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International commerce is not a new phenomenon. While some things change, such as we heard yesterday in the session on technology, much still stays the same – in particular human nature and the drivers for commercial behaviour. To quote Thomas Jefferson from some three centuries ago: 'Merchants have no country. The mere spot they stand on does not constitute so strong an attachment as that from which they draw their gains.'

The expectations by 21st century merchants of commercial regulation and dispute resolution systems are probably the same as those held by merchants who plied their trade back on the Silk Road – to provide sufficient certainty and predictability to sustain business while allowing enough flexibility to cope with changed circumstances.

As the last speaker in the last session, it is perhaps fitting that my comments on this topic focus on 'The Bottom Line' – the ways in which international instruments intersect with domestic commercial law to address insolvency. While insolvency is a perennial commercial risk in market economies, it is increasingly complicated by the modern phenomenon of globalised inter-dependent economies – a development that has been highlighted by the recent Global Financial Crisis. Perhaps more so that in any other area of commercial law, pragmatism in resolving disputes is the hall mark of the zero-sum game that is insolvency – and as such, aspects of the approach taken by insolvency law may well be considered for other areas of international commercial law.

My comments address two aspects of the papers presented in this session:

- First, Justice Gauthier's reference to the UNCITRAL Model Law on Cross-border Insolvency ('Model Law'). I will refer to some of the ways in which various legislatures as well as domestic courts have assimilated the Model Law into existing domestic commercial law.
- Second, Justice Phang's comments on the way in which commercial parties work with international instruments and make use of them to suit their own purposes. I will outline the way in which parties and their advisers in cross-border insolvency are using Protocols approved by the courts to facilitate cooperation and coordination and thus save time and money.

The Model Law on Cross-border Insolvency 1997

The Model Law is the product of a remarkably swift multilateral process.[1] One aspect of its evolution that is worth highlighting in the context of this Conference is the role that has been played by international colloquiums. In 1994, UNCITRAL and the International Association of Insolvency Practitioners ('INSOL') held two

1 Guide to the Enactment of the UNCITRAL Model Law on Cross-Border Insolvency ('Guide'), [4]-[8].

international colloquiums for insolvency practitioners, judges, government officials and representatives of other interested sectors. These suggested that UNCITRAL limit itself in the area of insolvency to facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

And as Her Honour's discussion of insolvency under the rubric of 'procedure and administration of justice' reflects, UNCITRAL subsequently adopted a very pragmatic approach to resolving substantive insolvency law issues by focussing on establishing a workable procedure and presenting it by way of a Model Law, rather than by treaty or convention.

In 1997 the United Nations formally adopted the UNCITRAL Model Law on Cross Border Insolvency and recommended that member states adopt it as part of domestic legislation.[2] In its drafting, UNCITRAL took into account 'other international efforts',[3] in particular the work of the European Union, subsequently implemented in 2000 through its Council Regulation on Insolvency Proceedings. Key terms were drawn from the European Insolvency Regulation ('EIR') –and this has had an impact on the growing international jurisprudence around the Model Law.

However the EIR addresses choice of forum and choice of law as well as recognition and enforcement whereas the Model Law limits its scope of application essentially to:

(a) inward-bound requests for recognition of a foreign proceeding;

(b) outward-bound requests from a local court or administrator for recognition of an insolvency proceeding commenced under domestic laws;

(c) coordination of concurrent proceedings in two or more states; and

(d) participation of foreign creditors in local insolvency proceedings.

The UNCITRAL Guide to Enactment[4] states that the Model Law is intended to operate as an integral part of existing insolvency law in enacting states and so it might be thought to have a limited impact on domestic law. However it is influencing cross-border insolvency law – not only in those countries that have adopted it – but also more broadly as it encourages a more cooperative and coordinated approach to business rescue or the efficient disposal of insolvent enterprises.

Domestic Adoption – legislature

The Model Law has been adopted with varying degrees of amendment by some 18 countries, including the United Kingdom, Canada and the United States of America, and within this region, Australia, New Zealand, Japan and Korea.

2 The Model Law is published in Official Records of the General Assembly, Fifty-second Session, Supplement No 17 (A/52/17, annex I) (UNCITRAL Yearbook, vol XXVIII: 1997, part three).

3 Guide, above n 1, [18].

4 Ibid, [20].

Some jurisdictions, such as Canada and Japan, have incorporated aspects throughout existing legislation. Canada's adoption[5] appears to have made little difference to their existing cooperative approach, which is evident in the cross-border insolvency jurisprudence of numerous Canadian-United States cases. By comparison in Japan, its adoption[6] heralded a move away from a relatively territorialist approach, which neither recognised foreign insolvency proceedings nor claimed any extraterritorial reach for its own, to a more universalist approach. For example, Japanese trustees appointed to Lehman Brothers Japan Inc and its affiliates and local Japanese representatives in the Japan Airlines reorganisation have sought recognition of the Japanese proceedings in foreign jurisdictions.[7]

The United Kingdom has adopted the Model Law as a stand-alone 'secondary' instrument, the Cross-border Insolvency Regulations 2006, and thus increased potential flexibility to amend the 'domestic version' in the future. In the process of adoption, the United Kingdom amended and expanded it – in part to clarify its interaction with domestic insolvency law.

The United States of America has adopted it as Chapter 15 within the existing *Bankruptcy Code* and amended it slightly. (However even slight amendments such as substituting the word 'evidence' for 'proof' in a significant presumption is already having an impact on international jurisprudence.)[8]

Australia and New Zealand have enacted the Model Law by way of Schedule annexed to stand alone legislation (*Cross-border Insolvency Act 2008* (Cth) and *Insolvency (Cross-border) Act 2006* (NZ) respectively). Both jurisdictions have diverged minimally from the UNCITRAL text.

Domestic implementation - case law

I will now refer to recent Australian cases on two important aspects of the Model Law that impact on domestic law: a Federal Court decision on recognition of foreign insolvency proceedings and a Supreme Court decision dealing with the provisions on cooperation with a foreign proceeding.

First, some background on how the Model Law determines which foreign liquidation and restructuring proceedings will be recognised locally, based on the exercise of jurisdiction in 'acceptable' circumstances.[9] The effects and relief that flow from such recognition depend upon whether the foreign proceeding is categorised as either (a) a foreign main proceeding - opened in the state in which the debtor has its

5 *Bankruptcy and Insolvency Act* pt XIII; *Companies' Creditors Arrangement Act* pt IV.

6 Through new legislation (*Civil Rehabilitation Law 2000; Law on Recognition of Foreign Proceedings 2001)* and amendments to existing legislation: Shinichiro Abe, 'Japan' in Look Chan Ho (ed), *Cross-border Insolvency Law* (2nd ed, 2009).

7 For example in Australia, see *Katayama v Japan Airlines Corporation* [2010] FCA 794.

8 *Bankruptcy Code* s 1516(3): *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122 (Bankr SDNY 2007), affirming 389 BR 325 (SDNY 2008).

9 As with conventions, there is provision for the exclusion of entities which, for public policy reasons, have specific insolvency procedures such as banks or insurance companies: art 1(2).

'centre of main interests' ('COMI')[10] or (b) a foreign non-main proceeding - opened in a state where the debtor has an 'establishment'.[11]

The Model Law provides a simple expeditious procedure for local recognition, to halt the 'potential race of the swiftest' to take advantage of local assets. It also requires the application to be decided upon expeditiously to assist effective protection of the debtor's local assets from dissipation and concealment.

Significantly, recognition of a foreign main proceeding introduces an immediate and automatic moratorium.[12] Under Article 21, once a foreign proceeding is recognised, either as a main or non-main proceeding, the court may grant various forms of relief where necessary to protect the debtor's assets or the creditors' interests.[13]

A recent Federal Court decision, *Ackers v Saad Investments Co Limited (in official liq)*,[14] dealt with recognition of foreign proceedings and determination of the COMI of the foreign company.

The applicants had been appointed by the Grand Court of the Cayman Islands to a company incorporated and with its registered office in the Cayman Islands. It was formed to be the holding company within a large global group of companies and its immediate parent company was also incorporated in the Cayman Islands. The company's books and records were held and maintained by a company registered in Switzerland. The liquidators sought to gain control of the global assets which in Australia comprised equities listed on the Australian Stock Exchange with a recorded value of some USD13 million. The company was not registered as a foreign company in Australia and it appeared that the only creditor was the Australian Taxation Office, claiming some AUD35million.

The court expressly recognised that Australian courts may have recourse to international jurisprudence on the Model Law. It referred to:

- Article 8 under which 'In the interpretation of the present Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.'
- The Explanatory Memorandum expectation that international jurisprudence on key concepts 'will assist Australian courts with any interpretative tasks that may arise in relation to the Cross-Border Insolvency Bill'.[15]

10 COMI is not defined. Instead, art 16(3) provides a rebuttable presumption: 'In the absence of proof to the contrary, th [corporate] debtor's registered office ...is presumed to be the centre of the debtor's main interests.'

11 Art 2(b) 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'.

12 Art 20. The stay does not affect the right to request the commencement of a local insolvency proceeding or to file claim in such a proceeding. There may also be exceptions, limitations, modifications or termination in respect of the stay c suspension, in light of local insolvency laws.

13 When granting or denying relief or in modifying or terminating it, the court is required to satisfy itself that the interests c creditors and other interested persons, including debtors, are adequately protected.

14 (2010) 276 ALR 508 ('*Ackers v Saad*').

15 Explanatory Memorandum, Cross-border Insolvency Bill 2008 (Cth), [1.4].

- The importance of approaching the interpretation of an international convention in accordance with the principles in the *Vienna Convention on the Law of Treaties 1969* [1974] ATS 2.

Thus the court reviewed the modern development of COMI, referring to United States decisions under Chapter 15 *Bankruptcy Code* (where the use of 'evidence' rather than 'proof' in s 1516(3) acquired some significance) and comparing these to decisions of the European Court of Justice on the EIR presumption (which was the same as in the Model Law) and of the English Court of Appeal on the Cross-border Insolvency Regulations (which accepted that the concept of COMI derived from the EIR and which referred to a European Court of Justice decision).

In formulating the test for determining COMI in Australia, the Federal Court preferred the European and English approach referring to:[16]

> the importance to international commerce and, to third parties, of having an objective ascertainable basis upon which to commence and decide proceedings that will govern winding up and insolvency of a debtor under the Model Law

It held that the operation of the presumption is 'intended to provide a manner of proof, to the point of being prima facie evidence, of the matter the Article has presumed based on the place of incorporation of the debtor.'[17]

The court also referred to, but did not rely upon, the fact that the liquidation had already been recognised as a foreign main proceeding in the High Court of Justice in the United Kingdom, the Supreme Court of Bermuda and the Royal Court of Jersey acting under the Model Law.

Before referring to the next case, some background on how the Model Law facilitates cooperation between local and foreign courts and representatives. Under Article 25, it mandates cooperation and direct communication between a local court and foreign courts or foreign representatives. Article 26 also expressly permits cooperation and direct communication between identified categories of local representatives and foreign courts or foreign representatives.

This issue of cooperation with foreign proceedings was considered by the Supreme Court of New South Wales in *Re Chow Cho Poon (Private) Ltd.*[18] The case was brought under the *Corporations Act* provisions which permit co-operation between Australian and foreign courts in external administration matters. These provisions existed prior to Australia's adoption of the Model Law and have continued to form

16 (2010) 276 ALR 508, [49].

17 (2010) 276 ALR 508, [56].

18 (2011) 249 FLR 315.

part of the domestic commercial law, as has occurred with similar provisions in New Zealand[19] and the United Kingdom.[20]

In this case, a foreign-appointed liquidator sought to take control of a foreign company's bank account in Australia. He had approached the bank directly however it had responded that it was 'not in a position to render the accounts operational as your appointment as liquidator is required to be recognised by the courts within Australia.'[21]

Thus the liquidator, appointed in Singapore to a Singaporean company, applied directly to the New South Wales Supreme Court under s 581(2) *Corporations Act 2001* (Cth) to seek declaratory relief:

- To recognise the appointment of the liquidator;
- To recognise subsequent orders of the Singapore High Court granting the liquidator authority to operate the company's accounts in a number of banks;
- To authorise the liquidator in that capacity to 'operate' a specific bank account of the company; and
- To authorise the liquidator in that capacity to do anything in connection with the bank accounts that he is entitled to do under Singapore law.

First the court considered the elements of the relevant section and held that, in the circumstances,

- The Supreme Court was within the definition of 'court' for present purposes;
- The Republic of Singapore was one of the 'prescribed countries';
- The subject matter was an external administration matter; and
- There was a 'winding up' of a 'body corporate'.

This therefore imposed on the court an obligation to 'act in aid of' and to 'be auxiliary to' the Singapore court in relation to the subject matter of the application.[22] Referring to legislative history as well as to decisions of the Privy Council, Full Federal Court and High Court, it held that its duty under s 581(2) was to deploy its own general jurisdiction so as to assist and support the foreign court by causing its orders to have effect and the objectives of those orders to be achieved.[23] It is interesting to note that the court held that 'the compulsory nature of s 581(2) leaves no room for the court to take the view that some aspects of the legal system under which the

19 *Insolvency (Cross-border) Act 2006* s 8 – see *Williams v Simpson* [2010] NZHC 1786.

20 *Insolvency Act 1986* s 426.

21 (2011) 249 FLR 315, [8].

22 (2011) 249 FLR 315, [12]-[13].

23 (2011) 249 FLR 315, [14]-[20].

orders were made is at odds with a like aspect of Australia's legal system and that, as a matter of discretion, assistance should therefore be denied.'[24]

Next, the court examined whether s 581(2) was denied effect in the case due to s 22 *Cross-border Insolvency Act 2008* (Cth) which provides that the Model Law prevails where it is inconsistent with the relevant sections of the *Corporations Act*.[25] His Honour highlighted a number of potential areas of inconsistency such that the court's obedience to its s 581(2) duty to 'act in aid of and be auxiliary to' a foreign court might come into collision with an Article 25 duty or mandatory obligation to 'cooperate with' the foreign where assistance is sought in Australia by a 'foreign court' (or a foreign representative). However, he concluded it was possible to perform the s 581(2) duty – as there was no inconsistency of the kind contemplated by s 22.

In assessing the s 581(2) claim, the court began with the proposition that, as a matter of private international law, the court recognises the orders of the Singapore court and the status and powers of the liquidator derived from those orders and the law of Singapore. It noted that there was no contradictor and so questioned the utility of any order; however found it significant that the bank had made it clear that it would not recognise the liquidator's status and authority unless and until it saw some appropriate form of confirmation of those matters by an Australian court. The irregularity of making a declaration in the absence of a contradictor was overborne by the statutory duty imposed by s 581(2).[26]

In the course of the decision, the court commented on some cross-border insolvency issues that have emerged in international jurisprudence on the Model Law:

(a) The extent of matters related to winding up: the case concerned a winding up on 'just and equitable' grounds however the court took an expansive approach to what might be classified as 'law relating to winding up', even where there has been no express or implied finding of 'insolvency'. It referred to English and American decisions pointing to 'a clear basis on which the whole of the Singapore *Companies Act* (or at least the winding up provisions)' might be so classified.[27]

(b) The existence of any inherent jurisdiction: the court also considered whether it might grant the declaratory relief without reference to any statutory foundation under s 581(2). His Honour referred to 'notions of comity' that have in recent years facilitated recognition and effectuation of foreign insolvency administrations by the deployment of the court's inherent jurisdiction. He decided that, given the statutory basis, there

24 (2011) 249 FLR 315, [21]. For example, *Companies Act* (Singapore) s 377(3)(c) would preclude resort to Singapore assets by the Australian liquidator until all Singapore debts had been paid.

25 'If the Model Law (as it has the force of law in Australia) or a provision of [the *Cross-border Insolvency Act 2008*] Act is inconsistent with a provision of ... [ss 580-581] of the *Corporations Act 2001* ... the Model Law or the provision of [the *Cross-border Insolvency Act 2008*] prevails, and the provision of *the Corporations Act 2001* has no effect to the extent of the inconsistency.'

26 (2011) 249 FLR 315, [73].

27 (2011) 249 FLR 315, [51].

was no need to express any concluded view on whether the inherent jurisdiction alone would have supported the making of the declarations sought.[28]

Cross-border Insolvency Protocols

I now move to the second area for comment: Cross-border Insolvency Agreements or Protocols whereby parties use the vehicle of the Model Law to obtain court approval of Protocols – and are in effect possibly creating a modern example of the Law Merchant. One reason that I find this point interesting in the context of this international commercial law Conference is that it highlights a developing role that courts can play in insolvency proceedings, which are uniquely collective proceedings and impact on third parties.

Articles 25 and 26 of the Model Law refer to cooperation and coordination between courts and insolvency representatives across jurisdictions and Article 27 provides some examples of forms of cooperation. Article 27(d) refers to the 'Approval or implementation by courts of agreements concerning the coordination of proceedings'.

In 2009, the Supreme Court of New South Wales issued a Practice Note on *Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives* that requires parties in formulating a proposed framework for cooperation under Article 25 to consider:

(a) the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published by the American Law Institute and the International Insolvency Institute; and

(b) the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.

The Federal Court and most state and territory Supreme Courts have also issued practice notes in similar terms.[29]

The use of protocols has gathered momentum since its successful use in the Maxwell insolvency of the early 1990s.[30] A leading current example is that of the Lehman Brothers case. In September 2008, Lehman Brothers Holding Inc (Lehman Holdings), a large investment bank, filed for Chapter 11 bankruptcy protection in the United States. While Lehman Holdings was incorporated and based in New York,

28 (2011) 249 FLR 315, [76]-[79].

29 Supreme Court of Tasmania - Practice Direction No 2 of 2009; Supreme Court of Western Australia - Consolidated Practice Directions - 9.11 Specialised Procedures - Cross Border Insolvency - Cooperation with Foreign Courts or Foreign Representatives; Supreme Court of the Northern Territory - Practice Direction No 5 of 2009 - Corporations Law Rules Division 15A - Cross Border Insolvency - Cooperation with Foreign Courts or Foreign Representatives; Supreme Court of South Australia - Division 15A [Proceedings under the *Cross-Border Insolvency Act 2008*] of the Corporations Rules 2003; Supreme Court of the Australian Capital Territory - Schedule 6, Part 6.1 Corporation Rules 2003. There are no relevant practice directions issued by the Supreme Court of Queensland or the Supreme Court of Victoria.

30 For commentary on the Maxwell case, see Rosalind Mason, 'Cross-border insolvency law: where private international law and insolvency law meet' in Paul Omar (ed), *International Insolvency Law: Themes and Perspectives* (2008).

it operated through a network of affiliates across the globe.[31] As Lehman Holdings managed substantially all of the material cash resources of the Lehman Brothers group centrally, its inability to settle obligations of these affiliates resulted in some 75 separate and distinct insolvency proceedings commencing in 16 jurisdictions. Within weeks preliminary discussions began to explore a possible framework agreement for cooperation between the proceedings.

Recital C of the Protocol, which was approved by the United States Bankruptcy Court in June 2009, succinctly outlines the need for such an approach:

> Given the integrated and global nature of Lehman's businesses, many of the debtor's assets and activities are spread across different jurisdictions, and require administration in and are subject to the laws of more than one Forum. The efficient administration of each of the Debtor's individual Proceedings would benefit from cooperation among the Official Representatives. In addition, cooperation and communication among Tribunals, where possible, would enable effective case management and consistency of judgments.

The initial signatories included the United States debtors and the representatives of proceedings in Germany, Hong Kong SAR, Singapore and Australia. By early 2010 additional signatories included representatives representing affiliates in the Netherlands, the Netherlands Antilles, Luxembourg, and Switzerland. In addition, official representatives in Japan and Bermuda had participated in a series of activities and meetings designed to advance the Protocol's objectives. The Joint Administrators of Lehman Brothers International Europe neither signed the Protocol nor attended protocol meetings. Instead, they entered bilateral memoranda of understanding with the Lehman Protocol signatories and other participating affiliates.

Group protocol meetings have produced some key achievements – in particular agreements on the use of Lehman Brothers' books at 14 September 2008 as the basis for inter-company claims, and on a valuation method for inter-company trades such as stock loans, over the counter derivatives and repos (sale and repurchase).

Professor Roy Goode has written on the [Law Merchant] confining it to 'that part of transnational commercial law that derives from the international practice of merchants'[32] – adopting Lord Justice Mustill's distinction that the law merchant 'simply exists as a product of spontaneous generation, whereas international conventions and standard-term international contracts have as their objective the harmonisation of rights, duties and practices.'[33]

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31 There were more than 900 operating entities located in more than 40 countries with more than USD 600 billion in assets: Notice of Report of Activities through January 15, 2010 of the official representatives and Other Participating Affiliates pursuant to the Cross-border Insolvency Protocol, filed February 2, 2010 in United States Bankruptcy Court Southern District of New York.

32 Roy Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) 54 *International & Comparative Law Quarterly* 539, 547.

33 Ibid, citing 'The New Lex Mercatoria: The First Twenty-Five Years' in M Boss & I Brownlie (eds), *Liber Amicorum for Lord Wilberforce* (1987) 149, 152-3.

Applying this distinction to cross-border insolvency, multilateral attempts to arrive at uniform insolvency laws, choice of law rules or recognition laws through international conventions or model laws may well not qualify. However, the spontaneous development by the parties of Protocols and their approval by the courts arguably is a modern form of the Law Merchant.

If the use of Protocols or Cross-border Insolvency Agreements is a form of such customary law, then courts from a range of jurisdictions may draw comfort from this in determining the extent to which they may cooperate or coordinate where there are concurrent proceedings.

Conclusion

In summary then, these comments have outlined how legislatures as well as domestic courts are assimilating the UNCITRAL Model Law into existing domestic commercial law and how international commercial players and their advisers are using court-approved Protocols to facilitate cooperation and coordination in cross-border insolvency. The pragmatic approach being taken in insolvency may provide some useful insights into resolving other international commercial law disputes. It has been a privilege to participate in this session and comment on just one or two of the issues raised by the excellent papers of Justice Gauthier and Justice Phang. Thank you.