

WORKING GROUP SESSION LAC 2006

OF THE
GLOBAL JUDGES FORUM

14-16 JUNE 2006 – BUENOS AIRES, ARGENTINA

Enhancing Court Capacity in Commercial and Insolvency Cases
Limits of Delegation or Substitution of Judicial Functions to Non-Judicial Entities

Impact of Globalization on the Domestic Judicial Process
*Judicial Cooperation and Court-to-Court Communication in Cross-Border
Insolvencies*

Session Coordinators

Sídnei Beneti, Court of Appeals, Sao Paulo, *Brazil*
Ana Rosa Bergés Dreyfous, Supreme Court of Justice, *Dominican Republic*
James Farley, Superior Court Of Justice (retired), Toronto, *Canada*
Aída Kemelmajer de Carlucci, Supreme Court of Justice, Mendoza, *Argentina*
Gavin Lightman, Royal Courts of Justice, London, *United Kingdom*
Rosa María Maggi Ducommun, Court of Appeals, Santiago, *Chile*
José Raúl Torres Kirmser, Supreme Court of Justice, *Paraguay*
Ivan Verougstraete, Cassation Court, Brussels, *Belgium*



Organized by
The World Bank Legal Vice Presidency

In Cooperation with
International Association of Judges
Latin American Federation of the Judiciary
European Association of Judges
Argentine Federation of Magistrates
Argentine Association of Federal Judges

DAY 1: Wednesday 14 June 2006	
16:00 – 19:00	Registration – Pacará Room at the Hilton Hotel
19:00 – 21:00	Welcome Reception – Pacará Room at the Hilton Hotel
DAY 2: Thursday 15 June 2006	
08:15	Meeting at the Hilton Hotel Lobby – Transportation to Stock Exchange Building
09:00 – 09:45	OPENING REMARKS <i>Adolfo Rouillon, Senior Counsel, LEGPS, Legal Vice Presidency, World Bank</i> <i>Christina Biebesheimer, Chief Counsel, LEGJR, Legal Vice Presidency, World Bank</i> <i>Elena Highton de Nolasco, Vice President, Supreme Court of Justice, Argentina</i> <i>Ricardo Luis Lorenzetti, Minister, Supreme Court of Justice, Argentina</i>
09:45 – 12:45	SESSION I: MEDIATION AND ARBITRATION IN COMMERCIAL / INSOLVENCY CASES
09:45 – 10:45	PART A – PRESENTATIONS <i>Barry Russell, Chief Judge, United States Bankruptcy Court, Central District of California</i> <i>Rosa María Maggi Ducommun, Minister, Court of Appeals of Santiago, Chile</i>
10:45 – 11:15	COFFEE / TEA BREAK
11:15 – 12:45	PART B - ROUNDTABLE DISCUSSION
12:45 – 14:15	LUNCH
14:15 - 17:45	SESSION II: STREAMLINING COMMERCIAL PROCEEDINGS USING NON-JUDICIAL ENTITIES AND PROCESSES
14:15 – 15:45	PART A – PRESENTATIONS <i>Aida Kemelmajer de Carlucci, Minister, Supreme Court of Justice, Mendoza, Argentina</i> <i>Charles G. Case, Judge, United States Bankruptcy Court, Arizona</i>
15:45 – 16:15	COFFEE / TEA BREAK
16:15 – 17:45	PART B – ROUND TABLE DISCUSSION
17:45	Transportation From Stock Exchange Building To Hilton Hotel
19:00	Meeting At The Hilton Hotel Lobby – Transportation To Dinner Venue
19:30 – 22:00	DINNER <i>Venue: “Daniel Maman” Art Gallery</i>

DAY 3: Friday 16 June 2006	
08:15	Meeting at the Hilton Hotel Lobby – Transportation to Stock Exchange Building
09:00 – 12:30	SESSION III: DELEGATION/SUBSTITUTION IN ENFORCEMENT PROCEEDINGS
09:00 – 10:30	PART A - PRESENTATIONS ANTONIO DA CUNHA , President of the Chamber of Bailiffs, Portugal
10:30 – 11:00	COFFEE / TEA BREAK
11:00 – 12:30	PART B - ROUNDTABLE DISCUSSION
12:30 – 14:00	LUNCH
14:00 – 17:15	SESSION IV: JUDICIAL COOPERATION AND COURT-TO-COURT COMMUNICATION IN CROSS-BORDER INSOLVENCY PROCEEDINGS
14:00 – 15:30	PART A - PRESENTATIONS JAMES FARLEY , Justice (retired), Superior Court of Justice, Ontario, Canada CHRISTOPH PAULUS , Professor of Insolvency Law, Humboldt University, Berlin, Germany
15:30 – 16:00	COFFEE / TEA BREAK
16:00 – 17:15	PART – B - ROUNDTABLE DISCUSSION
17:15 – 17:30	CONCLUDING REMARKS
17:30	Transportation From Stock Exchange Building To Hilton Hotel

Acknowledgements

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CFS – Center for Financial Stability - www.cefargentina.org

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ENHANCING COURT CAPACITY IN COMMERCIAL AND INSOLVENCY CASES

LIMITS OF DELEGATION OR SUBSTITUTION OF JUDICIAL FUNCTIONS TO NON-JUDICIAL ENTITIES

In most jurisdictions, commercial and insolvency proceedings are dealt with by courts that are required to administer a large number of cases. The fast-paced nature of insolvency proceedings often requires courts and judges to process large volumes of material in much shorter time periods than would be required in ordinary litigation. As a result, in some jurisdictions commercial conflicts are not quickly resolved, and insolvency proceedings are prolonged for years. The accelerating pace of commercial and financial transactions, and the need to take quick decisions to successfully restructure viable businesses, requires timely resolution of commercial and insolvency proceedings. Competence, efficiency and speed are essential for judicial decision-making in this area.

The creation of new courts to lessen the workload appears to be neither a feasible nor a sufficient solution - budgetary constraints in most countries impede any significant increase in the number of courts; even when new courts are established, experience indicates a gradual reappearance of backlogs. Moreover, irrespective of whether courts for commercial and insolvency proceedings are general or specialized, issues of competence, capacity and efficiency remain.

The costs and benefits of specialized courts, as compared to courts of general jurisdiction, are not the focus of this Working Group Session. Although there has been much discussion of various alternatives that lead to prompt resolution of commercial cases, this Working Group, in large part, seeks to explore the feasibility of a particular class of solutions that have recently been proposed to expeditiously resolve commercial and insolvency cases – *delegation to, or substitution by, non-judicial entities of certain functions traditionally performed by courts or judicial officers*. The purpose of the first three sessions of this Working Group is to look at the policy implications of such delegation/substitution, and any constitutional, statutory and practical limitations thereof.

Participants are requested to share their thoughts on the following questions:

- For which tasks may non-judicial entities substitute judges or other court officials?
- What are the different mechanisms through which such delegation/substitution is possible?
- What are the constitutional, statutory and other limitations to such delegation/substitution?
- What is the point at which such delegation/substitution constitutes erosion of judicial authority or legitimacy?

The last Session of the Working Group will look at resolving insolvency cases involving transnational parties, assets or relationships. Apart from the obvious cases involving assets located in multiple jurisdictions, globalization has also led to an explosion of cases where insolvency proceedings in one country may implicate civil, criminal or regulatory proceedings in

other countries. Co-operation between judges from different countries becomes invaluable in these cases. These Sessions will examine the need for promoting international judicial cooperation and court-to-court communication, and the feasibility and content of an international protocol to give effect that.

MEDIATION AND ARBITRATION IN COMMERCIAL / INSOLVENCY CASES

Recently, some jurisdictions have begun to expand the use of mediation and arbitration for resolving commercial conflicts. However, mediation and arbitration are not widely used to solve disputes that arise as a subset of a larger insolvency proceeding. There is even less experience in using arbitrators for conducting the entire insolvency proceeding. Consequently, it is not easy to determine whether, and to what extent, these methods have contributed to decreasing the workload of courts dealing with commercial matters, and whether these methods are comparatively more efficient in resolving such disputes.

In this context, **Session I** will consider the following questions:

- Are mediation and arbitration effective means of dispute resolution (in terms of their cost, speed and efficiency) that can reduce the burden on judges in commercial and insolvency matters?
- Are there specific tasks during insolvency/reorganization proceedings, such as the determination of conflicting claims, the setting aside of particularly onerous contracts etc. that can be performed using the arbitration/mediation mechanism?
- Flowing from above, what would be the nature and extent of judicial oversight required for formal alternative dispute resolution processes, in terms of
 - the procedure and substance of such dispute resolution, and
 - the enforcement of decisions

STREAMLINING COMMERCIAL PROCEEDINGS USING NON-JUDICIAL ENTITIES AND PROCESSES

Significant delay in resolution of commercial claims by courts increases credit risk. It increases the cost of credit, which restricts access for small and mid-size businesses. For this reason, most countries are keen to increase the efficiency of judicial and out-of-court credit collection processes.

Session II will address issues related to the current difficulties in commercial proceedings and explore mechanisms of delegation or substitution involving limited or minimum court intervention. This Session will discuss the following questions:

- What are the major impediments commercial courts face in quick decision-making, or in moving forward?

- Is it feasible to delegate some judicial functions, such as fact-finding, case management functions etc. to court-authorized Magistrates, Commissioners, Trustees or Insolvency Professionals?
- When can contractual or pre-packaged solutions (decided out of court) be helpful, and how can they be judicially enforced?
- What would be the constitutional, statutory or other restrictions to such contractual or 'private' solutions, and how can these concerns be addressed?
- How feasible is it to achieve expeditious resolution by referring commercial proceedings (in whole or in part) to quasi-judicial tribunals, which are governed by simplified, streamlined and time-bound procedures?
- Does the fast pace of commercial proceedings effectively render appellate oversight null, thereby making delegation to quasi-judicial tribunals difficult?
- Where judicial intervention is required or advisable, how can it be limited to accommodate delegation/substitution that makes commercial proceedings more efficient?

DELEGATION/SUBSTITUTION IN ENFORCEMENT PROCEEDINGS

In many countries, after the judgment is delivered, delays continue to plague the execution process. These delays also decrease access to credit and impact the interest rate at which credit is available. In some countries, creditors must wait months, sometimes years, for secured assets to be sold and the judgment satisfied. These delays are usually caused by procedural complications during the enforcement stage, or due to the inability of overburdened judicial offices in charge of seizure and/or sale of the assets to act quickly in every case.

The discussion in **Session III** will focus on the following questions:

- Is it possible to delegate certain steps of the judgment execution process to non judicial entities or professionals such as bailiffs, private recovery officers etc.? If so, which steps should these be?
- What would be the potential disadvantages of delegating some of the roles and functions that judges and court officials presently have, or substituting them by non judicial entities?
- Are there any constitutional, legal, cultural, or other restrictions to the delegation of functions currently performed by courts, or to their substitution by non- judicial entities. For example, what would be the limitations on the delegation of the state's coercive powers to non-judicial entities?
- If such constraints do exist, which legal and institutional reforms are required to overcome them? Can these reforms be adopted within a relatively short time-frame?

IMPACT OF GLOBALIZATION ON THE DOMESTIC JUDICIAL PROCESS

JUDICIAL COOPERATION AND COURT-TO-COURT COMMUNICATION IN CROSS-BORDER INSOLVENCY PROCEEDINGS

Globalization and regional integration has increased foreign investment and international commerce; it has also increased the number of commercial and insolvency proceedings with cross-border elements. The nature of these cases is diverse, and includes facts where resolution of the dispute:

- a) requires information about the conduct of parties elsewhere;
- b) entails assets of the same company located in different jurisdictions;
- c) involves conduct that may be governed by another country's laws; and
- d) necessitates taking into consideration judicial facts established in other countries, in regulatory, civil or criminal proceedings.

In these and other similar cases, where the locus of assets, domicile or citizenship of the debtor, or course of conduct involves more than one country, the domestic insolvency proceeding is related to other insolvency or non-insolvency proceedings covered by other laws in a different jurisdiction, and involving more than one court.

These complications lead us to explore the following issues in **Session IV**:

- In what type of cases is international court to court communication necessary to resolve insolvency proceedings – what type of information would be helpful and which issues would it resolve?
- Can such communication exist in a meaningful way in the absence of established mechanisms for dealing with cross-border insolvency cases?
- Whether and how does, each country's constitutional, legal and institutional system facilitate or hinder international judicial cooperation in insolvency proceedings?
- Are there any existing international Protocols or agreements that further international judicial cooperation in insolvency proceedings? If so, what is their scope and what are their limitations?
- In absence of international Protocols, how are judges in each jurisdiction currently able to communicate with their international colleagues? What are the limitations that they face?
- If an international Protocol to facilitate such communication is desirable, what should be its contents? How should it facilitate rapid and effective communication among insolvency judges from different countries and overcome technological, cultural, language and other barriers which hinder this process?