

## International Courts

# Judges lead cross-border commercial courts co-operation

By Barry Leon



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(July 23, 2019, 8:30 AM EDT) -- Important developments in cross-border co-operation among commercial courts have been taking place over at least the past four years, largely under the radar of many lawyers and judges.

By collaborating, commercial court judges from around the world are in many respects leading the way in:

- facilitating and increasing mutual understanding of laws and judicial processes, as well as communication, cooperation and efficiency;
- developing and sharing best practices; and
- assisting commercial courts of developing jurisdictions.

A few weeks ago, the latest initiative was the release of the *Multilateral Memorandum on the Enforcement of Commercial Judgments for Money*, by Standing International Forum of Commercial Courts (SIFoCC), which itself termed the Memorandum as "landmark."

The SIFoCC was convened in 2017 by then Lord Chief Justice, John Thomas, (who chairs the SIFoCC Steering Group), bringing together commercial courts of almost 40 jurisdictions from five continents.

The Memorandum, which was termed a "collaborative tool," on its face does no more than set out, for 32 jurisdictions, the understood procedures for enforcing commercial monetary judgments of one jurisdiction in the courts of another (although in some cases touching on other forms of judgments).

However, significantly, the enforcement outline for each jurisdiction comes from that jurisdiction's judiciary (except for New York where practitioners prepared the contribution for federal and state courts).

Lest the importance of the Memorandum be missed, Lord Thomas stated that it "shows to users the readiness of the world's commercial courts to enforce each other's judgments."

An earlier and more innovative initiative was by the Judicial Insolvency Network (JIN), an organization of commercial courts, initially comprising 11 jurisdictions (including an observer jurisdiction), that came together in 2016 in Singapore, in which I participated as the presiding Commercial Court judge in the British Virgin Islands, and Justice Frank Newbould participated on behalf of Ontario.

JIN's aim is to encourage communication and co-operation between national courts on multijurisdictional insolvency matters and outline best practices. Its first project was to develop "Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters".

The Guidelines have been implemented in 12 jurisdictions, including some that were not part of the initial JIN. They include Ontario's Commercial List; the United States Bankruptcy Courts for the District of Delaware, the Southern District of New York and the Southern District of Florida; the Chancery Division of England & Wales; Bermuda; Singapore; BVI; Supreme Court of New South Wales; the Seoul Bankruptcy Court; the Grand Court of the Cayman Islands; and the District Court Midden-Nederland (Netherlands).

The Guidelines address key aspects of communication and co-operation among courts, insolvency representatives and others involved in cross-border insolvency proceedings.

The fact that the Guidelines are a "judge-driven" initiative distinguishes them from the other initiatives to encourage co-operation and communication in multijurisdictional insolvencies.

Their overarching objective is to improve the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction (termed "Parallel Proceedings") by enhancing co-ordination and co-operation among courts.

The Guidelines aim at:

- the promotion of the efficient and timely co-ordination and administration of Parallel Proceedings;
- the identification, preservation and maximization of the value of the debtor's assets;
- the management of the debtor's estate in ways that are proportionate to the amount involved, the nature of the case, the complexity of the issues, the number of creditors and the number of jurisdictions involved;
- the sharing of information; and
- the avoidance or minimization of litigation, costs and inconvenience to the parties.

Under the Guidelines, courts encourage, and where necessary direct (if empowered to do so), the parties to implement a protocol (an agreement) or court order derived from the Guidelines. The Guidelines enable a court to receive communications from a foreign court and respond directly (for certain purposes: the orderly making of submissions and rendering of decisions and co-ordinating and resolving procedural, administrative or preliminary matters relating to any joint hearing).

However, consistent with due process, for communications between courts (whether *ex parte* or otherwise), in the normal case parties may be present and the communications are recorded and may be filed as part of the record.

The Guidelines enable a court to authorize a party, or appropriate person, to appear before and be heard by a foreign court, subject to the foreign court's approval. It also allows the flip side: that if permitted by its law and otherwise appropriate, to authorize a party to a foreign proceeding, or appropriate person, to appear and be heard by it without becoming subject to its jurisdiction.

The Guidelines include provisions for joint hearings (for courts that assent to it), without divesting or diminishing any court's independent jurisdiction over the subject matter of proceedings and preserving each court's sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters in its proceedings.

The co-ordination provisions include that each court should be able simultaneously to hear the proceedings in the other court and consideration should be given to co-ordination of the process and format for submissions and evidence in each court.

Courts conducting joint hearings may communicate in advance of a joint hearing, with or without counsel present, to establish procedures for the orderly making of submissions and rendering of decisions, and to co-ordinate and resolve procedural, administrative or preliminary matters relating to the joint hearing.

These initiatives should lead the way in other areas in which communication and co-operation in cross-border matters can help to achieve similar objectives.

These areas may come to include:

- asset preservation and recovery in situations such as fraud;
- corporate and shareholder disputes involving parties and/or related disputes in multiple jurisdictions; and
- international arbitral award challenges, recognition and enforcement.

These cross-border judicial initiatives recognize two realities.

First, today many businesses operate in numerous countries around the world so that courts cannot operate as they did in the 1800s, when businesses were largely based in and operated in one jurisdiction and communications were written by quill pen and sent by post in steam ships. When business communication is in the iPhone X age, and business enterprises are global, judges cannot operate independently blindly in dark silos — even though their decision making needs to be independent.

Second, in some areas, judges may be able to develop a means of cross-border communication and co-operation among courts easier, faster and more effectively than can be developed in other ways. In the process, they will build relationships, understanding, respect and trust that will facilitate the effective functioning of the processes developed far more effectively than where the participating judges and their courts are strangers.

All of this bodes well for courts and their users.

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