

# COURT-TO-COURT COMMUNICATION IN CROSS-BORDER INSOLVENCY CASES

International Insolvency Institute NextGen  
Leadership Program

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# THE FIRST PROTOCOL

- ▶ *In re Maxwell Communication Corp.*
  - ▶ Chapter 11 Case filed in New York in December 1991 (No. 91-15741 (TLB))
  - ▶ U.K. Administration Order entered the following day
    - ▶ U.S. Court appointed chapter 11 examiner with a mandate to “harmonize the two proceedings so as to permit a reorganization under U.S. law which would maximize the return to creditors”
    - ▶ *U.S. Final Supplemental Order Approving Examiner and Approving Agreement Between Examiner and Joint Administrators*
      - ▶ Recognized U.K. joint administrators as corporate governance
    - ▶ U.K. Court Order Approving Protocol
      - ▶ Granted standing to chapter 11 examiner to be heard in U.K. court

# THE FIRST PROTOCOL

- ▶ Successful reorganization of company with substantially all of its assets in the United States, but substantially all of its debt in England
  - ▶ Simultaneous filing of plan of reorganization and scheme of arrangement
    - ▶ “[T]he plan and scheme [were] mutually dependent and, in their effect, constitute[d] a single mechanism, consistent with the laws of both [the United States and the United Kingdom] for reorganizing [the debtor] through the sale of assets as going concerns and for distributing assets to creditors.” *In re Maxwell Commun. Corp.*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994).
    - ▶ 99.3% in number and 99.98% in amount voted to accept the plan.
    - ▶ 99.3% in number and 99.7% in amount voted to accept the scheme.
- ▶ “Judge Brozman and Chancellor Hoffman very often were in communication directly and sometimes with the parties involved.” 01/14/09 Hr’g Tr. 78:14-16 (Miller, Harvey), *In re Lehman Brothers Holdings Inc., et al.*, No. 08-13555 (SCC) (Bankr. S.D.N.Y. Jan. 14, 2009).

# STATUTES AND GUIDELINES

- ▶ International Bar Association Cross-Border Insolvency Concordat (1995)
  - ▶ “an interim step until treaties and/or statutes are adopted by commercial nations”
    - ▶ *In re Nakash*, No. 94-44840 (BRL) (Bankr. S.D.N.Y. May 23, 1996)
    - ▶ *In re Everfresh Beverages, Inc.*, No. 95-45405 (Bankr. S.D.N.Y. Dec. 20, 1995)
- ▶ UNCITRAL Model Law on Cross-Border Insolvency (1997)
  - ▶ The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.
    - ▶ 11 U.S.C. § 1525(b) (enacted in 2005) (“subject to the rights of a party in interest to notice and participation”)

# STATUTES AND GUIDELINES

- ▶ ALI/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000)
  - ▶ *Order Approving the Proposed Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, In re Lehman Brothers Holdings, Inc., et al.*, No. 08-13555 (SCC) (Bankr. S.D.N.Y. June 17, 2009)
- ▶ UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)
- ▶ Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (2017)
  - ▶ “court may receive communications from a foreign court and may respond directly to them”
  - ▶ Provide for parties to be present “[i]n the normal case” where courts are in communication
  - ▶ Provide that “[t]he communications between the courts shall be recorded and may be transcribed”
  - ▶ Adopted by the Supreme Court of Bermuda, the Eastern Caribbean Supreme Court of the British Virgin Islands, the Chancery Division of the High Court of England and Wales, the United States Bankruptcy Court for the District of Delaware (Local Rule 9029-2), and the United States Bankruptcy Court for the Southern District of New York (General Order M-511).

# RECENT COURT-TO-COURT PROTOCOL

- ▶ *In re Ocean Rig UDW Inc., et al.*, Case No. 17-10736 (MG) (Bankr. S.D.N.Y., June 29, 2017)
  - ▶ Protocol between Chapter 15 proceedings pending in the United States Bankruptcy Court for the Southern District of New York and insolvency proceedings concurrently proceeding in the Grand Court of the Cayman Islands.

# REASONS WHY BRAZILIAN COURTS ARE NOT INVOLVED IN DEVELOPMENT OF PROTOCOLS

- ▶ Few cross-border cases – even though involving great amounts
- ▶ Companies involved in other cases have most of the assets and operations in Brazil and were incorporated under Brazilian law
- ▶ Brazilian Courts are not committed to the development of protocols, guidelines and are not working to enact the UNCITRAL Model Law
- ▶ General misunderstanding among execution of protocols and guidelines on court-to-court communication and the recognition of decisions rendered by foreign Courts
- ▶ Legislative innovation by introducing a new Insolvency Code (under discussion in Brazilian Congress): provisions inserted in the project of law are not on track with Brazilian Rule of Law