

# INSOLVENCY REVIEW

## *Journal of the International Association of Insolvency Practitioners*

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Special Conference Issue  
Colloquium on Cross-Border Insolvency  
Vienna, 17-19 April 1994

Editorial <i>Ian F Fletcher</i>	2
Foreword <i>Stephen Adamson, President of INSOL</i>	4
Welcome and Introduction <i>Gerold Herrmann and Stephen Adamson</i>	5
Session I: The Needs	
A Perspective from an International Bank Lawyer <i>Professor Mario Giovanoli</i>	8
A Perspective from a US Judge <i>Hon Tina Brozman</i>	13
A Perspective from a UK Insolvency Practitioner <i>Neil Cooper</i>	23
Session II: What has been Done and What is Proposed	
Australia/Lawasia <i>Ron Harmer</i>	28
United States of America <i>Daniel Glosband</i>	33
Canada <i>Bruce Leonard</i>	40
The European Union <i>Manfred Balz</i>	45
Sweden <i>Professor Michael Bogdan</i>	54
Argentina <i>Professor Juan Dobson</i>	58
Session III: Open Forum	
Open Forum and Discussion by Evaluators	
UK Evaluator <i>Lord Justice Hoffmann</i>	74
US Evaluator <i>Professor Carl Felsenfeld</i>	79
Canadian Evaluator <i>Gordon Marantz QC</i>	81
French Evaluator <i>Jean-Luc Vallens</i>	85
Summation by Colloquium Moderator <i>Richard Gitlin</i>	87

# Editorial

This special Conference Issue of the Review contains the edited proceedings of the Colloquium on Cross-Border Insolvency, held in Vienna from 17 to 19 April 1994. The Colloquium was jointly organised and sponsored by INSOL International (The International Association of Insolvency Practitioners) and by UNCITRAL (The United Nations Commission on International Trade Law). The objects of the latter organisation, which was established in 1968, are “to further the progressive harmonisation of the law of international trade”. In furtherance of this goal, a number of important international conventions have already been elaborated and have entered into force between many of the world’s leading trading nations, including the 1980 Vienna Convention on Contracts for the International Sale of Goods. The fact that this highly respected and influential organisation has resolved to consider undertaking work on international aspects of insolvency is undoubtedly the most auspicious development of modern times in the quest for the “Holy Grail” of a genuinely *international* (as opposed to merely a regional), yet at the same time *practical* and *workable* convention.

It is a welcome, and equally propitious, initiative that in commencing to address some of the most intractable problems of international commerce – namely the complexities of cross-border insolvencies – UNCITRAL has adopted the approach of working in close collaboration with the body which is uniquely placed to represent the collective experience of the worldwide fraternity of insolvency practitioners, namely INSOL International. The blending of the skills and accumulated wisdom of the latter body with the authority and implementational capabilities of the former offers perhaps the best possible conditions for securing the elusive prize about which so much has been written, but so little accomplished in concrete terms, over the centuries.

The unqualified success of the Colloquium itself was attributable in large measure to the astute and sensitive guidance of the overall course of proceedings by the Moderator, Richard Gitlin, a Past President of INSOL International. Summing up the accomplishments of the working sessions, and assessing their ultimate significance, Mr Gitlin said: “With the support and participation of UNCITRAL, and particularly its Secretary, Gerold Herrmann, we have set a course that provides the opportunity for practical and tangible improvement to the legal framework for multi-national insolvencies and reconstructions”.

Thus the Vienna Colloquium of 1994 may well prove to have been a watershed in the developmental process of international insolvency, and as such the documentation of its plenary proceedings constitutes an important historical record. The positive and purposeful spirit of the assembled participants – representative of a wide cross-section of jurisdictions, and including lawyers, chartered accountants, bankers, judges, regulators and academics – is one of the consistent features of the proceedings, and has resulted in a clearly expressed resolve to carry the work forward through further rounds of meetings and conferences, focusing very much upon the art of the possible in a world where the laws of debt, credit, security and insolvency retain at the national level a formidable range of conflicting positions which cannot all be completely reconciled with one another within the medium-term future, if indeed ever. Nevertheless, a great deal undoubtedly can be done via suitably-framed enabling legislation to allow international co-operation to take place between courts, and even between office-holders in cases where the essential willingness exists to serve the ends of justice and fairness, and to maximise value to creditors by reducing wasteful duplication of

effort and by avoiding equally wasteful litigation over such assets as there are. With this objective in mind, a further, joint conference has been organised by UNCITRAL and INSOL to be held in Toronto in March 1995. Part of the purpose of this special Issue of the Review is to provide those participating in the Toronto conference with a convenient source of reference to the fruits of the Vienna Colloquium, derived from the transcript of the live proceedings. In turn, it is hoped that the Toronto proceedings will yield further material of archival value, which can in due course be published in a subsequent Issue. Given the importance of the initiative now under way, the wider dissemination of the themes and issues within the current debate about a possible international convention on cross-border judicial co-operation is clearly desirable. This is an appropriate task to be undertaken by the INSOL International Insolvency Review, and it is one with which we are proud and honoured to be associated.

*Ian F Fletcher*

# Foreword

The joint initiative of UNCITRAL and INSOL International in holding the colloquium in Vienna was one of many with which INSOL is currently involved.

The mission statement of INSOL is “to take the leadership role in international insolvency issues and policies, and also to facilitate an exchange of information and ideas among member professionals and other constituencies affected by the insolvency process. To these ends, the Federation will encourage greater international co-operation and communication”.

The colloquium was attended by 29 governments, members of the judiciary, regulators, academics and lenders together with representatives of INSOL member bodies. The extraordinarily high quality of the contributions made by delegates during the course of the colloquium is evidenced in this edition of the International Insolvency Review.

During the discussions in Vienna, past initiatives to achieve harmonisation on cross-border insolvency issues were reviewed and it was concluded that we should strive towards objectives which were achievable in the shorter term and to use them as building blocks towards harmonisation. Two possible joint initiatives were agreed. The first was to assist the judiciary who are faced with the problems of trying to reconcile differing judicial systems and it was agreed that they could be assisted by creating a forum for the judges to discuss these problems. Accordingly, a worldwide meeting of judges was proposed and this is being held in Toronto, Canada, on March 22 and 23. UNCITRAL and INSOL have invited governments to send representatives of their judiciary to this meeting.

The second initiative was to consider the problems that jurisdictions have in granting access and recognition to foreign applicants and it was agreed that recommendations should be prepared whereby governments would be able to select various alternatives by which access and recognition could be granted.

These joint initiatives were approved in New York in June at a meeting of the Commission of UNCITRAL.

We, at INSOL, are enormously encouraged by the enthusiasm of our colleagues from UNCITRAL to assist trading between nations by strengthening the ability of practitioners and the judiciary in their conduct of international insolvency procedures.

*Stephen Adamson,  
President, INSOL International*

# Welcome and Introduction

*Gerold Herrmann and Stephen Adamson  
Colloquium Moderator – Richard Gitlin*

**Richard Gitlin:** I have the privilege of serving as moderator for this conference but the two people who are the most important people are on my right and left who will provide the welcomes. Gerold Herrmann is Secretary of UNCITRAL, who very kindly agreed to co-sponsor this Colloquium and graciously made these facilities available.

**Gerold Herrmann [UNCITRAL]:** It is a great pleasure to welcome you to this Colloquium. The mandate for UNCITRAL is to try to reduce barriers, legal barriers, to international trade, which we can also translate into somewhat wider commercial activities, investments, the granting of credit and whatever is necessary in order to improve the economies and the exchange between different economies.

UNCITRAL also has the mandate of co-ordinating the activities of organisations working in areas of harmonisation and unification of trade law. Co-ordination does not mean that we tell Organisation A to stop something and Organisation B to do it. That is not the idea. But a first and necessary requirement is to have information about what is going on at these various organisations, governmental, and also non-governmental, and that is why we have a particular interest in this Colloquium and are happy to co-sponsor it.

Within the UNCITRAL Secretariat there has, up to now, been no expertise whatsoever on cross-border insolvency. The UNCITRAL interest in this event, is to get as much information as possible on what would be feasible. Is it worthwhile exploring in one direction or the other the possibility of unification or harmonisation of law? We would not necessarily be unhappy even if this Colloquium came to the conclusion that there is nothing to be done at a statutory level to prepare uniform rules, whether by statute, or model, or something else. I want to make it very clear from the UNCITRAL point of view that we did not co-organise this or co-sponsor this with a certain result already in mind, but simply to gather knowledge. That is why we have invited so many expert speakers who, based on their experience either in a national context, or in a number of cases in an international context, can tell us where we hit the wall, where we reach the area where it does not seem to be acceptable to governments – those who finally have to decide whether there should be law reform – that they should do something. As UNCITRAL we can bring to this partnership or marriage at least some experience, not in the area of cross-border insolvency, but as far as the means of communication are concerned. We have a fairly good track record of texts that have been elaborated by UNCITRAL in other parts of the law in the area of commercial law.

As far as possible instruments are concerned, I should like to give some advice right at the beginning. When I talk about vehicles or forms of unification I am not discussing something very innovative. Whatever has been said before, and also in the area of cross-border insolvency, there are only a limited number of forms or vehicles available that could be considered: perhaps a multilateral convention or treaty as some call it, maybe a model bilateral treaty which would then be chosen in bilateral relationships, a model law which does not go

through the process of a treaty or a convention but which like any good model is attractive by itself, by its contents, by its appearance. There may be something else to be done below the statutory level, maybe a practice manual on how to address certain questions in an individual arrangement, and so on.

The advice I should like to give is to invite speakers to take the following into account. I would suggest that you do not look at these vehicles or forms of possible unification in isolation or in any exclusive way. It is really a secondary problem. The first is the substantive area and let us try to find the areas where something can possibly be done. Probably no one in the room would suggest that it would be acceptable and feasible to draw up a model insolvency code within the next two years and recommend it to every country in the world in the hope that within five years all, or most countries, will have identical insolvency laws. That would not necessarily rule out consideration of a more comprehensive approach, may be in certain countries, such as those where there is a void or those countries that would be in need of what I would call “legal development aid”, where there is currently no infrastructure. Obviously even there I cannot imagine that they would have one final, very clear, precise insolvency code text, but something more like a road map to draw the attention of the legislators to the policy decisions which have to be taken: I do not need, in this group of experts, to say what the basic policy choices are. It would be more of a guide to a law, or a law with several possible options, policy options, perhaps leaning more towards liquidation, or reorganisation, or pro-debtor, or pro-creditor, or the many more subtle approaches that appear when one gets into the priorities and what those priorities should be.

As a further possibility, it may be desirable to facilitate the removal of restrictions on co-operation. There have been examples but they have been hampered by limits in national law in terms of recognising each others’ orders, or even limiting the possibility for two administrators (or whatever the persons who are in charge of separate proceedings are called) to work out the best solution in terms of the case in question. Maybe one could envisage some provisions which could be included in a model law or in a treaty in order to enable such work-outs or such arrangements to take place at a lower level.

The main point should be the substance: what are the areas, what are the subject matters, the issues, where we believe that it would be worthwhile devoting financial and human resources? We should also consider whether more can be done in the area of substantive law to get close to the idea of a full administration or unitary administration of a given insolvency; whether it is feasible at all to think of the approach as *compétence directe* or whether we have to be satisfied, as we have read, with a *compétence indirecte* approach to deal with a situation of concurring jurisdictions, parallel proceedings, maybe only ancillary proceedings, to assist in the foreign other proceedings. Should it then be limited to certain countries by way of a specific list, or is it acceptable to do it in an unlimited fashion? Is there some necessity of doing it maybe by way of membership of a treaty which involves some kind of reciprocity, although maybe not in the technical sense? Or do we have to be satisfied, if anything can be done at all, with even more limited steps to enable judicial co-operation?

One thing that should also be mentioned is that we should be realistic in two respects, not only asking the practitioners where the problems are and where they feel help could be rendered, but we have also to be realistic about what would eventually be acceptable to governments, or to legislators, or to judges and the people who will finally decide (which differs somewhat from country to country), what could help us to achieve the common objective of trying to get a

higher degree of equal treatment of creditors, or a more efficient administration of cases, and maybe a greater predictability and finality of the results?

**Stephen Adamson [President, INSOL International]:** On behalf of INSOL I would like to welcome you to this Colloquium.

INSOL was formed in 1982 when, as a result of an accident – that is one way of describing it – we discovered that it was extremely important to get people into one room to talk to each other. At that time we had what we would now regard as a very limited number of countries represented. Today we have 29 countries represented in this room and representation from several disciplines. We have the judges, the lenders, the regulators, the practitioners, and governments.

We are grateful to UNCITRAL for co-hosting this event. We regard it as a very important milestone in the life of INSOL.

## **Session 1: The Needs**

### **A Perspective from an International Bank Lawyer**

*Professor Mario Giovanoli\**

#### **Introduction**

Everybody is very happy to join the party, to have drinks and a buffet meal and so on; it is much more difficult to find volunteers to clean up the mess afterwards. Maybe this psychological truth is to some extent at the root of the disappointment we feel when looking at the record of harmonisation of international insolvency law. We know all the effort that has been expended in the EC, by the Council of Europe, and by many others, and despite that this topic is a cause of continuing frustration for lawyers. What possible explanation is there? Is there no real need, are there no real prospects, is there no real will to do something? If I can make another comparison, it is like asking for credit in Parliament to modernise prisons; everybody knows that they are needed, but nobody will admit that there is a prospect that some day it is they who might be there. Nobody wants to take the credit, nobody likes to feel like a future casualty. This may be part of the reason for the reluctance to do something about the harmonisation of international insolvency law.

I am not an international banker, I am a bank lawyer. I am one of those guys who bears the bad news to the bankers, who is considered by them in the same category as the customs officer to whom as little as possible is shown in order not to risk spoiling the business: and afterwards he is asked for a blessing because someone has a bad conscience about not having shown him anything.

The perspective of banking law is interesting on three counts. First, there are close links between banks and insolvency. Credit and insolvency are linked: there is no insolvency without credit. The second reason is that the experience gained by the incorporation of international supervisory authorities in the field of banking might be a possible approach to international insolvency law. In this context I shall focus on the example of the BCCI, the reaction of the international supervisory authorities and their co-operation, and the problems linked with this international, famous and complicated bank insolvency. Finally I shall show what results (I think, quite spectacular results) have been obtained on a very specific and interesting point. I am speaking of netting, where within a period of five years it was possible to introduce into some of the major legislations specific provisions in order to ensure enforceability of netting provisions. On these three counts the experience of international banking law may be valuable for international insolvency.

#### **The links with banking law**

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\* Professor Mario Giovanoli is the legal adviser and a manager for the Bank of International Settlements, Switzerland. He is also a Member of the Committee on International Monetary Law of the International Law Association.

First, the links between banking law and insolvency law. In banking we too note the phenomenon of globalisation. To a large extent the international financial markets have merged. We also note an increase in international bankruptcies in the field of banking. As examples I can cite Herstatt, Ambrosiano, the BCCI, and what is striking is that each case has brought about a boost in the co-operation of the supervisory authorities. This has brought about a significant enhancement of co-operation and also the establishment of principles for international banking supervision which might at some stage prompt, rather than a full convention, the establishment of principles, general principles, for international insolvency. At the same time the efforts that have been made in this field have shown that supervision, which is in a sense the prevention of insolvency, at some stage reaches its limits: at some stage the supervisory authority has a duty to intervene to prevent further damage and has to close down a bank, either the main office or a branch somewhere, thereby prompting the insolvency or the closure of the bank where we see close links between the end of the supervision and the beginning of the clean-up of the insolvency procedure, the liquidation procedure. The two are, therefore, closely linked at some stage.

But maybe there are also differences between normal insolvencies or normal business on the one hand and bank insolvency on the other. It is a rule of the market that only the strong and the efficient should survive and natural selection should apply in the Darwinian style. For banks this is not totally true as there is a general consensus that banks need special protection, special prevention by prudential supervision, and some protection afterwards by deposit protection schemes and assistance to banks in difficulty in order to prevent their liquidation. What are the reasons? The expectation of the general public that they will not lose their money, general repercussions on the economy resulting from the closure of banks and the losses involved, and maybe the systemic risk of the domino effect, the chain reactions which might be prompted by the failure of a large bank and which is also at the root of the famous aphorism that is perhaps only partially true *de facto* and certainly not legally, “too big to fail”, which may be a very dangerous illusion.

This seems very different from insolvency in normal business. However there is an analogy. Any protection scheme bears some risk of moral hazard. If someone has the impression that they are protected this could lead to a diminution of care, to unnecessary risk taking. There is also a certain analogy in non-banking businesses. There is no prudential supervision, there are no deposit guarantees, but when a very big firm is in a difficult position there might be some support from the public authorities in order to save jobs, to fight unemployment, and there too there is a certain “too big to fail” effect which very often has served only to prolong the agony but not to save an inefficient business in the end. In both cases the moral hazard problem remains.

The third observation is interesting. Banks may become insolvent but they can also have insolvent customers. There we have a problem and a certain conflict of objectives between prudential concerns on the one hand and the idea of maintaining alive and restructuring firms for a longer period on the other. For prudential reasons quick liquidation is needed to recover the credits and to prevent one bank from having difficulties that could lead to difficulties in other parts of the financial system and so create a change effect. There is a need for a quick enforceability of collateral. On the one hand we need not put fresh money down the drain, but on the other hand we have a concern to maintain enterprises alive, which may be contradictory. There is a close link between international banking law on the one hand and international insolvency on the other.

## **The BCCI affair**

In this context I want to focus briefly on the BCCI case, which serves as an example of international bank insolvency, an example of international co-operation, and evidence of the limits of co-operation between prudential supervisory authorities. In July 1991, BCCI was quite a bomb in the financial world. The regulators in Britain had at last uncovered evidence of massive, widespread fraud. This insolvency affected 800,000 depositors around the world. Regulators seized more than \$20 billion in assets, making the failure one of the largest for an international bank to date. Losses are estimated to be as large as \$15 billion, or 75% of the bank's assets. BCCI was founded in 1972 by a Pakistani financier in Abu Dhabi and for a time Bank of America was an investor with a 25% share. The problem was that the effective business was conducted from London while the legal centre was Luxembourg, so neither of these two authorities felt they had the ultimate responsibility, for conflicting reasons. In the course of its expansion, BCCI established branches or agencies in 32, and at a later stage 62, different countries, so we can imagine the complexity of the issue. Since its inception, BCCI has been viewed with suspicion by the world financial community and that is why the customers were primarily small businesses and individuals who were not aware of this feature, and this made things much worse. For a long time BCCI was suspected of being involved in various criminal operations, but nobody had proof of BCCI's illegal activities. After 1988 a College of Regulators was created between the American, Luxembourg and British authorities, but this college failed to produce results, and it was only after BCCI's auditors had discovered irregularities that the Bank of England prompted Price Waterhouse to conduct an investigation which in June 1991 uncovered evidence of the massive fraud that led to BCCI's downfall. The problem was that the very complex structure of BCCI prevented efficient supervision. It also prevented an easy liquidation.

What are the lessons to be learned from this experience and from earlier experiences like Herstatt and Ambrosiano. The Herstatt failure prompted the establishment of the so-called Basel Concordat, when bank supervisors gathered for the first time and decided how to allocate responsibilities between home country and host country in the case of multi-branch banking. After the Ambrosiano case the document was enhanced by including the feature of consolidation of conglomerates. After BCCI's downfall the document was again improved with a view to ensuring that in the case of any international bank or banking group there would be one leading authority who would have the responsibility of supervising the bank as a group. I wonder whether some of these principles could not be applied with a view to finding a solution in international insolvency? Rather than aim at a fully fledged international convention where it would not be possible to try to allocate responsibility, I would prefer to allocate assets and liabilities on a gross basis which would then make the divergence between the single entity and the separate entity approach much less meaningful. Each country could then apply its own priorities internally. This might take away this unpredictability where in some countries the separate entity approach is applied while they are fishing for all the assets that might happen to be within that jurisdiction whether or not those assets are linked to liabilities in the same country, which creates a significant distortion amongst creditors in various countries.

## **Netting**

As a last example I shall turn to netting. The netting issue is a good example of how, with a very limited problem, quick success can be gained and a very far-reaching harmonisation achieved. Netting is not a single legal concept. Netting is the idea that when a party is in

bilateral relationships and conducts a number of bilateral transactions through appropriate devices, of which mechanisms that are based on set-off – acceleration – are closed out, they may succeed in having one net exposure rather than having a number of gross transactions with the risks, when these transactions are still pending, of cherry-picking, when the administrator of an estate may select which transactions he wants to perform and which he wants to repudiate. Netting applies not only to payments but to a number of contractual commitments in the fields of foreign exchange transactions, derivatives, swaps, options, forward operations, and this has brought about a number of master agreements to wrap up the various transactions into one general contractual framework. But, as the enforceability of such master agreements was not absolutely certain, netting also brought about concerns in the prudential field. Bank supervisory authorities were prepared to accept a net position as a basis for calculating capital requirements, provided only that they were sure that those net positions were legally binding and enforceable. This prompted a number of international studies. Some were conducted by a committee set up by the G10 central banks, especially in the field of payments, others by reports by the Basel Committee on Bank Supervision, and another approach was within the EC, now the European Union: each of these studies produced a number of reports on inter-bank netting. The result was a growing awareness of the risks involved and this prompted legislation in a number of countries.

As an example, in the United States the Financial Institutions Reform, Recovery and Enforcement Act 1989, was passed; in 1990 there were amendments to the Bankruptcy Code which were aimed at also ensuring the enforceability of netting for non-banking business; in 1991 the Federal Deposit Insurance Corporation Improvement Act, the FDICIA, tried to extend netting, and rather than have a product-specific approach tried a general global approach; in July 1993 amendments to the New York State banking law tried to settle the problem of branches of foreign banks. The United Kingdom introduced special provisions on netting in clearing houses in the Companies Act 1989. Belgium has the Law of 22 March 1993 for banks, a special provision on netting in banking law. France introduced the *Loi de 31 Décembre 1993* and also Article VIII in the old law of 1985 on the *marché à terme*, on forward operations, and in all these instances special provisions concerning the enforceability of netting. Germany still has only a draft, a draft Paragraph 118 in the New Insolvency Ordinance of 1991. In Switzerland a special netting provision is being introduced in the course of the revision of the insolvency laws.

While this is significant progress, it is not completely satisfactory. Some of these provisions only apply to specific products, others apply only to the financial sector, others apply generally, and still the problem of foreign branches is not covered. However, I wonder whether this could not be an example of progress on specific limited points. Netting is very important as it reduces credit exposure significantly, provided that it is legally enforceable. If it is not, then it just increases risks and illusions.

## **Summary**

Netting suggests that a certain success in harmonisation on specific points can be obtained. BCCI and the work of the Basel Committee suggests that the route of allocating responsibility (and this may mean allocating assets and liabilities on a gross basis) might prompt a certain success. In any case, harmonisation of international insolvency laws is very important as it is one of the conditions of the stability of financial systems and of the economy in general.

**Richard Gitlin:** The netting example is informative for our efforts here. I am somewhat familiar with what happened there. What happened was that the banking community put tremendous financial and political resources behind netting and when the banking community invest in lobbying and organisation, things happen. It is much more difficult for a group such as this without that particular commercial commitment to accomplish something similar. It is probably why it is so important that we have such a good representation of the financial community here, we do need the help and the political impact of the financial community to really get the message across of the significance of the provisions involving harmonisation.

We thought it appropriate in analysing the need for laws to ask a judge to speak to us who has had the experience of having to deal with multinational insolvencies with the law in its present state.

## A Perspective from a US Judge

*Hon Tina Brozman\**

I suppose I bring something of a different perspective to this topic because I am one of those people who is forced to act, notwithstanding that there is not a whole lot to guide me in dealing with these sorts of cases. Professor Giovanoli began his presentation about whether or not there is a need for any type of legislative response to cross-border insolvencies and I think I can attest, based on some of my experiences, to the fact that there is such a need and it is a growing need. I shall try to illustrate through some of my experiences just how I perceive it is that the need for legislation arises, but before I do that it might be appropriate to spend a couple of minutes exploring in what guises cross-border insolvencies can be presented for judicial determination.

### **Cross-border insolvency**

In a sense we use the term fairly loosely, but what we are really taking into account is a whole permutation, a range of permutations, of corporate structures. For example, there have been cases involving a single proceeding for one corporation which has assets in two or more nations; that is one type of cross-border insolvency. There have been cases involving a proceeding for one corporation, probably a parent corporation, which has a bunch of non-filing subsidiaries that are located in more than one jurisdiction. There can be two or more proceedings for a single corporation and there can be proceedings in multiple jurisdictions for related corporations.

To complicate matters further, all of the proceedings do not have to be of the same type. Full-scale bankruptcy cases can be liquidations or reorganisations, whereas ancillary proceedings are filed in aid of a primary case pending in another jurisdiction. There have been cases where there is a debtor in possession in one jurisdiction, such as in the United States or in Canada, and then in a companion proceeding there is no debtor in possession but instead there is a different type of court-appointed fiduciary. Trustees may be appointed by different courts; there is no clear demarcation at times over who has jurisdiction over which assets, and that can lead to fights for primacy among the fiduciaries appointed in the different jurisdictions. A situation can arise where all of the creditors are in one jurisdiction and all of the assets, or most of the assets, are in another jurisdiction, or assets and creditors can be spread around the globe.

We see from this list of examples that there is no one typical case which presents itself in the event of a cross-border insolvency, and as a result it would seem that any type of legislation that deals with this has to take into account the need for a great deal of flexibility in order to try to deal with these different types of situations. I do not think it is sensible to view cross-border insolvency only, for example, from the perspective of reorganisation or only from the perspective of liquidation, nor do I think it sensible to try to view it in terms of necessarily only a single proceeding. There can be a great need for ancillary relief as well.

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\* Judge Brozman is a Judge in the Bankruptcy Court in the Southern District of New York. Judge Brozman has probably heard more international cases and more major cases than any other judge in the system. She has heard the Maxwell Communications case, the Hooker case, and has had to interpret and utilise section 34 of the US Bankruptcy Code with Aeromexico, the Headington case and others.

What is certain about the state of the law now, or the state of the shortcomings in the law, is that it is very difficult to predict in advance how any particular cross-border insolvency will play out. Jurisdictional challenges can be brought to petitions when they are filed in a particular jurisdiction. There can also be challenges brought not to the proceeding as a whole but to discrete disputes that are brought within the proceeding, disputes as to conflicts of law and whether or not a court has power or does not have power to act in any particular kind of proceeding where the parties are not all from the same nation.

There is only one certainty today in the area of international insolvency, and that is that the proceedings will be unreasonably expensive and that there will be some cumbersome aspects to trying to administer the cases pending in one or more jurisdictions where there are contacts with more than one nation. It seems to me, although I am not an economist, that what naturally flows from that state of affairs is a negative effect on the international lending community and probably a restriction of credit. I am aware of the fact that successful transnational reorganisations or arrangements do not have the effect of appreciably increasing the public fisc of nations and they do not really avert hostile relations between nations either, except in a commercial context. But if they are properly administered and there are laws that allow their proper administration they can save ongoing enterprises and jobs, and if they are properly managed they can return to creditors the maximum realisable from the assets of the enterprise which finds itself insolvent.

I have given a great deal of thought to what ought to be the objective of international insolvency legislation. It is probably a lot easier to state the objective than it is to figure out how to get there, but it is important not to lose sight of what that objective ought to be. It seems to me that the need is for legislation which permits asset enhancement. We have to remember that the basis for insolvency legislation anywhere in the world is to save enterprises where possible, and where that is not possible to return assets to creditors and to do that in such a manner as to return to them the maximum that is possible through an orderly liquidation of the enterprise. What you do not want to have out of the legislation is laws that act as a hindrance to the business objectives of insolvency, and that I think is really prime. I have certainly been faced with situations where the law, unless it is bent in a certain manner, can act as that hindrance and I think that is unfortunate. It seems to me that cross-border insolvencies ought not to be a battle of nations or a battle of nations' professionals, but instead a co-operative effort to return value to creditors.

### **The Maxwell case**

It might be appropriate to spend a few minutes discussing the *Maxwell* case which I am sure some of you are familiar with, but others of you not. *Maxwell* is probably the most notorious of the international insolvency cases that I was involved in. *Maxwell* is an English corporation, about 80% of whose assets were located in the United States; the creditors, however, were not located in the United States, most of them were located in England. The debtor filed a Chapter 11 petition in my court with the aim of trying to reorganise in the American style, that is with management being retained in place. There was a perception that this might move the company away from the possibility of immediate liquidation.

Following the filing of the Chapter 11 petition, as British law required, the directors filed a petition for Administration in the United Kingdom. The debtor anticipated, I think wrongly, that I would allow it to wage war in essence on the British proceedings and urged me, in order to do that, to appoint a so-called responsible officer who would effectively displace the board

of directors and possibly also displace or trump the administrators who would be appointed under British law. I declined to do that. Instead I appointed Richard Gitlin as an examiner with much more limited powers: an examiner under US law has a variety of functions, they can be investigatory, or they can try to foster a reorganisation, but the examiner does not act as a trustee and does not displace the debtor. I appointed Richard Gitlin to attempt to harmonise the proceedings and avoid the jurisdictional battle which it seemed to me was pretty likely to take place. I have to report that I viewed this somewhat as a gamble because I saw some pretty hostile orders emanating from the UK court. I suspected that the UK judge had been somewhat misled by the parties into distrusting what my motives were. The gamble for my part was that I thought that I would try to go down the route of co-operative effort, recognising that this could backfire and turn instead into a jurisdictional battle, which was exactly the opposite of what I was trying to achieve. However, my prior experience in international insolvency, particularly in section 304, had underscored for me that foreign courts will often attempt to work with one another if they are given half a chance to do so, so I thought following that route might be the most productive way of proceeding. I risked that if I was wrong then I was probably making the mistake of my career by doing this, but from the moment that I appointed the examiner on I would say that the credit for the success which was achieved in *Maxwell* belongs to the examiner and joint administrators and I really had very little to do with it from that point.

The examiner and the joint administrators were faced with a complete absence of law and had to deal with two primary proceedings pending in two different jurisdictions, both with the same corporation, but they understood too that there could be a jurisdictional battle and that if there were one the likely effect would be to affect negatively the business and to diminish the value ultimately which could be realised for all of the creditors, and to diminish the possibilities of reorganising if that were possible. So what did they do? They decided that rather than concentrating on the laws initially, the better approach would be to concentrate on the business and let the legal problems flow, or the legal solutions flow from the business solutions. I think that really that has to be the approach in all of these sorts of cases so one does not lose sight of what I talked about as being the underlying purpose of insolvency laws.

What they did was to negotiate what I guess we could call a mini-treaty but what they called a protocol to try to deal with the two cases. The protocol was presented to the then Mr Justice Hoffmann for his approval and to me for mine, and what it did was to cede effectively jurisdiction in certain areas to one or the other of the courts, and then in some instances to preserve dual jurisdiction. In very important matters, such as approving major decisions on disposition of assets or approving a scheme of arrangement or a plan of reorganisation, the jurisdiction was dual. In the areas of fees we divided up jurisdiction and the English court dealt with the English professionals and I dealt with the US professionals, and not necessarily on the basis of who appointed professionals in either jurisdiction but rather based on where they were located.

The protocol provided that it was an interim document that was subject to rescission by either side if it did not work out, but as it so happened it worked out very well and we never needed to tamper with it in any major way as the case played its way through. As a result of that protocol which set the tone for the proceedings, the two courts were very careful not to impinge on one another's jurisdiction and prerogatives, declining, for example, to issue any injunctions which would have the effect of purporting to hamper what the other court could do. As a result of the decision to mesh the two proceedings so as to preserve asset values, the joint administrators and the examiners did something very remarkable. They not only succeeded in

harmonising the laws of two different jurisdictions whose systems are not by any means identical, but they achieved a relatively expeditious reorganisation in what was a pretty massive case in anybody's lexicon and they did this in 16 months, which for a case the size of *Maxwell* in the billions of dollars range was a very very short time.

Nonetheless I am not here to advocate the *Maxwell* approach. I do not think that that ought to be pointed to as the best method for managing cross-border insolvencies. The reason for that is that the procedure was cumbersome, it had to go to two courts for all major actions and it was terribly expensive to deal with, not only because of the dual approvals, which were expensive, but more importantly because of dual sets of professionals. The joint administrators had UK counsel and they had US counsel; the examiner had US counsel and he had UK counsel. There was a committee of creditors, which in the US was an unofficial committee of creditors and then the same people sat as an official committee of creditors under UK law, and they too had US counsel and UK counsel. In addition there were financial advisers retained by the joint administrators and by the examiner. I would not say that that is the best possible method of administering that kind of case, although it did work in the absence of laws telling us a different way to deal with the problem, but I think that the best description perhaps that I have seen of what occurred in *Maxwell* is one commentator's description of it as a shotgun marriage.

I am very fortunate to have developed a special relationship with Lord Justice Hoffmann as a result of the case which fostered what I would say was a very favourable outcome, but it is not a certainty that that can be achieved in any one of these cases absent appropriate legislation. If the judges who are involved, or the professionals appointed by the judges who are involved, are not like-minded, you can have a very difficult road trying to administer such a case.

### **Olympia & York**

A good example of a case which in some respects was similar to *Maxwell* but was much rockier is *Olympia & York*. *Olympia & York* involved a dual filing for a single corporation in Canada and in the United States and it followed on the heels of the *Maxwell* case. What occurred there was that the bankruptcy professional who had been charged with running the *Olympia & York* estate for the Canadian parent company had been making some noises about interfering with management decisions in the US regarding dispositions or workouts of the real property owned by *Olympia & York* in the United States. The result of that was that the banks, who were the major creditors of *Olympia & York* in the United States, began to get cold feet because they felt that there was uncertainty regarding management's longevity and regarding management's authority to negotiate with them. As a result they threatened to seek relief from the automatic stay and seize their collateral, their real estate, which would have had the effect, certainly, of depressing the value that could be achieved for the creditors as a whole. This was potentially a very dangerous situation from the perspective of reorganisation. It was not my case, it was a case belonging to one of my colleagues in the Southern District of New York. He too appointed an examiner for a slightly different purpose, and it was a very imaginative use of an examiner. He appointed Cyrus Vance, who is familiar to many of us from his efforts in Bosnia to try to negotiate a treaty there, to come up with a protocol for corporate governance issues, and Mr Vance was far more successful in *Olympia & York* than he was, unfortunately, in Bosnia. He allowed the assets to be administered in an orderly fashion without any seizure by the banks, but, unlike *Maxwell*, the tensions in *Olympia & York* cropped up not at the beginning of the case but well into the proceedings when there really could have been a very negative effect on what occurred both in Canada and in the United States.

We cannot ignore the commercial importance of these transnational cases; *Olympia & York* is probably a very good case in point. *Olympia & York* was the single largest owner of real estate in New York City, and those who know anything about how New York City operates know that its real estate is really the lifeblood of the city, and so this had a tremendous impact on commercial endeavours in New York and on the large banks located in that city.

### **L J Hooker**

*L J Hooker* is another one of my cases which also was of tremendous commercial importance. Hooker was the US parent of a conglomerate which was headquartered in Australia, so there was ultimately an Australian corporate parent which was undergoing proceedings in that country. There were similar corporate governance flare-ups to *Olympia & York*, the difference being that there were different corporations rather than the same corporation in proceedings. The US company owned five national department store chains. In addition it was a major builder of housing in the United States and it was a major owner and builder of shopping malls across the United States, so this was a case of tremendous importance locally as well as in Australia. Maxwell, which had about 80% of its assets in the United States, owned some very significant companies there including the MacMillan Publishing Company, which was one of the best-known publishing houses in the United States. It also owned such companies as Nimbus Records overseas. So the impact of that filing was very significant as well.

I would suggest that we will see more and more of these large transnational cases. There has certainly been an increase in global business, and as the world shrinks it is a natural consequence that we see growing insolvencies with international overtones.

As I mentioned earlier, these transnational cases are not necessarily confined to two jurisdictions, some of them have tentacles reaching into numerous countries, such as, for example, *BCCI* and *Olympia & York*. About 20 years ago there was a case which was also illustrative of this, the dealing with Robert Vesco who was a financier who had funds in various countries. If I remember correctly there were insolvency proceedings in Canada, Luxembourg and in the Bahamas, which resulted in people flying all over the world trying to administer the cases.

There is a distinct problem from my perspective in leaving this area of the law to the ingenuity of those judges that happen to be involved, and that is that there is a high level of unpredictability for lenders, which leads to the tighter availability of money. In addition, absent laws setting a framework for the administration of transnational cases, there can be some difficulty, which is not insubstantial, in trying to set up a corporate structure which is consonant with the application of the insolvency laws of all the jurisdictions where the enterprise may have significant contacts. In those situations where the insolvency laws of one of the jurisdictions are not extra-territorial in nature or do not purport to be extra-territorial in nature (and Japan is an example of this), we have the possibility that creditors in one nation may fare much better than creditors of equal rank in another nation. This can occur not only with a single corporation but it can occur with multiple corporations where there is a central treasury function in one of them and the assets are transferred freely around the corporations as they are needed. What can happen is that because of the happenstance of the date of filing, creditors in one nation may wind up with a much greater share of the pie from the assets located in their country at that moment than creditors in another nation, even though, rightfully, some of those assets might not properly belong in that first nation. I think that is an unfortunate consequence.

Without legislation there can be a great deal of difficulty trying to reconcile the proceedings in two countries where one country looks to rehabilitate and a second country looks only to liquidate. For example, if a parent corporation seeks to reorganise under its own laws and it has subsidiaries (which are its assets) where its operating companies are located, and those subsidiaries are located in jurisdictions where the only alternative is liquidation, that may effectively pre-ordain a liquidation rather than a rehabilitation which might otherwise be possible. Closely related to this is the problem of foreign recognition of fiduciaries. In *Maxwell*, for example, I recognised as corporate management of the debtor the joint administrators who had been appointed by the UK court and I imbued them with fiduciary responsibilities under US law by considering them as the debtor in possession. In return the UK court recognised my examiner and granted standing to him in the UK proceedings. But if the situation had been slightly different and there had been a US debtor in possession who had sought recognition in the English court, I am not altogether certain that the debtor in possession would have been granted any relief in a UK court because the concept of the debtor in possession is really anathema to UK proceedings. I had a discussion along these lines with a UK judge who is a good friend of mine but we got into a rather heated discussion about it because he suggested to me that he would have been probably a lot less receptive to this type of dual proceeding had there been a debtor in possession.

From my perspective, when we look at the insolvency laws of nations we cannot focus on individual provisions of those insolvency laws. We have to try to look at the entire insolvency scheme as a fabric and see if what that scheme is trying to weave is a piece of cloth which will cover the insolvency proceeding in much the same manner that one's own does ultimately, even if the garment is fashioned in a different way from the way in which one would do it. But there are distinct differences in the insolvency laws of different nations which require some thought if we are trying to deal with legislation. For example, there are differences in priority schemes between nations and one has to decide, if there are multiple proceedings, whether to try to choose one priority scheme as being the one to follow, or whether to try to select or try to marry the priority schemes of different nations, granting priority as best one can to all of the types of groups who are granted priorities in the separate jurisdictions?

Other kinds of problems might be, for example, interest on claims: in some jurisdictions interest is granted to creditors in certain circumstances and in others not. In the United States, for example, normally unsecured creditors do not have interest on their claims which accrues post-petition unless ultimately the debtor turns out to be solvent; in the UK creditors are granted interest, so one has to try to decide how one might deal with different interest provisions. Other areas where there can be differences are in whether or not there is a discharge granted after the administration of a case: by discharge I mean a freedom from debt having gone through the proceedings – if the enterprise survives. Discharge provisions can be quite different from country to country. In the United States, if the corporate debtor is liquidating there is no discharge granted at all, only if there is a more traditional reorganisation is the debtor entitled to discharge. Other areas of difference can include, as a procedural matter, how to deal with claims. In the United States we have very firmly embedded in our law a provision that says that claims have to be filed by a particular date and if they are not filed by that date (we call it a bar date) then the creditor is foreclosed from participating in the reorganisation case. The United Kingdom has just as firmly embedded in its law the concept that creditors can keep catching up, and if they miss the first distribution of assets, and if there are assets left after that first distribution and they file a claim which would be considered late in the US, they can then

catch up before any of the creditors share in a second distribution. One has got to decide how to deal with that situation and how to marry those laws to one another if one chooses to do that.

Further, one has got to decide how to deal with secured creditors; the laws and jurisdictions can vary very widely on that: whether or not, for example, an automatic stay, which most countries observe in one manner or another when a bankruptcy is filed, will apply to the claims of secured creditors. In the United States the answer is yes, secured creditors are stayed from seizing their collateral and can only seize their collateral if they obtain relief from the stay from the judge. That is not the case in other countries where secured creditors are given much greater rights to proceed immediately to seize their collateral if they choose to do so, and the judge is powerless to stop it. That is another area where there has to be some thought given to how to deal with these cross-border insolvencies, particularly, which is not atypical in these kinds of cases, if there are cross-corporate guarantees among a group of corporations who have dealt with different jurisdictions. Should the secured creditors in the different countries all be treated alike, or should they be treated differently?

Another area which is related to that is how to deal with the automatic stay. What kinds of matters are to be stayed when a case is first filed? Does one hold everything, or are there exceptions for certain kinds of actions? For example, I can think of police actions, regulatory actions of jurisdictions. In some countries environmental laws are given exemptions from automatic stays, or the laws dealing with health, safety and welfare of the populace are given exemptions from the automatic stay. Do we allow that to be pursued in the face of the filing of a bankruptcy petition in one or more jurisdictions?

You can see from all these examples that I have given that there is room for a whole lot of confusion when we have cross-border insolvencies. The question then becomes what can we do to try to minimise that confusion to preserve enterprise value and jobs and encourage the availability of money for multinational conglomerates. The best answer to that question, which may be pretty unrealistic in these times, is model legislation which could be then enacted throughout the world, or better yet, a very widespread treaty. I am not altogether convinced that in my lifetime I shall see that happen. However, I do think that what is probably attainable is multilateral treaties, at least among heavy trading partners and among countries whose insolvency laws are fundamentally not incompatible. I say fundamentally not incompatible rather than on the face of it incompatible because I know from *Maxwell* that it is possible to reconcile the laws of different jurisdictions whose underlying aims are similar even though their method of getting there is different.

What would multilateral treaties do? I think that they would minimise that unpredictability which is so detrimental in the commercial context. I probably do not have to tell you that the barriers to international commerce are fast coming down. Western entrepreneurs are just rushing, we could even say willy nilly sometimes, into new markets like Eastern Europe, and now I read in the *Wall Street Journal* that the same sort of thing is occurring in Vietnam since the United States has resumed relations with that nation. We read regularly of takeovers of local concerns by foreign enterprises: investments are also cross-border now. Multinational corporate groups often grant cross-corporate guarantees which obligate the group to lenders in different jurisdictions. With the unification of Germany, the demise of the Soviet Union as we all knew it and the loosening of these new markets, and even such things as the recent enactment of NAFTA and the eventual return of Hong Kong to the Chinese, the possibilities of these kinds of cases arising is growing constantly. From my perspective this is the perfect

time as we are embarking on a new century to try to come up with a better blueprint for dealing with these kinds of cases as they grow in frequency and complexity.

In addition to multilateral treaties we might try to focus on another area, the need for legislation which would permit the judiciary to aid in active foreign proceedings. This kind of aid can take a variety of different forms. One of the forms might be something similar to what we have in the United States, what we call section 304 of the Bankruptcy Code. I will not spend my limited time talking about that because there is somebody here who will be spending time explaining and giving examples of how that works. What it does do is to put a lot of latitude into the hands of judges by prescribing factors which they have to take into account in trying to decide whether or not to aid a foreign proceeding, but letting them grant relief whenever they feel after reviewing all those factors that there is some relief which is warranted.

Another method of trying to deal with these concerns is section 426 of the Insolvency Act in Britain. That law, instead of being an open-ended kind of law like the US law, lays out a fairly limited number of jurisdictions to which the British courts can grant assistance fairly automatically. There is also a hybrid type of law like that which they have in Australia which combines in some senses the US version and the UK version. In Australia they have a law which prescribes certain nations to whom assistance will be granted, as the UK law does, but also prescribes some factors and permits the possibility of lending aid to other nations. Any one of these types of approaches is feasible, although I am not certain that they are all as desirable as one another.

I would be the first to say that section 304 is really not a panacea for all the ills which plague this area of international law, but it is flexible enough to allow the judiciary to lend considerable assistance to foreign proceedings. To give examples of what I have been able to do with the section, I have in many instances used it to vacate attachments which were obtained by US creditors, attachments under US law effectively granting creditors a priority over a debtor, and I have been able to enjoin those creditors from continuation of the US lawsuits: the effect of that is to coerce those creditors into participating in the foreign proceedings under the laws of the foreign country. I have also used the section to grant fairly broad discovery rights to foreign liquidators and administrators who are searching for suspected assets in the United States or for information from persons who are resident in the United States. Indeed I granted injunctive relief, as well as discovery relief, to the joint administrators of Headington Investments which is related to Maxwell; Headington is a parent in the privately-owned Maxwell companies and Headington used section 304 fairly successfully in order to try to refocus back into Britain some of what was occurring with respect to the private side companies.

Another use of section 304 is to allow repatriation of assets, other than real property, to the foreign jurisdiction and I have frequently used section 304 to accomplish that purpose. I have also granted section 304 relief in situations where the foreign representatives are administering entities which themselves would be ineligible under US law for relief under our bankruptcy laws; the primary examples of that would be insurance companies, or reinsurance companies more typically, and banks. Those entities are not themselves eligible under US law for reorganisation. Although bank holding companies in the United States can file petitions, banking subsidiaries cannot, but section 304 is broad enough to allow me to aid those types of reorganisations or liquidations so long as the laws of the foreign jurisdiction permit those proceedings to occur in their own countries.

**Aeromexico**

Let us spend a few minutes talking about the *Aeromexico* case. *Aeromexico* is a particularly fine example of how ancillary bankruptcy legislation can operate. One of the factors which I have to look to under section 304 in deciding whether to grant relief is prejudice to US creditors in the processing of their claims. In Mexico, not only do all claims with their supporting documentation have to be filed in Spanish, which is not particularly surprising, but when a creditor files a proof of claim a notice is not sent to that creditor stating that the claim is disputed, instead there is something published which reflects that there is some disagreement with the claim. But the publication occurs in Mexico and the practical result of that is that in order to assure that one will share in the Mexican proceeding one has got to hire Mexican counsel to keep an eye open for what is occurring in the Mexican court.

In *Aeromexico*, because it was an airline, there were many many small creditors located in the United States, ticket holders, travel agents and the like, and many of them held very small claims relatively speaking. I was concerned that these creditors would be effectively foreclosed from participating in the proceeding because it would be unduly expensive for them to hire counsel and to have everything translated into Spanish in order to participate in that proceeding, but I also was desirous if I could of trying to solve that problem and be able to repatriate to Mexico the assets which were located in the United States. I decided that the best approach to this was to explain to the Mexican Bankruptcy Trustee just what my concerns were and see if we could come up with something creative to solve my problem and yet allow me to grant relief which the trustee was seeking. The trustee, to my delight, was quite receptive to what I was suggesting and took my ideas and ran with them, creating something which was a whole lot better than what I had envisioned myself. What came out of these discussions was that free translation of claims was provided to creditors holding claims worth \$5,000 or less and free counsel as well. But even more importantly, the trustee set up in New York a Claims Trust – and this was not limited to small creditors but was available to all creditors who held undisputed claims – which offered to purchase their claims for 70% of face value. In order to explain to the US creditors what this was all about I approved a very short form of disclosure document telling them why they would be getting a discount on face value and I encouraged them to participate in the programme and they all flocked to it. It worked out so well that at the end of the case, when everything had played through, the Mexican Bankruptcy Court, which had a small residue of funds left from administration which belonged to some US creditors that could not be located, brought those funds to New York, deposited them in our Treasury and said “See if you can find the creditors and then we are finished”.

I think that is a fine example of how these laws can work if they are properly enacted in the jurisdictions which are involved.

I want to end with the notion that there was a time when I thought that there was a great desirability for legislation to deal with both ancillary cases and primary cases. I am no longer of the opinion that there is a desirability for it; I think it is an absolute necessity if we are to avoid the judicial warfare which can stymie the efforts of dedicated professionals to try and save enterprises and return asset value to creditors.

## A Perspective from a UK Insolvency Practitioner

*Neil Cooper\**

A word of clarification. I am listed in the programme as an insolvency practitioner. I have been involved with things long enough to know that that description means different things in different countries. In the United Kingdom, what is most important is that that embraces corporate rescue, that is that our services are called upon by banks and companies in financial difficulties to help them resolve those financial difficulties. This is in addition to the common practice of trying to sell businesses as a going concern because that is better for creditors. Today the needs of many countries are nothing more complicated than embracing this area of financial rescue. Forgive me if I seem arrogant, but one of the first needs of many countries whose insolvency practices do not embrace the rescue culture as an intrinsic part of the laws of insolvency could be that they first need to achieve that essential balance. That is, the balance that determines whether the laws will get the respect that they deserve, the balance between the rights of the secured creditor, and maybe the minority creditors, with the rights of the company and its unskilled creditors to be rescued. Unless you achieve that balance you have got nothing. That is your first need.

It is not that I am reluctant to wind up businesses. There are dead ducks, lame ducks, and very important lame ducks – those ones that are too big to fail. Dead ducks, as we know, need burying as quickly as possible. We need to concentrate on the lame ducks that are capable of rehabilitation, that means a sustained recovery and not simply survival. That is good for employment, banking, the economy, for all of us. Survival of the fittest is not compatible with the modern caring society. The more systems become global, the more trade becomes international, the more our firms operate internationally, the more unnecessary it is for us to separate that part of the insolvency laws and practice which is specifically international from domestic law and practice. Many of our needs are just as true in terms of domestic law as they are internationally. International insolvency is clearly not only that area where insolvency courts of inherent jurisdiction have to relate to one another, it embraces a wide range of aspects of insolvency law and practice, most of which have domestic, as well as international implications.

This has not deterred me in putting together a list of my needs, and representatives matching their systems against my list of needs may say that their domestic laws already meet half of these. Fine! Let us concentrate on the gaps. I would like to concentrate on a number of problems that my colleagues and I have encountered in the world of cross-frontier insolvency and to identify the needs that flow from these. I know that these pull together quite a number of the needs that the two previous speakers have mentioned. I shall then attempt to show how these needs relate to the various players in the International Insolvency World, the director or the debtor or the troubled company, the secured creditors, the unsecured creditors, the courts and the insolvency practitioner. I shall only look at a few of the needs because lists are extremely tedious, and hopefully I can illustrate the type of problem we are coming across. It is not my brief to consider any of the solutions that have been offered so far, nor to offer any

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assessment of the relative merits of the different legal systems that are represented here today. Neither am I, with the greatest respect to the lawmakers and the judges present here today from England, holding out the English system as a model for others to follow. As a system it is capable of working superbly, particularly when dealing with Commonwealth countries, but all too often the courts are forced to find pragmatic solutions, possible only because of the seniority and experience of the judges handling the case. But even then there are limits to the discretion that they have and their ability to simplify the proceedings being used. And so let us consider just a few problems which may seem quite trivial but illustrate the actual problems that the insolvency practitioners come across.

### **Problem one**

An air travel business with substantial operations became insolvent overseas. It was fundamentally sound once the loss-making divisions were closed; it needed reorganisation. Reorganisation was possible in theory. We raised about £50 million from a new source, but then the preferential creditors in Germany effectively seized some very important assets to secure their preferential claims. The priority of these preferential claims exceeded the preferential claims of the other countries involved. The company ended up going into liquidation, nobody got anything, millions and millions of pounds were wasted, jobs lost and other businesses ruined. Solution? We need systems which facilitate the rescue and rehabilitation of viable businesses by providing a moratorium to prevent action by individual creditors. We need greater harmonisation and the ultimate reduction of priority claims. We need people to think beyond their own borders.

### **Problem two**

In the *Maxwell* case, where I am winding up the pension funds, thousands of pounds have been spent trying to trace assets overseas in the United States, Israel, France, Germany, Switzerland, Portugal, Liechtenstein, and probably others. In many cases the properly appointed representatives of the creditors have been unable to obtain information even from foreign banks, foreign institutions, or foreign professionals, to enable them to establish what the assets are, never mind recover them. We need treaties which provide for the recognition of duly appointed representatives and to facilitate the recovery of assets. We need to be able to oblige directors, bankers and others capable of assisting creditors' representatives to provide information that is required. We need a greater determination of the assets available to creditors.

### **Problem three**

An English company funded by English banks which was trading out of Los Angeles in motor cycle clothing. We needed another \$1 million to fund the purchases to keep the business going, but the security that had been granted by the company in the United Kingdom was not recognised in the United States and the delays of registering further security instruments almost brought the group down. We need laws which enable banks and other lenders to be certain what is charged to them; this encourages

them to lend funds, particularly when companies are in financial difficulties. We can achieve this in part by certainty as to applicable laws.

### **Problem four**

*East African Airways*, 1977 was my introduction to international insolvency. The company had assets in 26 countries. Desperately simple, I thought. All you do is arrive out there with your international directory, get on the phone to everyone, and before long you have got one global insolvency. It does not work like that, does it? Ultimately we arranged a pooling between the Kenyan and the English liquidations but there were also liquidations in other countries where the liquidators were either unwilling or unable to join in with our pooling arrangements. The creditors were able to participate in some of these by multiple proof, but this tended to benefit the commercial creditors, the big creditors, at the expense of the many thousands of employees and ticket creditors. This sounds similar to Judge Brozman's case earlier but here these people lost out. Dividends were paid after our pooling and we did not have the opportunity to take them into account in the pooled liquidation. We need simple procedures which enable liquidators to prove on behalf of creditors in other proceedings, to avoid the necessity for multiple proofs, to enable creditors to prove simply in their own language with a minimum of formality. We need a simplification of procedures for pooling liquidations and reorganisations.

#### **Problem four – costs**

Clearly no insolvency practitioner could be expected to admit that any case in which he had been involved had cost any more than it need have done, especially when fees have been the subject of such press speculation and attention as mine have been on the Maxwell affair. I would point out that I am also, on behalf of the pensioners, one of the largest creditors of both Maxwell and Headington, so there are people here with a conflict of interest, maybe. But there is not a shadow of doubt that in many cases the complexity of the proceedings has added enormously to the costs.

#### **Problem five**

In the *Asil Nadir* case, this is the man who owes creditors more than £500 million and is charged with fraud in the United Kingdom. The British bankruptcy is not recognised in Turkey where there are assets. It was necessary for me to get court orders obliging Asil Nadir to give me powers of attorney in Turkish to enable me to deal with his assets in that part of the world. The provision of these powers of attorney involved the Turkish Ambassador, notaries public and numerous other luminaries and the cost was not inconsiderable. No one will be surprised to hear that when Nadir jumped bail and fled from England, the first thing he did was to revoke the powers of attorney. The whole process was ineffective. We need simple systems whereby nations recognise each other's court orders to reduce the cost to creditors, to stop debtors interfering with assets overseas by the recognition of the insolvency proceedings.

## **Problem six**

In the *Carrian* liquidation the petitioning creditor was owed about \$200 million, if I remember rightly. One very small aspect of it, it was necessary to go down to Singapore to collect a diamond, the Star of Asia, 50 carats or \$35 millions worth. Having located the asset I was told that to remove it from Singapore lawfully I would need an Order in Aid which would take at least 14 days to obtain as the local creditors would need to be given notice. At that time there was a certain friendly rivalry developing for the ownership of this diamond and the case had already cost three lives and I was not sure that I would be able to hold on to it for a fortnight while we had the court case. So I was left with no practical alternative but to smuggle effectively the asset out of the country and I was singularly unamused to get back to Hong Kong to find that because it was a bank holiday in England, the asset was not even insured. The solution? We need legal systems that act speedily and are available literally around the clock: corporate failure and the race for assets is no respecter of normal court opening hours. We need timely, dependable co-operation between the courts of the sort that we have seen uniquely, I have to say, on *Maxwell*.

## **The needs**

These problems illustrate some of the needs. Lists are tedious and we want to get on. Whose needs are they? There are various players on the insolvency scene and there is no doubt that their needs differ. Principal concerns will vary from case to case. The purpose of this exercise is far from academic. It is to highlight those needs which I suspect are most widely felt: a rapid consideration of the legal reforms introduced by some countries seems to fall a long way short of the needs of the majority of the interested parties. Indeed, in some cases it is difficult to see what purpose they truly serve other than bureaucratic satisfaction.

I have identified what I suspect are the 12 most important needs and these are worthy of some attention:

- systems which facilitate rehabilitation;
- protection of the debtor's assets world wide by enforceable moratorium;
- systems which encourage refinancing by certainty as to applicable law;
- a greater determination of the assets available, including access to information;
- to stop the debtor interfering with assets overseas by recognition of foreign proceedings;
- assurance that security is recognised and a consistent approach to all security claims;
- ultimately to rationalise and reduce the extent of preferential claims;
- to enable creditors to participate in foreign proceedings with the minimum of formality;
- greater simplicity and speed of proceedings;
- simplification for pooling liquidations;
- a reduction in the duplication of effort caused by multiple proceedings;
- the ability to examine directors, creditors and others located outside the jurisdiction.

I make no apology for the fact that some of these may be addressed within your domestic bankruptcy laws without any cross-frontier or multinational intention. What matters is that laws embodying these features are available not only to your own practitioners but to practitioners from other jurisdictions. It is more than an academic exercise.

We must consider the solutions that we are offered against the needs that are identified. To the extent that our existing or proposed laws do not offer the solutions, we must ask why that cannot be. As a professional I get no satisfaction out of winding up companies that could have been saved or getting involved in long tortuous proceedings made so only by the complexity of the procedures under which we are obliged to work.

There are many other issues which have to be resolved before we can seriously reduce the number of company failures. We need better management of companies, better information systems, more funds available. Resolving some of these will take a long time. There is no excuse, however, for some of the quite inadequate legal systems that we have to contend with.

These, I believe, are our principal needs.

## Session II: What has been Done and What is Proposed

### Australia/Lawasia

*Ron Harmer\**

#### Introduction

Why should we come all this way to a conference in Vienna? There are four reasons. When I was invited to attend I made it my business to find out precisely what UNCITRAL had done in this area because when I heard that UNCITRAL was supporting this conference I was, quite frankly, thrilled. I regarded it as being probably the most important breakthrough in the endeavour to bring about some part of the development of law in this area that we have witnessed. I was afforded copies of a number of the records of UNCITRAL, which I am sure are available to the public, and in particular that extract from the annual session in July 1993 where there was recorded a resolution to investigate "...the desirability and feasibility of harmonised rules of cross-border insolvencies" with particular consideration of "what aspects of cross-border insolvency lend themselves to harmonisation and what might be the most suitable vehicle for harmonisation". UNCITRAL, through its influence in international trade and commerce, is in a unique position to raise the level of awareness among nations of the problems and difficulties and to encourage the development and common application of basic attitudes towards recognition and assistance. I must say that without the support of a body such as this we will not get anywhere.

The second reason was that in 1990 a conference on cross-border insolvency, it was called a Colloquium and I believe that that name was borrowed for the purpose of this gathering, was held in Aberystwyth. A number of people that are here today were at that conference and it was a real learning journey. Professor Ian F Fletcher who convened the conference later wrote a report on it, which he delightfully termed "The Aberystwyth Papers".<sup>1</sup> In his report, in summary, he said that a study, a comparative study of insolvency regimes, demonstrates a range of procedures and contrasting approaches to the regulation of the problems of insolvency. He said that all systems operate a different stratification of creditors' claims, the effectiveness of the security interest varies from jurisdiction to jurisdiction, some systems are more debtor or creditor oriented than others, the treatment of Revenue and employee claims differ and attitudes to recognition of a foreign insolvency administration differ markedly. Anyone reading that would not be encouraged to enter the field of endeavouring to bring about something approaching a harmonisation regime, but in Australia we consider that notwithstanding the disparate nature of some features of insolvency regimes and the often very intense domestic protectionism that some of them feature, we are encouraged by a passage from a finding of the

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<sup>1</sup> This publication is available from the British Institute of International and Comparative Law, 17 Russell Square, London WC1B 5DR.

Association for European Studies in its 1988 study on “Security of Moveable Property and Receivables in Europe”. They concluded after looking at the diverse nature of that subject matter that even totally different legal systems tend to involve structures giving a rather similar end result in practice, and that is what we have to keep in mind so that we do not get divorced from the seeming frustration of trying to deal with all of these myriads of differences.

The third reason we are here is that we hope to go away and encourage not so much insolvency practitioners, nor judges, employers, nor accountants, we want to encourage the banking community, but we want to encourage those who are engaged in foreign trade and commerce from our countries to take an interest in the subject matter. We implement the law, we are not the real users of it, and we are certainly not the people most affected by it. The people most affected by it are those who engage in trade and commerce, and that is why UNCITRAL is so important in this area. I would hope to hear a lot more in the future of the prospect of engaging people from those areas in the type of thing we are discussing at this Colloquium.

The fourth reason why we are here is because of the developing trade and commerce which is rapidly taking place in the Asia-Pacific area. One statistic will suffice to demonstrate the incredible growth that has occurred in that region and that is that the spending power of the average middle-class person in the countries of Singapore, Indonesia, Malaysia and Thailand is now greater than the spending power of the middle class in Australia, and if that is true then it must also be true of many of your countries. The next decade will see a huge amount of trade and commerce within and beyond that region and we in Australia are not prepared to stand idly by and see that take place without some type of regimen of law that will assist those who are engaged in that trade and commerce.

### **The Australian experience**

Let me now turn to the Australian experience. Many people overlook the fact that Australia is a federation of states and our experience in what we call cross-border insolvency goes back a long long time. It goes back to the very formation of the colonies and then the States of Australia. We did not have a single insolvency law, we did not get it in bankruptcy until 1924 and we did not get it in respect of corporate insolvency until probably the late 1960s when there was some attempt at uniformity. In my country we have had the experience of having to deal with insolvency laws within the country, six different insolvency laws albeit taken from the same model, but nonetheless different; under the guise of different courts, under the practice of different practitioners. We had to develop our own internal system of dealing with the problem of assets located in more than one state, of a company with subsidiaries in more than one state, and when I say that that is part of our experience and that is why we believe that we have something to contribute to the exercise, I ask that you accept that.

Secondly, Australia is an island. One can pass through many countries in Europe by car, or bus, or whatever, without having to take planes or ships as we do to Australia. It is very difficult to come into Australia and – as Neil Cooper would put it – to smuggle the property out; it might be possible in some European countries, there do not seem to be any checks on borders now. When we in Australia were developing our attitude to foreign insolvencies, we had to think in terms of our position, we had to think in terms of the fact that Australia is a nation which thrives on – certainly – imports, and hopefully in the future on more exports. That means, or that meant to us, that we had to offer, at least to some countries in the world, reciprocity in bankruptcy: and we did that. We went about it in this way. We said there are some countries where the insolvency law is so similar that it is futile, useless and absolutely stupid to talk in

terms of minor differences. What does it really matter that a Revenue claim might be given some higher priority in another jurisdiction? What does it really matter that an employee might be entitled to more in one country than in another? It does not matter in the end. At the most it might make a minor difference in the type of dividend or distribution which is paid. So we deliberately avoided looking with any close intensity at other regimes, we looked for countries where there was a similarity, and that led to a law which said to an Australian court, if you get a request from a court in one of these prescribed countries for aid and assistance in a matter of an insolvency administration, you *must* – it is mandatory – you must give assistance. You have no discretion whatsoever and you must afford every type of assistance that can be given. But we did not forget about those countries where perhaps there is not a great similarity. There we said to the Australian court again, “if you get a request from a court in that country then you *can* give assistance”. But we laid down no railway tracks, we laid down no guidelines as to what factors might be taken into account.

We recognise that that is less than perfect, but it has worked extremely well, as far as I am aware, over many many years now, where assistance has been afforded to many countries.

Sometimes when another country gets a view of our legislation we get an amusing result. In the BCCI case, where one of the companies was formed in the Cayman Islands, I was asked to process a request from the liquidator for (a) the obtaining of assets in Australia, and (b) the examination of a number of people whom it might be thought could give some assistance to help the liquidator in his inquiries, as they say. I gave the foreign liquidator the advice of how to go about it, get a letter of request out of the Grand Court of the Cayman Islands. Well apparently the judge almost fell off his chair when he read that in Australia, because the Cayman Islands comes within the concept of a prescribed country, that our court would, as a matter of a mandatory requirement, give assistance, and he was so amazed by this that he wrote a long letter which accompanied the letter of request. He went to great pains to point out to the Australian judge, “Look, in the reverse I am sorry but we probably cannot help you. I want you to understand that this is a one-way trade.” I had to produce that letter for the judge and the judge was most amused by his colleague’s attitude. But it does come as a surprise when a country or a group of countries might go out and say “In respect of an insolvency administration originating in this group of countries there will be a mandatory recognition and assistance”.

In the Asia-Pacific Region we do not find anything like that and that is one of the tasks that is in front of the Insolvency Committee of Lawasia, to try and bring about in the region some type of reciprocity law. In my paper I have given some examples of countries in the region where either there is no bankruptcy law whatsoever, which will prove to be disastrous someday, or if there is, there is no mention of any type of recognition or assistance; because of that I must say to you that as the deliberations continue on from this Colloquium, do not forget the Asia-Pacific Region. You must give them every opportunity to be involved in what you are about, because if you do not there will be some fearful vengeance. I am well used to looking at the European and the North American scene, but do not keep it there, this is a global problem.

We have come a long way for you and we will not let you get away without some suggestions as to how we might proceed. Let me introduce that by some very small reflection on the two philosophies that seem to come out of all the literature that is written in this arena. It is staggering the number of articles that have been written on the area of cross-border insolvency, they go back decades, even centuries. Out of it appears to me two lines of thought, one is the unity principle which aims at a total regime that would be common in effect to all countries. We must say to you: “Give it away! It is an impossible ideal, nice to write about, nice to

contemplate; you will never ever do it.” The second is the unitary or the universality principle and that is much more modest in what it attempts to achieve; it attempts to achieve some basic recognition. That, in my view, first and foremost, is what we should be about at this particular stage. It may well be that in the future we can build some sophistication into that basic attitude, but if we start out with something which aims too high then we will be looking at one another in 10 years time without having made any progress whatsoever.

## **A “Model Law”**

Now for our contribution to the way we suggest we might start. I have used the term “model law” but please do not take that for what it might mean within the realms of UNCITRAL. Treaty, model law, set of rules, whatever; I am not fussed what we call it. What we are looking at is something where signatory countries would each become designated for the purpose of the rules of this law or whatever it might be, and any designated country is mandatorily required to recognise an insolvency administration originating in another designated country. An insolvency administration is a reference to a formal insolvency proceeding under the law of a designated country, whether resulting from administrative or judicial acts – let us get rid of this nonsense about whether you go to court or whether there is an appointment made outside of the judicial system, but this is where we are quite hard and determined – in respect of which a court or tribunal of the designated country is empowered to exercise at the very least a supervisory jurisdiction. In addition, that court or tribunal must be empowered by the law of the designated country to exercise jurisdictions under the model law. Why? Because our experience is that it is much safer, and it is really quite expedient, and it is not necessary expensive, to require recognition to be only sought by and only granted by a court. You would be amazed at the confidence that judges in Australia have when they get a letter of request from a court of the foreign country. They know as well as they can that things are fine, that there has been a formal insolvency administration instituted, whether by administrative or judicial act, and that gives them the initial confidence not even to bother to inquire as to the antecedents and origins of that administration. I say to you that that comes to you from our experience, it is not something that we are not willing to discuss, to trade with, or whatever, but we put it forward as a very important part of the exercise.

I will not take you through our proposed “model law” step by step, but I shall ask you to look at what I describe as draft Article 9:

“In the event of difficulty or a conflict arising, the respective jurisdictional courts of each designated country should be empowered to attempt to resolve the difficulty or conflict by co-operation between them.”

That is not a licence for judges to become legislators. Some of you may well say that it is naïve of me to suggest that we can in some type of legislative writing encourage judges to act together. Surely having reached the stage of the development of our law, having heard of the experience of people like Judge Brozman and of others, it is impossible to suggest that the judiciary cannot try and get together and work out the problems which might arise, particularly if they are given a mandate for it by the legislation of their home country. It goes on to provide for a possible recognition of a non-designated country and ultimately, and most importantly, the jurisdictional court of a designated country can request recognition and assistance in another country.

Our proposal makes no apology for the fact that a lot of this is based upon the MIICA, the IBA Committee J' MIICA model law. The paper does then tend, however, to suggest the differences between that proposal and this proposal.

Let me sum it up in this way. We have heard from Judge Brozman and we have heard from Gerold Herrmann that what is most important is access, to get the foot in the door, to open up the courts of our countries to be able to give immediate recognition and assistance. Other things will follow from that but that must surely have to be the first most vital premise. Judge Brozman suggested that in her lifetime she may not see anything; if that is true of that young woman then I will certainly not even see the first stroke of the pen. But it is possible. This is a very historic occasion. I would like us not in any way to waste it.

# United States of America

*Daniel Glosband\**

## **Introduction**

I have an easier job than the other panellists because I get to describe something that already exists and is embodied in a written set of legislation adopted by the United States in 1978. For the benefit of the delegates they can view it as an experiment and decide whether or not they think it is working in its entirety, or if not, which parts are susceptible to adoption and which are susceptible to rejection.

The Bankruptcy Law in the United States is a federal law. There is a uniform Bankruptcy Law that applies throughout the 50 States and is embodied in something called the Bankruptcy Code. The Bankruptcy Code in turn is part of the United States Code which is the full embodiment of federal statutory law. In addition there are procedural rules that apply both to Bankruptcy Law in general and to multi-national proceedings that take place in the United States and those are embodied in a set of federal rules.

Finally, to give the complete simplistic overview, bankruptcy judges are the judicial officers charged with administering the Bankruptcy Law. They are part of the federal judiciary, subject to some interesting jurisdictional meanderings. The appellate route from the Bankruptcy Court, though, is to the United States District Court; there are districts within each of the States. The next level is to the United States Court of Appeals which typically accumulates several contiguous States, finally to the Supreme Court. The structure for precedent that emerges from Bankruptcy Court decisions is also part of the federal structure and it is ultimately unified through the Supreme Court.

## **Multi-national insolvencies**

In 1978 there was a major revision to the United States bankruptcy laws and as part of that revision several provisions were adopted that deal specifically with multi-national insolvencies. The inspiration for those provisions was the failure of the Herstatt Bank in West Germany several years before, and the fact that as part of that failure there were approximately \$150 million trapped at the Chase Manhattan Bank in New York and no successful legislative or judicial procedure which could deal with those funds. As a consequence there were “battling proceedings”, there were involuntary bankruptcy proceedings against the bank brought in the United States, there were separate lawsuits brought to try to reach the funds, the Herstatt Administrator was advised by counsel not to set foot on the North American continent for fear that he would be embroiled in those proceedings and subject to process in the United States, and as a consequence there was ultimately a settlement that was essentially stimulated by the fact that there was no judicial or legislative way to deal with these funds.

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In recognition of those problems, the Bankruptcy Code draftspersons had several suggestions which ultimately made their way into the statute. They start with the definition sections of the Bankruptcy Code and the fact that there are definitions for foreign proceedings and foreign representatives; a foreign proceeding is simply defined as a “proceeding ... in a foreign country” which has some jurisdictional basis, “in which the debtor’s domicile, residence, principal place of business or principal assets are located ...”, and the proceeding must be one that is for the purpose of liquidating or reorganising an estate. There is a complementary definition for a foreign representative: the foreign representative is a “duly selected trustee, administrator or other representative” in that foreign proceeding. Those two definitional constructs are then used to enable access to the US court system, the Bankruptcy Courts, by a representative appointed in a foreign proceeding. While most of the conversations that take place about the US system focus on section 304 of the Bankruptcy Code, there are several sections that are relevant and they define three broad categories of action that can be taken by a foreign representative in the United States Bankruptcy Court; only one of those is the ancillary proceeding encompassed by section 304.

The first and simplest kind of thing that a foreign representative can do in a United States proceeding is to appear, and to appear without being exposed to jurisdiction of the Bankruptcy Court for any other purpose; it is what used to be known in the US system as a special appearance. In other words, very safely now, as opposed to the Herstatt situation, a foreign representative can appear in the United States and ask for various kind of relief, and there are three broad categories of relief that are available.

The first is simply to seek the dismissal or suspension of a pending United States proceeding. In other words, a foreign representative who is involved in a foreign proceeding can come to the United States and say, for example, “Judge Brozman, you should not listen to this case, it is already being adequately administered in another jurisdiction; kindly dismiss or suspend these proceedings.”

The second category of relief is one that enables the foreign representative to commence a full United States bankruptcy proceeding against an entity involuntarily: in other words, the foreign representative can petition the United States Bankruptcy Court to start a full administration of a debtor in the United States separate from the foreign administration. There are reasons, which I will come to in the examples, as to why that might be an appropriate approach.

The third and more broadly known category of reliefs that can be requested by a foreign representative is through the ancillary proceeding mechanism of section 304 of the Bankruptcy Code. Ancillary means just what it says, there can be an auxiliary proceeding, not a full administration, commenced in the United States by a foreign representative to deal with some set of issues or problems that exist in the United States relative to the foreign proceeding. The problems need not necessarily be over the administration of assets. As Judge Brozman indicated, often the problems might be a need for discovery, a need to obtain information in the United States. A limited relief could also include a repatriation of assets, very often it will include a request to stop, or enjoin or stay proceedings against the foreign debtor or that debtor’s assets in the United States. There is a whole array of things that can be done through this ancillary proceeding, but it is a limited proceeding, not a full US bankruptcy proceeding which would result in a collection and distribution of assets in the United States according to the priority structure of the United States bankruptcy law.

## Section 304

There is within section 304 itself, although buried, a statement of the purpose of section 304. Section 304 applies a modified universality approach. The terms that we typically use in the United States to describe the extremes of multi-national insolvency proceedings are, on the one extreme, universality. Universality would envision a single central proceeding taking place in some relevant jurisdiction with ancillary or limited proceedings in other jurisdictions which all eventually feed to the central proceeding where assets would be administered and distributions made. The other extreme, definitionally, is territoriality. Territoriality assumes limited discrete proceedings in each jurisdiction where there are assets to be administered without necessarily any co-operation or participation in foreign proceedings. It would assume for a multi-national debtor an array of separate proceedings. The United States position is somewhere in between. In quoting from the statute at section 304(c), which later contains a list of the conditions which a judge will apply to decide whether to grant ancillary relief, the purpose is to be guided by what will best assure an “economical and expeditious administration of such estate”. In other words, the US court is told before it starts to think about specific factors, to think about what will ensure the most economical and expeditious administration of the estate of this debtor, and the estate is not necessarily one reposed in the United States. In fact in this context it will be an estate that is focused somewhere else with the US court deciding whether to assist that estate.

If the statute stopped there – this is one of my few editorial comments – if the statute stopped there it would be sufficient. It would perhaps be a more appropriate and a more consistent statement of purpose than what ultimately appears when we then look at the factors that a US judge has to consider in deciding whether to grant relief that will aid in economical and expeditious administration. There is a list of factors set forth in my paper on this subject and each of those is to be considered by a Bankruptcy judge in deciding whether to grant ancillary relief. They are commonly known as the section 304(c) factors.

First, will there be just treatment of all holders of claims against or interest in the estate? In other words, will creditors from the United States particularly be treated fairly in the foreign proceeding. Next, a specific iteration of what is the same principle. It calls for protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings. I think that is just what Judge Brozman had in mind when she dealt with the *Aeromexico* trustee, she arranged that protection by agreement as opposed to there being statutory protection intrinsic in the Mexican law.

The next factor is prevention of preferential or fraudulent dispositions of property of such estate. Most regimes have some provisions to deal with unfair transactions that preceded the bankruptcy; in the United States we call those preferences. Preferences relate to the distribution scheme in other countries. We also call them fraudulent transfers, transfers for inadequate consideration, transfers made to hide assets from creditors. The US judge has to consider whether or not there is some mechanism to level things off and prevent or adjust for unfair treatment in the foreign country.

The next factor is more controversial and reflects something of a chauvinistic twist in the US statute, that is that there be “distribution of proceeds of such estate substantially in accordance with the order prescribed by this title”. The United States, as do most jurisdictions, has provisions that order the distribution to creditors so that certain creditors get preferential treatment from the assets of an estate that is being distributed. In the United States first come the cost of the proceedings, next come certain recognised wage claims, and so on down to

revenue claims and the like. The question that arises under this section is just how close does the approximation of the United States scheme have to be. I have yet to see a section 304 decision that turns on this issue so the answer is that there is a lot of room for flexibility in that situation.

The next factor is comity. Comity as a separate factor creates confusion in the US courts because comity generally encompasses the other issues that have been specifically delineated, so there is not a clear instruction to the judge as to how to balance comity which encompasses all of these other factors against these other factors separately stated. Is comity in general more important, or are the particular factors specifically more important?

The last consideration is one that relates only to individual bankruptcy cases and that is the provision of an appropriate opportunity for a fresh start for the individual involved in the foreign case. Again I have yet to see a US decision turn on this. What this refers to is the US principle that says that an individual debtor who has behaved himself gets a discharge of his debts by going through bankruptcy proceeding. If he surrenders his assets, if he has done nothing inappropriate, he is then free of debts. That obviously is not a universally accepted principle.

To focus the ambiguity. There is a traditional definition of comity that is set forth in United States case law which says it is: "...the recognition which one nation allows within its own territory to the legislative, executive or judicial acts of another nation. It is not a rule of law, but one of practice, convenience and expediency. It is a nation's expression of understanding which demonstrates due regard to both international duty and convenience and to the rights of persons protected by its own laws ...". What is different about that than the first four factors in section 304(c) and why are the two separate approaches set forth?

### **Implications of the statute**

In any event, the United States has now had this statutory scheme in place since 1978, in effect since 1979 when that statute went into operation, and the question is what has happened as a practical matter? The first answer is that what has happened has not happened that many times. There have been, notwithstanding all of the literature on the subject, a very limited number of reported ancillary proceedings. In the last calendar year reported, which was for 1992, there were 29 such proceedings. That leads to the question of why are we wasting our time with all of this and I think the answer is that what we see in terms of reported proceedings in most respects and in most categories is a lot less than what actually occurs in the context of thinking about those proceedings. The example I would give is in dealing with an out-of-court restructuring in the United States, in other words an effort to effect some sort of reorganisation without invoking the judicial system.

Most parties are familiar with what they can accomplish or what could be imposed upon them in a Chapter 11 and they use that skeleton as a backdrop to structure both their negotiating positions and the ultimate results; the idea being can we do it more quickly and for less money, and with ultimately less exposure to ourselves and, out of bankruptcy, knowing what could happen in bankruptcy. The same is true in my experience in dealing with foreign proceedings. To the extent that there is a statutory skeleton, if you will, of what can happen or what might happen on one side or the other, parties are able to negotiate a position against that, that is less extreme for each of them, that is reasonably satisfactory, less expensive, more efficient and the like, so the statistical incidence of cases in probability does not represent all of the situations,

certainly not to my experience, in which the statute has been used for an effective purpose, albeit not through a judicial proceeding.

There are one or two other practical implications of the statute to be aware of in evaluating it as a successful or otherwise experiment. The first is the venue issue. Venue is the location in which a judicial proceeding takes place. The venue rules for section 304 proceedings require a focus on a jurisdiction that has either assets or the need for some particular activity, for example if there is discovery to be taken of someone in Washington DC then there needs to be an ancillary proceeding in Washington DC. If there are assets to be administered in one of the money centre banks in New York, there has to be an ancillary proceeding in New York. If the same entity owns real estate in Kansas City, there will be a need for an ancillary proceeding in Missouri. There is room for judicial co-operation among US judges if they choose to communicate and defer to one central judge for administration of all of those activities, but primarily the venue is scattered all over the place, and that perhaps is a drawback to the US ancillary proceedings that could be addressed if there were to be remedial legislation.

### **The procedure**

The next practical topic is the procedure; what happens, how does one start a section 304 proceeding in the United States? The procedure is fairly simple and it is contained in the bankruptcy rules. Basically there is a petition filed in the relevant court, there must be service of that petition on each affected entity including the debtor, typically, and there is a 20-day answer period. If there is no answer filed then the court can proceed to entertain relief without hearing; if there are answers filed there must be a hearing and the court will decide what to do. It is a fairly simple procedure but nonetheless each step must be followed appropriately.

The typical section 304 proceeding that has resulted in a reported judicial decision in the United States focuses on an effort to repatriate assets; people get most excited and most litigious when there are money and assets involved. What typically happens is first a determination of who owns the assets. In the United States federal system the federal courts still look to state law to determine property ownership issues. The first step is then to decide whether the assets that someone seeks to have administered in a section 304 proceeding, and seeks perhaps to have repatriated, actually belong to the estate of the debtor that is in a proceeding in another country. The asset turnover litigation arena is the one that really has led to the most reported law in the United States and I shall give examples of three or four cases that have resulted in somewhat divergent results, and have provoked a fair amount of controversy, at least in the academic treatment of multinational proceedings.

First, a case called *In Re Toga Manufacturing Corporation*, a case which has been poorly treated by the commentators, particularly the Canadian commentators. The *Toga* proceeding involved a situation where a US creditor reached by judicial process an asset of a debtor before that debtor then became involved in a bankruptcy proceeding in Canada. The Canadian foreign representative came to the United States and sought to have assets repatriated for administration in Canada and the US court declined, thereby provoking the ire of the Canadian practitioners. I believe, however, that in that case the US court was correct: there are provisions in a number of American jurisdictions essentially to obtain a non-consensual lien or security interest in assets so that those assets will be available if ultimately a judgment is rendered in favour of the creditor who has obtained that lien. That is not a procedure that is available in all of the American States but it is available in many of them, and if that procedure is properly followed and there is a pre-judgment interest in assets granted in the United States, and that interest lasts

longer than the avoidance period in the United States, that interest will survive in a US bankruptcy proceeding. So a pre-judgment attachment of assets typically if it lasts more than 90 days in the United States creates a property interest, and here we are looking at the State law to see if there is a proper property interest. In *Toga* the judge found that there was a property interest created by this attachment, the property interest was not avoidable because the avoidance period had passed and therefore he refused to repatriate assets to Canada out from under that property interest.

The case that represents a middle ground is known as *In Re Koreag, Controle et Revision SA*. The bankruptcy court in the *Koreag* case entertained a section 304 petition to turn over money that had been deposited in a New York bank account by an American entity to ultimately be transferred to Switzerland in exchange for a foreign exchange transaction. Before the foreign exchange transaction was completed, in other words, before the foreign currency was credited to the account of the US creditor, the foreign bank failed. The US judge very liberally said “Well, no matter: we will transfer the assets back to Switzerland, we are confident that they will be fairly administered there and that US creditors will have appropriate right to claim them there.” That case on appeal was returned to the Bankruptcy Court saying it should have first determined whether ownership of those moneys had passed under State law to the Swiss bank: if ownership had not passed, those assets should not be repatriated, if ownership had passed, then they should be repatriated. It focused that issue back into the Bankruptcy Court.

The third case is what I think is a genuinely bad example of the use of section 304, a case called *Interpool* that involved a shipping company located in Australia. It involved a situation where there had been a proper application of Australian procedures in dealing with certain claims and a request by the Australian administrator to a US Bankruptcy Court to repatriate assets for administration in the ongoing Australian proceeding. The US court said that it was not satisfied, its standards were not met by the proper application of Australian proceedings, basically saying the Australian law just was not good enough for it, and therefore it refused to repatriate the assets. That is an example of the US court exercising discretion, I think, in the wrong way. It is impossible to expect that each and every jurisdiction will have identical laws and procedures, and the idea behind section 304 and the discretionary factors involved is to see if there is fair treatment in the foreign jurisdiction. If there is basically fair treatment it should be allowed if it is the primary jurisdiction to administer assets.

My last example is a hybrid use of all of the sections. This is a case called *Axona*. In the *Axona* case there was a non-bank depository institution in Hong Kong that failed and the funds of that institution were caught in New York before the bankruptcy by attaching creditors in banks that were trying to set off those funds. The Hong Kong administrators felt that they could not avoid those attachments or set-offs of funds in the United States by an ancillary proceeding; rather they needed a full US bankruptcy proceeding to invoke the US avoidance laws to set aside these transactions. So the Hong Kong administrators filed an involuntary full proceeding, one of their alternative rights, in the United States; the trustee in that proceeding used the US avoidance powers to set aside transactions that favoured the creditors who had started the lawsuits. Once those transactions had been set aside and the funds recovered, they did something very creative. The foreign administrators came into the US court and said now that they had this money back, why should the US court not act under the other section described above and dismiss the case and let them take the money back to Hong Kong and administer it there. That is exactly what happened. So instead of using section 304 with its limited ancillary relief, they used first section 303 which is a fully involuntary proceeding, they got relief in that

involuntary proceeding then they used the dismissal procedures to get back out from under the US jurisdiction and take the assets back to Hong Kong.

**Richard Gitlin:** What is interesting is that we just heard two laws, they are different in their approaches but they both have two aspects relating back to Weinstock. One is access: the Australian and US laws give access to foreign proceedings in one fashion or another; and the other is they chose not to require reciprocity.

One organisation that has undertaken a study of this area is the Committee J, the Insolvency Committee of the International Bar Association. We have asked Bruce Leonard, Co-Chairman of that committee, to share with us the Committee J experience and how they have approached it.

## Canada

*Bruce Leonard\**

### **Committee J**

My remarks will be largely based on some of the experiences that Committee J has gone through over the course of the last several years in attempting to improve the international insolvency situation.

By way of background for those who may not be familiar with it, Committee J operates under the auspices of the International Bar Association (IBA). The IBA is an organisation that was created in New York in 1947 and is headquartered in London, England. It has about 16,000 individual lawyer members but it also acts as an umbrella organisation for a number of law societies and bar associations from around the world. Committee J's umbrella covers about 140 law associations and law societies representing about 2.5 million lawyers worldwide.

### **The way forward**

By way of background to what the Committee has been doing I shall suggest – and these are my own thoughts, not necessarily shared by others on the Committee, and in certain circumstances opposed by them – that there are four ways of approaching international co-operation in insolvency matters.

- (i) The first option is possibly the best option, and having said it is possibly the best option maybe it is the least likely ever to happen: multilateral treaties between countries would be the ideal way to facilitate and enhance international co-operation in bankruptcy matters.
- (ii) If multilateral treaties are not possible, perhaps the next best way of doing this would be through bilateral treaties; as Judge Brozman has indicated, perhaps a series of bilateral treaties between countries would be the most effective way of achieving some tangible progress in international co-operation.
- (iii) If that is not available, the third option is to have facilitative provisions in every country's domestic legislation. In other words, section 304 type, 426 type, 580 type analogues in every country's domestic legislation so that there is no necessity for international action where one sovereign country depends on another sovereign country to do something first before it does anything. We can perhaps solve the problem by having domestic legislation in each of our member countries.
- (iv) The fourth way of doing this is more in the professional/commercial realm of things, what I call the protocol or concordat-derived model: countries' courts, commercial

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enterprises, can look to a statement of principles that is generally agreeable to those who participate in international commerce. A protocol perhaps governs what happens in the event of a multinational insolvency, or a concordat. That route does not depend on legislative action, it depends upon professionals and members of the insolvency community coming up with principles upon which general agreement can be framed.

Having listed what I call the four options, my own view is that the way toward achieving significant international co-operation in insolvencies and reorganisations is probably just the inverse. If I can suggest for discussion the prospect that co-operation is an evolving process, and that it starts with the insolvency community, it starts with the professionals who are involved in insolvency, it starts with the organisations and enterprises that encounter insolvency in the course of their trans-border dealings, i.e. lenders and other major credit-granting institutions that deal with cross-border insolvency as a factor of life. The way to a solution, I will postulate for discussion and for people to have shots at, is that the professions and the insolvency community agree through colloquia like this on acceptable principles on which to proceed. If we can do that and derive a protocol-derived set of principles, or a concordat, we have achieved something upon which the front line of the insolvency industry can agree.

If that works, if that happens, if we go forward on that basis, we establish a body of practice that relates to a specific set of principles or a specific set of guidelines. If that happens I think it will be relatively easier to go to what I consider to be the next step and persuade the legislators in our own countries to recognise in domestic legislation the principles upon which the commercial community and the insolvency community have already agreed in the previous step. Then, if enough countries have enough positive experience with domestic legislation, it should be relatively easy to go to what I consider the next stage, that is bilateral treaties. If at the point we move from stage two to stage three the countries most closely involved in the exercise have benefited from a common positive experience with the principles in stages four and three, it should not be difficult to go into the bilateral treaty mode because the experience of stages four and three should, one hopes, go a long way to eliminating areas of controversy.

Where the current process gets hung up is that there are any number of areas of controversy ranging from significant areas of controversy to insignificant areas of controversy, but even insignificant areas of controversy can incite dissent and disagreement and bring the process to a halt or at least slow it down.

Once there are bilateral arrangements in place – my stage three – from that point forward one can go into, or one can conceivably expect, multilateral treaties. As we have heard this morning that whole process may take 50 years, but unless a person starts somewhere it may never happen at all.

## **Model International Insolvency Co-operation Act**

Committee J, in probably its first major effort at seeing what could be done to improve co-operation internationally, went through its Model International Insolvency Co-operation Act (MIICA). That was a project that took three or four years of the committee's activities. It involved seeing if as a committee we could come up with a short, understandable model piece of legislation that could be adopted domestically by all of Committee J's member countries and that would be "user friendly" to international reorganisations. The ultimate objective would have been to have all of Committee J's member countries, or a significant proportion of them, adopt MIICA, and with MIICA in place in a number of different countries international co-operation would be stimulated because MIICA was set up to operate so that one country would find it fairly easy to recognise proceedings and foreign representatives coming out of another country.

That in retrospect and in hindsight might have been too ambitious a process for the international community at the time; it may still be too ambitious. On my analysis, if that is any way close to the mark, that is starting international co-operation at stage four without going through the preliminaries. In fact what we found was that there was a general level of consensus that MIICA was a useful step, it did focus a lot of attention in the committee and in the International Bar Association on the need to improve international co-operation in bankruptcy matters. It focused attention on a number of different alternatives to improving international co-operation because we had to consider a number of different models by which we could achieve this goal, and in the process discard some as not being as favourable as others. What was produced was the MIICA. That went through the process of the International Bar Association to get the approval of the IBA's Council, it was then circulated to all of the attorneys general in the IBA's member countries. It went to 147 different countries, it has been translated into seven or eight different languages, and really has had a high degree of dissemination.

On the more practical side it has not been adopted anywhere. I am delighted – from Ron Harmer's presentation – to hear people are still giving it some thought. It was the product of a number of very talented lawyers. My thought on it at this point is that it may have been too far ahead of its time, or too far up in the chain, to have a realistic expectation of success.

### **The second project**

With that recognition in mind, Committee J's second major project comes at the problem from a different angle. It comes at the problem from more of a stage two kind of model. The idea is to analyse fundamental insolvency concepts in all of the major countries that are represented on Committee J to determine how fairly fundamental insolvency concepts are dealt with around the world. This project is now only a year-and-a-half old, but the committee have set up a number of task forces, each of which has been given the responsibility of taking a pretty fundamental concept and analysing its treatment around the world.

The first two concepts we decided to take a look at, because of their importance in bankruptcy administrations generally, were invalid pre-bankruptcy transactions for the first, and priority claims in insolvency administrations for the second. Those two task forces have empanelled, through the committee's Bankruptcy Legislation Sub-Committee, a team of country chairs from 25 different countries from around the world, and the reports on those two surveys are now in and are being worked on and model statutory language has been derived in those two areas. The thought is, after exposure and more consideration, that what we will have

accomplished is to create provisions that could be used in a model insolvency code, not just in common law countries but in civil law countries as well.

### **Common law and civil law**

One of the very fascinating things to me that we came across in the course of this survey was completely unexpected. My background is as a common law lawyer with limited exposure to civil law concepts. But through the reviews that we have been doing on this project, it has been remarkable to me that the differences between how a civil law jurisdiction handles an invalid transaction or a priority claim, and how a common law jurisdiction handles the same concepts, are not that substantial. There is a great deal of similarity in the way bankruptcy regimes around the world treat these concepts. If that is the case, it should not be too difficult, and it has not been in the limited focus we have had on this project so far, to come up with a concept which in theory, in dealing with an individual area, would be acceptable to a civil law jurisdiction and to a common law jurisdiction, and we have created two of those provisions.

The object of doing this in the way that we are is to attack the problem on a manageable basis. There is not much likelihood of anybody being able to come up with a complete model insolvency statute that could be sent out to a waiting world, but if we could focus on specific major areas of insolvency reform, produce model legislation, model language, and disseminate it to our members, through the aegis of organisations like INSOL and UNCITRAL, what we would have available would be the product of some of the most talented insolvency lawyers in the world. We would have a product that would be a pretty good guide for any country that is attempting to reform or improve its insolvency legislation. That project is very much under way as we speak.

### **Draft Cross-Border Insolvency Concordat**

The first level approach has more recently emerged as a committee activity. A Draft Cross-Border Insolvency Concordat was produced for publication in the “Norton Treatise on Bankruptcy Law & Practice”, produced largely by a small group of Committee J members operating out of New York. That was a very ambitious and well thought out attempt to come up with a statement of 10 principles that should be applicable in multi-national insolvencies or cross-border restructures. It is only a first cut, and through exposure to meetings like this we hope to evolve the concordat. There is an explanatory comment with each of the principles and the principles themselves are not written in stone. We hope to derive the benefit of the experience of those in the insolvency community to improve the concordat. Committee J is in the process of establishing a task force which will create a network of country teams in all of our major countries to review the concordat with a view to having a next generation version of it discussed and in place following Committee J’s annual meeting in Melbourne in October. I certainly hope that everyone will have a chance to look at it and give us the benefit of their views on whether this will work, how it could be improved, and so on.

### **Conclusion**

Let me emphasise again that in my own view the key to proceeding to improve the current situation lies with all of us here. There has been a long and illustrious history on the part of our legislatures of failing to act and do anything constructive in the area. The obvious exceptions to that are the US section 304 of 1978, the new Australian provision, and section 426 of the UK Code which has been around for a while. Those things are there. They are

valuable first steps. Hopefully we can discuss the issue of whether they are doing the job that they could, whether they could be improved or not. But that is what we have at the moment.

Committee J's experience, which I am sure is comparable with the experience of other organisations, is that there is no legislative imperative on the part of very many countries in the world to do anything in the insolvency area. In the sense of an imperative to create multilateral treaties that will allow multi-national insolvencies to happen in a slightly more refined and organised fashion, there is no international imperative at the legislative level at all. There may never be any significant multilateral treaties and I despair of the prospect of having a multilateral insolvency treaty that works at any time soon. There are some functioning examples of bilateral treaties: however, Canada and the United States over a number of years were unable to conclude their negotiation of a bilateral treaty.

The insolvency area is not about negotiations between sovereign states. Insolvency is a commercial area, it is not a sovereign state kind of issue. Any improvement in the area will come because the professionals and the insolvency community recognise that we are in a position to do something. With the assistance of a very informed and constructive judiciary we are in a position to develop something that will work. We need not wait for legislative action in this area. We should proceed as best we can with all the enormous talent and enthusiasm represented by people present today, and their organisations, to create something, a framework, guidelines, that will show the way ahead.

If the professionals can get their act together in this area, the courts thus far have shown an ability to accept what the professionals have put together and, to echo a thought Judge Brozman has expressed, we may be able to develop something of a common law of international reorganisations that may even eventually dispel the need of legislative action. It will certainly improve where we are today.

**Richard Gitlin:** Our next three speakers in part are to shift to another type of international co-operation. We will discuss the attempts to, and some of the experiences of, the world of treaties as opposed to access laws.

# The European Union

*Manfred Balz\**

## The European experience

Let me start with a few preliminary remarks. First, from the EC or the European Union perspective the Kingdom of Heaven is nearer than we might think after this morning's session and it is time for a great awakening for some of us. We think that there will be a convention in Europe this year, or at the latest next year. So it is possible to get something done, at least it is my strong personal conviction that this is so.

What I have to say is based on the European experience. The European experience has to do with codified law, with codes and with relatively simplistic principles embodied in relatively short codes as compared to the Anglo-Saxon statutes. We in the Continent of Europe have less confidence in the equitable powers of the judge: I ask the UK members of the European Union to forgive me for insisting on the continental European background to this exercise. We know that harmonisation of insolvency dates back to the Community of Six and not to the present Community. We have less confidence in the broad and sweeping traditional discretion and latitude of which we have heard so much today and we put more trust in the simplicity of rough-hewn, at times inefficient, and not very sophisticated rules. We also view the function of law more directly as an instrument of planning and of predictability and we do not attach that much weight to the refinement of ex post facto solutions which are so characteristic of the case law, the highly developed case law of the common law countries. We place great reliance on predictability based on simple rules.

In Europe we have the same degree of variety in insolvency laws as has been described by our distinguished Australian colleague on a world-wide level. All of the world-wide diversity recurs on a European level, a fact we have to live with. There is the same variety of debtor-protective and creditor-protective systems and there is great attachment in some countries to what they call the public interest, which again may weigh more in favour of the debtor, or the creditor, depending on the economic circumstances. All of this occurs and our outlook on international insolvency is very much determined by this variety.

## Conflict rules

What does one do when complexity is very great, when there is a great deal of diversity among civilised nations? The answer is to have conflict rules: rules determining conflicts of jurisdiction, rules determining substantive conflicts of different policies. We try to develop a minimum standard of harmonised procedures and harmonised material, substantive approaches. This is exactly what can be done and needs to be done on a world-wide level. One will have to determine first and foremost what it is we mean by insolvency proceedings. This

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requires some debate, and also some decision: what is an insolvency proceeding? Secondly, we have to delineate the proper scope of national jurisdiction or national rule-making capacity; which country should be recognised to be the right one to rule on insolvency, and which in a conflict situation should prevail over all others. It is a question of jurisdiction.

As for the third point, we have to develop standards to govern the extent to which local and national interests must be protected against the sweeping reach of foreign insolvency laws, which local interests deserve protection and how this protection is to be brought about. In the case of a plurality of proceedings there are questions of how to balance the interest prevalent in the main proceeding and in the local proceeding that concerns only a portion of the debtor's assets. These were the main points I wanted to make following this morning's discussions, to hammer them out in all clarity before fatigue sets in.

### **The Convention of Istanbul**

Let me come to my subject, which is to explain the tortuous road of treaty making in Europe. I shall start with the so-called Convention of Istanbul, a convention drawn up within the framework of the Council of Europe, before going on to the EC draft or the European Union draft and drawing some conclusions for our work. Having explained those two texts I shall point to the German development, which is interesting in so far as it recapitulates, to some extent, the rule in the EC draft, without requiring reciprocity, or even comity, or anything like that. One country, Germany, will soon have the same rules as the EC Convention proposes on a strictly unilateral basis.

Let me start by pointing out some of the essential features of the Istanbul Convention, the Council of Europe Convention. The origins of this text lie in the failure, the historic failure, of harmonisation across the EC. Early in the 1960s, the EC Commission had proposed a convention which aspired to embody both the principle of universality and the principle of unity, that is the idea of universality in its highest development, the idea that one insolvency should prevail in all cases with international links and that only one country should be entitled to administer a case in international situations. This draft was discussed for some 24 to 25 years until, in 1984, it became evident that it was not realistic, that unity could not be achieved, and it is now almost forgotten despite the considerable lasting impact of its ideas. Why was that so? At the beginning it soon became apparent that the substantive rules of bankruptcy laws, especially on privileges and priorities, were far from ever being harmonised even within a very homogeneous region such as Europe at a time when the EC had only six members. With the accession of new members, the United Kingdom, Denmark and Ireland, it became even more apparent that a substantive harmonisation of bankruptcy laws could not be aspired to, and the idea of a unity of proceedings did require a certain amount of homogeneity of national laws, which was never within reach. For practical purposes it was also evident that no professional group in Europe would have the capacity, the legal quality and the experience to practise insolvency in six, ten, or more countries with their highly different legal systems.

By 1984, therefore, the EC draft was considered to have failed and this gave rise to immediate efforts within the Council of Europe to prepare a new text. The Istanbul Draft derived its jurisdiction directly from the shortcomings of the EC draft. It aimed at only two things. Not full unity and universality but only two things: first, mutual recognition not of a foreign proceeding as such but only the mutual recognition of certain powers of the liquidator. These were the powers to collect assets from all Member States and to sue and be sued in such states. The second element was secondary bankruptcies, which could be opened in other Member

States where the debtor had substantial assets once the main bankruptcy proceedings had been opened. In another modest approach, the Strasbourg or Istanbul Convention regulated international jurisdiction not “directly”, within the French meaning of the word, but “indirectly”. The Convention limited itself to setting out conditions under which a foreign case would have to be recognised and did not define the primary competence under which a country might open a case.

Let me say a few words about the rights and powers of the foreign trustee. From the moment of his appointment under the Convention the trustee may take provisional and protective measures in all other Member States of the Convention which are legally possible under the laws of the other state where he wants to act. He may also apply for the opening of local bankruptcies in any other Member State when the general conditions for these are met. Other measures, especially the repatriation or the removal of assets from a foreign Member State to the bankruptcy forum, require prior publication in the Member States where such assets are situated and where the trustee wishes to act. For a period of two months after publication, only secured and priority creditors as well as creditors with public law claims and establishment claims, e.g. employees, might be satisfied out of those foreign assets. After the lapse of the two months the foreign trustee can exercise all the powers and rights that he has under the bankruptcy law of the bankruptcy forum, not the local law but the forum. He can then remove assets from the foreign territory to the bankruptcy forum state.

An important rule in the Istanbul Convention is that the trustee cannot take any action in the territory of a Member State which would impair rights *in rem* or security interests of a person other than a debtor when these rights are situated outside the bankruptcy forum.

The second novel element of the Istanbul Convention was the secondary proceeding, something which has a faint lineage from the American ancillary proceeding, but is much more schematic and much more roughly-hewn than the American ancillary proceedings. What is meant by opening a secondary proceeding? It means that in the first place there is no need to make a showing of insolvency in the other forum, in the foreign state, the case can proceed without insolvency being proven. It is sufficient when a case has been opened in the main forum, where the debtor has its main centre of interests, to trigger secondary bankruptcies in all other jurisdictions. Under the Istanbul Convention, jurisdiction would lie with any Member State where the debtor has an establishment, or other assets. Any claims may be lodged or processed in all of the bankruptcies that are opened, but only secured or priority claims and employee and establishment claims will be considered and satisfied in secondary bankruptcies; all other claims will be transferred to the main bankruptcy where the processing of these claims will be valid. Finally, under the Istanbul Rules any surplus obtained from the liquidation of local assets and secondary bankruptcies would be transferred in kind or in cash to the estate of the main bankruptcy.

I have tried to be as abstract as possible because time is short but let me come to the final provisions of this Convention which I find very interesting in our context. What is interesting about them is that they offer the elements of the Istanbul Convention as a menu: the slogan in Strasbourg among the negotiators was a “Convention à la carte”, a convention with several courses that can be picked at will and someone who is hungry will take more than someone who is not so hungry. A complex system of reservations allows contracting states to opt either for the entire convention or for the recognition of foreign trustees’ powers only, or for secondary bankruptcies only, and they may also go beyond, towards greater recognition and

fuller universality than the Convention provides. It is only a minimum standard that can be transcended.

If we add up all the possible variations we have five different courses on our menu. Under the Convention, a State might, for instance, opt:

- (i) for full universality (automatic and immediate recognition of all effects of a foreign bankruptcy) without allowing for secondary bankruptcies and thus ensure the principle of unity of bankruptcy proceedings;
- (ii) for universality in the aforementioned sense with the possibility to open territorial (local) bankruptcies in which all creditors (and not only secured, priority, and “establishment” creditors) of the debtor may participate;
- (iii) for application of Chapter II (limited recognition of certain powers of foreign liquidators) only;
- (iv) for application of Chapter III only, i.e. strict non-recognition of foreign bankruptcies and of the powers of foreign trustees (territoriality) with the right for foreign trustees to trigger a secondary bankruptcy within the meaning of the Convention;
- (v) for the full menu of the Convention (recognition of certain powers of foreign trustees under Chapter II) and for secondary bankruptcies under Chapter III.

There is no opting-out possibility for Chapters I (General Provisions) and IV (Information of Creditors etc), however.

This is a complicated statement and the impression I should like to leave is that there are a great many choices that one may pick from the Istanbul menu.

### **EC Draft Convention**

Let me now discuss the EC Draft Convention: the Working Group started right after the completion of the Istanbul Convention. The Istanbul Convention has still not been signed and ratified by a sufficient number of states to come into effect. Germany, among others, did not sign it because it was felt that it did not go far enough and that something better could be expected within the European Union. The EC’s group was established at Council level, there was no preliminary procedure within the Commission, and for the first time the Council set out to produce something relatively new at the relatively political level of the Council. I have been the Chairman of this group since its inception.

The objectives are these: to create a more efficient and closely-knit system within the internal market of the European Union than the Istanbul Convention provided for and to do this by six elements:

- (i) to establish universality to the extent practicable;
- (ii) to refine the Istanbul system of secondary bankruptcies so as to make it compatible with maximum universality, that is to insist more on the ancillary character and to coordinate the two proceedings more closely and more intensely;

- (iii) to allocate jurisdiction among Member States directly both for main and for secondary bankruptcies and not just indirectly solely for purposes of recognition;
- (iv) to harmonise over and above those elements certain important rules of conflict that have a bearing on the administration of bankruptcies on important areas of bankruptcy law;
- (v) to take proper account – this is a point we shall have to discuss – of the introduction of rehabilitation and reorganisation proceedings in most of the Member States or ongoing reforms in these states;
- (vi) to create a unitary system without complex reservations in the system's options, a system that would be binding on all Member States of the EC, and also to vest jurisdiction in the European Court of Justice in order to have a unitary interpretation of the system.

Let me briefly address a few of these elements. In any bankruptcy convention the question of the scope of application is a thorny one. Countries will always be wary that they may be made to recognise a proceeding which they will not consider a proceeding in justice or in equity but rather an instrument of political subsidy to certain industries, and they will be afraid that their creditors will be made to pay for the economic policies of other countries. Obviously this is a recurring theme in all of these discussions.

Let me explain how we define the concept of an insolvency proceeding:

- (i) There must be collective proceedings before a court or another authority and we do expect that one of the common European tests of insolvency would be applied in the opening stage. For someone to say they no longer cared, that they were in trouble, would probably not be enough, we would want to have a certain amount of testing of the insolvency.
- (ii) The proceedings must entail “the partial or total disinvestment of the debtor”. He will lose the capacity and the power to administer his estate and he will lose the right to dispose of his estate.

What is partial disinvestment? Would the American debtor in possession be considered partially disinvested because he is under the guidance of the court, and because he is under the threat that at any moment at the behest of committees a trustee may be appointed? Would that be partial or total disinvestment? I have my doubts, but with a benevolent reading of the text one might end up saying that the American debtor in possession who is really insolvent would probably qualify under this criterion.

- (iii) A liquidator or a trustee must generally be appointed, but it need not be a trustee in the full sense of the word, it can also be a person who has to supervise the debtor or to guide him in his affairs. This last could perhaps be a plurality of persons.
- (iv) Only such proceedings that may entail the liquidation of the debtor – “may entail” is literal – are considered to be insolvency proceedings.

As one of the draftsmen I understand this to mean that we require that the conversion of, say, a reorganisation proceeding into a liquidation must be possible without the debtor's express consent. If the debtor is required to file another petition before he goes into liquidation, or if a third party has to intervene before liquidation follows the failure of a reorganisation proceeding, my impression is that such proceedings would not entail liquidation within the meaning of our definition.

We are currently debating whether voluntary proceedings, such as, under English and Irish law (creditors' voluntary winding up) should be included. My impression is they will be included but possibly some sort of court certificate, some court stamp, will have to be given on the creditors' decision before recognition can be provided.

In the end, in order to foster legal certainty, delegations will negotiate a list of each Member State's proceedings which qualify under this definition and this list must be open to review from time to time without a formal revision conference.

The second important point is the direct allocation of jurisdiction among Member States, which would mean that within Europe there would be a unitary system of jurisdiction both for main bankruptcies and for secondary bankruptcies, harmonised substantive rules on jurisdiction. The draft also has a series of what I think are very important, substantive, rules of conflict that govern certain very relevant areas of bankruptcy, such as the effect of a bankruptcy proceeding on pending lawsuits, on executory contracts, existing contracts of the debtor on employment, leases, and also on rights to security. Here the draft incorporates the text of the Istanbul Convention by saying that bankruptcy shall not affect security in chattels or immovables situated outside the forum state.

Whenever an insolvency proceeding is opened by a competent jurisdiction where the debtor has its main centre of interest, this being the criterion for jurisdiction, it will be automatically recognised in all other Member States. "Automatically" means without intervention of a court, without *exequatur* or other formality. Publication is not a prerequisite for this, it is optional. It has certain effects and must be requested by the foreign liquidator or by a public authority. When recognition is operative the bankruptcy effects are exported in their entirety to the other Member States, the forum's laws shall govern relationship of individuals in the other Member States. The convention does not operate a system whereby the opening of one bankruptcy would be considered to be equivalent to a bankruptcy in all other states where recognition should take place. It goes beyond that in its view that recognition means the full export of all of the effect of bankruptcy under the laws of the forum.

Universality is mitigated by a system of secondary bankruptcies ancillary to the main bankruptcy opened at the debtor's centre of his main interests. When a bankruptcy has been opened in a Member State, a secondary bankruptcy will be opened automatically without showing insolvency where a debtor owns an establishment or any other significant assets in the other Member States, and when there is a petition by the liquidator, by the debtor, or by any creditor. The question of whether the debtor should have this right is still open, but according to the present text the debtor too can file for secondary bankruptcy. Unlike the Istanbul Convention, the EC draft allows all categories of creditors, not only secured, privileged and priority creditors and certain establishment creditors, to take part in the secondary bankruptcy. This avoids a great many of the technical problems that arise when all creditors may lodge but only some creditors will be paid, as in the Istanbul Convention. In the EC draft all creditors can lodge a claim in a secondary proceeding. This decreases the change of getting a significant

surplus in secondary proceedings which could then be transferred, but the rule still stands that the surplus from secondary proceedings will be transferred to the main bankruptcy and added to the main estate.

There are quite a few innovative rules on the links between main and secondary bankruptcies and these are perhaps as innovative as some of the rules developed by American courts in their ancillary proceedings. In the first place, the two liquidators must exchange all relevant information back and forth, especially with the intent to allow maximisation of the total value of the debtor's assets and the most economic and expedient administration of the assets themselves. There is an interesting rule that liquidators must file, or process claims that have been processed in their respective bankruptcies in any other bankruptcy. In the *Aeromexico* case this would relieve the smaller American creditors, the ticket holders, from the expense and the problems of producing their claims in Mexico and in the Spanish language. The liquidator would lodge these claims in Mexico City. We gave the liquidators voting rights for absent creditors. When a creditor comes up either directly or with a proxy he can exercise his voting right; when he chooses not to be there the voting rights will be exercised by the liquidators mutually in the respective proceedings.

A further interesting rule allows the liquidator of the main bankruptcy to stay proceedings, especially a liquidation, in a secondary proceeding when he makes a showing that such a stay is useful for the sale of portions of the debtor's business as a going concern or for a rehabilitation or a reorganisation of its business. The stay can last for up to six months with one prolongation possible after three months. The court may require adequate protection from the foreign trustee for the secondary bankruptcy's estate as well as for the protection of individual classes of creditors. This may mean, for instance, continuous payments of interest to secured creditors or the protection of an equity cushion for secured creditors for the coverage of interest payments during such a stay. As under Istanbul, when all claims in a secondary bankruptcy are met in their entirety, the remaining assets will be transferred. It is very much up to the liquidators to co-ordinate their behaviour in such a way that creditors do not lodge their claims in all possible fora. We very much trust in the capacity of liquidators to bring about voluntary agreements with a plurality of creditors so that in the end, at least, quite often a surplus can be achieved.

### **The German experience**

So much for the EC draft, now I would like to say a few words about Germany. The essential rule in the ongoing German reform is that foreign bankruptcies shall be recognised, but the local bankruptcies having the character of parallel, or satellite, or secondary bankruptcies, shall not be excluded. The German legislator, as I understand, is waiting for the EC Convention to come into force or to be completed, and I understand that the EC rules will then be incorporated in full into German law. The significant thing about that is that rules which make sense, which embody economic reason, which are practical – we hope they are practical – such as the EC draft, can be enacted unilaterally. Germany will not require reciprocity for the application of their rules on international bankruptcies. She will not even ask for comity, because we do not know what comity is in Europe for one thing, and we will not even ask for more than that the application of foreign laws will not be against German public policy, which would only exceptionally be invoked against the application of a foreign bankruptcy law.

It can be demonstrated when the German reform is enacted, and this is due very soon, that reasonable rules on the recognition of bankruptcies need not be conditional on treaty links

between states, they need not be conditional on reciprocity, and this leads on to a few remarks on what approaches could be possible within UNCITRAL to produce a minimum standard for some elements of international co-operation in the bankruptcy area.

### **Suggestions to UNCITRAL**

My first impression is that the time is not yet ripe for a multilateral treaty and in fact I am not sure whether a multilateral treaty should ever be attempted given the very tensile, lengthy and long history of multilateral treaty making within the region of Europe. I also think a model bilateral treaty would not be the right thing to aspire to right now, the same goes for a model statute. The time has not come for an elaborate, complete, systematic model statute. But what is possible right now is something in the way of soft law, something that would act without the force of law on parties, on individuals, something that would convince governments, practitioners, courts, by the very reasonableness of its content and by its potential for a harmonised approach.

I would indeed propose that UNCITRAL embark on such discussions, invite practitioners and governments alike, because I believe that governments must be included in such discussions, to develop elements of soft law that would lend themselves to a gradual penetration of international legal systems. Of course for such soft law one could require reciprocity; but let me be brief: I would not advocate that reciprocity be made a criterion for such rules, and the same goes for comity. Of course we would have to admit of countries enforcing their public policies, the cornerstones of their convictions, against a foreign law. Most of the elements of the EC draft can be used as part of the menu which could be offered to states in such an UNCITRAL soft law recommendation, but I would like to inject an element of *à la carte*, the menu element embodied in the rather hapless Istanbul Convention.

In a soft law context, the search for functional equivalents that will serve more or less the same purpose with different technical rules, is quite fruitful, and I think promising, in such a context. As to the scope of its application, it would have to use a relatively solid definition. The definition used by the EC draft, with its opening towards reorganisations but with its exclusion of certain pre-bankruptcy and non-insolvency proceedings, is probably a right and a productive approach. One would have to offer perhaps two or three different systems of recognition. These systems could be the EC draft model, i.e. automatic recognition with the full export of legal effects of a bankruptcy to other countries. One could also imagine automatic recognition with the effect that local bankruptcies would be deemed to have been opened, that is there would be no export but a plurality of local bankruptcy effects in other countries. One could condition recognition on prior publication, something which has been discussed within the EC and which was quite an interesting idea there, but not far-reaching enough for such a closely-knit internal market. On a world-wide level one could say that offering recognition after publication is better than nothing and would go a long way. And we could also offer the Istanbul system, which requires recognition only of certain powers of the trustee and further recognition after a certain lapse of time, starting with publication.

Jurisdictional issues would probably be solved in terms of an indirect rule, solely for purposes of recognition, and one would probably not install a world court to interpret such a criterion. There could be a system of secondary bankruptcies and with the option to include all creditors, as in the present EC draft, or to include only special creditors, namely secured, privileged, and local employee and establishment creditors. It would probably be wise to include a few substantive conflict rules where we already have a substantial body of judicial doctrine and

authority, on such issues as pending lawsuits, executory contracts, the treatment of security rights, or set-off. How do we treat discharge in an international context? This is very important. How do we treat fraudulent conveyances, voidable acts, actions to set aside, avoidance powers, etc?

I do not want to be enumerative, and I think I have exhausted my time. I think if something could be done there would be an ample role for INSOL and for other professional bodies to propagate such a system, and to elaborate it further. Something like this could be started tomorrow. If we are positive and constructive, there are ample things we could do relatively soon.

## Sweden

*Professor Michael Bogdan\**

### **Introduction**

I will try to be brief. I do not think that the world has that much to learn from the experience of a small number of exotic countries on the northern outskirts of Europe.

Scandinavian law, and particularly Swedish law, enjoys the reputation of being very modern, advanced, up-to-date and internationally minded. This might be true in some areas, but unfortunately not in the area of international bankruptcy law where some rather conservative, I would say parochial, attitudes still prevail. Suppose that an Austrian debtor, residing here in Vienna, is declared bankrupt by an Austrian court. Such an Austrian bankruptcy would not stop or prevent attachment of property, enforcement of judgments or other individual actions against this bankrupt's property in Scandinavia, it would not prevent a parallel bankruptcy being opened there. With some partial exceptions, in Denmark, it would not vest the Scandinavian property in the Austrian trustee. It would not invalidate the disposals the bankrupt might have made in respect of his Scandinavian property after having been declared bankrupt in Austria.

Ours is rather a territorial approach to international bankruptcy law, but since we are reasonable men, we do not want to be extremist, we do not want to be too territorial, we have compensated for this by considering our own bankruptcies as universal. A Swedish, Danish, Norwegian or Finnish domiciliary bankruptcy – n doubt about it – is ambitious to include property all over the world, wherever situation; whether we get it is another matter but that is the basis. I want to stress that point. I have seen in some international literature written by non-Scandinavian authors in English a widespread and differing view. Some authors write that, for instance, a Swedish bankruptcy has no extra-territorial ambitions, which might be logical considering we do not recognise other bankruptcies, but that is not the case. Our bankruptcies have extra-territorial ambitions. Furthermore, this is not actually codified. The international bankruptcy law of the Nordic countries is codified in statute only to a limited extent. All I have said is based mainly on a very limited number of precedents, some of which are of a very respectable age, and since precedents are not a source of binding legal rules in our legal systems we could say we have no law at all, we have some precedents, some legal authority which we probably would follow, but it is difficult to predict what would happen in fact.

In this desert of Nordic international bankruptcy law there are some oases. We have no discriminatory rules that would discriminate against foreign claims or foreign creditors, they are treated the same way as our own claims and our own creditors, but this is on a formal level. In reality, geographical distance and linguistic problems may put a foreign creditor at a disadvantage. For instance, a Swedish bankruptcy is advertised in the *Swedish Official Gazette*, which is hardly the preferred reading material outside of Sweden. But there are cases, I am

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thinking particularly of a Danish case, where foreign creditors were given advantages without any basis for this in statutory law. They were treated with additional courtesy just because they were foreigners. There is a Danish case where a foreign creditor did not file his claim because he knew that it was known in Denmark. He said that since his claim was known there he probably did not have to file it, which was a mistake. However, the court treated him with great courtesy and said that it was an understandable mistake, and the claim was admitted nonetheless; I think a very good and wise decision.

### **Nordic Bankruptcy Convention 1933**

One thing we can be proud of in Scandinavia is the Nordic Bankruptcy Convention of 1933, by now more than 60 years old, which has worked pretty well. From time to time I have been asked by my foreign colleagues to cite caselaw *vis-à-vis* this Convention, and from time to time I get letters from Germany from young students who want to write a doctoral thesis and who choose to write about something in foreign law. In recent years several of them have written to me asking about caselaw under the Nordic Convention and I have to reply that there is no caselaw, there is only the Nordic Convention. I know that my colleagues from the common law countries get very disappointed when they hear this and they think our Convention is a dead letter and that it does not work in practice, but the contrary is true. It works so smoothly that there is no reason to have any caselaw. If we go to England, I do not know of any English court decision discussing whether a bankruptcy opened in England is valid in Wales.

The Convention is simple. If we forget about the final clause it has some 15 short articles. Compared to other Conventions it is very simple, very clear. It is based on the principle of universality, a bankruptcy opened in one Nordic country covers property in the whole Nordic Region and is recognised there, provided the bankruptcy proceeding is a domiciliary one: it must be opened in a Nordic country where the debtor has its residence or seat. The Convention in no way restricts the jurisdictions of the Nordic countries, they can open bankruptcies wherever their own national rules allow, but only domiciliary bankruptcies have the benefit of the Convention, the others are not covered.

One thing which is practical and useful is that the Convention stipulates in principle that the law of the country of the bankruptcy is to be applied to practically all questions of bankruptcy law. There are two notable exceptions. One concerns claims with preferential rights against particular assets; there the law of the country where the asset is situated must be taken into consideration, e.g. in the event of a mortgage. The other exception has to do with general preferences, which in my experience are probably the most difficult problem in international bankruptcy law, if property is situated in different countries; the main rule still is to apply the law of the country of bankruptcy, but there is an additional substantive rule concerning fiscal claims. It is not possible for any Nordic state to take everything for its fiscal claims, although some of our countries have priority for fiscal claims: Denmark does not and Sweden does, for instance. Some portion of the property must be put aside for the private creditors.

The Nordic Convention functions very well. However, I would not recommend it for universal use. One has to keep in mind that the Nordic countries are very close, although perhaps not as close as the United Kingdom, the United States and Canada. Danes, Norwegians and Swedes understand each other, they are geographically close, their legal systems are similar and they have a high level of confidence in each other's legal systems. Under such conditions the Convention works pretty well and it is generally accepted. A Swedish creditor may in another

Nordic country get less, or more, than he would receive in a Swedish bankruptcy, but that is accepted.

### **Scandinavia and the EU**

Only Denmark, as a member of the European Union, has presently the possibility to be a part of the work in the EC, the EC Bankruptcy Convention discussed by Dr Balz, but I do not anticipate any problems from the other Nordic countries. Finland, Norway and Sweden have applied for full membership, there is to be a referendum in these countries later this year,<sup>2</sup> and if and when we become members and when the EC finalises its Bankruptcy Convention, I am sure we will have no problems with accepting it.

One word concerning the Swedish attitude to the Istanbul Convention. In 1992, a Government-appointed commission in Sweden suggested that we ratify that Convention. The latest news I have is that sometime later this year there might be a government bill to that effect. However, I have heard this before. I have also heard that the EC Convention is almost ready, and the Swedish Government might decide to wait for that one depending on the outcome of our referendum concerning our membership. What is interesting is that in the usual way in which legislation is made in Sweden, the 1992 proposals of the Commission were sent to various organisations and bodies in Sweden for their opinion. This is customary practice in Sweden, and I suppose in many other countries, and we had answers from a number of bodies including the Bank of Sweden, the Swedish Chamber of Commerce, the Swedish Bar Association, select Swedish courts, the bailiffs, even the police and prosecutors because there may be crimes connected with bankruptcies, and everybody was very positive. Everybody was surprised that no one had thought about it before. So that is a good sign.

I have some concerns about the Istanbul Convention which Dr Balz described as an à la carte convention. The Swedish proposal is to accept only the chapter covering secondary bankruptcies, and not the chapter that would allow the administrators in one contracting country to act directly in another contracting state. According to the system as it has been described to me, this means that even if, as is proposed in Sweden, we ratify solely in respect of secondary bankruptcies, we can still benefit from Chapter II, the chapter to which we do not subscribe, in those countries that subscribe to that chapter. This is incompatible with the Vienna Convention on the Law of Treaties which says that if a country makes a reservation regarding a part of a treaty it is neither bound by that part nor entitled to invoke it in relation to other countries, unless there are specific provisions in that convention to the contrary and there is no such provision in the Istanbul Convention. I do not know how it will work but perhaps it never will have to work. With so many of the non-EC countries becoming full members, the Istanbul Convention will be swallowed by the EC Convention.

### **Non-convention countries**

To me the main problem seems to be what to do with those countries with which we have no convention. Seventy per cent of Sweden's trade is with other Western European nations and the EC Convention will probably cover those. But there will still be many countries which will not take any convention, countries which perhaps we would not even wish to join with in a bankruptcy convention: we do not trust every country. What is to be done there? My feeling

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<sup>2</sup> In consequence of the referenda mentioned in the text, Sweden and Finland (together with Austria) became members of the EU, effective 1 January 1995, while Norway did not.

is that the American way, section 304, is probably the best alternative and I do not think we could have much more. The situation can vary so much from case to case. In one case there may be hundreds of small domestic creditors, as in the *Aeromexico* case described by Judge Brozman, and in other cases there may be no domestic creditors at all. One aspect that has not been fully discussed but that I think is an important point is the fiscal claims. Sometimes there are huge fiscal claims involved that cannot be enforced abroad, and sometimes there are no fiscal claims. It would be rather too idealistic, from a Swedish point of view, to repatriate the property from Sweden to a foreign country of bankruptcy and then to hear there, when the Swedish fiscals come there to file a claim for taxes, that foreign fiscal claims do not get a penny. It is not realistic to send the money there knowing that our Revenue will not get paid. The situation is highly variable and there is no general solution. When it comes to the countries in which we have little confidence, with which we do not co-operate closely, the only way is to have a flexible rule along the American lines.

# Argentina

*Professor Juan Dobson\**

## **Introduction**

The outlook in South America in general and in Argentina in the last three or four years has changed radically. Foreign investment has increased fivefold in the last five years, according to the statistics released in April by the World Bank. Since 1991 Argentina has lifted all of its foreign exchange trade restrictions and is now one of the world's most open economies. At the same time, and very significantly, in 1991 Argentina entered the Treaty of Asuncion which establishes a progressive free trade zone involving Argentina, Brazil, Uruguay and Paraguay. This is quite a different picture to the one we had in Aberystwth in 1989.

## **Cross-border insolvency**

This having been said, I shall try to go into the legal aspects of the problem, or the problems encountered in cross-border insolvency. We in Argentina have a two-sided attitude: we re an example, I would say, of the co-existence of a very open system with a very restricted system.

To start I shall mention the Treaties of Montevideo, the first of 1889, which practically repeated itself in 1940; so we have had a system regulating cross-border insolvency for more than 100 years. The treaties are not very long and I shall try to cite some examples to show how they work. There are not too many cases. In my researches on the subject I looked into the reported cases but most of the cases I shall mention today are unreported, which meant that I had to talk to the judges and find out what they were doing, and most of the judges I talked to were not really aware of the importance of what they had been doing.

## **The Montevideo Treaties**

As an example of a recent case, we have in 1992 *Torres Astigueta*. This involved an individual bankrupt who had an important piece of land in a luxurious seaside resort in Punta del Este, Uruguay. The administrator traced those assets and invoking the Montevideo Treaties he went to the Argentine judge that had appointed him and asked him to request international judicial co-operation from the Uruguayan judge to freeze those assets. The judge complied, the request was made, the judge in Uruguay complied with the request and ordered that the freeze be registered in the Land Register of Uruguay. I saw the document and the document states that the freeze had been ordered by the Argentine judge, so it really worked across the border. The administrator judge then requested that those assets be sold, the Argentine judge proceeded to do it and disposed of the assets according to Argentine liquidation law. He introduced Argentine bankruptcy law into the proceedings and disposed of the assets, and once they had been sold he requested the Uruguayan judge to put the buyer in possession. The Uruguayan judge complied, and finally the land was entered into the land registry in the name of the new buyer. Things worked as if the border did not exist.

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In another case, a case of 1990, the case of *Adabor*, the administrator went further. He requested, he petitioned the Argentine judge to order a stay of proceedings that were taking place in Bolivia. The debtor was under suit in Bolivia, a legal suit, and the administrator, applying Argentine law, which ordered a general stay of all actions, intended to have this made valid in Bolivia as well. The Argentine judge said no, that the provisions of the Montevideo Treaties must apply, and that the provisions of the Montevideo Treaties require that notices be published before any specific action can be taken against assets. Once the notices are published then local creditors can require the opening of another bankruptcy, which will be carried on entirely separate from the first, and in that case there will be two entirely different bankruptcies.

So we have a very open system with respect to the countries involved in the Montevideo Treaties. The Montevideo Treaties involve six countries out of a total of 13 countries in South America, the 1889 treaty involved Argentina, Peru, Colombia and Bolivia, and the 1940 treaty involves Argentina, Uruguay and Paraguay. The system works on the same terms in most of the countries of South America.

What I have said so far is the bright side of Argentine law; let me now point out some of the darker aspects of domestic Argentine law. I shall also try to illustrate the law through cases, and wherever possible through recent cases.

First I shall refer to the powers of the administrator. There is no statute law in Argentina to cover the powers of administrators in foreign bankruptcies. A case heard in 1976, *Panair do Brasil*, concerned a Brazilian airline which went bankrupt which had assets in Argentina. The Brazilian administrator appointed an agent in Argentina to sell those assets and the agent appeared in front of the Argentine judge to ask for judicial co-operation. The Argentine judge faced a legal vacuum, he did not know what to do, so, applying the principles of the Montevideo Treaties, he decided to publish notices of the Brazilian bankruptcy and he appointed a local administrator and then waited to see what happened. Some local creditors appeared and the Brazilian administrator decided to bring money from Brazil and to pay those creditors. At this point there were two questions before the court:

- whether the powers of the administrator were to be accepted in Argentina; and
- whether he could pay an Argentine creditor.

The decision was twofold. The Supreme Court of Argentina in its final decision said that a foreign administrator could not be recognised in Argentina. Under Argentine law, the administrator in bankruptcy is a public official and as such he represents Argentina's sovereignty and they could not recognise a foreign administrator of a foreign bankruptcy. On the other hand, the Court of Appeal in the same case decided that this foreign administrator had been appointed as an agent of the debtor under Brazilian law, and that Brazil's law of agency could be recognised, and so he was allowed to pay the creditor as an agent of the debtor: a practical, although rather an incoherent solution.

In the last year or so there has been a further case which I was very doubtful about bringing to this audience because it has elements of English law in it. I decided to consult. I had the rare opportunity of being able to consult legal experts in England and, classically enough, one said no and the other said yes. I then decided to cite the case because it might have implications, important implications, for Argentine law.

The case of *Luis de Ridder* is now in front of the Argentine Supreme Court and might therefore affect the *Panair* doctrine just expounded. This case concerns an Argentine corporation that went bankrupt a few years ago and an English creditor, Knowles & Foster, decided to prove its claim in the Argentine bankruptcy. The Argentine bankruptcy was very much delayed – Argentine bankruptcies usually are delayed, this is South America – and it took a few years. There was a restitution action that took some time. Finally, some 10 years on, some assets came into the proceedings, and by this time, after a lapse of 10 years, Knowles & Foster, the English firm, had itself gone bankrupt; the British proceeding was apparently faster and dissolution had been registered. In such instances assets belonging to the debtor would go to the Crown, being considered *bona vacantia*. This situation determines that property of the debtor would go to the Crown and so the British Crown appeared before the Argentine judge wanting to claim dividend. The Argentine Court of Appeal said yes, that under Argentine company law the law that applies on the dissolution of a company is the same law that applies when the company is organised. This is an extensive interpretation of Argentine company law but it was the ruling of the Court of Appeal. Now it is up to the Supreme Court to decide whether to recognise the power of the British Crown to collect dividend, or whether to deny that power.

I have a feeling that this decision is inconsistent with the decision in *Panair do Brasil*, cited above. I have consulted with a distinguished legal practitioner and a distinguished English judge, both of them in the audience today, and one has said he thinks the decision is consistent whereas the other says it is completely inconsistent – so here we are.

I do hope that the Supreme Court decides in the same way as the Court of Appeal, that they come to the decision that it is correct to recognise the powers of the English Crown, and that is inconsistent with *Panair do Brasil* and that they will overturn the basic decision.

### **Proof of foreign claims**

Having said that I shall say something about proof of foreign claims under Argentine law. Until 1983, Argentina was a member of a very infamous club, the infamous club of national priorities, giving priority local creditors. Since 1983 this is no longer true, although we do have a restricted area where local priorities can apply. But let me illustrate some of the problems we are now encountering. The problem I now mention is one of the modifications that is proposed in the proposals to reform Argentine law and to make it more open still.

This case, a 1991 case called *Cavifre*, really derives from *Banco Ambrosiano Overseas*. A creditor who tried to prove his claim in the Argentine proceedings had a foreign domicile for payment with the document to be paid at Bankers' Trust, New York. The court requested, following the statute law of Argentina, section 4 of the Bankruptcy Law, that the creditor produce evidence that US law would allow a creditor to prove his claim and to participate *pari passu* with the other creditors, had his debt been payable in Argentina. This is what is called "reciprocity" in our statute law. The problem was that Argentina requires that if the domicile of payment of a claim is in a foreign country, a country other than Argentina, then the creditor must demonstrate, must produce evidence, that in that country claims payable in Argentina would be allowed and would be paid *pari passu*. The question that then has to be resolved is who is to prove this, does the onus fall on the creditor? Up to now the decision has been "yes". This means a costly procedure. It means translations, it means having to acquire legal opinions from other countries. Of course this benefits members of the profession in other countries who can collect fees, but it is disadvantageous for the creditor. However, there are two new

proposals for reform of the law and there is a feeling in the air that this will be reformed within a very few months, that this proof of reciprocity will be put away, will be derogated.

Let me mention another situation considered by Argentine bankruptcy law, namely that it is possible to open proceedings, bankruptcy proceedings, with respect to debtors not domiciled in Argentina. A bankruptcy proceeding can be opened by a creditor whose claim is payable in Argentina of a debtor who has domicile outside the Argentinian borders. In the 1993 case of *Pacesetter Systems Inc*, the Buenos Aires Appeal Court decided that it is a mistake to read the law as if this requirement of the possibility of opening bankruptcy proceedings in Argentina required the presence of assets in Argentina. Under this ruling it might be possible to open a bankruptcy proceeding in Argentina, even if there were no assets in Argentina, as if there were such assets, provided that the claim was payable in Argentina. In *Kennel Investment*, another 1993 case involving a Uruguayan corporation, the court decided that for the court to have jurisdiction the debtor whose bankruptcy was being petitioned must at least have a place of administration, a business establishment, or a place of business activity in Argentina, and if none of these three requirements was met then the Argentine judge had no jurisdiction.

Finally, a reference to a situation that came as a surprise to Judge Brozman when we talked about it because we have a second Pan Am bankruptcy in Argentina. How is this possible? She is the judge who has the Pan Am proceedings and the Chapter 11 proceedings in the Southern District of New York and there is a Pan American World Airways Inc bankruptcy proceeding in Argentina that is completely separate. Pan American World Airways Inc is really the same company or the same corporation; apparently it is an old name. This case shows that a foreign insolvency order can be used to petition an Argentine bankruptcy. By producing evidence that a bankruptcy order has been opened, has been ordered in a foreign country, an Argentine proceeding or bankruptcy can be opened without have to prove the normal situation, to show the usual conditions before opening a bankruptcy proceeding. The usual condition is the inability to meet payments, i.e. normal insolvency. In this case the judge had to decide whether a Chapter 11 bankruptcy proceeding under American law could be considered the equivalent of an insolvency proceeding under Argentine law, so as to comply. I had a discussion with the judge. He said that the law was not entirely clear but that the proceeding indicated that there was a general call to creditors and it involved a plan to pay creditors in a different way than originally contracted. He decided that it was a similar proceeding to the Argentine insolvency proceedings and that this was sufficient to open a proceeding in Argentina. There will now be a bankruptcy proceeding in Argentina with a view to selling the assets of Pan Am, and according to the principles of Argentine law, there having been another simultaneous proceeding opened in a foreign country, the creditors belonging to the foreign proceeding will not be allowed to participate and will be subordinated by the local creditors. The intention of the Argentine judge applying Argentine law will be to subordinate all creditors that are not local.

## **Law reform**

There are two proposals to reform the laws of insolvency. One was originated by the very powerful Ministry of Economy in Argentina, which more or less assures that it will be passed by Parliament. The only modification that concerns international or cross-border insolvencies is the replacement or the setting aside of the reciprocity condition mentioned above.

The other proposal, which originates from the Ministry of Justice goes into ideas such as the global village, but in terms of international insolvencies and in no way affects the *status quo* as I have tried to explain it.

The Ministry of Economy, in conversations I had before coming to this meeting, expressed considerable interest in the recommendations we should be able to produce. I can conclude, therefore, with a word of hope: some of the darker aspects of Argentine law will probably be reformed and this meeting should have an influence on that.

## Session III: Open Forum

**George Redling (Canada):** I represent myself as Superintendent of Bankruptcy in Canada. I do not pretend to speak on behalf of the government on this occasion.

This has been a most useful exercise for us. Canada brought about amendments to its bankruptcy law in 1992 after a fairly tortuous route to get there; it took almost 25 years. What we did, because of the participation of the private sector getting the amendments over the Hill, was to make a commitment to ongoing reform. We have established a Phase II process, called the Bankruptcy & Insolvency Advisory Committee (quite a few of my colleagues who are here are on that committee) the purpose of which is to assess and evaluate how the legislative amendments are working and also to continue with more substantive reform. That substantive reform includes the treatment of international insolvencies.

It was good to hear the kind of consensus that I thought was developing on the choice of approaches; Bruce Leonard laid out the four options quite well. The one we have been leaning towards in our own working group on the subject is that the way to approach it will be through domestic legislation, and it was good to hear that. I think it is necessary because we have to bring our insolvency law into line with the general economic framework, which by necessity has become more outward and trade oriented. I expect that by the close of this Colloquium we shall have all our answers on how to proceed with its substantive elements and I appreciate that.

The second point I was asked to raise is the question of the relationship between international regulators in insolvency and INSOL. The last meeting we had at INSOL was for the purpose of naming a small study group to look at the issue of the relationship, and that included the United States, the United Kingdom, Canada and Australia. We met yesterday and, following various telephone conferences, we have agreed an association amongst ourselves which would have as its key objectives:

- to promote liaison and co-operation amongst regulators;
- to identify legislation and practices in foreign jurisdictions to benefit our domestic legislation, including managing our operations;
- to identify issues which impede the efficient and effective administration of insolvencies, particularly international ones.

We would also be encouraging other regulators to join the association. We have agreed to the establishment of an executive and we will be meeting after the close of the Colloquium with the INSOL Executive to discuss the relationship further.

**Richard Gitlin:** What we find in insolvency, in rehabilitations, is that the framework of laws, even if we improve them, is just the starting point. It is the people who work the system who make it work. INSOL decided that it could not just function with accountants and lawyers and have a system where we learn to work with each other and succeed, and in order for us to function and develop links so that the people can work the system we absolutely needed the presence of the regulators, the bankers, the judges, and any other group that is a critical element and component to a process working.

**Bernard Bradford (National Westminster Bank, London, UK):** I speak as a lender and our role in insolvency, or pending insolvency, is first of all the protection of the bank's money. We are also concerned about protecting our relationship with our business customers. We have concerns about jobs, and we have concerns about the survival of the business outside of a formal insolvency regime.

We have heard a lot today about post insolvency and insolvency proceedings, but I have not heard very much today about the need to focus attention on the role of the insolvency practitioner and insolvency regimes in workouts prior to insolvency. Both Neil Cooper and Tina Brozman referred to the certainty as to what jurisdiction applies in workouts, and as lenders we certainly need that certainty. We do not want to find that we are at risk, that an activity which was perfectly legitimate in our home country can subsequently be challenged in some other jurisdiction.

Lenders themselves need to learn to work across borders and not just within their own country. The London approach seems to work very well in the United Kingdom, but as I have learned over the last few months in a case which has received a lot of publicity recently, it does not work quite as well across borders. Post insolvency – again that same case – receivers and the law have to work together in order to maximise the result. No formal insolvency procedure appears to be cheap and insolvency practitioners (IPs), lawyers and judges, in our view should concentrate on ensuring that creditors at the end of the day, because it is their money, will get value out of the process.

**Eddie Theobald (Barclays Bank plc, UK):** I can endorse that as a fellow clearing banker. It is a real job of work that we have got on our hands and if I may, I would like to draw four points that have particularly appealed to me.

The measure of what we are trying to do today and achieve over a number of years is to remove the uncertainty for businesses and the lenders. Already, because of the problems we have been discussing, I have detected that it is inhibiting the finance of international trade; Tina Brozman suggested that this might happen, it is happening now.

People are reluctant to put up money because in certain situations, such as the failure of a multinational company, we do not know which jurisdictions the proceedings will be heard in and that leads to uncertainty. A little while ago I myself refused to put out money to keep a company going, because had that company failed, the item of security I took could have been snatched back if a claim was brought in a different jurisdiction. So I register that as a major problem now from my perspective as a workout man.

Some of the items we have heard today have been on the agenda for so long that we might usefully consider deleting the non-workable now and reducing the agenda to the workable and then proceed to implement it. There is universal agreement on that.

**Richard Gitlin:** It is so interesting in so many of these cases because usually the business solution is not that complicated and usually if we put some competent people in a room who understand business, they will be within the same range of a reasonable business solution. But if it is cross-border, the legal positions are insoluble. Hopefully we will build the legal solutions a bit.

**Louis Levit (INSOL International, US):** From the time that I have had any connections though INSOL or otherwise with the systems in other countries, it is pretty apparent to me that we in America are in many ways a pariah. Our whole system is structured now and based on a presumption of a debtor being in possession, except for the highly unusual case. To say that that it not accepted in any other country is an understatement. Yet, rightly or wrongly, American practitioners, no matter who they represent, tend to believe in that system, tend to believe in all that goes with it, and would be very reluctant to submit to any concordat or series of treaties where that was weakened. I would be interested in the reactions of other Europeans, or even the Canadians, to what extent they would. To what extent in a cross-border situation where we were willing to agree to the jurisdiction or sovereignty of some other jurisdiction, would our views or our attitudes with regard to retaining management in possession be permitted to prevail?

**Adrian Marriette (Midland Bank plc, UK):** Can I make a point which I have made in other fora? This concept of debtor in possession, particularly as regards the United Kingdom, is misunderstood. The United Kingdom has its debtor in possession position, it has it for countless months in many workouts and it is the informal workout process that the banks run for their clients long before the companies fall over. We have got far more companies in difficulties with debtor in possession than we have administrations or receiverships. Our bank has several hundred at any one time, and I believe Barclays normally has more.

The mistake that gets made is the comparison of Administration and Chapter 11; the valid comparison is Administration and Chapter 7. Those are the real comparisons. Debtor in possession is not so much of a handicap, it is just that we do not have a court-ordered process. The difference is that just like receivership is not a court-ordered process, our informal workout and our debtor in possession is not a court-ordered process.

**Richard Gitlin:** There is another dimension from the US point of view. Although management stays in place, it is fair to say more often than not by the time they file for Chapter 11 they have changed management in one way or another. They have gone through the workout stage with the banks and with others and will end up, very often, with professional management from the outside even though they do not start with the title “Administrator”. Often the debtor in possession that we are looking at is not the management that really took the business down in the first place, although it can be.

**Louis Levit:** I am not at all familiar with how workouts operate in the United Kingdom, but the phrase was used that “banks run”. There is a direct tension between the phrase “banks run” and the phrase “debtor in possession”, it is one of the things that most courts and most practitioners in the United States will avoid. The banks, of course, have input, but the idea of the banks acting through any type of an agent, no matter what he or she is called, we tend to resist.

I get the impression that certainly in the United Kingdom they consider that the norm.

**Adrian Marriette:** I do not know if I used some loose wording. The last thing I can think of in any situation where I have been co-ordinator is the banks succeeding in running anything.

As was said earlier, the easiest thing in the world in a workout is to see what the commercial solution is. My problem is always the damage a group of banks can do to themselves.

**Richard Gitlin:** Louis Levit's question gets to the heart of our ability to co-operate with each other, it gets beyond the statutes and talks about the real world.

Let us take it with the Canadian experience. They have a committee, they are trying to adopt the statute and they have an orientation towards international work, and yet I know that there is fear in the Canadian practitioners, including those on the committee, about allowing this debtor in possession Chapter 11 to reach across the border. And that really goes right to the heart of the question. How do the Canadians react to that? Is it something that really is a troublesome concept to open doors? Are these the type of handicaps that they seem likely to bump into?

**Bruce Leonard:** I do not think the debtor in possession concept by itself ought to scare us or to stop us from doing anything that seems sensible. I have had some small experience with the Chapter 11 system, and along with Gordon Marantz, a lot of experience with a reorganisational system that provided no protections to the debtor at all and if one had to choose between them, one would certainly go for the Chapter 11 route.

My advice, or my comment to members from the meeting who are from civil law jurisdictions is that Chapter 11 *per se* should not be treated as a bogeyman, there are a lot of things that are of value in the Chapter 11 system. Where the Chapter 11 system may fall down is in its application. I am sensitive to Judge Brozman sitting right here next to me, but our judges in the new Canadian system which we have, which took some inspiration from the English administration system and some inspiration from the Chapter 11 system, are tending to be quite firm how the process is administered. I think that makes a tremendous difference to whether the system is abusive of creditors and overly friendly to debtors, or whether it attempts to balance the interests of creditors and debtors both.

I guess most importantly, the debtor in possession argument is an issue that will have to be addressed, but as we go forward from today, it will be more constructive, and certainly more beneficial for all of us if we concentrated on the kinds of issues that we can agree on rather than focusing on the ones that divide us. That would be my comment.

**Gordon Marantz (INSOL International, Canada):** The Canadian process was concerned about Chapter 11 because of three things. One was the abuse of position of a debtor that was in possession and who one could not get rid of, and as a result the prejudice that was worked on lenders, particularly secured lenders. The second was that if it was a complicated procedure that had a lot of opportunity for litigation, it became very adversarial, and the third was that it stretched out over an indecent period of time. We have no difficulty in Canada with the concept of debtor in possession, but under the system we now have in place there is an attempt to control those three elements so they are a little more manageable.

As we have been in Canada for many generations, we are half way between the United Kingdom and the United States.

**Manfred Balz:** One word about the debtor in possession; I indicated that briefly in my remarks. It all depends what we mean by recognition and co-operation. If the debtor in possession is established in an American Chapter 11, co-operation in Germany would mean that we recognised this as a bankruptcy proceeding and, so far, individual creditor action is

stayed. But at the same time we recognise the rights of German creditors to fight for a German liquidation, or a local Chapter 7, and I see little potential for abuse.

If that system, which is essentially the EC perspective, is adopted, one can be relatively generous with recognition of Chapter 11 cases. But of course the debtor who fights for Chapter 11 must be aware that in other countries he has declared himself insolvent and the full rigour of the insolvency laws of those other countries will hit him. He cannot expect to be treated like a Chapter 11 debtor in Germany, or in any other country.

That is the compromise one might strike in that area. Let other countries accept that he wants to be an insolvent, he declares himself to be insolvent, which he never does in an American Chapter 11. Recognition, the price for recognition, would be that he could also be declared in a liquidation in other countries where he owns assets.

**Richard Gitlin:** I want to get away from Chapter 11 for a minute. That really raises a fundamental issue of what we are dealing with. Reference was made to a recent case, a German-UK case, and it is troublesome. It is troublesome to think that as our clients become involved with multinational businesses, so the business truly is interrelated across borders – products, parts and so forth – that we do not have a mechanism when it gets into trouble that can put a ring fence around it while we find the right solution. It seems to me that where the ring fence comes from, how we do it and which jurisdiction does it is less important than – going back to what Judge Brozman said – that our duty should be to create a vehicle to maximise the asset value. We cannot maximise the asset value while people are taking parts away and liquidating them, someone has to have a chance to look at the whole. But I am not sure how the provisions that we have been talking about really do that. If in fact the local creditors can file for a liquidation, so that the business is being liquidated while people are trying to keep something together, I am not sure whether that really gets to the heart of it.

**Ron Harmer:** Could Manfred Balz explain in more detail what he means by soft law?

**Manfred Balz:** Soft law is something which has some authority behind it and the authority could be UNCITRAL's authority. The world community as represented elsewhere would add authority to what I call recommendations, guidelines, or something of that nature, which in essence would be directed to governments – urging them to introduce one out of a cookbook, or one out of a toolbox, of essentially functionally equivalent systems. That is what I tried to get across. There could be several self-contained elements of international co-operation, one being the recognition of certain powers of trustees, another being secondary bankruptcies with different ramifications, different modifications, different types of things. They would be contained in a cookbook with the stamp of UNCITRAL on it saying these are proven and workable solutions and one of them, or a combination of them, will give an edible menu. The idea would be that with a certain amount of monitoring on the implementation of these systems, INSOL, or UNCITRAL, or whoever, could monitor where countries go, could advise countries on how to implement such systems.

**Gerold Herrmann:** I do not think I am in a position to judge fully the wisdom of the recommendation of a cookbook. Unfortunately we have not yet reached Tuesday lunchtime. I have learnt a lot up to now, I have heard many proposals, but I have not personally come to one conclusion; I think that is an advantage.

But as to the formal aspect, and that is how the question started, UNCITRAL up to now has in essence prepared – there are some exceptions – legal texts in the hard sense in terms of either conventions or model laws or rules which become effective by being incorporated into contracts. But, there has been at least one exception, in 1985 a recommendation which was basically an appeal to states to screen their legal systems to see whether there were requirements that might be inhibiting the use of electronic data interchange or other electronic media, which is soft law. The soft law approach, and I speak only about the form as such, is not a typical UNCITRAL approach; it is much more typical for other parts of the UN family. Of course it is more common in the public international – may I call it law area, if we are talking soft law.

I would like to limit my explanation to that at the moment. If we talk about a recommendation to legislators, a model law is a recommendation as such. In a formal way it is a recommendation, it is a recommended text. The difference I see is more in two areas of the content. Either it is a recommendation, as the one just mentioned, which is an appeal, “please screen”, “we invite you to screen your laws”. Looking back at what we did then, this approach might have been all right in 1985, but those who are familiar with our work know that we have learned something in the meantime and there is now a Working Group on Electronic Data Interchange. We do not think it was enough to make an appeal to legislators to screen without giving any kind of guidance. If they noticed that there were requirements for a written form, for signature, which might get in the way of accepting the use of electronic and similar means, they were not given any guidance as to what to put once they had noted there was a defect, and now we are working on this. As I understand Balz’s recommendation, it would be something along those lines, to put together in positive terms, not just principles. I do not think it is meant at an abstract level, I think it is fairly concrete, but maybe with options within the optional recommendations, with alternatives. That is how I understand it but I invite correction as to what was meant.

Listening to policy choices there were three or four examples of possible methods of judicial co-operation, or offers, unilateral offers, in a domestic law (not in a reciprocal or non-reciprocal network of a convention for example) to offer certain methods, maybe two, three or four, which could be regarded as equally satisfactory in terms of saying that they are equally reasonable methods which have certain advantages and disadvantages, and that would not typically appear in one model law. Up to now, as we have understood the term “model law”, it is not a law with a lot of options, although I might add that with the development of the use of the form of a model law in UNCITRAL, a fairly recent phenomenon, our first model law was on International Commercial Arbitration in 1985 and we now have two more, one on procurement, one on international credit transfers. In the model law on procurement there are options built into the law.

If my interpretation of the proposal is correct, we would probably still label it a model law. I did not want to get into a labelling dispute here, I only wish everyone to understand better what is meant and as a belated and additional reply, to Ron Harmer’s question about soft law.

**Nigel Hamilton (Ernst & Young, London, UK):** First I think I need to say that I do very much believe in harmonisation and it is something which we have got to strive towards. However, I would like to come back a little bit to what Stephen Adamson was saying, and he will correct me if I have misinterpreted him, but it does seem to me that we have a tremendous number of ideas, some of which go a very long way forward. I would like to see perhaps some of the simpler ideas and ideas which we can actually achieve in a living timescale. We still for

instance, have a lot of problems with one jurisdiction ranged against another and not even recognising the procedures which take place in other jurisdictions. It would be nice, for instance, if each country recognised that the procedures in another country were valid, and one did not have to prove it every time one went across a continent or across a country. But it does seem to me that we just have to make sure that whilst we may have a very long agenda, we also have some things which we will actually achieve and point to some concrete successes pretty quickly, which will actually be an enormous fillip for the organisation.

**Hon Tina Brozman:** I think that it is particularly important that we act in a small way within each country to give a mandate to the judiciary. From my experience, unless there is some sort of statute which encourages one in whatever manner to co-operate, one could have the best intentions in the world as an individual judge, and yet be unable to carry them out because there is no statutory permission to do that. I would say that if we can do anything from our collective experience, it is to encourage one another to enact some small form of legislation to allow flexibility to the judiciary so that they can start in the direction of co-operating with one another.

**Nigel Hamilton:** Would you go so far as to wish the judiciary to be bound in the mandatory way that the Australians have put on the prescribed country?

**Hon Tina Brozman:** I have no problem with that so long as we are talking about countries whose laws are fairly compatible. But I do think public policy which is likely to be contravened by a particular action in another country, or for nations who simply have a different view of the world.

**Nigel Hamilton:** What you would have then is rather like they have in Australia, the prescribed countries and the others, where it would be much more discretionary?

**Hon Tina Brozman:** That is right. I also personally do not have a problem with a more flexible law which allows discretion to the judge. I recognise that when such a law is enacted, initially it causes a lot of consternation because no one knows how it will be interpreted. But in truth, after a couple of years have passed and a body of law begins to develop, the uncertainty goes away and in some respects it is easier because it enables a judge to mould the decision to the needs of the case instead of being bound by a statutory framework.

**Richard Gitlin:** Of course one could dichotomise two things. One is to identify which countries have similar laws so that their petition will automatically be accepted; so the judge does not have to make a finding that their laws are similar. We could unify that and then leave the remedy to have more discretion, based on what the judge sees as the circumstances.

**Hon Tina Brozman:** It is an interesting point about not having to look to whether the laws are similar. In section 304 in the United States we have to look to whether the laws are similar, yet if we look at the reported decisions, and even see what has happened in some of them where there are no reported decisions, where the country which is involved in the primary proceeding is a common law country, there is a pretty automatic recognition of the laws of that jurisdiction. The system is sufficiently similar to the American system, albeit that it may play out procedurally differently, and most judges have no problem writing a sentence or two saying they have looked at the law, it is good enough, and let us go from there.

**Mark Homan (Society of Practitioners of Insolvency, UK):** Can I try and shift the ground of the debate because I think we have been missing one of the main points?

Ron Harmer said it is unrealistic to think that we will have a model law that everybody agrees to, and having heard the discussion about whether we like the debtor in possession or not I think I can agree with him. I also question whether it would be desirable anyway because the needs of a country like, say, the United States, are very different from the needs of a country like, say, Russia, where the creditor needs to be empowered in order to make something happen.

I also think there is a fair amount of agreement that we need to co-operate with each other's procedures, whether through recognising them in the first place or with ancillary proceedings and so on. The only question is precisely how we do it. But we have not yet got down to the issue of how do we determine what is the law of the primary proceeding in the first place. We have heard the banks want certainty, but how do we ensure that we know which law is the primary law, how do we avoid having unnecessary competing primary proceedings? Is it possible to have a convention that determines which law will be the primary law? Do we base it on where the corporation is registered, where its principal place of business is, where its assets are, whether that be 80% of them or 51% of them, where its debts are payable, or the country where the first proceeding starts chronologically? Or do we leave it to judicial discretion, as under section 304, or do we stick with a free for all? That is the central issue. I am astonished that we have deliberated for so many hours without getting our teeth into whether it is possible to have a convention on that issue, because it seems to me that when a case breaks, when it starts, there is chaos, and unless we can bring order to it quickly value will deteriorate, and if we do not know what law applies we cannot bring order to it quickly.

**Richard Gitlin:** As I recall the negotiations that took place between Canada and the US some years ago, one of the key issues in the treaty that they were trying to put together was the definition of which would be the primary proceeding, to try and agree on that in the first instance. That may have been one of the reasons it did not work out, but that was certainly a focal point at that point in time.

**Michael Prior (Committee J – IBA, London):** Manfred Balz has addressed quite substantially in the European Bankruptcy Convention the question of “what date”, when do you start, how do you start, what is the common date; it is seriously addressed in his draft. It is not correct to say we have not touched on it, but perhaps we have not explored it beyond the European Bankruptcy Convention. But a common date, which lies at the root of all of this, is key. If there is some insolvency internationally and we are sitting here, we have experts from many fields, and if we do not actually know internationally the date on which the failure starts, we will have difficulty in applying all the laws of insolvency, no matter in which legislation. So whilst I think we have touched on it through the European Bankruptcy Convention, I do not think we have nailed the point down. Mark Homan is quite right. What are the views here, please, on establishing a single communal date for the start of an international insolvency problem from which all subsequent actions will flow?

**Neil Cooper (INSOL International, UK):** In Session I, The Needs, all three speakers touched on the need for the procedures to embrace those that are reorganisational. In Session II so far, most of the speakers have concentrated on what we might call the terminal procedures,

the liquidation procedures. Is it the wish of the body of the people here that what we are talking about should extend to the reorganisational, or is that over-ambitious for the time being?

**Manfred Balz:** As I said in my last intervention, it is possible to go far towards a reorganisation, or even pre-bankruptcy proceedings, if we admit that other countries will go on having bankruptcies to their liking. This is essentially what I said and we cannot, or we should not, say that this is not a recognition of a reorganisation. If a US Chapter 11 is opened and if a German court says this is fine but it will protect the local creditors by opening a German liquidation with respect to the assets situated in Germany, this is a recognition of the reorganisation as a bankruptcy proceeding, but it is not a recognition of all the policies of reorganisation law as we might like it, which would perhaps reach out a little too far.

What I said is perfectly compatible with the recognition of administrations, Chapter 11 cases, even concordats, compositions, but it is modified by a certain right of all other countries involved to safeguard some local interests, tax claims or whatever else happens to be the case. So the answer is yes, and no.

If I may reiterate. Let me stay with my example of a local liquidation, some assets in Germany, a bank account and some real estate in Germany: the debtor is seated in America and the debtor has filed for a chapter 11 in the Southern District of New York. Why not say that the American debtor has the possibility to talk with his German creditors? He can talk with his German creditors, he can convince the German creditors that it is in their best interests to participate in the American proceeding and that the reorganisation bonus will be such as to allow even the German creditors to get something over and above what they would get in the German liquidation. If this is not so, then German insolvency policies would be hurt by recognising all the policies of an American Chapter 11, but it does not mean that a good solution cannot be found, a businesslike solution – if we are talking about business – by opening negotiations between two or more fora. The emphasis on talks and negotiations, negotiations eased by money that goes from one jurisdiction to another, is a solution.

**Louis Levit:** Taking Dr Balz's example, suppose this American company can come to Germany and convince 75% of the German creditors that this is a good thing, and he can convince a court that people will be treated fairly, but 10% or 15% of the German creditors say that they want to proceed with all their rights of seizure. Would he concede under those circumstances that perhaps there should be some provision where if certain minimum standards were met, then at least some dissenting party in the ancillary jurisdiction could be – to use our term – crammed down?

**Manfred Balz:** This would be the case under existing German law; a majority of the creditors could bring about a composition that would close the German liquidation, that is they would force the minority to do the same as the majority wants, cram down the minority. Or it could be done under the EC system where it says that with the consent of the main liquidator a composition can occur in a local bankruptcy, which means majority rule and whatever the local law provides for.

**Gerry Weiss (INSOL International, London):** With respect to Louis Levit, I am not sure he has asked entirely the right question. My question would be this: if the relationship of the German assets to the German creditors was such that the German creditors, if this were taken in isolation, would get much more than if this were a total global insolvency, but the

German separate proceedings would ruin the possibilities of saving the business, would it not be in the interest, the global interest, to try and assist the global insolvency?

**Richard Gitlin:** What you are doing is you are pointing out part of the problem that we have to solve. We have half a loaf if we do not really address what happens in a reorganisation because that is where the jobs are saved and that is where the business value is.

# Open Forum and Discussion by Evaluators

**Richard Gitlin:** We will begin today with the report of the evaluators and I should like to introduce them to you.

**Carl Felsenfeld** is a Professor at Fordham University Law School in New York. He has had substantial experience with UNCITRAL and has participated in two very successful UNCITRAL programmes, the International Bills of Exchange and Promissory Notes and the Model Law on International Credit Transfers.

**Sir Leonard Hoffmann** is a Lord Justice of Appeal in the United Kingdom. He was the justice who started the *Maxwell* case and then left us to go to higher causes: he got promoted in the court. He has been very active with INSOL in connection with the creation and the first meeting of the judges from around the world and has been extremely helpful in getting a dialogue among judges from other countries.

**Jean-Luc Vallens** is a judge in the courts of Paris, France. He has participated, and is participating with Manfred Balz in the EU in the drafting and has played a significant role in bringing about what he expects will be a very successful EC convention very soon.

**Gordon Marantz** is a partner in the law firm of Osler, Hoskin & Harcourt in Toronto. He is Vice-President and a Member of Council of INSOL and he brings to us some very practical experience in what we are about to encounter. He was outside adviser to the Canadian Government in connection with their recent revamping of their bankruptcy law and brings to us some political reality of encompassing bankruptcy law revision.

## **UK Evaluator**

*Lord Justice Hoffmann*

Yesterday's discussion was from a number of different points of view. There were also some further points of view which were present in the hall but from which we did not hear. But let me say first whom we did hear from.

We heard from a United States judge from New York, an insolvency practitioner in the United Kingdom, a country with a well-developed banking system, and a Swiss banker. We heard from them about the practical difficulties in international bankruptcy. We were then told of various measures which have been tried or proposed to remove some of these difficulties, unilateral measures in Australia and in Germany, the model law which has been drafted by Committee J and the Draft Convention for the European Community. The aim of this conference is to arrive at some proposals as to how we could make further progress with the problems which have been identified; and identified they have. It does not seem to me that there is any call for much further investigation or inquiry into what the problems are, we all know what they are. The question is, how is it possible practically and politically to do anything.

The constituencies from which we heard yesterday have got somewhat different interests and let me try to identify what they appear to be. First, and yesterday most vocal, the insolvency practitioners. They are presented with an insolvent economic entity and their objective is to maximise the economic value of that entity for the benefit of the creditors, the employees, and possibly even the shareholders. This may involve a reconstruction without any change of ownership, or it may involve a change of ownership of the whole or of the individual parts of that entity. But for an insolvency practitioner, whether it is an accountant or a lawyer, the decision-making is driven by what makes business sense, what part of the business is viable and should be continued, what part should be broken up and its assets sold, and they judge the efficacy of the law by the extent to which it helps to bring about these economic objectives.

It follows from what I have said that from the point of view of the insolvency practitioners, the primary objective, the bottom line in any kind of international co-operation, whether it be unilateral, or treaty, or general principles, is the need for efficient decision-making in dealing with the insolvent entity. This requires that they should be able, if necessary, to deal with all the assets of that entity in whatever country they may be situated on the simple principle that assets may have a greater value if dealt with together than if dealt with separately. To an insolvency practitioner, therefore, the ideal situation is one where it does not matter whether the assets are in one country or another, or belong to one corporate entity or another, provided that the economic enterprise is a single one. Furthermore, and this is very important from our point of view in deciding how we might go forwards, to an insolvency practitioner it does not really matter how the ultimate proceeds are to be distributed. As long as the maximum value can be realised from the economic entity it does not matter who gets the proceeds as a secured creditor or as a preferred creditor, or whether one applies one national law to the distribution of one part of the proceeds and another national law to the distribution of another part of the proceeds. What the insolvency practitioners want is efficient decision-making on how to deal with the realisation of the entity or its reconstruction.

A second constituency was the bankers. In principle they are not altogether against efficient decision-making in dealing with economic entities; in many cases they will make common cause with the insolvency practitioners in seeking to realise maximum value. But they also have a different agenda which may be an opposing agenda, because sometimes they will be preferential creditors, or secured creditors, who can do better, who can achieve a quicker and more certain realisation by taking control of particular assets rather than by allowing them to be realised as a part of the whole enterprise. So there is sometimes, therefore, an opposing interest there. In addition the bankers have an interest in the actual method of distribution and we heard of their need for more certainty in the conflict rules so that they are able to say, when they advance money to a potentially insolvent enterprise, which law will judge whether a repayment constitutes a preference or not, whether the security which they get will be valid or not.

Then there are certain constituencies from which we did not hear. First, there are governmental interests in protecting their own creditors, and to some extent the strength of this interest depends upon the nature of the economy of the particular country. If it is a country where the creditors in any international enterprise are likely to be outside the country and the local creditors are likely to be relatively small in relation to what there is to distribute, then there is no particular domestic interest in being co-operative in other countries. One got some flavour of that from the Argentine speaker as to what the law of the Argentine used to be, although now it seems to be changing, presumably in recognition of economic changes in the Argentine. On the other hand, there is one powerful motive even for such countries to be willing at a basic level to co-operate, and that is that it encourages the inflow of capital. It is all very well saying when the company has gone insolvent that we do not stand to gain from co-operating with foreign creditors, we would do better distributing to our local ones, it is more of a problem when one comes to borrow next time.

Finally, another interest which was not spoken of yesterday, the governmental interest in preserving employment, again may run counter to market-driven decision-making about what it is best to do with the business. It might be the view of the insolvency practitioner that it would be better if that part of the business was closed down, the assets disposed of; that might not be in accordance with governmental views for the preservation of employment in that particular country.

Given these different interests, the strong feeling of the meeting was that we should not try to be too ambitious, but rather try and advance a step at a time. This was because a lot of the proposed improvements would require some form of legislation, either unilateral legislation within the country or accession to treaties of some kind, and that legislation will only happen if it is made to appeal to the legislators, if there is some sufficient political incentive to do so. What that seems to point to is the need to break down the problems into those basic things which can be dealt with and leave other things which might be equally desirable but which are perhaps more intractable until later; and how do we arrange our order of priorities? There are various ways in which we can do that. Bruce Leonard was suggesting that perhaps we might start by getting through INSOL to get at least the developed countries to accept general principles upon which insolvency co-operation might take place, and then to move on from that to legislation and perhaps to bilateral treaties and finally to multilateral treaties. That is not inconsistent with what I am about to suggest, which is that another way of breaking down the problem is to consider what in practice most gives rise to difficulty, where does the shoe pinch, on what particular problems are people able to go to the equivalent of the Department of Trade and Industry and say: "This is a serious problem, this is something which we need to

have some political input behind dealing with because it is in your interest that we should not have these difficulties”.

On the question of trying to get some political impetus into finding solutions, one has to distinguish between the position of the European Community and other countries. As Manfred Balz was telling us, the principle of the Single Market, to which we have subscribed, in itself provides a certain amount of political impetus in achieving co-operation. That is lacking when one comes to deal even with relations between countries which are not from an economic point of view so similar as the EU countries on the one hand and the United States on the other. What about these other countries? If one breaks down the problem, what seemed to emerge yesterday was that the basic problem, the really front-line problem which arises, is the need to have some form of basic recognition, a recognition mechanism in the courts of one country of insolvency proceedings which have been started in another country. Again one can distinguish there between the countries in which that problem is most acute and the countries in which perhaps it is less acute. The countries in which it is clearly most acute are those of the EU, the G7 countries, the countries with the most developed economies; that is where the problem most frequently arises. It is less so, and therefore the menu will be less crowded, in the case of countries which do not have such developed trading economies. Although, therefore, the shopping list of demands which Neil Cooper presented us with consisted of 12 which were all extremely sensible in themselves, we have to be able to choose from those the ones where we think we are most likely to make progress.

In looking at the question of recognition, I want to propound what I might call “Hoffmann’s Law of Recognition”, which is that the degree to which someone is prepared to trust the legal system of another country varies inversely with the extent of what they are to trust them with. By that I mean – to give an example – that in the Maxwell litigation, I am sure that in retrospect Tina Brozman would agree with me that in the realisation and the putting together of the scheme it would not much have mattered whether we had entrusted the job to Mark Homan, or whether we had entrusted the job to Dick Gitlin. Either of them on their own could have been trusted to do it and that would have been a great deal more efficient than having them doing it together, tied together in a kind of three-legged race; which was a great deal more cumbersome and a great deal more expensive. What we would not necessarily have entrusted them with, each of us, is to deal with the proceeds according to the laws of their own legal system. What really mattered in that case was that the scheme which was eventually produced satisfied the requirements both of Chapter 11 and of the provisions for reconstruction in England. So, if, for example, someone comes to me, says they want me to recognise an insolvency practitioner who has been appointed under the law of Australia, or Germany, or any other country, and they want to be able to take hold of some part of the English assets in order to realise them to best advantage, or in order to proceed with the reconstruction, I would say that was perfectly all right, as long as he has got some kind of authentication for honesty or efficiency from his home organisation, there is no difficulty about that. If he says he wants to repatriate the assets and distribute them according to the laws of his own country, that is a very different matter.

What I think, therefore, we will need in order to have a first step in arriving at a minimum of agreement is to sever the question of who deals with the assets, who is put in charge of the possible reconstruction which is put to the creditors and so forth, with the question of the laws by which that distribution takes place. That is a much more intractable problem.

For example, the problem that was mentioned of what one might call the accidental location of assets, where because there is one company in the group which acts as the treasury there are

accidentally enormous assets in one country which have got very little relationship to the amount of trade which goes on in that country, the creditors and so forth, and less assets in another country. That is a very difficult problem. It is a far more difficult problem than dealing with the actual administration of the company.

That deals with what seems to me to be the chief concern of the insolvency practitioner constituency. It is also possible, from what we heard from Manfred Balz, to deal in a fairly non-controversial way with some of the problems of the bankers. The conflict rules which his committee have developed for the European Community seem to me something which one could make progress with in other developed countries as well and that would introduce a good deal more certainty into the business of lending. But there are other problems besides the one I have already mentioned about where the assets are which will come, for example, much lower down the list such as the question which was raised of how to get secured creditors to come into a reconstruction and so forth. There are countries, the United Kingdom is one of them, which treat the holder of a security such as a floating charge as absolutely immune from any attempt to involve them in a reconstruction. If that is what we do with our domestic law, it will be very difficult to persuade us to take a different view internationally. This is true of a lot of other domestic rules as well. Somebody made a plea for greater speed in being able to deal with insolvency problems as they arise, because often it is necessary to get hold of the assets very quickly before there has been a seizure by other creditors. That again is praiseworthy, but there are, I am afraid, countries who in their own domestic systems do not move very fast, and if one turns up wanting an appointment even for an urgent domestic matter, they say: "I will fit you in on Thursday week". Again that is a more difficult problem to address.

What I think emerges from that is that there is room here for a multi-track approach, there is room here for an approach in which INSOL could play a leading role in fostering agreements within the major trading countries to solve the more crucial problems, where as I say the shoe pinches, between them. There is also room, and here I think of UNCITRAL as playing a major part, in developing a much more broad-based agreement to which many countries can join but which perhaps does not involve quite the same degree of co-operation as is demanded between the more developed countries. Here I was rather attracted by the proposal which Manfred Balz made about having a broad cafeteria from which countries could select what it was that suited them along the lines of the Istanbul Convention.

That is my impression, my summing up of yesterday's proceedings. It does, I think, give us a possible way forward.

## US Evaluator

*Professor Carl Felsenfeld*

It has been commented that we are here in Vienna for an extremely brief time for such a complex and difficult set of problems as we are addressing. I think that brief time is entirely appropriate and I think we can accomplish a good deal in that brief time. The reason the time can be as brief as it was is that we know the problems. Over the last 36 hours, I do not think any of us was presented with anything very new. What we have heard here is an excellent summation of the problems that exist, the history of where we have been. We are left now with the real question, once we know where we were heading, which is: "What do we do now?" I shall try and speak to that.

There are many practical problems involved. It has been mentioned that the best approach, the best possible approach to these problems is a treaty among different countries that specifies what the law should be and that will be adopted by the member states of the United Nations. The applicable law will then be there for everyone to apply in an identical manner. We can all agree that however desirable that is, we are at the very least 100, perhaps 200, perhaps 300 years away from accomplishing that, so there is not much point in spending a great deal of time on it.

Another commonality among us is that probably the best way to reach a conclusion, the best way we have found so far, is with a strong business sense of what is involved: what assets are there, who will benefit from divisions in various ways, and perhaps what we can do is start to stimulate an environment where businessmen get together and reach the best possible conclusion amongst themselves. Having said that, where is the place? How do we accomplish this meeting of minds? There are certain elements that are common to all of the problems. One is that we are dealing with situations where assets, entities, individuals, exist across the borders of more than one country, so we start with that. We then deal with a situation where the problems begin in one place or another place, and there already we start to stumble. What do we mean by begin? Where does a cross-border insolvency start? Does it start when one creditor sues a debtor for an obligation? Does it start when a situation gets into court? Does it start with the creation of an arrangement or a plan for distribution or assets, or a reorganisation which can exist in the United Kingdom for example to a great extent out of court? We could spend a great deal of time defining where the insolvency starts or how it starts, but I ask as a preliminary matter "Does it really matter?" Maybe it does not.

Assets are in different places. As a matter of applying law, it is important where the assets are located to see what law is most likely to be applicable. In terms of an overall insolvency, does that really matter? Maybe it does, maybe it does not; arguments can be made about that. I think what we need is a place, a place where business people can get together, discuss their problems, work out solutions, and have the decisions of that place binding in some manner, have an official quality given to the decisions. Here, of course, I am talking about court.

Now I reach what seems to me a relatively modest proposal, one where we can perhaps join forces, although even here there will be disagreements, and move on in a practical and effective

manner. What I am proposing is that there be established in all of the countries of the world a court, a forum, with a judge in charge, where international insolvencies can be taken and ruled upon, a court that is open to entrants from other countries and representatives from other courts, representatives from debtors, creditors, whatever, in the country involved and in other countries, so that they can all be heard and all hash out their problems. I am not proposing at this time, (although one hopes that we will ultimately reach that through the passage of time and the evolution of ideas) the law that that court should apply or the decisions that that court should make. I am not proposing that stays should be imposed in accordance with certain rules, nor that creditors have priorities in a particular manner, and certainly not that the law applicable to assets be the law of ownership of one jurisdiction or another jurisdiction. I am proposing that business people be able to get together and share their ideas within some given forum.

Then what can the forum do? We have been experimenting in the United States, and I hesitate to mention the United States because that often causes one to slip several steps behind in the process, but we have been experimenting in the United States with a kind of open ended procedure where a court can accept a problem and deal with it in whatever way seems practicable. Maybe that is too open ended, maybe it is not, but at the very least one thinks there should be an opportunity in all of these judicial systems to deal with whoever comes before the court and to try and find what appear to be a rational result. That I think is an appropriate and desirable first step.

Step two that I would propose on top of that is that we have learned from Judges Brozman and Hoffmann, that international co-operation among judges can be a very useful device, it can be very useful to bring procedures together to reach an effective result. While it seems relatively casual, perhaps, in view of the types of problems and the significance of the problems involved, I think there should be set up along with all of these courts, an international conference of some kind among bankruptcy judges, so that these judges over the course of time can get to know each other and find it easier than it has been found in the past to pick up the phone, and call one another, and say they have got a problem and let us talk about it. With the open end procedures of the courts, with the communications of the judges, one might be at this point several steps down the line. So from what I have heard, I would put this forward.

We have moved very swiftly. I propose an idea as specific as this extremely deferentially, and it is something that should be talked about. It can be, however, a modest and effective move forward: that INSOL and UNCITRAL consider the proposal of a universal court system, with judges in communication with one another, with the ability to make decisions binding, and move forward on that basis.

## Canadian Evaluator

*Gordon Marantz QC*

When Gerold Herrmann made his introduction, I think he had modest expectations of what could be accomplished in a gathering of this kind. He said he would be satisfied if we came to the conclusion that nothing could be done because at least that would be an informed decision. I think we have come a long way from that modest expectation and the question is whether we can carry it forward into real action.

This conference is different from virtually every other conference any of us has been to dealing with international topics. Many of them focused on the creation of a uniform law, a treaty, some means of multilateral action, and this gathering, while recognising that there have been some successful multilateral actions – the Montevideo instance, and the Nordic countries – also recognises that those have stemmed from a very similar cultural, social, legal and historical background in those areas and all of those treaties have been in place for a very long time. In terms of the modern world where change is moving so rapidly, it is no longer practical to expect to be able to accomplish anything on a multilateral basis in such a complex area in a reasonably foreseeable time frame – two or three hundred years perhaps.

Other conferences have focused on the need for some form of harmonisation, the systems where you can get there, and in explaining local laws to the participants. This conference has moved beyond that. We have got to the point where everyone understands and is fully sensitive to the issues, they accept that change is needed but one has to have incremental change. Very small pieces that can be easily digested and understood.

What we have managed to do is to bring together in this gathering a whole group of different forces in terms of the body politic. It was interesting that Dr Giovanoli, the Swiss banker, was able to focus in his presentation on the political realities that face those dealing with multinational issues. The banking community, the central banks particularly, are very sensitive to these pressures and they look after their own. The collapse of a banking system in any country is economic disaster for that entity; the banks are sensitive. The pressures that can be brought to bear by a banking system or an international bank are co-ordinated, they re focused and they get the attention of politicians, because the wellbeing of that community is at stake. If it is a question of netting of debits and credits to avoid cherry picking of assets and bank liquidation, there is co-operation. In the liquidation of the major banks that have had failures there has been a remarkable measure of co-operation amongst nations; not perfect, but the clout is there.

This group represents a far brighter interest than just those of central banks or major banks. This is an economy, a globally trading economy; all of the participants are players in it in one way or another. The question is, how do you take effective action. Professor Felsenfeld's proposition that there has to be in every jurisdiction a forum, a court, is a valid one, and just about all jurisdictions in the world do have some form of court structure. The question is how does one get access as a foreign representative in an insolvency proceeding to that court. The solution at the very basic level is really very simple: put something into the legislation, as a

separate statement, that sets out a set of rules that enables a foreign representative to come within that jurisdiction. That is almost a motherhood proposition. I do not think there are many people here who would disagree with the proposition that yes, this would be a welcome first step.

But how do you get that first step into your legislation? That is probably the most difficult task that anyone can undertake. We have seen examples of it happening: in the United States with section 304, in Australia, Great Britain, now Germany. We are looking, however, at major trading nations. Canada is also rapidly moving into that position. These are countries with well-developed economic activity in a sense of international involvement. There are other countries that are just beginning to see what the global economy really does mean to them.

How to attract the attention of those people who make decisions? That is where this body has to marshal itself and effectively deploy resources. We have studied the issue to death, as a community. We have all of the problems clearly identified. It becomes a question of mobilising the different issues, the different forces that play in the games.

Previously the focus has been largely in terms of the professionals. The lawyers and the accountants who administer insolvency have figured out the rules, they want a nice expeditious fast system so that they can get in and get the job done. It matters little, as the saying goes, how the money is distributed; first you want to get the pot of funds, then you can have a fight over who gets it, but if there are no funds there is no point having the fight. The problem though in terms of lawyers and accountants is that they do not get listened to by their various governments because they are perceived as carrying the forces of self-interest, they are looking at enhancing their fees and making life easier for themselves; and politicians, who are even more cynical than lawyers and accountants, do not really see that there is necessarily a benefit anywhere. We have also mobilised the academics and the economists, but to a large measure the politicians think they are living in ivory towers, and there is little reality there.

Then we come to the special interest groups. In Canada, as in many other places in the world, the whole question of bankruptcy law reform has been a long, arduous, and delayed process. To some measure the special interest groups have slowed that process down because they do not welcome change. Banks are remarkably adaptable, they can function in any environment. It takes them a while to adjust, but they will function, and they will survive; but they do not like change because it means they have to change the way in which they do things. So banks have in many respects been resistant to the process. But we have bankers here. We have bankers as part of INSOL, and they come to conferences, and they are very helpful. Even if it is enlightened self-interest that brings them here, that is all right because they are very important to the process.

The trade union movement has been a dominant force in bankruptcy law reform because they are interested in protecting the rights of their members, of the workforce, not only their wages, their severance and their termination, but their continued employment, their pension benefits and so forth. Then there are all the industrial groups. Protectionism is a major interest of most industrial bodies; they do not want any competitors in their home territory but they want free access to everywhere else in the world. So they are not too concerned about reform which changes the *status quo* in which they have operated. But, they are also participating in the process because they realise that the world is not a one way street.

We then have in the process the bureaucrats, the regulators and the administrators. They are very strong allies. They realise how the system works because they are charged in many countries with the responsibility for making it work: one can also cynically say they are looking to expand their power base and their empire. I do not think so, however, certainly not the ones we have seen here. They have a legitimate interest in seeing legislative change that makes the system work, and as we have seen in Canada, if we can get the public service behind an initiative, they can drive the process, they can manage the interest groups, they can manage all of the bankers, and the industrialists, and the trades unionists, who have an agenda to push on the one side, and the lawyers and the accountants who have another. They can manage the process and influence, very materially, the decision process; certainly in a parliamentary system.

But the real thrust is to reach the actual decision-makers, the politicians, the members of the government, the legislators, the people who are responsible for bringing forward policy and pushing legislation through the various legislative bodies. They respond only to those issues that push their hot buttons, because if there are no votes in it, if they cannot make mileage out of it, they are not interested. It is a brutal reality of life. Politicians look at it and they say “What is in it for me?”, or “for us”, or “for the party”: “How do we enhance our image?” They do not like to make tough decisions. They do not have a long-range vision. A politician’s long-range vision is until the next time he has to stand before the electorate at the polls. That is their horizon and we have to realise that in dealing with them. So, to send draft legislation to a government official in the hopes that they will move forward with it will not get very far, because unless that government official, that attorney-general, sees a real need, he has got several other things on the agenda. We have talked to many government people about legislative initiatives. Legislative timetables, I think globally, are now full up because everybody has all kinds of legislation they have to get through to protect the national and the state interest and they will not look at something new unless they can see there is a real need for it. So we get down to really marshalling a public information campaign in each jurisdiction where we want something done, and it is important. We all have to go home to our respective jurisdictions and the professionals in the field, the various interest groups, and the bureaucrats, the regulators and administrators, and we all have to approach it from a slightly different angle: like a massive military manoeuvre where one will attack on many fronts at the same time.

We are all satisfied, I believe, that some form of easier access to the courts in multi-national situations, where there is some small measure of certainty as to result, will enhance the availability of credit, will make it easier for capital to move into markets, will give people greater comfort. That can translate into greater job opportunities, more employment, greater tax revenues, all the rest of the good things that governments want to see, and the process has to be sold from that point of view.

What we have done in the last day and a half is bring the players together from a number of countries who represent these various interest groups and who can deliver that message for us. What we have left to do in terms of going forward is to take the product forward. We have the ideas, we want to market it, but we have to formalise it, and somehow within a short space of time, shaped up as between UNCITRAL, INSOL and its various participants, we have to design a package, in a sexy wrapper, and then we have to be able to market it to the individual governments involved so that it will get their attention.

One of the great virtues of what we are proposing is that it does not cost anything. It will not cost anything for any government to add a piece of legislation providing a mechanism for

access to its courts. But there can be benefits, there can be enormous economic benefits. There could be an increase in tax revenues and capital inflow. That, if properly presented, can convince a government to act. Certainly we found in Canada that the Canadian Government have been extremely responsive to the whole idea of bankruptcy law reform because they realise it is very important to the country's position as an economic trader. The same situation has prevailed in Australia, the same situation prevails in Germany. The major traders realise that there are a large number of jurisdictions out there that are developing trade, are becoming players in a larger marketplace where that message has to get home to the politicians, and it is not just a narrow interest that has to be served.

So our challenge really is to put together a package – it is an easy package, it is a step-by-step package, it is a unilateral package – and then to dress it up and sell it, and to marshal the forces at each of the jurisdictions involved, each of the countries, to go forward. If you couple that with sponsorship from UNCITRAL, who can say this is something they have looked at and they recognise as being valid, it provides a tremendous amount of comfort, if not for the large nations, certainly for those smaller states that do not have the resources to do all of the research and development that is necessary. That is our challenge.

## **French Evaluator**

*Jean-Luc Vallens*

The French Ministry of Justice asked me to attend – to hear rather than to speak. We know we have a lot to learn from foreign practitioners.

Yesterday we heard different ways of handling bankruptcies and cross-border bankruptcies, and of very different positions in different countries. I guess there are differences in countries that operate under common law; practitioners make protocols to handle bankruptcy. Under written law it is more difficult because nothing can be done that is outside the legal rules. However, we know we need basic rules to get legal authority to act.

We do not have many cross-border bankruptcies but those we have involve many people, many creditors, many interests, many assets, many liabilities. We have been looking at the work done by UNCITRAL with interest, and with favour, because of some of the proceedings we have had, BCCI for example. We consider harmonisation with a favourable eye for the future, but it is already impossible to ignore cross-border bankruptcies for three reasons at least:

- (i) credit and securities may be given abroad;
- (ii) the politics of many firms who have branches abroad do not know borders;
- (iii) the activities of the debtor who uses the border to shield his actions and who moves his assets abroad to prevent their being taken by a liquidator.

Manfred Balz described the work that has been done in Brussels on the EC Draft Convention, and some work on a convention was done earlier in the Council of Europe. The EC's Draft Convention does not attempt to harmonise the laws of the European states, but to set legal conditions for the handling of cross-border bankruptcies by settling conflicts of laws and jurisdictions. The work in Brussels and in the Council of Europe was long, hard and difficult, and we have learned to be modest and patient. We must also be realistic. There are many differences between laws, and not only bankruptcy laws but rules about privilege, public privilege, property and secured creditors. So what we need first is judicial co-operation based on trust in other courts and the legal conditions to manage trans-border proceedings. We need harmonised rules to cover issues in several of the proceedings. May I point out some of those that I have been thinking about in the course of these deliberations.

First, a rule in respect of jurisdiction for the main proceedings. In that case we may find a common criterion for opening proceedings. Secondly, it should then be possible to think about a stay of proceedings for two or three weeks so that a protocol or an arrangement can be drawn up between two, three or more practitioners and judges to search and to define legal proceedings. Third, we ought to find common cause for these rules to counter public policy in several countries where the rules covering the opening of bankruptcy proceedings are not always the same. Fourth, we need rules to protect local creditors: how to protect them? First there is a need for information. Who provides this information? The liquidator of the main proceedings? The others? How to protect too with simple rules on lodging claims? Under French law, for example, foreign creditors have a later time limit to lodge claims in a French

bankruptcy (2 months more), a simple rule that can avoid mistakes and accidental defrauding of these creditors. We have rules to recognise securities, such as mortgages.

Everybody has similar criteria and notions of mortgages or reservation of title too, but rules about effects of these securities are not the same in our different countries. We should think about publishing court decisions abroad, automatic publication, so that creditors can quickly be informed of the opening of the proceedings.

Fifth, we can maybe think about a simple rule to cover the ability of foreign liquidators to apply measures to protect the interests of creditors abroad so that assets can be frozen for a time. Sixth, it is surely necessary to think about harmonisation of measures to guarantee wages and to prevent dismissal of employees.

I hope that UNCITRAL and INSOL will think too about rules for groups of companies. The EC Draft Convention does not say anything about company groups and I think this is a lack.

Finally, the French Deputies have just passed a reform of our law on bankruptcy and under this new text, creditors will be treated a bit better than previously in several ways, especially secured creditors like bankers. But there is no provision in our internal laws to deal with cross-border bankruptcies under national law without some treaty or convention. It should be possible to introduce rules about these matters when such provisions have been drawn up, perhaps by UNCITRAL and INSOL.

## Summation by Colloquium Moderator

*Richard Gitlin*

Something very profound came out of the aggregate comments. I am drawn particularly to Sir Leonard and Judge Brozman, and when we combine that with the collective comments, a scene emerged. It is remarkable to hear two distinguished judges involved with international insolvency start by saying it is a business problem: one would assume the judges would start by saying it is a legal problem and that that is why they are involved with it. The recognition that an international insolvency is a business problem and that the job of the lawyers and the judiciary is to create a framework in which that business problem can be resolved as opposed to a legal problem is probably the most profound thing we could do.

If we look at what London and the United Kingdom have done with the assistance of the Bank of England, internally they have adopted what they call the London Approach, which is really sensible guidelines about how bankers and creditors can get together when there is a troubled credit. But what happens when that troubled credit seeps across borders is that it often becomes impractical to apply sensible guidelines. It seems that our collective mission is to put those sensible guidelines in place. From what I have heard of our evaluators, the sensible guideline to start with, if I interpret their comments properly, and certainly Professor Felsenfeld's suggestion, is to be able to have a court to go to in a jurisdiction where there may be assets, and to be able to have a law in that jurisdiction, or a treaty, that can allow someone to stand before the judge and say a problem has just arisen and we fear the business will lose value unless we have a global holding pattern. It does not necessarily have to be a mandatory act of the judge, our experience with judges around the world has been quite positive that if one can get before a judge, and if one is allowed to make one's arguments based in reason, particularly if it means saving employment and businesses, most often one will get a proper response in the courts. Just as M Vallens says, maybe a two-week holding period while we try to make sense out of this very complicated legal structure while we preserve the business, is what we really need.

As we pull it together, whether it is section 426 as the United Kingdom has it, whether it is the sensible and creative approach of Australia, whether it is section 304, or what, how that is pulled together will require some thought, and some approach, and maybe the thoughts of Manfred Balz and your thoughts today. But it seems to me that the collective comment from the group is to let us at least get an opportunity to get before a court so we can in effect create a holding pattern so that business people can then see if they can make resolution out of this, and see if we can put the legal complications – which no matter what laws are passed will have no good answers – in the bag.

*(There then followed a further, full session of open discussion, after which came the formal closure of proceedings).*