

INTERNATIONAL INSOLVENCY IN THE NEW MILLENIUM

CO-ORDINATING MULTI-NATIONAL INSOLVENCIES AND RE-ORGANISATIONS

BRIEF PAPER ON PROTOCOLS

Introduction

As a practitioner sandwiched between noted judges, I want to approach the question of co-ordination from the point of view of a legal adviser and advocate advising and acting for insolvency practitioners.

The concerns that the insolvency practitioner will have in a multi-jurisdictional insolvency will be relatively obvious. First, professionals do not normally act without being paid. The insolvency practitioner therefore needs to know where his fees are coming from. The assets may well be very unevenly distributed between the relevant jurisdictions and the laws of the different jurisdictions may lay down different priorities and different forms of authorisation for payment. A protocol or other arrangement as to how the insolvency practitioner is to get paid is of vital interest to him.

Second, where there is to be a rescue, reorganisation or liquidation of all or part of the business, co-ordination of the outcome or outcomes is essential in order to promote cost-efficient and speedy outcomes in the interest of creditors and, where relevant, stockholders.

Third, leaving to one side questions of getting paid, there may be significant differences in the relevant local laws as to the priority of different types of creditor and there may be significant differences as to the timing of any plan or scheme and the cut-off dates for claiming and offset. Unless some compromise or other resolution is found in relation to these conflicts, inter-jurisdictional war can break out. Likewise, there needs to be an

agreed approach to the collection of assets and in respect of any attack on voidable transactions and payments. The acquisition of evidence, where needed, ought to be coordinated between the different jurisdictions. Any stay of proceedings or remedies in one jurisdiction needs to be extended, as far as possible to the others.

Protocols – an important part of the solution

Since the pioneering protocol in the *MCC* case, in which Richard Gitlin was a leading figure, as Examiner, there have been a whole series of protocols adapted to the needs of subsequent cross-frontier insolvencies. There have also been cases where a protocol could and should have been put in place but chaos resulted instead.

A Greek tragedy

I can illustrate the type of difficulty that can arise where no protocol is put in place from a case in which I tried and failed to persuade the relevant participants to enter into a protocol.

Metro Trading International Inc was incorporated in a country of convenience but was controlled from Greece. Its business was to provide storage facilities for oil products in ships stationed Fujairah in the Persian Gulf and acted as an oil trader in its own right. Oil supplied by different suppliers was blended or mixed in the tanks of the vessels and on sold.

When *Metro* became insolvent, different groups of creditors made different sorts of claims against Metro and its property. Some creditors claimed retention of title or tracing rights against oil. Others wished to attack as allegedly secured creditors. One group of creditors began proceedings in London. Another group began proceedings in Paris. A group of creditors in London succeeded in having a receiver appointed by the English court to try to enforce English court freezing orders in proceedings in which the creditors were trying to establish proprietary rights over oil held by *Metro*.

Meanwhile, liquidation proceedings were started in Greece and a liquidator was appointed by the Greek court. The English receivers continued to act under English court

orders and the direction of the English court and the Greek liquidator acted under the jurisdictions of the Greek court. The Greek liquidator declined to obey the orders of the English court and arguably put himself in contempt of the English court. The English courts, however, had little practical sanction against a liquidator in Greece.

The English court appointed receivers fought out court battles with the Greek liquidator in the Greek courts. Both the receivers and the liquidator made rival sales of the same oil held by Metro. This led to conflicting claims of title.

At a relatively early stage I had been acting for the liquidator and suggested that there should be a protocol established between the English court appointed receivers and the Greek liquidator to avoid precisely the kind of conflict between the insolvency practitioners and the courts which later occurred. No such protocol was agreed.

Metro, therefore, is a good illustration of the huge waste of time and expense and the considerable damage to creditors, as well as international inter-court conflict which can arise from the absence of a protocol in a case where rival court appointed representatives failed to agree critical matters in a protocol.

Maxwell's legacy

No doubt Richard Gitlin can fill us in on the American approach to *MCC*, but perhaps I can add a few words from an English point of view. *MCC* was Robert Maxwell's public listed corporation, incorporated in England. By the time it became insolvent, most of its assets were in the US. The corporation had an administration order made under the UK Insolvency Act 1986 by the English Companies Court. English insolvency law requires directors of a company in administration to co-operate with the administrators appointed by the English court. The directors filed for Chapter 11 in the US. This might arguably have been a contempt of the English court and arguably a breach of the English statutory stay, depending upon whether it has extra territorial application a point not yet settled. However, the potential conflict between England and the US was prevented by means of the protocol. This led in due course to a plan in the Chapter 11 proceedings and an analogous arrangement under English law, arranged in parallel so as to avoid conflict. I

was involved in giving advice in relation to that parallel arrangement. The avoidance of conflict and harmonization of outcome was plainly a major benefit to creditors.

Going global

ICO Global was a start-up global satellite communication business into which about US\$3 billion had already been invested. The principal corporate entities were incorporated in Bermuda and the Cayman Islands. Critical suppliers were in the US or subject to US jurisdiction. The solution was to have a Delaware Chapter 11 combined with provisional liquidation in Bermuda and the Cayman Islands. Given that neither of the latter jurisdictions has yet legislated for a dedicated reconstruction or rescue proceeding, there was no possibility of using an administration order in those law countries. Provisional liquidation however had been developed in England and has been used in English law type jurisdictions as an approximate substitute for the English administration order proceedings.

From a technical point of view, the position in principle ought to be that the proceedings in the countries of incorporation should be the principal proceedings and proceedings in other countries should be ancillary. However, in this case, because of the location of the main suppliers, it was plainly more beneficial to the creditors for the principal proceedings to be in Delaware, since Chapter 11 has significant legal advantages over provisional liquidation when it comes to trying to continue an ongoing business.

A protocol was agreed between the debtor in possession, the provisional liquidators in Bermuda and the provisional liquidators in the Cayman Islands. This protocol was limited to the question of fees. It was not necessary to go beyond that subject, since the provisional liquidations were by the terms of the court orders set up as being ancillary and having a limited and supervisory role.

An interesting aspect of this approach was the objection raised by an opportunistic shareholder to the effect that the Bermudian court had no business allowing the Delaware court to run the primary proceedings in relation to a Bermudian incorporated company. I am glad to say the Chief Judge in Bermuda had no difficulty dismissing this complaint by

pointing out, amongst other things, that Bermuda was not so much conceding sovereignty to the US as co-operating with that jurisdiction in the interests of creditors. The *ICO Holdings* restructuring, in which I advised the Bermudian provisional liquidators, is thus a magnificent example of cross frontier co-operation, going to the extent of subordinating what in principle would be the primary proceedings, in the interests of creditors.

Hedging bets

In a recent case, the name of which I will not release for the moment, involved a more detailed protocol in a situation involving a disastrous hedge fund. The relevant corporation was incorporated in the British Virgin Islands but had activities and assets in Bermuda and New York. Provisional liquidation ensued in the BVI and Bermuda and Chapter 11 in New York. I have advised the US trustee.

Again the critical choice was there. Warfare could have broken out between the three sets of courts and representatives. Instead, the parties' concerns and interests have been accommodated in a protocol for the benefit of creditors. This case, one of a number since the *MCC* precedent, has helped to establish a very positive climate between US and English and English law based courts worldwide, in which protocols and other consensual arrangements are being used for the greater good of creditors.

The future

The European Union now has a Regulation (a type of directly applicable statute) binding all EU countries except Denmark, which will take effect in 2002 and require mutual recognition of insolvency proceedings and insolvency practitioners, subject to the detailed rules of the Regulation. Protocols probably will not be necessary within the EU.

The UNCITRAL Model Law would also be a great step in the direction of efficient management and conflict avoidance in cross-frontier insolvencies, providing that it got enacted by more significant countries than Eritrea. Delegates will be interested to know that the UK Parliament has passed enabling legislation under which the UK Insolvency Service can put forward delegated legislation bringing the Model Law into effect. Although no date has been set as far as I am aware, this development is expected within

the next few years. not require reciprocity to be established before legislating and bringing into effect the Model Law.

Meanwhile, protocols remain an essential tool for harmonising international insolvencies. No-one has yet published the protocols to date – there may be a business opportunity combined with a public service opportunity available here.

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