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Cross-Border Insolvency: A British Perspective

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CROSS-BORDER INSOLVENCY: A BRITISH PERSPECTIVE

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I. Introduction to the British Perspective on Insolvencies

BRITISH attitudes to cross-border insolvency are a product of its history and its legal and commercial culture. I shall start by listing some of these and then go on to consider how they have affected the law in Britain today. First, British bankruptcy law was formed during the eighteenth and nineteenth centuries, when Britain was the foremost trading nation in the world. The law therefore developed to reflect the needs of a mercantile community in which the assets of an insolvent trader might be situated in any part of the world. Secondly, Britain was an Empire, composed of many countries with widely different legal systems but all subjects of the British Crown. Notwithstanding the differences in legal systems, courts of the Empire were expected to assist and cooperate with other courts and particularly with the courts of the United Kingdom. The right to claim assistance from courts in other jurisdictions and the duty to render assistance to those courts has long been a part of the British system. Thirdly, insolvency has traditionally been seen as a system for the realization of the debtor's assets in the interests of his creditors. In the hard competitive world of the nineteenth century industrial revolution, bankruptcy was a disgrace and the notion that it could be an instrument of rehabilitation for the debtor is a relatively recent development.

Fourthly, corporate debt financing has been provided either by the issue of fixed interest debentures or, more commonly in this century, by advances under facilities by banks. In either case, the debt has been traditionally secured by a floating charge in favor of the debenture holders or the banks over all the assets and undertaking of the corporation. The floating charge is a remarkable invention of Victorian equity lawyers which was designed to enable a company to trade freely with its assets and at the same time to use those assets as security for its fixed or bank debt. The instrument that creates the charge entitles the creditor in the event of default to appoint a receiver with wide powers to take possession of the whole of the corporation's assets and to run the business as agent of the corporation. The powers of the former management are suspended. The receiver is however an agent whom the management of the corporation cannot dismiss and

* The Right Hon. Lord Hoffmann is a Lord of Appeal in Ordinary in the United Kingdom. These remarks were given on April 4, 1996, at the 1995-96 Fordham University Graduate Colloquium: International Insolvencies.

his primary duty is to realize the assets and goodwill of the corporation in the interest of the appointing creditor rather than the stockholders.

The pervasiveness of the floating charge leads to a fifth characteristic of British insolvency, which is that there is seldom any money left over to pay unsecured creditors. The whole of the assets of the corporation are caught by the floating charge and applied for the benefit of the debenture holders or more commonly the bank. This phenomenon has caused a great deal of bitterness among unsecured creditors and has been debated inside and outside Parliament for more than a hundred years. The only steps that Parliament has taken have been to require floating charges to be registered, so that persons dealing with the company can in theory have notice of their existence, to avoid floating charges granted within a year before insolvency, and to give government creditors and employees certain preferential rights ahead of the floating charge. It remains the norm that when the preferential creditors, the expenses of the receivership, and the bank's debt have been paid, there is nothing left for anyone else.

Sixthly, it is a further consequence of the floating charge that the persons appointed as receivers have traditionally been accountants rather than lawyers. The banks have regarded accountants as suitably qualified to take charge of the conduct of the business and the realization of the assets. The result is that British insolvency practitioners are to this day almost entirely accountants who are, in their capacity as receivers, used to having virtually unlimited powers over the assets of insolvent corporations. Seventhly, the development of a rescue culture in Britain has been spearheaded by accountant insolvency practitioners and conducted principally through the medium of receivership. Banks have learned that more can be realized if the business is sold quickly as a going concern rather than broken up. Even in cases in which the breakup value would be sufficient to pay off the bank, the odium which would be incurred from unsecured creditors and stock holders, the protests of employees, and sometimes the threat of litigation, has helped to persuade banks to try to maximize the value of the business.

This leads to the eighth point, which is that the British statutory rescue procedure, which is called administration and is the nearest thing in British law to Chapter 11 of the U.S. Bankruptcy Code, is modelled on receivership. Administration was introduced by the Insolvency Act 1986 to enable rescue to take place in cases in which there was no power to appoint a receiver or the creditor entitled to appoint a receiver for some reason did not want to do so. The administrator is appointed by the judge for one or more of four statutory purposes, which include the survival of the company or its business as a going concern, the sanctioning of a plan of reconstruction, or the more advantageous realization of the assets than would be effected on a liquidation. The administrator has full power to do anything which may be necessary for the management of the affairs, business, and property of the corporation. He must within three months make proposals for how the statutory purpose is to be achieved and these are put to a creditors' meeting. If they are successful, the administrator will be discharged. If not, he will report failure to the court and will usually be appointed liquidator instead. My ninth and last general point is that receivers and administrators, like liquidators, are independent insolvency practitioners appointed by the creditors or the court. British law has no equivalent to the debtor-in-possession under Chapter 11, an institution which lawyers outside the United States usually find rather puzzling.

II. International Aspects of British Insolvency Law

This background should be sufficient explanation to enable me to turn to the international aspects of British insolvency law. At present, an English court has jurisdiction to make a personal bankruptcy order against anyone who is domiciled in England, who is present in England when the order is made, who has been ordinarily resident there, or who has carried on business there at any time within the previous three years. The jurisdiction to wind up corporations is even wider. The court may wind up any company registered in England and any foreign company if there is sufficient connection between the company and England and there are persons who would benefit from the order. It is therefore not even necessary for the purposes of jurisdiction that there should be assets in England. This wide power may be useful when the company is incorporated in a foreign tax haven like Liberia or the British Virgin Islands and there are no known assets in England, but the creditors hope that some may be unearthed by using the inquiry procedures of the court against officers or directors or bringing proceedings to set aside pre-bankruptcy preferences or fraudulent disposals.

In a recent case,[1] the company was incorporated in the Channel Island of Guernsey, which is a separate jurisdiction, not part of the United Kingdom. It had no assets in England but owned property in Portugal. The business appeared to have been conducted, however, from the basement of an hotel in North London by a person resident in England and the money that was owed to creditors had been borrowed in England. The judge made a winding up order. Although the court has this very wide jurisdiction, its exercise is discretionary and it will not be exercised, even in respect of an English registered company, if there is another more appropriate jurisdiction in which the company can be wound up. Jurisdiction to use the administration or

1. *Re A Company (No. 003102 of 1991)* ex parte *Nyckeln Finance Co. Ltd* [1991] B.C.L.C. 539.

rescue procedure is rather narrower. Although there is some debate on the point, it appears to be confined to companies registered in England.

III. British Recognition of Foreign Insolvency Proceedings

A. *General Approach*

I move next to the English law on recognition of foreign insolvency proceedings. In personal bankruptcy, English law has always recognized the jurisdiction of foreign court to make a bankruptcy order against anyone domiciled in its territory or who has submitted to the jurisdiction. Furthermore, it has recognized that bankruptcy order as operating worldwide to assign the debtor's moveable assets to his trustee in bankruptcy. The foreign trustee in bankruptcy is entitled to sue in England to recover the debtor's assets. This universalist theory of personal bankruptcy has always been regarded by English courts as mandated by international law and they have on occasion expressed great surprise and vexation when some foreign courts have not been correspondingly willing to recognize the title of an English trustee in bankruptcy appointed to an English domiciled bankrupt.

It will be seen that the theory is to the advantage of an international trading nation such as Britain was at the time it was developed. If universally practiced, it enables the trustee of a bankrupt English merchant to claim title to his goods in a warehouse in Bombay or his ship in a harbor in New Zealand, leaving the local creditors to prove concurrently with the English ones. On the other hand, the theory is less advantageous to an underdeveloped country where few locally domiciled businessmen will hold assets abroad. In such a case they may prefer to keep the assets of the bankrupt foreign merchant for local creditors. They will not be concerned with questions of reciprocity because the trustees of local bankrupts will seldom need to call upon the assistance of foreign courts. Britain was able to impose its will upon the countries of the Empire but the United States clung obstinately to a territorial theory of bankruptcy and did not give recognition to foreign bankruptcy proceedings or trustees. Worse still, some South American states actually gave preference to local creditors over foreign ones.

In addition to the common law conflicts rules of personal bankruptcy by which the title of a foreign trustee is recognized, there have long been statutory provisions for rendering assistance to other courts. In the Bankruptcy Act 1914, which applied to the whole Empire as it then was and which remained in force until 1986, any British court in bankruptcy could call upon the assistance of any other British court. The latter court had a duty to provide such assistance and had the power to make any order which could be made in bankruptcy proceedings in its own jurisdiction or in the jurisdiction of the requesting court.[2]

The position in relation to corporate insolvencies is less clear. There is no doubt that British courts will recognize the right of a liquidator or other court official appointed by a court in the territory of incorporation to represent the company. But that leaves a number of questions unanswered. First, the fact that a company is subject to insolvency proceedings in its place of incorporation does not prevent a British court from making a winding-up order under the very broad jurisdiction to which I have already referred. The fact that the company is already in liquidation in its home territory is merely a matter affecting the discretion. English courts can wind up foreign companies that are not merely in bankruptcy proceedings in their home territory but have even been dissolved and ceased to exist there. So in the 1920s and 1930s the courts wound up several Russian banks that had been dissolved by the Soviets. Secondly, it is not clear to what extent a British court will recognize the position of a liquidator appointed by a country other than the territory of incorporation; for example, a Chapter 7 liquidation in the United States of a company registered in Liberia but carrying on business in New York. Thirdly, there is the question of whether a British court will recognize not only the title of the person who under the foreign bankruptcy law represents the company, but also the consequences of the commencement of those proceedings. A good example is whether an English court will pay any attention to the automatic stay that results from filing a petition under Chapter 11. Fourthly, if there are bankruptcy proceedings in respect of the same debtor in the foreign country and in Britain, to what extent will the British court cooperate with the foreign bankruptcy?

Before addressing these points in general, I should say that on the last question, namely, assistance between courts, the principle of the right to cooperation, which in the days of the Empire applied between British courts in cases of personal bankruptcy, has been extended to corporate insolvency. The provisions are now in section 426 of the Insolvency Act 1986. But the concept of a British court overseas has gone with the Empire. Instead, there is a duty to assist the bankruptcy courts in a list of countries contained in a Schedule to the Act, which can be added to from time to time. At present the countries on the list are the old Dominions of Canada, Australia, and New Zealand, the Republic of Ireland, and a collection of present or former colonies like the Cayman Islands and Bermuda. The United States is not on the list. As in the old bankruptcy law, the English court in giving assistance to, for example, an Australian court, can make any order that it could make under English bankruptcy law or any order which

2. Section 122 of the Bankruptcy Act 1914.

the Australian court could have made under Australian bankruptcy law. This produces what may seem to be slightly odd results. For example, an English court was able to make an administration order in respect of an Australian company. It decided that its own jurisdiction applied only to English companies but it made the order because an Australian court would have been able to do so.[3]

There is an interesting difference between the British technique of dealing with requests for assistance from foreign courts and the corresponding provisions in section 304 of the U.S. Bankruptcy Code. The former creates a mandatory obligation to render assistance in respect of a limited number of countries and leaves other cases to the common law or ad hoc arrangement. The latter applies without restriction as to countries but is by no means mandatory. There is an elaborate list of factors that the U.S. Bankruptcy Court has to take into account. It is the British model which, as I shall mention later, has been followed in the European Insolvency Convention. Its great advantage is that it provides a measure of certainty to the liquidator or other officer who, through his own court, is attempting to enlist the assistance of the British court. He knows that if his country is on the list, he will be able to obtain such assistance quickly and cheaply, without elaborate legal proceedings. It is often a feature of insolvency proceedings, particularly if some form of rescue is being mounted, that every day counts and that speed and certainty are vital if the business is to be saved.

B. *Cooperation Between British and United States Courts:* Felixstowe *and* Maxwell

The United States, as I have said, is not on the list. Cooperation with British courts depends upon the common law and ad hoc arrangements. I shall give two very well known illustrations of these principles at work. The first was *Felixstowe Dock and Railway Co.* v. *U.S. Lines Inc.*[4] U.S. Lines was a shipping company carrying on business all over the world. It owed money to the dock company at Felixstowe, a big container port in the east of England, and to similar organizations in France, Holland, and other countries. It had money in a bank account in England and some assets in France. It filed a petition under Chapter 11 in the United States. The response of the Felixstowe Dock company was to obtain an injunction to restrain the company from moving its money out of England back to the United States. U.S. Lines applied to Mr. Justice Hirst to discharge the injunction on the grounds that it was a violation of the worldwide automatic stay which followed from filing the Chapter 11 petition and that all the

3. *Re Dallhold Estates (U.K.) Ltd* [1992] B.C.L.C. 394.
4. [1989] Q.B. 360.

company's assets should be administered in accordance with the Chapter 11 reorganization.

The judge refused to discharge the injunction and kept the assets in England. There has been a lot of criticism of this case, particularly in the United States. Mr. Justice Hirst has been accused of insularity, not showing comity, and not understanding the nature of proceedings under Chapter 11, in spite of being sent a long essay by the U.S. judge explaining in simple language how they worked. I am not sure that these criticisms are fair. As a matter of private international law, all that he was required to do was to recognize the title of the U.S. corporation to sue in respect of its injuncted assets. This gave rise to no problem. The former management were now debtor-in-possession under Chapter 11, but so far as the English court was concerned, they still had title to act on behalf of the company in the same way as if there had been no Chapter 11 proceedings. The question was whether recognition should be given to the consequences in U.S. law of the Chapter 11 petition. As a matter of U.S. law, the automatic stay operated worldwide. But that was no reason why an English court should give it effect.

English courts are used to the extraterritorial pretensions of the United States. In the field of antitrust law, the British parliament has been driven to retaliate by legislation providing specifically that no effect shall be given to such laws and that triple damages awarded by a U.S. court shall be recoverable in English law. The purpose of such extraterritoriality is often to advance and protect U.S. economic interests at the expense of those of other countries. Of course this is not always the case. Quite often it is perfectly sensible that the whole of a corporation's assets worldwide should be dealt with under a single system of law and undesirable that creditors in one country should be allowed to break ranks. Not long after *Felixstowe* I heard a case myself in which a U.S. creditor of a U.S. corporation in Chapter 11 in Texas wanted an injunction to freeze assets of the corporation in England. I refused the injunction, saying that fairness to all creditors required that he should participate in the reorganization in Texas. But this was not the case in *Felixstowe*. The proposed scheme of reorganization was that the assets removed from England would be used to keep U.S. Lines going in the United States but that it would withdraw from the European market. This meant that the Felixstowe Dock company would gain nothing from the reorganization. Furthermore, it was clear that the French, who have a highly developed sense of their own national interest, were for similar reasons not going to allow any of the assets in France to be sent to the United States. The question of whether to discharge the injunction was a matter of discretion for the judge and in those particular circumstances, I am not surprised that he thought it would be unfair to the English creditors if they had to take their chance in the Chapter 11 reorganization.

The *Felixstowe* case was thought at the time to represent a low-water mark in cooperation between the bankruptcy courts of the United Kingdom and the United States. It seems to me that it was a very special case which I, if I may so, would probably have decided in exactly the same way and furthermore, as Mr. Justice Hirst remarked, would probably have been decided in the same way in the United States if the situation had been reversed.

A year or so later came the Maxwell Communications Corporation bankruptcy, which is often regarded as showing a welcome reversal in the attitudes of the British courts. I happened to be the judge in that case and I can only say that I did not regard myself as doing anything unusual or anything which my colleague Mr. Justice Hirst would not have done. M.C.C. was a British company and most of its creditors were British banks. But most of its assets were in the United States in the form of subsidiary companies like Macmillan Publishing and Berlitz. After a period of unsuccessful negotiation with its banks, the company petitioned for an administration order in England. I made the order, but there was a dispute between the company and the banks over who should be appointed administrator. Both candidates were highly respectable accountants from huge international firms and I decided in favor of the banks' nominees simply on the ground that they had a running start because they had already put in thousands of person/hours investigating the company's affairs during the negotiations over the previous weeks. The company management did not like this and went off to New York to petition under Chapter 11. They invited the New York judge to appoint an Examiner. They hoped that this would block the attempts of the English administrators to gain control of the U.S. assets. The judge appointed an Examiner for the different and perfectly proper reason that she needed someone independent to advise her in how to run the Chapter 11 proceedings.

The English administrators, who hoped to be able to dispose of the U.S. subsidiaries as quickly as possible as going concerns, now found that they had to deal with the U.S. Examiner. This was something of a culture shock for them.[5] As I explained earlier, the English administrator is the descendant of the nineteenth-century receiver appointed to take complete control of the whole of the company's assets and business. He is used to going round to the offices or factory within an hour of his appointment and taking charge. He has full powers to do whatever he likes and although he is in theory the agent of the company, his duty even to provide information to the old management before the termination of the receivership is practically zero. He can

5. For a view from the other side of the fence, see Evan D. Flaschen & Ronald J. Silverman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communications Corporation International Insolvency*, *in* Current Developments in International and Comparative Corporate Insolvency 621 (Jacob S. Ziegel, ed. 1994).

employ the old management if he likes, but if he decides not to, he simply collects the keys of their automobiles and leaves them to go home on the subway. These powers enable an English administrator to act with what in other jurisdictions might seem incredible speed. When Barings Bank collapsed, the administrators were appointed on Sunday night and had sold the bank, lock, stock, and barrel, nine days later. The ability to act quickly enabled a good deal of the value of the bank to be saved when otherwise it would have trickled away with every hour of uncertainty. But in *Maxwell* the English administrators found that they had to deal with an Examiner who was responsible to a judge who in turn had to have regard to the various interest groups who jockey for position in any Chapter 11 proceedings. Even the old management, who would simply have been shown the door in England, had their leverage which enabled them to keep a place at the negotiating table.

The administrators therefore found that to get anything done—for example, to raise interim finance to keep the subsidiary companies going—required a great deal of expensive and time-consuming negotiation. So they negotiated an overarching agreement with the Examiner, rather grandly called the Protocol, which laid down general lines of demarcation for running the proceedings on both sides of the Atlantic with a view to avoiding delay and duplication of effort. The New York judge had encouraged both the negotiation of the Protocol and cooperation between the Examiner and the English administrators.

The Protocol was brought before me for approval. I think it took me about twenty minutes to read and approve it. I checked to see whether it contained anything which looked like an obvious mistake. Otherwise the chances are that I would have approved of whatever it said. I certainly did not think of myself as giving effect to some unusual form of cross-border insolvency cooperation. In this respect, it seemed to me that my position was quite different from that of my colleague in New York. I had appointed administrators in respect of the whole company and it was their duty to take charge of the business and collect the assets according to their professional judgment. In English law they have full powers and although they report to a meeting creditors and are in the end responsible for their actions, they are subject to the very minimum of ongoing supervision by the court. They are accountants, not lawyers, and have an experience in the management of insolvent businesses that the court does not share. Administrators are entitled, if they feel they are doing something unusual, to protect themselves against subsequent complaints by asking for the court's approval. But in general the attitude of the court is that if the administrator's business judgment is that doing something would be in the best interests of creditors, the court will accept that judgment. So in this case, the administrators told me that they were having a difficult time in New York. Naturally they would have preferred simply to take charge of everything as they were used to doing in England. That would have been quicker and cheaper. But they had been advised that an attempt to terminate the Chapter 11 proceedings in New York would be expensive and delay matters without necessarily being successful. So they felt that the interests of creditors were best served by agreeing to the Protocol. In those circumstances, it is hardly surprising that I approved. I think that any other English judge would have done the same.

It may be fanciful to make comparisons, but I cannot help thinking that the differences between Chapter 11 in the United States and insolvency proceedings in Britain resembles the differences between our constitutions. The constitution of the United States has a clear separation of the powers of three branches of government and an elaborate system of checks and balances. There are many points at which interest groups who do not want something to happen can stop it from happening. Every step has to be negotiated. In Britain, the government generally has complete control of the legislative process and the courts have no power to review legislation. We have in effect a dictatorship between elections. In the early stages of a Parliament, a newly elected government can do virtually anything it likes. It is only accountable to the people at the end of its term. In the same way, a British insolvency practitioner is put in charge of the business. He is accountable to the creditors and the court only retrospectively after his job has been done. In Chapter 11, I have the impression that the management is, to use a striking image of Thomas Hobbes, like one who goes to play tennis carried in a wheelbarrow.

The Protocol having been approved, the *Maxwell* case disappeared from the English courts and the administrators got on with their job as best they could. It reappeared on only two further occasions. One was for the approval of the final scheme of reorganization and reconstruction under both Chapter 11 and the scheme of arrangement provisions of the British law. The other was an attempt by Barclays Bank to persuade the English court to stop the administrators, who had been recognized as the management for the purposes of being the debtor in possession in New York, from using the provisions of the U.S. Bankruptcy Code to set aside a pre-bankruptcy repayment as a preference. This was on any view a fairly pointless application because even if the English court did tell the administrators not to sue in New York, the bankruptcy judge could have empowered the Examiner to bring the proceedings on behalf of the company. In other respects the case involved the application of general conflicts rules about the circumstances in which courts will issue anti-suit injunctions, of which English courts gained a good deal of experience during the antitrust litigation brought by the liquidator of Laker Airways in the 1970s. But these principles are not peculiar to bankruptcy. They involve the general question of when it is appropriate for a court to intervene in proceedings in another country by prohibiting a person subject to its jurisdiction from bringing a suit there. The attitude of the British courts, which I think is shared by those of the United States, is that a court should not take such a step unless serious injustice is otherwise likely to take place and that one should ordinarily assume that the foreign court will not do anything which constitutes a serious injustice. In this particular case,[6] Barclays Bank were complaining that it would be unfair if the avoidance provisions of the U.S. Bankruptcy Code were used against them because the arrangements under which they had advanced money to the company and under which they had been repaid had all been made in Britain. My decision, and that of the Court of Appeal, was that they should address these arguments to the judge in New York. If it would constitute a serious injustice for the U.S. bankruptcy judge to take jurisdiction under the Bankruptcy Code, then no doubt she would not do so. But the British court, even assuming that it had effective power to do so, should not try to tell her when it would be unjust to apply U.S. law.

Perhaps I could summarize what I see to be the differences between *Felixstowe* and *Maxwell.* In *Felixstowe*, the assets were in England but there were no insolvency proceedings in England and no liquidator or administrator to protect the interests of English creditors. The court was being asked to put the interests of English creditors in the hands of the U.S. Bankruptcy Court supervising the reorganization. It refused to do so. In *Maxwell*, the English court had appointed administrators to look after the interests of English creditors and the assets were in the United States. In those circumstances the court approved of the decision of the administrators to cooperate with the U.S. Bankruptcy Court through its Examiner.

C. *Cooperation in the European Union: The Proposed Bankruptcy Convention*

From cooperation between Britain and the United States I want finally to turn to cooperation between Britain and the other Member States of the European Union. One of the objects of the European Treaty is stated in Article 220 as being to secure the reciprocal recognition and enforcement of the judgments of courts and tribunals. As long ago as 1968, the then European Community signed what is known as the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. But that convention excludes the judgments of courts in bankruptcy.

For the past thirty years or so, the Member States of the European Union have been trying to negotiate a Bankruptcy Convention. Their first attempt was a very ambitious proposal to have a set of rules by

6. *Barclays Bank plc* v. *Homan* [1992] B.C.C. 749.

which only one Member State would have jurisdiction in any bankruptcy. The orders of the court in that State would be effective in all the others. But this proved completely unacceptable because no Member State was willing simply to hand over the claims of its creditors, particularly its government and preferential creditors, to the bankruptcy rules and court of another country. For a long time, work on the convention was abandoned. But a couple of years ago it was resumed. At the end of last year a new draft Convention was initialled by the representatives of all Member States and opened for signature. It has been signed by twelve out of the fifteen members of the Union. The Government of the United Kingdom has not yet decided whether to sign or not. A Committee of the House of Lords, of which I happened to be Chairman, has just produced a report on the Convention that is reasonably favorable but requires some doubtful points to be cleared up in an explanatory memorandum that will accompany the Convention and be used as a guide to interpretation. In theory, the three Member States who have not yet signed have to make up their minds by the end of May, but I imagine that it may well take rather longer. Then the Convention has to be ratified. So it may be some time before it comes into force, if indeed it ever comes into force at all.

The present draft Convention is not nearly so far reaching as the first draft. It says that in every corporate insolvency the main proceedings shall take place in the country in which the corporation has the "centre of its main interests." This is presumed to be the state of incorporation until the contrary is proved. All other Member States are obliged to recognize the orders of the court in which the main proceedings are taking place and the liquidator, administrator, or other officer appointed by that court, who may exercise all the powers he has under the law of the State which appointed him in any other Member State. Most of the questions that arise in a bankruptcy will be determined by the law of the State in which the main proceedings take place. There is, however, nothing to prevent the commencement of insolvency proceedings in the courts of any other Member State in which the corporation has what the Convention calls an "establishment." An establishment will most obviously mean a place of business, but the draft explanatory memorandum suggests that it will be very widely interpreted. Such secondary proceedings can be started by a creditor or by the liquidator or other officer appointed in the main proceedings, for example, because he wants to use procedures of interrogation available through the courts of another state. If secondary proceedings are started in another State, they will apply only to assets situated within that State. In respect of those assets, however, the local law will apply to most of the issues which arise.

I can best explain how it is supposed to work by giving an example. Take an insolvent French company that is the subject of main proceedings in France. It has a factory in England and a bank account in Frankfurt. One of the directors, whom the French liquidator would like to question about what has happened to some of the assets, is living in Italy. Employees at the English factory can, if they wish, start secondary proceedings in England. If they do, the English assets will be subject to the English law of insolvency and the employees will get the limited preferential rights in those assets to which they are entitled in English law. If no one starts any secondary proceedings in Germany (and the mere presence of a bank account in Frankfurt would not seem to amount to an establishment sufficient to give jurisdiction to start such proceedings) then the German courts are obliged to give effect to the French bankruptcy and hand over the money to the French liquidator. If there are any German creditors, they must go and prove in France. English creditors, on the other hand, can all prove in the English proceedings and if the English assets are not sufficient, the English liquidator will hand over their claims to his French colleague. As for the director in Italy, the French liquidator can apparently go there and exercise whatever powers of interrogation he may have under French law.

The view of insolvency practitioners in Britain, as given in evidence to the House of Lords Committee, was that the Convention is likely to be helpful. It does mean that an insolvency practitioner who is appointed liquidator or administrator of a British company can obtain quick and cheap recognition of his position in all other Member States in which secondary proceedings have not been commenced and a minimum of cooperation from the court appointed officers in those in which they have. On the other hand, companies of any size which operate in more than one Member State usually do so, not through branches but through locally incorporated subsidiaries or associated companies. The Convention has nothing to say about recognition of insolvency proceedings in respect of associated companies except, for what its worth, the right of the liquidator of a parent company to be entitled to control its stockholding in a foreign subsidiary. So this immediately reduces the practical value of the Convention. If one takes the common example of a British company with a German subsidiary or vice versa, each buying and selling stock items from the other as part of an integrated business and linked by cross guarantees of the same debt, the Convention does nothing to help the administrator or liquidator of either company in trying to rescue them both as a going concern rather than breaking them up. As now, it will depend upon ad hoc negotiation between the insolvency practitioners in the two countries.

The general principles of the Convention are however to be welcomed. On the one hand, within the limits of its operation, it provides certainty. Recognition and cooperation follow as of right and do not have to be litigated or negotiated. On the other hand, it does not achieve certainty at the expense of sacrificing the interests of creditors in any country in which there are sufficient assets to count as an establishment. Such creditors are entitled to their own secondary proceedings and the operation of their own law.

Conclusion

Are there any general conclusions to be drawn from the British experience in cross-border insolvency? Perhaps there are three. First, we do not see a role for judges and the judicial process in the early stages of rescue or liquidation. At this stage, the law can do little except impose obstacles to a quick business solution. We think that the right answer is to appoint someone to represent those interests which are common to all creditors and indeed stockholders and employees, namely to preserve the business and realize its maximum value. The time for lawyers is afterwards, when the business has been saved or sold and priorities in the proceeds have to be adjusted. In this field, it is better to have a few cases in which mistakes are made than to impose expense and delay on everyone. Secondly, we think that cooperation between jurisdictions should be rapid and a matter of right rather than discretion. Again, we think that the role of judges should at this stage be as limited as possible. But this inevitably means that the kind of cooperation provided should be modest and limited to whatever can be done without damaging the ultimate rights of local creditors. Because thirdly and finally, we think it is unrealistic to require the courts of one country, however well disposed to those of another, to act in a way which is manifestly to the prejudice of its own creditors. The courts of the United States do not do so, nor do we, and the European Convention is designed, subject to a certain amount of give and take, to avoid compelling any Member State to do so.