

Cross-Border Insolvency

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Options for Recognition of Insolvency Administrations

- ▶ Comity
- ▶ Exequatur
- ▶ Reciprocity of Judgments
- ▶ Unilateral Discretionary legislation
- ▶ Unilateral Mandatory legislation

Options for Recognition of Insolvency Administrations

- ▶ Bi-lateral legislation
- ▶ Multi-lateral or Regional Treaty legislation
- ▶ Economic Union legislation
- ▶ “Model Law” legislation

Sovereignty

- ▶ What is the issue?
- ▶ Can the issue be resolved by a treaty which recognises the equality of the parties?
- ▶ Even if a treaty of universal application would not be agreeable, could there be a treaty between, say, the ASEAN countries?

Sovereignty

- ▶ Can the issue be resolved by a pre-requisite of reciprocity of recognition so as to accord the decisions of the courts of the relevant countries equal status?

Reciprocity

- ▶ Should recognition of an insolvency regime be dependant upon mandatory reciprocal recognition?
- ▶ Would the existence of similar insolvency regimes be sufficient?

Protection of Local Creditors

- ▶ Should local creditors enjoy preferential treatment from the “local assets” of an insolvent multi-national company?
- ▶ Can laws conferring preferential treatment on local creditors impact upon a re-organisation as by inhibiting the sale of assets as part of a “multi-national” package?

Cooperation

Economic Benefit Considerations

- ▶ A case study - New Zealand
 - ▶ bulk of National Income comes from overseas trade
 - ▶ Foreign Investment:
 - ▶ 95% of banks and 61% of value of share market
 - ▶ Level Net Foreign Investment
 - ▶ Top 10 Companies - predominantly foreign owned
 - ▶ Flow of new Foreign Investment
 - ▶ Level of foreign debt

Cooperation

Economic Benefit Considerations

- ▶ Factors Affecting Foreign Investment
- ▶ Would laws conferring preferential treatment on local creditors impact upon the availability of loans or credit?
- ▶ Could laws conferring preferential treatment on local creditors impact upon trade and the cost of imports?

Economic Benefit Considerations

- ▶ Do transparent economic laws (including insolvency laws which do not discriminate against foreign interests) encourage investment?

Practical Issues

- ▶ Are there practical or other barriers to the establishment of a recognition regime in any of the selected countries?
- ▶ Are there any means of addressing these barriers?

Practical Issues

- ▶ If a recognition regime is established in each of the selected countries:
 - ▶ what formalities might be required to commence an application for recognition?
 - ▶ what court should be involved?
 - ▶ could there be communication between that court and foreign courts if simultaneous applications needed to be made?

Practical Issues

- ▶ Will a foreign insolvency representative have direct access to the courts?
- ▶ What “evidence” will be required of the commencement of an insolvency case in a foreign jurisdiction?
- ▶ What should be the effect of recognition?

Practical Issues

- ▶ What assistance might be provided to the foreign insolvency representative?
- ▶ What controls may be exercised over a foreign representative?

Statement of Principles

- ▶ Is it desirable to work towards a regional cooperative approach to recognition
- ▶ That approach may be facilitated by an addendum to an existing regional treaty such as those applying within ASEAN

Statement of Principles

- ▶ Parties should be permitted to reserve their position with a right to “opt in” within a prescribed period
- ▶ It will be useful to understand
 - ▶ the genesis of the agreement between Singapore and Malaysia; and
 - ▶ the benefits which have accrued to each as a result of the Agreement

Cooperation

A Regional Cooperative Approach

- ▶ Would aim for mutual recognition
- ▶ Would seek agreement on common basic elements in national laws and procedures
- ▶ Would be dependent upon:
 - ▶ efficient administration of national laws; and
 - ▶ confidence in other countries about that process of administration

Cooperation

A Regional Cooperative Approach

- ▶ Should be supported by an agreement, protocol or convention which provides for common procedures
- ▶ Might entail understandings between governments:
 - ▶ on procedures to facilitate mutual recognition
 - ▶ including exchange of information

Cooperation

Proposal for Exploring Regional Approach

- ▶ A paper might be prepared on proposed common basic elements in national laws and procedures for consideration by governments of participating countries
- ▶ A related area of study could include the extent of economic and commercial interdependence between participating countries

Cooperation

Proposal for Exploring Regional Approach

- ▶ If acceptable to governments, they might then wish to consider adopting, perhaps formally, a regional scheme to facilitate mutual recognition