International Corporate Rescue

ChaseCambria

3-4 SOUTH SQUARE BARRISTERS

Centre for Commercial Law

UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

Annual Subscriptions:
Subscription prices 2011 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

The UNCITRAL Practice Guide on Cross-border Insolvency Cooperation: A Good Practice Guide to Cross-border Insolvency Agreements

Devi Shah, Partner, and **Jeremy Snead**, Associate, Mayer Brown International LLP, London, UK

Introduction

States often seek to assert the universality of their insolvency laws to produce a collective and compulsory regime for the better realisation of assets and the fair treatment of creditors. Increasing globalisation inevitably leads to more insolvencies crossing national boundaries, leaving courts and insolvency practitioners needing to rationalise inconsistent and at times mutually exclusive regimes. Various legal frameworks have been advanced for the harmonisation of cross-border insolvency regimes but until such time as a global model is universally applied, ad hoc situations will arise that need to be dealt with on a case by case basis. The use of insolvency agreements has evolved to cover this legal hiatus.

In 2005 the United Nations Commission on International Trade Law (UNCITRAL) commissioned a project to investigate methods of coordination and cooperation in cross-border insolvency cases. This was viewed as closely related and complementary to the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law'), and, in particular, article 27 of the Model Law, which encourages cross-border cooperation and the use of cross-border agreements. This project culminated in July 2009 when UNCITRAL adopted the Practice Guide on Cross-border Insolvency Cooperation (the 'Guide'). The Guide received a recommendation from the UN Commission that it should 'be given due consideration by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings'.

This article provides an overview of the Guide and the concept of the cross-border insolvency agreement.

What has UNCITRAL done?

The focus of the Guide is on the negotiation and drafting of effective cross-border insolvency agreements. Analysing over forty cross-border insolvency agreements dating back to 1991, the Guide provides a reference source of issues that commonly arise in cross-border insolvencies with sample clauses and techniques for addressing these issues and enhancing cooperation. The Guide is not prescriptive, recognising that other solutions exist and will need to be negotiated on a case-by-case basis. However, the final version of the Guide was adopted by resolution of the General Assembly and takes into account comments provided by Governments and the UNCITRAL Working Group V (Insolvency Law).

What is a cross-border insolvency agreement?

The Guide defines a cross-border insolvency agreement as 'an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest'. An insolvency agreement will commonly be discussed and negotiated by the affected parties before it is presented to the courts for review and approval. They range from statements of good faith and intent, through frameworks for cooperation with no enforceable obligations, to agreements that are intended to have legal effect on the parties involved.

A plethora of titles is used globally for the subject matter of the Guide, including protocols, administration contracts, cooperation and compromise agreements and memoranda of understanding. A single formal agreement is not necessary and insolvency estates may enter into multiple arrangements with different parties over separate issues as and when each issue arises. The scope of the Guide is therefore very broad, which renders it more of a 'good-practice, time permitting guide'. However, an effective and well thought-through insolvency agreement can increase the efficient resolution of an insolvency, reduce litigation costs and provide a framework for tailor-made solutions to be developed, with a view ultimately to increase the return to creditors or secure the survival of the debtor in circumstances where individual state insolvencies could be value destructive.

Entering into the insolvency agreement

A key issue for the success of an insolvency agreement is the identity of the parties to the agreement. This will vary depending upon what is permitted under the applicable law but will need to include those intended to be affected by the agreement. Early involvement of the courts can often be a key factor in ultimate success and may assist in binding dissenting creditors and parties and limiting the scope for litigation to undermine the agreement.

The Guide reveals that parties will often include the insolvency practitioners or representatives, the debtor, a creditor committee, and sometimes any major lenders. It is important that the parties negotiating the agreement should have the requisite authority or capacity to commit to what they agree. An insolvency practitioner may have inherent statutory powers or may need consent of the majority of creditors or of the court. Appropriate statutory authorisation may be required for court approval in the absence of any general equitable or inherent powers: acting outside of legal authority could render judges or insolvency practitioners personally liable.

The fundamental requirements for a cross-border insolvency agreement

Insolvency agreements are not means for circumventing legal obligations, duties or limitations imposed on the parties, but provide a tool for working out a means of coordinating the proceedings in the States involved, within the limitations of their domestic legal regimes. As such, they tend to focus on harmonising procedural rather than substantive issues between the jurisdictions involved.

However, the fact that the parties are willing to seek a compromise or agreement in order to reach a common goal provides the genesis for an effective cross-border insolvency agreement. The Guide suggests that the process of negotiation often helps to manage the parties' expectations and facilitate the successful conclusion of the insolvency proceedings.

The Guide identifies that certain circumstances support the use of an insolvency agreement. These include significant assets being located in multiple jurisdictions, complex debtor corporate structures or operations and the existence of a centralised cash management or accounting function. The parties should consider the similarity of the substantive insolvency laws, any uncertainty over choice of law or choice of forum and the differences in applicable insolvency procedures including the existence of contradictory stays, notice periods or controls enforced upon the debtor.

Insolvency agreements should only be considered if there are sufficient assets to justify the costs of drafting the agreement and if no urgent action is required that would leave insufficient time for satisfactory negotiations. If the same insolvency representatives are appointed in different insolvency proceedings the use of an insolvency agreement may assist to standardise work practices and prevent wasted costs.

Issues commonly addressed

The choice of issues to be addressed in an insolvency agreement will be influenced by the similarities or dissimilarities between the laws and procedures of the jurisdictions involved in the particular case.

However, issues typically addressed in the agreements reviewed for the Guide include *terminology* and *rules of interpretation*, *choice of applicable law* and *methods for joint-approval of costs and fees* (where each jurisdiction's insolvency representative or court is involved in approving the remuneration of the other insolvency representatives).

If avoidance or asset recovery remedies vary in each jurisdiction, then the *responsibility for investigation and recovery* is commonly considered to maximise recovery and minimise duplication of work. Provisions for *information sharing* and *analysis of claims* both of and against the company are also commonly included. Agreements often cover the *submission and treatment of claims* and the *methods of communication* between and *provision of notice* to creditors, courts and the insolvency representatives. Consideration has to be given to allowing appropriate *rights of appearance* in differing courts where legislation does not provide for direct access and agreements may seek to establish direct access for insolvency representatives or to other parties of interest, including the creditors (whether or not they have submitted claims in that jurisdiction), the debtor, the creditor committee and any post-commencement lenders.

Where provisions governing *stays*, *debtor relief*, *reorganisation mechanisms* and *post-commencement finance* differ in each of the relevant States, agreements often include provisions on these aspects, to prevent a race to the court that could dissipate assets or to assist in implementing the coordination of rescue plans and finance.

The parties must consider the resolution of disputes arising from both conflicts in the insolvency proceedings and the insolvency agreement itself. The allocation of responsibility for the resolution of either type of dispute or the appointment of third party arbiters should provide scope for resolving disagreement.

Impact on national courts

The Guide recognises that judicial cooperation is essential to the efficient and effective conduct of cross-border cases. Parties have to accept that the comity and independence of the courts often cannot be overridden but in cases where several courts may be equally or jointly responsible, then the insolvency agreement may allocate responsibility for different matters between competent courts to ensure efficient coordination of proceedings and avoid overlap, disputes and duplication of effort. This may involve the parties agreeing to limit their recourse to certain courts, requesting that the courts take foreign matters into account or seeking the dismissal of one set of insolvency proceedings conditional on the manner of treatment of claimants in the remaining procedure.

Conclusion

Conflicts will inevitably arise between different legal systems in relation to cross-border insolvencies. Insolvency agreements provide a flexible solution to enable insolvency practitioners to work-around this legislative shortcoming but an inflexible precedent could not succeed in universal application. However, the Guide provides valuable reference material for the structure and negotiation of an insolvency agreement, which will provide a useful checklist and basis material for putting into place an effective and lasting insolvency agreement and allow the parties to focus on the unique aspects of their own case.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.