

INDEPENDENCE AND ACCOUNTABILITY OF JUDGES IN FORMAL INSOLVENCY PROCEEDINGS

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INTRODUCTION

- Much of the substance of insolvency law is common to many countries, both common law and civil. Insolvency law to be discussed here applies to both corporations and individuals.
- Insolvency law is complex. You either know a little or a lot about it. As Alexander Pope, the great British poet said, “A little learning is a dangerous thing, drink deep or taste not the Pyrrhean spring.” A judge sitting in insolvency matters must have a sound knowledge of the law and practice in this field. Ideally, this is developed over years before the Judge is appointed to the Bench, both in legal education courses and in practice; but this is not always available, especially in developing countries.
- It is important that judges acquire knowledge of insolvency law and practice before they hear insolvency cases. This emphasizes the importance of judicial education and training of judges before appointment or shortly after appointment. Ongoing judicial education is also important to all judges because the law moves and changes so fast.
- In some countries when insolvency law has existed and operated for many years, a cadre of insolvency legal practitioners and judges grows up and the choice of suitable persons as insolvency judges is fairly easy. This is not so in the case of countries where insolvency law is comparatively new. In some countries there is no tradition of insolvency law for a variety of reasons including in many countries the inconsistencies between insolvency law and local cultures.

ROLE OF JUDGES

- Applications of many different kinds come before judges hearing insolvency matters. Classically, the insolvency petition or application to make an individual bankrupt or to wind up a company or organization is the most frequent and significant matter to be dealt with by the judge. This may be preceded, accompanied or followed by a large variety of interim or interlocutory applications including injunctions, appointment of receivers, pre-trial procedures to prepare contested and complex cases for hearing, applications for discharge from bankruptcy or to stay windings up, applications to approve schemes of arrangement, assignments of property, reconstructions and amalgamations of companies, etc.
- Much of this requires the judge to act as an overseer, even though he may delegate these matters to court officers or senior court officials, or in some cases, to trustees in insolvency.
- In some countries there is a supervisory judge who directs or controls the insolvency proceeding from beginning to end and has close contact with the relevant court officers and trustees. This is particularly so in civil code countries.

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- Often, undefended petitions or applications to wind up companies or organizations or to sequester the estates of individuals may be heard by persons subordinate to the judge by delegation from the judge.
- In some countries, particularly those that have written constitutions, questions of constitutional power of the officer hearing insolvency matters can be raised. This is so in countries where only judges can exercise judicial power. The position is complicated further in countries that not only have written constitutions, but have federal systems of government. So the further and more refined question arises of whether only judges exercising federal or state or provincial power, can hear insolvency matters.
- Arrangements, assignments of property, reorganizations and amalgamations are becoming increasingly popular. It reflects the desire of persons and corporations in financial difficulties and their creditors to keep outside the formal procedures of insolvency. Some are private insolvent administrations, others are administrations under the control of the court, not necessarily involving the status of bankruptcy or winding up. The role of the judge in these matters varies considerably from country to country. In some countries, very tight control is exercised by the judge and in others, the judge only hears applications that are brought to the court by interested parties.
- Whatever the system may be, judges are frequently involved in legal proceedings after sequestration or winding up. Examples are applications for declaration of preferences, unauthorized or fraudulent dispositions of property, setting aside of voluntary settlements, determining questions of priorities of debts, dealing with public examination of bankrupts or persons associated with the insolvency, etc.
- Control of court processes, including pre-trial directions, is an ever increasing part of the life of a judge. Some judges do this competently, others do not. The conduct of pre-trial litigation is a large discipline itself with many sophisticated training courses being conducted throughout the world. If judges are to handle these matters themselves, they must be trained to do so. Hence, the necessity for the availability of courses for pre-trial administration. This generally should be ongoing for judges and others associated with insolvency work.
- A problem constantly confronting judges is the extent to which they should control the conduct of a case. This depends to a large degree on the personality of the judge concerned. But the days have gone when judges sit back and let the lawyers have a free hand in conducting the case, merely ruling on points of evidence. Communities today demand efficient, quick and cheap administration of justice. This is of course a relative concept. Judges should not hesitate to take a hands-on approach to the conduct of cases provided they do not enter the arena and become partisan. Of course, in legal systems where a judge legitimately assumes an interrogating role, the duties of the judge are different.
- Settlement discussions are difficult matters for a judge to engage in, especially if he/she is the judge of fact. The judge may be perceived as showing bias and therefore may be disqualified from hearing the matter further. Officers of the Court or experts outside the Court often conduct such discussions on the direction of the judge.
- The supervisory judge. The supervisory judge in some countries, generally civil code societies, plays a day to day hands on role in the administration of insolvencies. This has a number of advantages that include close relationship between the judge and the trustee administering the estate, so that each can speak frankly to the other and deal with problems on the spot with minimum of delay.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

- ADR is alive and well. It is being used increasingly in modern commercial societies. It is also being used in developing countries, sometimes as an alternative to an inefficient judiciary. In some countries, people feel that judges are appointed with scant knowledge of the law and little understanding of judicial independence and may be ill equipped to handle litigation particularly litigation that inevitably arises in a modern market economy. Reforming the courts and the judiciary is

an important step forward; but that is a slow process and court business must go on in the meantime.

- ADR can be a useful aid to solve this problem. This involves setting up an appropriate mechanism with or without government assistance. Generally, it would need government assistance which involves meetings with government officials, members of the private legal professions and others to establish it. Sometimes it is necessary to retain an outside expert to undertake a diagnostic survey of the country concerned with respect to ADR and its mechanisms.
- If an ADR center is established in a particular country then the following are some key matters to be considered concerning the establishment and operation of that center:
 - a. It should be a free standing, independent service, not related to any existing institution in the country, to avoid perception of bias for or against any party.
 - b. It should consider providing both mediation and arbitration services.
 - c. There should be a legislative base for ADR, although it may not be strictly necessary. Legislation may give ADR added weight and force.
 - d. The ADR program may be focused solely on commercial disputes (not necessarily so) and staffed by people with experience in the business world.
 - e. A panel of people who are highly respected in the community should be trained as mediators and arbitrators.
 - f. The ADR center should be headed by a director with responsibility for promoting the ADR services and administering it.
 - g. First class training must be provided to the staff of the ADR center and to the mediators and arbitrators.
- The ADR center should be provided with its own office, with sufficient space for the director and administrative assistant, a large room for conducting mediations and arbitrations, a smaller conference room and a reception area. The office will need basic office equipment, telephones, faxes, computer, printer and office furniture.

CONDITIONS OF SERVICE

- There is little use in a country saying that it should have competent and corruption free judges unless they are treated properly by Government. This means proper salary and working conditions.
- Broadly speaking, developing countries have a number of problems in common which include:
 - a. Corruption is said to exist at many levels of society including the judiciary.
 - b. Judges of the courts of first instance (trial courts) work in difficult conditions. The courtrooms and offices (CES) in the court buildings are often in poor condition. There is a need for proper facilities including computers, copying machines, etc. Judges' staff are not given adequate training. Security measures to protect the judges are insufficient.
 - c. Judges are poorly paid and understaffed.

- d. The public has insufficient access to the written records of the laws of the countries and to the principal judicial decisions.
- e. There are no, or very limited, facilities for judicial training.
- f. Appellate courts sometimes have not been established on a proper basis.
- g. There is an absence of proper mechanisms to enforce the decisions of courts in civil cases.
- h. Practicing lawyers may not be licensed.
- i. Law schools frequently have poor facilities.

Unless these matters are addressed, the quality of the judiciary and therefore society itself will not improve.

SPECIALIST COURTS

- Some countries have specialist courts dealing with insolvency matters. For example, in Indonesia the Commercial Court was established in the wake of the Asian financial crisis, and in Thailand a new bankruptcy court was established and commenced operation in June 1999. Other countries prefer judges to have general jurisdiction including insolvency. The main problem in some countries is that there are insufficient judges with expertise in cases of insolvency and reorganization.
- A problem that arises in some developing countries is the fact that there is an absence of consistency in the decisions of the courts. Sometimes this is explained by the absence of precedent in the country's judicial system. But at other times, it is simply compounded by an absence of published material on decisions of the courts that might otherwise assist in establishing a base for decisions.
- There is a strong body of opinion to the effect that there is a need for specialized courts and judges with experience and knowledge especially in commercial matters. A specialized court need not devote itself solely to questions of insolvency. It may be a court with board commercial jurisdiction of which insolvency is a part.

JUDICIAL INDEPENDENCE

- Judicial independence is sometimes defined as "the freedom of judges from influences brought to bear by other organs of government, in particular, the executive." I think this is as good a definition as any other; but it needs explanation and a degree of qualification.
- The concept of an independent judiciary is not in theory confined to democracies; but in practice it generally is. Also, in modern democracies, large power is wielded, not only by the executive and parliamentary branches of government, also by large corporations, in particular multinationals, and by other organizations including those who control the media.
- Judges are not totally free from outside influences. They are human beings with families and friends, and often belong to public organizations. In my view, membership of outside bodies is permissible provided it is not inconsistent with judicial office. But where other organs of government and other organizations and people seek to bring pressure to bear on judges in the execution of their public duties, they encroach on judicial independence, which is the principal watchdog of a civilized society. It guarantees the rights of citizens and adjusts the balance, often delicate, of the relations between citizen and State, citizen and citizen, thus ensuring a strong and efficient society on the one hand and the advancement of individual rights and freedoms on the other. Judicial independence is thus the freedom of judges from interference exerted from external sources.

- It is important to remember the aim of judicial independence. It is not to confer a benefit or privilege upon judges. It is to enhance and safeguard a modern society in the interests of the society itself.
- Judicial independence is one of the most important rights in a democratic society, together with freedom of speech and association. Without it, other rights would be seriously diminished or lost.
- Judicial independence is vital to the preservation of every system of truth and justice and also to the preservation of a democratic system of government. Judicial independence means that judges are free to determine cases according to their view of the law, not without pressure from government or extremes of public opinion.
- A related question concerns a practice followed in some countries of promoting or translating judges from lower courts to higher courts, or from trial courts to appellate courts. In my opinion, this is a permissible practice; but should be watched with care. However, there should never be a perception amongst judges that they will be “promoted” if they perform well. Obviously, this could lead to judges discharging their duties with an eye to making decisions convenient to the Executive.

THE DISMISSAL OF JUDGES

- It is imperative that the power of removal from office is not vested in the Executive.
- The preferable method of removing judges from office is by clear provision in the Constitution. The classic formula is still the best; namely, by vote of the House or Houses of Parliament for proved unfitness for judicial office or incapacity. However, in some countries, it is felt by the Parliaments and Executives that Parliament has no effective mechanism available to it to determine in a particular case the unfitness or incapacity of a judge. The measure is adopted of interposing some agency, independent of the Parliament and the Executive (a judicial commission), to act, either of its own motion or upon complaint being made, by examining the relevant material; hearing witnesses, including the judge; acting fairly and reporting to Parliament. It is then for Parliament to act as it wishes. Great care must be exercised in defining by statute the qualifications of members of such a commission and its powers.

THE REMUNERATION OF JUDGES

- The mechanism for determining the remuneration of judges should be independent of the Executive. My own country (Australia) has a reasonably effective mechanism; namely, the Parliament (federal or state, as the case may be) has enacted legislation to establish a remuneration tribunal, the members of which are appointed by the Executive, who must have certain prescribed qualifications and who are required to report on a periodic basis to the Parliament and recommend increases or decreases in levels of remuneration to the Judiciary. Once the report is tabled in Parliament, it becomes law of its own force, provided it lies on the table of the Houses of Parliament for a fixed number of days during Parliamentary sittings and is not disallowed by the Parliament, which intervenes only occasionally. When I use the expression “remuneration”, I include pensions payable upon retirement, and other benefits. As pointed out by Mr I. F. I. Shihata in his work “Judicial Reform in Developing Countries and the Role of the World Bank” at 376, post retirement pensions “provide judges with the insurance needed for the carrying-out of their function without the fear associated with an early or abrupt retirement without a secure income.”⁷ This raises an interesting question in countries which, by their constitutions, provide that the remuneration of judges shall not be diminished during their tenure of office. Does the protection extend to retirement pensions and other benefits of office?

PERSONAL SECURITY OF JUDGES

- This is an important element in preserving judicial independence. In some countries judges are not protected from actual threats of death or physical violence, especially from organized crime. It seriously undermines the capacity of judges to perform their duties conscientiously when the security of themselves and their families is a matter of personal anguish. Governments must provide adequate resources to ensure the protection of the judges.

THE ADMINISTRATION OF THE COURTS

- It is only in comparatively recent times that some courts have been given control over their own budgets, with power to prepare and submit them to Parliament and expend the monies authorized by Parliament. Traditionally, courts have depended on the Executive arm of government for budget allocation and authorized expenditure. The most advanced country in this respect is the USA. The Judicial Conference of the USA came into existence in 1922. The Administrative Office of the United States Courts and the Circuit Judicial Council trace their origins to 1939 when the Judicial Branch achieved budgetary and administrative independence from the US Department of Justice.

ACCOUNTABILITY OF JUDGES

- There is constant reference today to the need for judges to be accountable. It is said that judges have greater security of tenure than most people, yet are the least accountable. I disagree. In my opinion, judges are more accountable than most holders of public office. Everything they do is open to public scrutiny. They sit in court, hear cases, and deliver oral or written judgments – all in public. Unsuccessful litigants may appeal from judgments which are not to their liking, frequently within a two (sometimes a three) tier appellate structure. Their judgments are poured over, dissected and scrutinized in minute detail.
- If judges are proved to be unfit for office, they are liable to removal. The removal process should not be invoked lightly. In particular, it should not be invoked because the community or some section of it regards a decision as unpopular. The appellate process should take care of this. In the United States during the 1980's, there were considerable numbers of attempts proposing constitutional amendments to contest judicial tenure. Very little came of them.
- There should be an appropriate judicial disciplinary mechanism and a system for handling complaints against judges to safeguard both the judges from undue interference with their independence, and the public from abuse of their right to a free, prompt and efficient hearing of their cases.
- There is a growing body of opinion that there should be canons of judicial conduct enunciated either by the Parliament or by the judges themselves to ensure that judges remain free from improper influences, handle their cases expeditiously and efficiently, are fair and impartial to litigants, and that they keep abreast of current developments in the law. There can be benefit in these published codes of judicial behavior, subject to the qualification that they are sometimes an exercise in public relations rather than of substance. Fine judges do not need them and poor judges (mercifully few, one hopes) may not heed them.