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COMMENT: A MORE OPTIMISTIC VIEW OF CROSS-BORDER INSOLVENCY

JAY LAWRENCE WESTBROOK*

As always in these matters, I am impressed by Professor Boshkoff's scholarship, but depressed by his attitude. His paper¹ demonstrates that it will be a daunting task to achieve cooperation, much less universalism, in the general defaults of transnational enterprises. But the task is not hopeless and cannot be left to our grandchildren.

The difference in the way Boshkoff and I view the same body of evidence is best illustrated by three decisions in two cases that he does not discuss: *In re Axona*² and *In re Maxwell Communication Corp.*³ These cases, along with other cases in other jurisdictions,⁴ demonstrate a remarkable level of cooperation in international insolvency in comparison with the discouraging results accepted as inevitable just a few years ago. When one considers these concrete results in the courts in conjunction with the rapidly expanding international initiatives for reform in this field, the prospects seem distinctly gloomy.

Axona represents the global high tide of international cooperation in

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1. Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931 (1994).

2. *In re Axona Int'l Credit & Commerce, Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991).

3. Final Supplemental Order Appointing Examiner, *In re Maxwell Communication Corp.*, No. 91B15741 (TLB) (S.D.N.Y. January 15, 1992) (Brozman, J.) (copy in author's possession); *Barclays Bank PLC v. Homan*, [1993] BCLC 680, [1992] BCC 757 (concerning anti-suit injunction sought against Maxwell administrators in the United Kingdom). See *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992) (discussing, in a related "private side" case, cooperation in the Maxwell MCC case). See also *In re Maxwell Newspapers, Inc.*, 151 B.R. 63 (reporting decision in related "private side" case); *In re Maxwell Newspapers, Inc.*, 164 B.R. 858 (Bankr. S.D.N.Y. 1993) (same).

4. E.g., Judgment of Feb. 25, 1986 (*Kleber v. Friis Hansen*), Cass. civ. Ire, 1987 La Semaine Juridique [J.C.P.] II No. 20,776 (Fr.); (See annotation by Judge Remery, 1987 La Semaine Juridique ed. E, [J.C.P.] II No. 14,969 (stating foreign adjudication effective to invalidate an attachment lien obtained subsequent to the foreign adjudication, but prior to any action by the foreign liquidator in France)); Judgment of July 11, 1985 (P.N. KG u.a. v. RA O) Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 95 (F.R.G.) (giving effect to a Belgian bankruptcy for the purpose of entitling the Belgian liquidator to claim a debt in Germany). See Stefan A. Riesenfeld, *Transnational Bankruptcies in the Late Eighties: A Tale of Evolution and Atavism* in COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 409 (David S. Clark ed., 1990) [hereinafter Riesenfeld, *Transnational Bankruptcies*].

insolvency cases. Arguably it overemphasized cooperation, but whether correct or not, the case expresses a thorough rejection of parochialism and a high level of commitment to achieving an international solution to insolvency problems. I am one of several authors who have discussed this case extensively elsewhere,⁵ so I will only summarize it here. The case involved a Hong Kong bank. After the inception of its financial crisis, the bank made various transfers to accounts in the United States that enabled U.S. banks, including Chemical Bank, to use attachments and setoffs to improve their positions. Within ninety days, insolvency proceedings were commenced in both Hong Kong and the United States. The U.S. Bankruptcy Trustee then brought preference actions against the U.S. banks. The transfers apparently would have been recoverable if U.S. law applied.

The *Axona* court held that U.S. law could be applied to recover the transfers. It then turned over the proceeds to be distributed in the Hong Kong proceeding.⁶ The effect was to force prominent United States creditors to disgorge large amounts of money in favor of a Hong Kong distribution that presumably included many creditors from other countries. In the traditional world of territorialism and the “grab rule,”⁷ this result would have been inconceivable.

A more recent and even more dramatic example of international cooperation is reflected in a brace of decisions in the *Maxwell Communication* case, the huge international bankruptcy begun shortly after British press magnate Robert Maxwell was found drowned near his yacht in Spanish waters in 1991. The public part of his empire was managed through Maxwell Communication Corporation (MCC). MCC was incorporated in the United Kingdom and its executive offices were there, but eighty percent of its revenues were derived from its holdings in the United States.⁸ Those holdings included companies important to U.S.

5. See Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 521 (1991) [hereinafter Westbrook, *Avoidance*]; Riesenfeld, *Transnational Bankruptcies*, *supra* note 4, at 423-25; Henry Goodman et al., *Use of United States Bankruptcy Law in Multinational Insolvencies: The Axona Litigation—Issues, Tactics, and Implications for the Future*, 9 BANKR. DEV. J. 19 (1992).

6. *Axona*, 88 B.R. at 611.

7. The grab rule favors creditors who use local procedures to seize assets or initiate insolvency proceedings over all other creditors. Local procedures control without regard to the typical commercial conflict of law analysis. See Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 457, 460 (1991) [hereinafter Westbrook, *Theory*]; Kurt Nadelmann, *Revision of Conflicts Provisions in the American Bankruptcy Act*, 1 INT'L & COMP. L.Q. 484, 487 (1952).

8. See *Re Maxwell Communication Corp.*, [1992] BCLC 465, [1992] BCC 372.

economic and cultural life, notably MacMillan Publishing and Official Airline Guides, Inc.⁹ Thus, it was one of those rare cases in which there could be plausible argument about which nation was the “home” country of the defaulting enterprise. The management of MCC filed a Chapter 11 proceeding in the United States, apparently hoping to keep control of the company during the proceedings. Shortly thereafter, administrators¹⁰ were appointed in the United Kingdom.

It appeared from the start that the Maxwell empire was riddled with fraud, including huge amounts siphoned from British pension funds, and many questionable transfers during the prebankruptcy financial crisis.¹¹ Given these facts and the hybrid nationality of the debtor, the stage was set for an all-out conflict between the U.S. and U.K. courts to control the Maxwell assets and to protect the thousands of creditors, employees, and stockholders in each country. Remarkably, that conflict was averted and the Maxwell worldwide holdings have been administered in a cooperative spirit—distilled comity.

The first of two key decisions was made almost immediately by Judge Brozman in the U.S. Bankruptcy Court for the Southern District of New York. Presented with conflicting demands for control of the Chapter 11 case, she appointed an Examiner, Richard Gitlin of the Connecticut bar. Examiners have been given an amazing variety of jobs under the Bankruptcy Code,¹² but Gitlin’s assignment was unique. In effect, he was charged with negotiating the terms of a joint administration of this global bankruptcy with the English administrators. The latter were less than charmed with this arrangement, but because of the potentially huge savings associated with avoiding a tug-of-assets between the two court systems, they

9. The “private” companies also included important U.S. assets, especially the *New York Daily News*. See *In re Maxwell Newspapers, Inc.*, 164 B.R. 858, 861 (Bankr. S.D.N.Y. 1993).

10. “Administration” is a new procedure in the United Kingdom created under the Insolvency Act 1986. It has some of the same purposes as Chapter 11 reorganization in the United States. See Jay L. Westbrook, *A Comparison of United Kingdom Administration and Chapter 11 in the United States*, 6 *INSOLVENCY L. & PRAC.* 86 (London 1991).

11. *In re Brierley*, 145 B.R. 151, 156-57, 164 (Bankr. S.D.N.Y. 1992).

12. The creation of the examiner position, 11 U.S.C. §§ 1104(b), 1106(b) (1988), has turned out to be one of the most important and flexible reforms of the 1978 Code, providing a variety of functions never dreamed by its drafters. See, e.g., *In re Revco*, 118 B.R. 468 app. (Bankr. N.D. Ohio 1990) (Zaretsky, Examiner) (reporting a possible attack on a leveraged buyout as a fraudulent conveyance); *In re Franklin-Lee Homes, Inc.*, 102 B.R. 477, 481 (E.D.N.C. 1989) (holding that an examiner may be appointed to bring preference actions).

negotiated.¹³ The result was a “protocol” that left the English in charge of the case, but provided the U.S. Examiner with a right to consult and object.¹⁴

Not only has this remarkable arrangement permitted the case to be administered efficiently and without jurisdictional litigation, but it has resulted in a joint Scheme of Arrangement and Plan of Reorganization, in the British and U.S. proceedings respectively.¹⁵ It is the first truly worldwide bankruptcy reorganization, and it has been accomplished in a case filled with controversy and fraud. That achievement is simply stunning.

A pessimistic observer might try to dismiss this monument to cooperation because it involves the liquidation of the debtor companies.¹⁶ Yet cooperation in this case proved essential to maintaining the value of the enterprises to be sold and to avoiding potentially ruinous cost, and even more ruinous delay, through transnational litigation.¹⁷ Cooperation was needed and it was achieved.

One of the areas in which litigation has arisen is the claim by the joint administrators, supported by the Examiner, that payments made by MCC to two British banks (and a French one) were preferences. With a total of more than \$100 million at stake, it is not surprising that one of the defendants, Barclays Bank PLC, sought an injunction in the English courts to bar the English administrators from bringing a preference action against it in the U.S. Chapter 11 case. The British court (Justice Hoffmann, as he then was) refused the injunction and held that it was up to the U.S. courts to select the proper law to apply to the challenged transfers. The decision was upheld by the Court of Appeals, largely on the basis of the trial court

13. During a visit to London in 1992, I was struck by the general resentment found there toward the requirement that the administrators deal with the U.S. Examiner and the U.S. Bankruptcy Court. I was surprised, because I expected congratulations on the U.S. deferral. I have the impression that the U.K. attitude may have warmed since. *See, e.g.*, Editorial, 9 *INSOLVENCY L. & PRAC.* 57 (London 1993).

14. These events are described briefly in an opinion in the “private” cases. *In re Brierley*, 145 B.R. 151, 164 (Bankr. S.D.N.Y. 1992).

15. Confirmation Order, *In re Maxwell Communication Corp.*, No. 91B15741 (TLB) (S.D.N.Y. July 23, 1993) (on file with the author).

16. Actually, the holding companies are being liquidated, but the operating companies are being sold as going concerns, so U.S. experts would snort and sputter as to whether it was a liquidation or not.

17. *Cf. Kilbarr Corp. v. Business Sys. Inc.*, B.V., 990 F.2d 83, 84 (3d Cir. 1993) (revealing a twelve-year lapse between decisions over international rights to intellectual property in Netherlands-U.S. insolvency).

opinion.¹⁸

This second decision was in some ways even more important than the original U.S. decision to defer to British administration, because an earlier U.K. judgment, *Felixstowe Dock and Railway Co. v. U.S. Lines, Inc.*,¹⁹ had created serious concerns about the willingness of British courts to cooperate in cases with a center of gravity in the United States. The *Barclays* judgment seems to confirm the U.K.'s interest in cooperation in transnational cases, especially in cases such as this in which the United States had deferred first and most generally.²⁰

Set in this context, the decision in the *Koreag* case²¹ can be seen for what it is: an unfortunate blunder, but by no means a harbinger of future decisions. The case was wrong for just the reasons that Professor Boshkoff asserts,²² but the mistake—applying two-party notions of equity in the multiparty, collective context of bankruptcy—was of the type that nonbankruptcy courts often make in domestic cases.²³ *Koreag* does not demonstrate any specific hostility to the concept of international cooperation. The process of cooperation will inevitably progress “two steps

18. *Barclays Bank PLC v. Homan*, [1993] BCLC 680, [1992] BCC 757. Since the Conference, the U.S. preference actions in *Maxwell* have been decided by Judge Brozman of the U.S. Bankruptcy Court for the Southern District of New York, who granted motions to dismiss by all three bank defendants. *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994). I should disclose that I participated in that action as an *amicus curie* appointed by the court, but I do not believe that my role would have any special impact on my views for present purposes.

19. *Felixstowe Dock & Railway Co. v. U.S. Lines, Inc.*, [1987] 2 Lloyd's Rep. 76 (refusing to defer to United States Chapter 11 reorganization proceeding). See Westbrook, *Theory*, *supra* note 7, at 478; Ian F. Fletcher, *The Ascendence of Comity from the Ashes of Felixstowe Dock*, *INSOLVENCY INTELLIGENCE*, Feb. 1993, at 10 (1993).

20. However, it should be noted that the *Barclays* decision was also consistent with British doctrine that carefully and generously refrains from cross-border anti-litigation injunctions in most cases. See, e.g., *British Airways Bd. v. Laker Airways, Ltd.*, [1984] 3 W.L.R. 413, [1984] A.C. 58. There was one earlier U.K. case, also decided by Justice Hoffman, that refused an injunction in favor of cooperation with a U.S. bankruptcy court. *Banque Indosuez S.A. v. Ferromet Resources, Inc.*, [1993] BCLC 112.

21. *In re Koreag, Controle et Revision, S.A.*, 961 F.2d 341 (2d Cir. 1992).

22. Boshkoff, *supra* note 1, at 937-38 nn.29-32. See also Donald T. Trautman, Jay L. Westbrook & Emmanuel Gaillard, *Four Models of International Bankruptcy*, 41 AM. J. COMP. L. 573, 620 (1993) [hereinafter *Models*]; Jay L. Westbrook & Donald T. Trautman, *Conflict Of Laws Issues In International Insolvencies*, in *CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE INSOLVENCY LAW* (Clarendon Press 1994) [hereinafter *Conflicts*]. Of course, the *result* could have been the same even if the court had done the right thing and deferred to the Swiss bankruptcy court for resolution of the issues presented. *Conflicts, supra*, at n.31; *Models, supra*, at 621.

23. See, e.g., Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 327.

forward, one back."²⁴ If *Koreag* is a step backward, *Maxwell* is at least two steps forward—maybe three.²⁵

In addition to progressive case law, we can be encouraged by a number of international efforts at reform and greater cooperation. The re-emergence of a serious European effort to forge a bankruptcy convention is a hopeful development, despite all the obvious difficulties that exist.²⁶ The Council of Europe has promulgated a treaty (the Istanbul treaty) that has lighted the way forward²⁷ and stimulated a renewal of efforts within the European Union (EU), even though the Istanbul treaty itself will probably not be adopted. The EU Committee has issued a series of new drafts²⁸ and seems quite bent on success.

Since the Conference at Washington University, two new international reform projects have been launched. In April 1994, the United Nations Commission on International Trade Law (UNCITRAL) sponsored a meeting in Vienna to discuss the possibility of a new U.N.-sponsored effort to achieve some preliminary international agreements in the insolvency area. It was agreed in Vienna to go forward with an effort to achieve some initial procedural reforms, notably cross-border recognition.²⁹

24. It is troubling that the Second Circuit in *Koreag* was more reluctant to embrace cooperation than the lower courts. As in the domestic context, the nonbankruptcy judges may be slower to recognize that the collective process of bankruptcy, with a single worldwide pie to divide, is a different context for choice of law decisions than is individualized dispute resolution in ordinary transnational litigation. On the other hand, one might hope that their distance from bankruptcy doctrine and convention would give them a broader sense of the public policy importance of international cooperation.

25. There is additional reason for optimism in two more recent cases: *In re Ocana*, 151 B.R. 670 (Bankr. S.D.N.Y. 1993), and *In re Rubin*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993). In *Ocana*, the court perhaps should have deferred to the Panamanian court to resolve issues concerning an insurance trust, but the fact that it was a New York statutory trust provided such strong grounds for applying New York law in the existing New York forum that the decision is easily justified. See *Conflicts*, *supra* note 22, at 665-67. The court demonstrated its appreciation of this rather subtle point in *Rubin*, where it deferred to an Israeli insolvency proceeding concerning an insurance trust. The *Rubin* court distinguished *Ocana* precisely because of the statutory nature of the trust in that case. 160 B.R. at 275 n.7. See also *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 980 (2d Cir. 1993) (deferring, under *forum non conveniens*, to Venezuelan insolvency proceeding, although with certain conditions); *In re Spanish Cay Co.*, 161 B.R. 715, 719 (Bankr. S.D. Fla. 1993) (deferring to Bahamian bankruptcy).

26. The difficulties are well documented in Professor Fletcher's discussion of the 1980 EC draft. IAN F. FLETCHER, *CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW* ch. 6 (1982).

27. Council of Europe, *European Convention on Certain International Aspects of Bankruptcy*, Europ. T.S. No. 136, reprinted in 30 I.L.M. 165 (1991). The Convention was ready for signature on June 5, 1990, and has been signed by Belgium, France, Germany, Greece, Luxembourg, and Turkey.

28. See *Models*, *supra* note 22, at 573 n.2.

29. See UNITED NATIONS, COMMISSION ON INTERNATIONAL TRADE LAW, *CROSS-BORDER INSOLVENCY: NOTE BY THE SECRETARIAT, REPORT ON UNCITRAL-INSOL COLLOQUIUM ON CROSS-*

In May 1994, the American Law Institute (ALI) announced an initiative in the international insolvency field. Its new project is designed to increase regional cooperation in insolvency matters among the North American Free Trade Agreement (NAFTA) countries by developing Model Procedures for cooperation among the courts of the three NAFTA countries.³⁰ The importance of this project is underscored by the fact that it is the first truly international project undertaken by the ALI. It will involve reporters and advisory committees in each of the three countries. Each national reporter and committee will produce: (a) national reports concerning domestic and transnational insolvency law in that country, and (b) proposed procedures for cooperation developed in tandem but tailored for use in each country's courts.

A cynic might restate these developments: We must quicken our efforts to reform transnational insolvency to keep up with the mushrooming sales of financial derivatives.³¹ The growth of international markets, and especially the globalization of financial markets, has indeed given a sense of urgency to efforts to reform international judicial cooperation in insolvency cases. The development of ever more sophisticated and complex financial instruments traded increasingly on utterly impersonal international markets has indeed increased the risk of transnational financial failure.³² Unlike Professor Boshkoff, I think there is every indication that these needs are widely perceived and that knowledgeable people and important institutions around the world are moving rapidly to create a better system of transnational insolvency. If I may repeat here what I have previously written:

If we can help to create such a system, our reward will be to make an important contribution to the historic evolution now taking place, the binding-together of a world of nation states by the sturdy cables of commerce.³³

BORDER INSOLVENCY, U.N. Doc. A/CN.9/398 (May 19, 1994). Richard Gitlin, the Examiner in *Maxwell*, is leading the UNCITRAL reform effort in the United States.

30. THE A.L.I. REP., Spring 1994, at 5.

31. Derivative financial instruments have been the cause of large losses to nonfinancial corporations recently, notably Procter and Gamble. See, e.g., Steven Lipin et al., *Portfolio Poker*, WALL ST. J., Apr. 14, 1994 at A1, C6. There have been calls for increased international regulation of derivatives to protect financial institutions and investors. See Henry Hu, *Misunderstood Derivatives: The Causes of Informational Failure and the Promise of Regulatory Incrementalism*, 102 YALE L.J. 1457, 1505 (1993). See also SEC Chief Levitt Warns Mutual Funds To Be Cautious in Handling Derivatives, WALL ST. J., June 21, 1994 at B2, C3.

32. The scandal in Britain involving municipalities and derivatives was surely an early warning. See Hu, *supra* note 31, at 1487.

33. See Westbrook, *Avoidance*, *supra* note 5, at 538.

