and case management coordination" .
- Authorizes cooperation, "to maximum extent possible", including direct communication, between courts and officials from different jurisdictions on issues governed by Model Law.
- Suggests possible means of cooperation.
- Useful but non-specific content in Guide to Enactment.

Cooperation - article 27

Possible means of cooperation include:

- Appointment of person to act at direction of court.
- Communication of information.
- Coordination of administration and supervision of debtor's assets and affairs.
- Approval or implementation of agreements for coordination.
- Coordination of concurrent proceedings.

Coordination - articles 29 & 30

- Coordination between local and foreign proceedings concerning same debtor, eg consistency of relief.
- Coordination between two or more foreign proceedings concerning same debtor, eg consistency of relief.
- Presumption of insolvency based upon the recognition of foreign main proceedings.
- Rules for payment of creditors in concurrent proceedings to ensure equal treatment.

Stage 2

UNCITRAL Legislative Guide on Insolvency Law

- Model Law is annexed to Legislative Guide.
- Discussion in Working Group.
- But minimal further elaboration at this stage..

Stage 3

UNCITRAL Practice Guide on Cross Border Insolvency Cooperation- 2009

- Project started in parallel with work on enterprise groups.
- Expert group comprised judges from wide variety of jurisdictions.
- Focus on cross border agreements (protocols) from outset.
- Analysis of 39 agreements that existed when we did the research.
- Nearly all invented from scratch (in same way security agreements used to be).
- Use has reduced cost of litigation substantially and enabled parties to focus on conduct of proceedings rather than upon resolving conflict between parties.
- Unfortunately, lack of familiarity in EU caused some misapprehension that they may enable parties to circumvent legal obligations or side step authority of courts.

Cross-border insolvency agreements

- Although differing in form, protocols are nearly all intended to be binding on parties.
- Promote efficient coordination & protect the fundamental local rights of the parties involved in the proceedings.
- Typically tailored to address specific issues of case but purposes are:
 - To promote certainty in efficiency with respect to management and administration of proceedings;
 - to clarify the expectation of parties;
 - to reduce disputes;
 - to prevent jurisdictional conflicts;
 - to facilitate to restructuring;
 - to save costs by avoiding duplication of effort;
 - to promote mutual respect for the independence and integrity of the courts;
 - to promote international cooperation; and
 - to contribute to maximisation of the value of the estate.

Cross-border insolvency agreements

Recitals normally include

- the timing of negotiations;
- parties to agreement;
- capacity to enter into agreement;
- format;
- legal effect intended; and
- safeguards.

Cross-border insolvency agreements

Model contents

- Allocation of responsibility for various aspects of conduct and administration of proceedings between courts and IPs.
- Availability and coordination of relief.
- Coordination of recovery of assets.
- Submission and treatment of claims.
- Use and disposal of assets.
- Communication, including language, frequency and means.
- Provision of notice.
- Coordination and harmonization of reorganization plans.
- Issues related to agreement, including amendment and termination, interpretation, effectiveness and dispute resolution.
- Administration of proceedings.

Stage 4

UNCITRAL Legislative Guide Part three: Treatment of enterprise groups in insolvency

- Most suppliers trade with them but we have ignored groups in:
 - European Convention on Insolvency Proceedings
 - Model Law on Cross Border Insolvency
 - Rules for groups were always 'too hard'.
- Solutions have included:
 - Administrative & substantive consolidation in USA.
 - Schemes of arrangement.
 - Court orders consolidating estates.
- Compare fortunes of KPN Qwest with Collins and Aikman.
- Increasing demand for ability to coordinate.

Does it matter?

- 'Enterprise groups' are most common form both domestically and across Europe.
- Impact of financial difficulties of groups.
- Groups increased in complexity.
- Our laws are based on separate entities with limited liability to protect shareholders.
- But how real is this protection?
 - Cross guarantees.
 - Shadow directors' liabilities.
 - Inter-group liabilities.
 - Letters of comfort.
 - Group financing facilities.
 - Activities organised by product stream rather than entity.

Court to court cooperation to date

- In EU, in single company, liquidators in main & secondary proceedings must cooperate...
- Difference is that courts are not dealing with the same debtor – link is that debtors are members of same group
- Legal need to specifically permit cooperation in law - or attempts to seek assistance may seem like interference with local court
- Courts need to be aware of shared benefits for creditors.

Working Group V Deliberations

- Defined:
 - 'Enterprise group' - two or more enterprises interconnected by control or significant ownership.
 - 'Enterprise' - any entity, regardless of legal form, engaged in economic activities and governed by the insolvency law.
- Distinguished:
 - Administrative coordination from
 - Substantive consolidation.

Administrative coordination

- Maintain separate estates
- Information sharing
- Coordination of hearings - which can be joint, simultaneous or coordinated
- Coordination of creditors' meetings
- Coordination of the use, realization and disposal of debtors' assets and affairs
- Coordination of agreement of creditors' claims
- Other cooperation involving insolvency representatives.

Substantive consolidation

All former points PLUS:

- One pot of all assets and all liabilities.
- Winners and losers?
- Intra-group liabilities fall away.

Cooperation between courts

- Joint application for commencement with respect to group members may raise issues of jurisdiction, even in domestic context, if group members in different places and different courts.
- Where it is...in best interests of the administration of...two or more group members, a single insolvency practitioner or the same representatives may be appointed
- Conflict of interest with respect to group members may require appointment of additional insolvency representatives.

Cooperation between courts

- Coordination of hearings which can be joint, simultaneous or coordinated.
- Coordination of the use, realization and disposal of debtors' assets and affairs.
- Cooperation involving insolvency representatives.

Cooperation between insolvency representatives

- When different IPs appointed to group members, they should cooperate to the maximum extent possible.
- In administrative coordination, when more than one IP appointed to administer insolvency proceedings that are subject to procedural coordination, they should cooperate to maximum extent possible .
- In addition to law, court may indicate measures to be taken to that end.

Stage 5

Model Law – the Judicial Perspective

- Based on work by Mr Justice Paul Heath.
- Debated in Working Group V.
- Sent to Judicial Colloquium in Singapore for approval.
- Adopted at UN Commission meeting in July 2011.
- 47 pages plus case law examples.

Where next?

- CLOUT.
- Working Group V – currently working on COMI and Directors' liabilities.
- Judicial paper developments.
- Judicial training by World Bank & others.
- Judicial Colloquiums.
- Dissemination of papers by UNCITRAL to member states.