EDITORIAL

World Standards – The Role of INSOL International

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It is a measure of some achievement that INSOL International probably requires no introduction to any reader of this journal. INSOL's genesis was very much an afterthought to the conference that the English Insolvency Practitioners Association held to mark its 21st birthday in Cape Cod, Massachusetts in 1982. At this conference we met IPs from Canada, the US and Australia. In a nutshell, the conference was deemed a success and it was decided to repeat the exercise, which duly happened in 1985 in Monte Carlo. But the history of professional bodies is of little interest except to those who were involved, and they already know the story.

The purpose of mentioning INSOL's origin is to make the point that there were no lofty ideals of defining international best practice, helping to set standards or anything of the sort: no, we just wanted an excuse for another party with a different bunch of party animals. The fact that they purported to be the leaders of the profession in their countries (well they would say that, wouldn't they) was immaterial. If truth was told, in those early days, as an organization, we did not always pick the most suitable partners, but as any parent would tell you, youngsters seldom do.

At some stage, the need for INSOL to do something vaguely technical crossed the minds of those running INSOL, because I was asked to set up a technical committee of INSOL which was charged with 'keeping up to date with all legal changes around the world'. Even with today's resources, you have to marvel at the impossibility of such a task, but that didn't stop the directors from passing it out or me from taking it on. In many respects, the great debate was just getting under way: the early drafts of the European Bankruptcy Convention were being discussed, a couple of books had been written on international insolvency law (international in as much as they referred to more than one jurisdiction) and a limited number of practitioners were starting to think about the differences between insolvency laws. *International Harvester* was one of the first truly international cases but more large domestic cases had foreign elements to them.

By the late eighties, the UK, US and Australia had legislation that facilitated international co-operation in ways that many nations still only dream about. The US led the way with Sections 304/306 by providing an open door to any foreign representative needing the assistance of the US court. The UK, not surprisingly, was a great deal more conservative. Although it provided a long list of jurisdictions which the English courts would recognize, closer examination would show that most of them were small, surrounded by water and had once been coloured red on the map. This recognition did not extend to the United States, irrespective of the fact that it had been our major trading partner for many years, probably because they refused to play cricket. We did not like to admit this and so the excuse of the insurance industry being unhappy with the US penal judgment regime was invented. Australia in its Section 581 had gone much further than either of the other two by making recognition mandatory for a specified list of jurisdictions and discretionary for virtually all others.

So as the eighties disappeared and we struggled into the depression of the early nineties, the problems of practitioners endeavouring to deal with assets outside their home jurisdiction rose inexorably. INSOL (in the persons of Richard Gitlin and Stephen Adamson) identified the opportunity to work with the United Nations Commission for International Trade Law (UNCITRAL), although no one appreciated what the involvement would entail.

We did a lot of groundwork, produced a report and convened a colloquium of interested parties in Vienna. Dr Gerold Hermann, then Secretary General of UNCITAL, asked us to specify what an insolvency practitioner needed when he went to another jurisdiction. Our best attempt was for access and recognition with an element of judicial co-operation thrown in for good measure. Clearer thought would have told us that recognition on its own, without a degree of relief, was rather pointless, but fortunately that point dawned on us somewhere along the way.

And so, with little vision of the potential end result, an UNCITRAL Working Group was established comprising representatives of most member nations, numerous other observer nations and a couple of NGOs. The technical expertise came from INSOL, in the form of Ron Harmer and I, and the International Bar Association, in the form of Dan Glosband. And so we started our lengthy and sometimes painful negotiations. Lengthy, because all submissions are formal

to facilitate multi-lingual translations (there are six official languages in the United Nations) and because some delegates are incapable of making their point succinctly; and painful, because some delegates simply did not have a clue what the discussions were about. Fortunately most delegations contributed constructively and the UNCITRAL Model Law on Cross-Border Insolvency was produced in record time. The finished product had fewer policy choices for nations than we envisaged when embarking on the task, and the proof of the pudding is that most nations that have adopted the law have made very few amendments.

With hindsight, the model law became the first international standard in the world of bankruptcy and restructuring. For sure, the debate on the EEC Bankruptcy Convention had come a long way and there had been a couple of interesting projects by US lawyers looking at insolvency models, but with hindsight these were a long way from global standards.

The need for international standards in insolvency systems was thrown into sharp relief by the Asian crisis in the late nineties and it was the International Monetary Fund that first rose to the challenge with their publication 'Orderly and Effective Insolvency Procedures – Key Issues' published in 1999.

A more far-reaching exercise was undertaken by the World Bank, which assembled a most formidable task force to report on quite wide-reaching topics which it gathered together as the World Bank Principles on Creditor Protection and Insolvency Systems. INSOL played a major role in putting together these teams with the World Bank, collaborating in the discussion process and helping to set the world standards by which insolvency systems (being both black letter laws and the infrastructure that makes the laws work) are judged.

At this stage it's worth asking why we need standards. By one measure, the collection of laws and processes that we call 'the insolvency law' of a country is simply a problem-resolution system for dealing with businesses that fail. It has to accommodate a country's laws and attitudes to aspects as diverse as the ownership of land, employment, limited liability and corporate stewardship. Any attempt to set a standard ('one size fits all') is firstly bound to fail and secondly an interference with the sovereignty of nations. This may be so, but the demand came from the nations themselves. When, in early 2000, UNCITRAL was considering the areas in which it could assist the international community, there was a widespread call for guidance on insolvency laws. Many of the transition economies, the former iron-curtain countries, had attempted reforms of their insolvency laws, but the results were moderately successful at best, ranging to the downright appalling. Furthermore, some of the former tiger economies had found that their insolvency laws left a lot to be desired and there were even mature economies that had realised that their insolvency laws had not kept pace with the development of commerce.

There were, however, already a number of ongoing projects including those of the IMF and World Bank mentioned above. So, in December 2000, INSOL International convened a colloquium in Vienna in collaboration with UNCITRAL and the International Bar Association. We brought together senior people from the World Bank, the IMF, OECD, the Development Banks and many other interested parties. We sought to determine the global needs for insolvency laws. The conclusion was that UNCITRAL should produce a guide to the basic components of an insolvency and restructuring law. As with any construction, once it got underway, it was tempting to add items rather than delete them, and the UNCITRAL Legislative Guide on Insolvency Law which has been written over the last three years work now goes further than the initial modest scope, being quite comprehensive.

Need it have taken three years? Surely professionals could have written such a 'model law' in a month or so? The UNCITRAL process can seem tedious at times, as alluded to above. The consequence of talking out every issue, however, is a very high level of 'buy-in' by the nation states that participate in the process. The gap between each meeting permits the governments of the nation states to deliberate on the output of the Working Group, feeding back their concerns and ultimately increasing their commitment to both the process and the end product.

As all practitioners at the coalface will readily acknowledge, a principal consideration when restructuring a major business is dealing with secured creditors. Many laws give secured creditors 'rights of separation', enabling them to simply deal with their security on the insolvency of a debtor. However, this is inadequate in laws that encourage the restructuring of debtors as opposed to their dismemberment.

It is essential that secure transactions laws are capable of being reconciled with insolvency laws, balancing the need to give secure creditors certainty with the rights of debtors to reorganize their affairs (in the interests of all parties). With this in mind, when UNCITRAL commenced work on a legislative guide on secure transactions law, it thoughtfully convened the meetings back to back with the insolvency meetings, to enable delegates to attend both. The result is that we will soon have a legislative guide on insolvency law and, about a year later, its equivalent on secured transactions. Nations adopting both guides will find them entirely compatible. INSOL has played a key role in both Working Groups from their inception, providing guidance as to best practice, the options available and the consequences of following them.

INSOL International is delighted to have developed this close working relationship with UNCITRAL. In addition to the above, since the early nineties, INSOL International has convened biennial global meetings

of judges and court officials jointly with UNCITRAL – the next is planned for Sydney in March 2005. The meetings are a great opportunity for judges from widely different discipline: civil law; common law; Islamic courts; judges from supreme courts with judges of first instance: they have all been able to discuss the practical problems that they encounter in dealing with insolvency and restructuring matters. Most importantly, they have been able to discuss the ways in which courts from different jurisdictions can co-operate when dealing with the same matter. For obvious reasons, the meetings are closed but INSOL International publishes an evaluation of each of the colloquia by a team of senior judges and these evaluations are made available through INSOL and UNCITRAL.

These two ways of collaborating with UNCITRAL, the development of model laws and the training of judges, epitomises the hard realization of the last few years. That is, that there is no point in putting in shiny new insolvency laws unless there is the institutional capacity to support them and make them work. Until recently, the attitude was that if a country had a court system, the laws would be enforced. Fine in theory, but in practice few restructurings can stand the inefficiency of a court system that is going to function 'eventually'. It has been the growing preference for corporate restructuring over bankruptcy that has thrown into sharp relief the inadequacy of many court systems.

So what do we need by way of institutional capacity that will support an effective insolvency law? The minimum is a judiciary, regulators and practitioners that have the skills sets to make the laws work cost-effectively. In addition to the judicial colloquia, teams from INSOL have met and helped train judges from many countries: it has been informative to show the ways in which courts can play a constructive role in the restructuring of businesses. There are no internationally agreed standards of best practice and there are many practical difficulties in developing these, but for many judges, simply facilitating meetings to discuss problems with leading practitioners helps them understand the requirements of court users.

The INSOL Lenders Group has also undertaken invaluable work, not only with the development of the Principles for Multi-creditor Workouts, but also in convening meetings of senior lenders around the world, enabling them to consider the problems of restructuring away from the pressures of individual cases.

The development of the insolvency regulators has been led by the International Association of Insolvency Regulators. This is a fiercely independent body but one which has an excellent working relationship with INSOL International: its meetings are frequently organized to coincide with INSOL conferences and this too facilitates a greater understanding between the regulator and insolvency practitioner communities.

It is, of course, in connection with the international conferences and quadrennial congresses of practitioners that INSOL is still best known. These conferences are now held annually. They rotate through the three working regions of INSOL International: the Americas; Europe, Middle East and Africa; and Asia and Australasia. Currently, the demand is for congresses of about two days' duration plus ancillary meetings. The quadrennial meetings naturally rotate through the three regions and tend to be at least three days in duration, which, with a wider range of ancillary meetings, offers the most comprehensive and highest quality insolvency meetings. Also, by attracting upwards of a thousand insolvency practitioners to each congress, they offer unrivalled opportunities for networking, which as we all realize, is far more likely to induce delegates to attend than merely the opportunity to increase their technical knowledge.

The extension of technical knowledge, however, has long been fundamental to the mission of INSOL International. This has been achieved through a series of publications. Some of these are multinational guides such as 'The Twilight Zone' (2001) and 'Cross-Border Recognition' (2003). Others are studies and statements of best practice such as the 'Statement of Principles for a Global Approach to Multi-Creditor Workouts' (October 2000) and 'Consumer Debt' (April 2001).

Publications currently under production include an update of 'Twilight Zone' and new publications on employees' entitlements and protection of depositor legislation.

Ultimately, these endeavours typify the role of INSOL International – the creation of the leading forum in the world for the development of international standards and best practice. It does this in collaboration with the global institutions. INSOL's unique strength is that it is multi-disciplinary, representing accountants, lawyers, lenders, judges – indeed all those involved in the insolvency and credit communities; it is multi-cultural with active participation from all four corners of the globe (a strange expressions for a round object) and indeed, a truly global organization. The association is organic and its direction is shaped by an executive and a board of directors which is continually changing and evolving. There is a very wide range of projects currently being undertaken. These projects involve an increasingly wide number of professionals who are prepared to not only attend conferences, but also share their technical expertise. The benefits to members are enormous. The only thing that is surprising, really, is that INSOL is able to deliver these benefits for as little as it does, but that is another story.