

The past, present and future of UNCITRAL Model Law on Cross Border Insolvency and Australia's participation.

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Good evening everyone.

Thank you Justice Besanko and the Court for hosting this special event. Thank you all for attending.

The choice of insolvency for this year's UN Day Lecture is timely and for me is particularly satisfying after having taught many law students over recent years on the topic and having travelled to many places internationally to give presentations predominantly on Australian law although occasionally on the topic of international insolvency law. For me, more frequently it has been listening to many international law experts present on some of the more refined areas of cross border insolvency. This Lecture each year highlights the work of UNCITRAL and this year it highlights UNCITRAL's cross border insolvency framework and our Australian involvement over the last 25 years.

Tonight I've been asked to make some reflections on the last 25 years although I will talk about the past, the present and the future of UNCITRAL's work on insolvency.

International insolvency law is not new in Australia. I'm reminded of the case *In Re Commercial Bank of South Australia*¹ a case heard in the Chancery Division in 1886. In that case Justice North was very concerned to make a South Australian colonial bank liquidation efficient. Briefly it was a company set up by a colonial Act in 1878 and it had both local directors and London directors. The company had branches throughout the colony in towns like Angaston, Gawler and Silverton, in fact in most sizable towns that had railways passing through them and it even a branch in London. The company conducted a banking business and held gold bullion amongst its assets in the colony. It spectacularly collapsed in 1886 due to fraudulent loans and transfers by some of its senior officers. There was concern that there would be two liquidations commenced, one in London and one in Adelaide.

In the course of the judgment North J said "I will take care that there shall be no conflict between the two courts, and I shall have regard to the interests of all creditors and all the contributories, and I shall endeavour to keep down the expenses of the winding up so far as is possible"

Over 130 years later the same sentiments can found and are made much more achievable by the UNCITRAL Model Law.

¹ *Commercial Bank of South Australia* (1886) 33 Ch D 174.

1. The Past

The United National Commission on International Trade Law was established in 1966 by the UN General Assembly and some 28 years later a decision was made by UNCITRAL to develop a legal instrument on cross border insolvency. We celebrate 25 years this year because the starting point for UNCITRAL and its insolvency involvement was a colloquium held in Vienna in 1994. Like a lot of insolvency reform it followed a time of financial trouble – the recession of the early 1990s.

The first thoughts of UNCITRAL were to facilitate judicial cooperation, court access for foreign insolvency administrators and recognition of foreign proceedings. In 1995 an international meeting of judges suggested that UNCITRAL provide a legislative framework with model legislative provisions. Working Group V, a working group of UNCITRAL, first met in 1996. The Model Law on Cross Border Insolvency was approved in 1997. Australia took 11 years to adopt the Model Law doing so in 2008. The Model Law on Cross Border Insolvency is by far the biggest achievement of UNCITRAL work on insolvency.

For those of you who remember Australia had a corporate law reform program known as CLERP [Corporate law economic reform program] initiated in 1997 and the Model Law introduction became CLERP 8. The CLERP 8 reform paper was released in 2002. Perhaps suggesting its importance or the lack of it in the minds of the Parliament, CLERP 9 on Audit reform and corporate disclosure was released in 2003 and

legislated in 2004. This is 4 years before the Cross Border Insolvency Act making it 6 years after the reform paper release.

Tonight was organised by UNCCA. In Australia we have had an UNCITRAL Coordination Committee for Australia (known as UNCCA) since 2013. In its brief history it has been represented at UNCITRAL conferences, expert group meetings and most importantly at all UNCITRAL Working Groups since 2015. There is now an annual seminar in Canberra and these UN Day lectures.

In December last year I attended Working Group V in Vienna. Of the 193 countries in the UN, 57 were represented at this session of the Working Group and there were 15 NGOs and 4 International government organisations also in the chamber. Most countries had their diplomatic staff as the Lead, some had academic support, some had barristers and senior lawyers in attendance. The Australian government did not attend and I was able to go and participate as the LawAsia Lead assisted by two interns (recent graduates from two Australian universities). As a member of the UNCCA I was able to wear an UNCCA hat.

The main business in 2018 was the finalisation of the Enterprise Group Insolvency Model Law, with a small amount of time dedicated to MSMEs (which is very much the 2019 concentration for WGV).

2. The Present

The Australian Cross Border Insolvency Act and the UNCITRAL Model Law

The Act sets out the conditions under which persons administering a foreign insolvency proceeding have access to local courts, the condition for recognition of a foreign proceeding and granting relief, permits foreign creditors to participate in local insolvency proceedings, permits courts and insolvency practitioners from different countries to cooperate more effectively and makes provisions for coordination of insolvency proceedings that are taking place concurrently.

The CBIA has only 23 provisions and its Schedule 1 the Model Law has just 32 Articles. Firstly, it does not get dismantled and distributed across the Corporations Act and the Bankruptcy Act but it is an independent member of the statutory laws of Australia. This helps the visibility of the provisions for an international audience.

Secondly its scope is Chapter 5 of the Corporations Act but without Part 5.2 (Receivership) and Pt 5.4A (winding up that is not insolvency based) and not for banks or general and life insurance companies. It then extends to all of the Bankruptcy Act and a tiny bit of Part 5.B Div 32 on Foreign Companies who have ceased business in Australia.

Thirdly it provides a preamble which helps in the interpreting of the provisions just as s435A has helped in Pt 5.3A cases.

The Preamble is

- a) Cooperation between courts and other competent authorities of this state and foreign states involved in cases of cross border insolvency
- b) Greater legal certainty for trade and investment
- c) Fair and efficient administration of cross border insolvencies that protects the interests of all creditors and other interested persons including the debtor
- d) Protection and maximization of the value of the debtor's assets
- e) Facilitation of rescue of financially troubled businesses, thereby protecting investment and preserving employment

Let us mention just three of the Articles from the Model Law.

Under Article 8 regard in interpretation is to be had to international origins and the need to promote uniformity in application and observe good faith. The explanatory memorandum expressed the expectation that Australian courts will make use of international precedent.

This started with one of the early cases, *Akers v Saad Investments*² in 2010 and has continued to be referred to in a

² *Akers v Saad Investments Company Limited (in official liquidation)* (2010) 190 FCR 285, [2010] FCA 1221.

number of cases.³ This has seen the recognition of rules of interpretation from the Vienna Convention on the Law of Treaties being imported into the Model Law. And CLOUT helps. Let's take time to explain this development.

CLOUT

There is a wonderful recent development that provides a resource for us all and it is called CLOUT. Far from being a bad thing this is a collection of the case law on UNCITRAL texts (Case Law On Uncitral Texts). As Article 8 of the Model Law requires that in its interpretation regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith. National correspondents collect these court decisions and arbitral awards and in Australia this correspondent is Stewart Maiden QC who has a great passion for insolvency and has served on committees of INSOL, the international insolvency body with me for a number of years.

Under Article 6 the court can refuse to take an action if the action would be manifestly contrary to public policy. The bar is set high. Atkins and Mason suggest that the interpretation will be always be 'restrictively' as the Article is only intended to be invoked under 'exceptional circumstances'.⁴ Justice McDougall suggests the "manifestly contrary" test is very high indeed.⁵ Case law is scarce on this and no Australian

³ *Akers v Deputy Commissioner of Taxation* (2014) 223FCR8; [2014] FCFA57, *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308,

⁴ Atkins S & Mason R, 'Australia' chapter in *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, 3rd Ed. Look Chan Ho (Ed) (Globe Law and Business, 2012) 15-54.

⁵ McDougall R, *Recognition of Foreign Insolvency Proceedings – An Australian Perspective* Paper for LawAsia Conference November 3 2018 Cambodia. Paper available at

court has ever declined to recognise as foreign insolvency proceeding on this basis.⁶ Two recent cases *Abate*⁷ where a conflict of interest for the administrator was not sufficient for the court to refuse and *Indian Farmers*⁸ case where a strategic bankruptcy being used to circumvent a winding up was not enough for a Victorian Court.

The Model Law and therefore the Cross Border Insolvency Act has given us some new terms. For example we now use 'foreign main proceedings', 'foreign non-main proceedings', 'establishment' and the big one 'COMI' the centre of main interest. Australia has contributed to the use of COMI again with the case of *Ackers v Saad Investments*⁹ where the court set out why we followed the *Eurofoods*¹⁰ case. Justice White delivered a judgment involving local facts in *Wood v Astra Resources*¹¹ where he followed *Ackers* after balancing a lot.

Article 25 deals with cooperation and direct communication between a court locally and foreign courts or a foreign representative to the maximum extent possible. This will generally occur within the framework or protocol that was previously approved by the court. In Australia we have seen the use of Practice Notes, the MoUs with the superior courts

http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/McDougall_20181103.pdf

⁶ *Ibid* para 36.

⁷ *Abate, in the matter of Chang Rajii v Change Rajii (No 2)* [2018] FCA 241.

⁸ *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1.

⁹ *Akers v Saad Investments Company Limited (in official liquidation)* (2010) 190 FCR 285;; [2010] FCA 1221; *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCFCA 57.

¹⁰ *Re Eurofood IFSC Ltd* (2006) Ch 508.

¹¹ *Wood v Astra Resources Ltd* [2016] FCA 1192.

in Singapore, the UK and the US and now there is JIN, the Judicial Insolvency Network.

The Judicial Insolvency Network has been in place now for a couple of years. The Network has produced Guidelines for modalities for court to court communications. Both the Federal Court and the NSW Court of Appeal have been active in this development.¹²

How popular is the Model Law?

I remember teaching a class on cross border insolvency at Flinders University Law School in about 2002 and pointing out to students that UNCITRAL had produced this new Model Law and that Eritrea (1998) and Mexico (2000) were two of the first jurisdictions to adopt it. But then observed those two countries were unlikely to have had much or any trade with Australia – located as they are in the Horn of Africa and Central America and even were even less likely to have any insolvency disputes arise between Australia and these jurisdictions.

Presently there are over 40 countries who have adopted the Model Law. Our top ten trading partners are China, United States, Japan, Korea, Singapore, New Zealand, United Kingdom, Thailand, Malaysia, Germany. But which of these top ten have Model Law though? Well the answer is six have.

¹² Justice Gleeson speaking at UNCCA 5th Annual May Seminar 2019 Canberra. Paper available at <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-gleeson/gleeson-j-20190510>

They are Japan (2000), New Zealand (2006), United States (2005) United Kingdom (GB) (2006), Korea (2006), Singapore (2017).

If we look at Australia's top twenty trade destinations, more than half are in Asia. Unfortunately, the Model Law has not been adopted in China, Thailand, Malaysia, India, Vietnam, Taiwan, Hong Kong or Indonesia, who are all in our top 20 trading partners.

Also of interest to us is that Vanuatu adopted it in 2013 after some significant attention to their insolvency laws and another neighbour, Timor Leste is attending Working Group V and could be expected to adopt in due course.

It is often remarked that a limitation of the Model Law has been the slow uptake by countries. Many countries attend Working Group V and observe and some even actively participate in the working group without having the Model Law as part of their domestic law. This is perhaps because their trade and, by implication, their insolvencies involve countries that they already have some forms of Agreements or treaties. Let me give you two examples, The EU. Few countries from the EU have committed to the Model Law because there is an EU Insolvency Directive and Recast that governs member states and has done so for many years. Then there are the Nordic states who have had their own Bankruptcy Convention since 1933.

Are we using the Model Law in Australia?

There is growth in the use of the Model Law and the CBIA. Let me use a rough indicator, in our textbook, *Australian Insolvency Law* published by LexisNexis, in the last 4 editions spanning 10 years the chapter on Australian Cross border has grown from 23 pp¹³, then 36¹⁴, then 42¹⁵ and this year 48 page chapter.¹⁶

On Tuesday this week, October 22, the most recent judgment was delivered in the case of Senvion GmbH [2019] FCA 1732. It is a fine example that Australia is using the Model Law. Briefly the case involved a German company wanting to restructure and it had contracts in Australia. The German system of corporate rescue is a Formal Self Administration Proceeding, unlike our Part 5.3A that uses an external administrator, and the administrator was looking for recognition as a foreign proceeding. Further the applicant was requesting the Federal Court grant a stay for the contracts and claims arising here. In this case the COMI was clear. Whilst not needing to go into the details of the judgment here it is interesting to note that Germany of course being in the EU has not implemented the Model Law and yet its administrators as foreign representatives are able to avail Australian courts and processes.

GROUP INSOLVENCIES

¹³ Symes & Duns, *Australian Insolvency Law* 1st ed (LexisNexis, 2009) Chapter 13.

¹⁴ Symes & Duns, *Australian Insolvency Law* 2nd ed (LexisNexis, 2012) Chapter 13.

¹⁵ Symes & Duns, *Australian Insolvency Law* 3rd ed (LexisNexis, 2015) Chapter 13.

¹⁶ Symes, Brown and Lombard, *Australian Insolvency Law* 4th ed (LexisNexis, 2019) Chapter 12.

2019 saw the finalisation of a new Model Law that had been worked on by UNCITRAL Working Group V for the last few years to develop what is known as a Model Law on Enterprise Group Insolvency (EGI).

It provides for procedures to harmonise the various proceedings like intercompany claims, the duties of directors in the period approaching insolvency, and the appointment of a single group representative. The aim is to develop a group insolvency situation for all or part of an enterprise group through a single insolvency proceeding in a jurisdiction where at least one group member has its Centre of Main Interest even if the COMI of group members is located in different jurisdictions.

The new Model Law on EGI aims to protect and maximise the overall combined value of operations and assets of enterprise group members affected by the insolvency and of the enterprise group as a whole. The provisions strive to provide adequate protection of the interests of the creditors of each enterprise group member participating in any group insolvency solution.

There is new terminology in the new Model Law like 'planning proceedings', 'group insolvency solution' and 'group representative'.

Well is this just around the corner for us in Australia? As I said in an article published in January this year in the Insolvency Law Bulletin "it would be unlikely to see this

Model Law adopted within the next 10 years unless a major corporate group suffers a worldwide collapse.”¹⁷

3. The Future

UNCITRAL and its insolvency working group, Working Group V have a busy agenda ahead of it. And remember the Working Group meets 10 days a year, although a tremendous amount of work is done between formal meetings by the Secretariat and jurisdictions that are active in the Working Group such as Canada.

MSMEs

MSMEs are currently being discussed and there is a draft text on the objectives and features of a simplified insolvency regime to serve as a guide for countries. I would expect this will not be formally adopted by the UN until 2021 at the earliest.

For Australia this may mean casting a critical eye over the current law with regard to efficient and effective preservation of value in liquidations, and a streamlined, efficient process for liquidation and rescue. This would mean avoiding court intervention and even avoiding insolvency practitioner-in-possession type roles for a more advisor-type role. It may become unfortunate that we have a one size fits all corporate insolvency statute in Australia and that we have separate regimes for corporate and personal insolvency as

¹⁷ Symes, C ‘There’s a new Model Law on the block but don’t expect to see it become LAW soon’ (2019) 19 *Insolvency Law Bulletin* 195.

these factors will make implementing the UNCITRAL developments on MSMEs, slower and complicated.

AUSTRALIAN GOVERNMENT

The Australian government must continue to recognise the importance of ensuring orderly, efficient and cost-effective reorganisations or winding up and the same for personal bankruptcies and this extends to cross border matters. Firstly, they can do this by their support of UNCITRAL and sending representatives to Working Group V and to the Forum of Asian Insolvency Reform (FAIR) which was set up by the Keating government many years ago and has in recent years had little Australian government presence. Secondly, they can do this by supporting our judges, particularly those in this court and certainly the judge's initiatives like the furthering of the JIN. Thirdly, they can commit to collection and release of useful data on matters of cross border insolvency. Let's take the current UNCITRALs MSME work and then ask do we know the numbers that might be effected in our own country. The answer is a clear "No", with opaque figures around the numbers of small proprietary limited companies, the registrations of partnership and the existence of zombie companies. Finally, they can be realistic with reform. There is a clear need for another government inquiry into insolvency law reform which would include cross border matters. The ALRC Harmer in 1988 was an outstanding example of law reform but it is time for another.

What will UNCITRAL Working Group V look at in the future?

UNCITRAL Working Group V agenda already includes Choice of Law rules in insolvency matters. If there has been a consistent criticism of the Model Law it is that it did not and does not deal with choice of law. The Model Law is in essence concerned with cross border assistance in insolvency matters – matters that have already commenced. The argument put for not already having choice of law rules is that trading nations needed time and sufficient experience with the present Articles and only then would consensus on choice of law rules be possible. The EU already has law that chooses the law of the jurisdiction in which proceedings are issued as the law that applies and it applies then to proceedings, conduct and closure. Provisions in the EU address third parties rights in rem, set off, contracts relating to immovable property and even avoidance provisions. So the next project for Working Group V is to harmonise with the existence of the EU Recast and the principles already worked on since 2012 as a result of the American Law Institute and the International Insolvency Institute and known as the Global Principles. We might see these provisions in a new Model Law which includes rules of binding choice of forum and some provisions on the selection of the governing law in a group dispute.

The second agenda item that exists for Working Group V is the asset tracing and recovery. This is an agenda item the

United States is lobbying on. The topic seems very relevant but what really is the problem. Asset tracing of the physical assets even large ones in the maritime, aviation or space context have their difficulties but it seems that it is the 'mixed funds' and how to trace investor contributions that perhaps start in timber, olives or real property but then become something altogether different. The debate will address the method to be adopted such as first in first out, intention based, lowest immediate balance rule or many other that are currently promulgated.

Other 21st century issues that may find their way to UNCITRAL

Firstly, litigation funding.

There is a rise in the number of litigation funders operating in the insolvency industry across the world and certainly in Australia. They are largely unregulated by the state. This new phenomenon throws up issues of ethics and independence, the client-lawyer-litigation funder relationship being really a 'client' perhaps creditor-liquidator-lawyer-litigation funder relationship. With a colleague from Flinders University we have just received the first funding to look at this in the Australian and UK context. The topic has the potential to be a contagion that UNCITRAL will need to assist and address.

Another issue for the future may be a more universal approach to the regulation of insolvency practitioners. But that is a discussion for another day.

Finally will we see the Model Law on Cross border Insolvency be upgraded to a Convention?

Emeritus Professor Bob Wessels in 2016 blog said “A World Wide convention on international bankruptcy has been discussed throughout the whole 20th century. Now it has been put on the international agenda.”¹⁸ He identified issues such as the time and the cost required to negotiate a convention and for it to enter into force, reciprocity, interpretation, the alignment with existing treaties in certain areas, a requirement for an inventory into the matters that make States shy or reluctant to follow the Model Law, as well as suggesting an assessment into the States’ support for an international insolvency convention. At this stage in the Model Law’s development such issues seem to be unnecessary.

Tonight we have only talked about a part of cross border insolvency world. UNCITRAL’s work on the Model Law is seen as a ‘first legislative milestone’¹⁹ and its achievements are not to be decried. Sure the Model Law may be, as in the eyes of

¹⁸ Emeritus Prof Bob Wessels blog <http://bobwessels.nl/blog/2016-05-doc13-uncitral-convention-on-intl-insolvency-law/>

¹⁹ Wellard M & Mason R, Global rules on conflict of laws matters in international insolvency cases: An Australian Perspective (2015) 23 *Insolvency Law Journal* 5, 30.

Justice Barrett, a ‘rollercoaster’²⁰ but it has served us well. Working Group V has produced a Model Law on the Recognition and Enforcement of insolvency related judgments, a Model Law on Enterprise Groups Insolvency, a legislative guide on Insolvency law, various Guides to Enactment and has started on MSMEs. This is impressive. Australia has some catching up to do if we are going to legislate all these and we should in time. As a former Judge of this court Prof Paul Finn wrote some time ago now ‘Australians were born to statutes’²¹ so perhaps it’s our birthright to have good international insolvency statute law.

And the last word, let us return to the 1886 case of the Commercial Bank of South Australia. Why would the CBIA and the Model Law not have helped back then if it had existed?

[Correct Answer provided by the commentator for the evening, Brendon Roberts QC – because banks are not covered by the CBIA, they are exempted by Regulation]

Thank you all for your attention and thank you Your honour

²⁰ Barrett R I, Cross border Insolvency – Aspects of the UNCITRAL Model Law, paper to BFSLA Annual Conference August 2005 Cairns. Paper available at https://nswca.judcom.nsw.gov.au/wp-content/uploads/2017/04/barrett_2005.08.06.pdf

²¹ Finn P, Statutes and the Common law (1992) 22 *University of Western Australia Law Review* 7.