The Elements of Coordination in International Corporate Insolvencies: What Cross-Border Bank Insolvency can Learn from Corporate Insolvency

Jay L. Westbrook

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CROSS-BORDER BANK INSOLVENCY

Edited by
Rosa M Lastra

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I offer here a summary of the evolution of international cooperation in the management of multinational corporations in financial distress. The notion is that an understanding of the emerging experience in the corporate insolvency field may help to reveal useful approaches in dealing with distressed financial institutions once they have reached the point of requiring the aid of procedures akin to liquidation or reorganization. (I will use the term ‘resolution’ procedures to distinguish

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1. Jay Lawrence Westbrook is Professor of Law at The University of Texas School of Law, USA.
2. ‘Bankruptcy’ is the term most often used in North America for the legal response to a general default by either a natural person or a legal entity. ‘Insolvency’ is the English-language term generally used outside North America to refer to business bankruptcy. This chapter will generally use the term ‘insolvency’ to refer to a legal proceeding or process intended to resolve the financial distress of a business whether by liquidation or reorganization. The term ‘financial distress’ refers to a circumstance in which the company is or may soon be either insolvent in a balance sheet sense or seriously illiquid.
liquidation or reorganization of financial institutions from ordinary insolvency processes.) What follows reflects a clear understanding that resolutions must differ importantly from ordinary corporate cases, but it also reveals that reformers active in the insolvencies of multinational corporations have had to overcome much the same sort of scepticism and parochialism that impede current efforts to achieve international cooperation in resolving the crises of financial institutions.

8.02 In summary, the following are the key elements of international corporate insolvency that are especially relevant to a multinational resolution procedure:

- control of the institution's assets and affairs everywhere in the world as quickly as possible;
- ultimate control of the management of the resolution by a public body;
- the provision of necessary financing for the resolution and thereafter;
- maximization of asset value by sale or otherwise;
- distribution of that value, including priorities in distributions where available value is inadequate to permit full recovery by all parties;
- the expectation that most countries will assert that the opening of a local proceeding in their country gives them worldwide jurisdiction over the debtor's assets unless they agree to defer to another jurisdiction.

8.03 In an international insolvency case, success in achieving the goals of distress management requires that public bodies and resolution managers cooperate and coordinate as to each of these elements. That requirement in turn means:

- One jurisdiction must be understood to have the lead role as to a given debtor, although that role does not require other jurisdictions to relinquish autonomy (or sovereignty).
- The entity that provides the financing will necessarily have a considerable influence over the management and results of the proceeding.
- The ‘home country’ of the institution will generally provide the leadership and will often be the location of the leading lender as well.


3 I ignore in this brief report the question of avoidance or ‘claw-back’ procedures that permit reversal of transactions and asset transfers, especially to insiders, although such provisions might be important, inter alia, to public support for the resolution process and for the possible expenditure of public funds.
The identity of the home country should be clear and ascertainable in advance of the onset of distress.

- Discrimination on the basis of nationality (as opposed to other legitimate bases for distinguishing parties and circumstances) must be forbidden and measures having that effect must be viewed with caution.
- Maximization of value must be pursued on a global basis so that a strategy (for example, a sale of a subsidiary) that produces maximum value for the global institution should be accepted even if a particular jurisdiction or certain interests would be better served by a local strategy.

I will discuss the background to these principles and the principles themselves, but I want to start by making it clear that the methods and reform initiatives in the international corporate arena are relatively new and very much in evolution. They are also far from perfect. They have been successful in a number of cases large and small, but they have also failed, especially in certain mega-cases. While generalization is difficult, I think most failures or partial failures have one or more of these characteristics:

- The case involves protected creditor classes in one or more of the jurisdictions (e.g., in the Federal Mogul case: tort victims versus pensioners).  
- The debtor's corporate organization and operations lend themselves to breaking the case into national pieces, sometimes because of regulatory effects (e.g., the Lehman case).
- The case includes local professionals who desire to have more authority and to receive more fees, although many professionals are deeply committed to international cooperation.

Background

This space does not permit even a summary discussion of the variations among insolvency systems around the world, but a short description of the major differences found in various insolvency regimes will be helpful. First, national insolvency systems involve more or less public control. The French and American systems are often cited for their detailed regulation and relatively close court supervision. Some systems even use a public office as the administrator or 'trustee' to manage the distressed institution. By contrast, most common law countries other than the

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United States appoint a private liquidator or administrator and give considerable leeway for independent action.

8.06 A second distinguishing characteristic is the place of the secured creditor, especially a dominant secured creditor (one with a lien on most or all assets). In the English system, such a creditor has traditionally dominated a corporate insolvency through a lender-appointed receiver, although that dominance may have been diluted in recent years. Again, France presents a contrast, the rights of secured creditors being constrained in a variety of ways. Other jurisdictions, like the USA, are somewhere between the two on this point.

8.07 Third, there is considerable variation between those systems that employ liquidation in most cases and those that emphasize reorganization or rescue. In recent years, there has been a convergence toward a de facto single proceeding in which either might occur, but there are still important variations. Reorganization sales aimed at obtaining going concern value are common in corporate insolvencies.

8.08 Historically, international cooperation in insolvency matters—often under the rubric of 'comity' (common law) or 'enforcement of judgments' (civil law)—reaches well back into the nineteenth century. However, cooperation was hit or miss and often frustrated by the requirement of reciprocity, which is easier to dispute than to prove. Only a handful of treaties were achieved and cooperation under those treaties was often spotty.

8.09 Some important transnational cases in the 1970s stimulated reform efforts in the USA and elsewhere. Reform and a growing number of insolvencies of multinational corporations began to produce a fair number of cases of successful cooperation, which were celebrated, and cases in which courts did not cooperate, which were criticized. These developments culminated with the promulgation by UNCITRAL (United Nations Commission on International Trade Law) in 1997 of the Model Law on Cross-Border Insolvency (the 'Model Law'), which has now been adopted in one form or another by eighteen countries, including jurisdictions of considerable commercial importance.

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7 The Model Law and various other texts important in the field are available on the website of the International Insolvency Institute, <www.iiiglobal.org>.

Despite the substantial history of cooperation leading up to the UNCITRAL negotiations, there was widespread scepticism that any agreement could be reached. When agreement in the form of the Model Law was achieved in record time and the law promulgated, many argued that it would fail due to lack of significant adoption. After a number of countries had adopted it, critics claimed courts would evade granting recognition under provisions the critics deemed too vague to enforce. Now that decisions are emerging from courts in a number of countries enforcing the local versions of the Model Law, no doubt the next prediction of scepticism is searching for a purchase. But so far, the claims that parties and courts will invariably be parochial and nationalistic, failing to see the long-term benefits of cooperation, have proven importantly wrong.

The Model Law

The Model Law is not a treaty and does not contain any requirement of reciprocity. It provides for recognition of foreign insolvency proceedings as either 'main' or 'non-main' proceedings. A foreign main proceeding is one that is pending in the debtor's centre of main interests (COMI). A non-main proceeding is one brought in a jurisdiction in which the debtor has been engaged in active commerce, but does not have the centre of its interests. A proceeding must be main or non-main to be recognized. (Haven jurisdictions need not apply, because ordinarily they have no economic connection with the debtor's activities and therefore are neither main nor non-main jurisdictions.) There is a very simple, fast procedure for recognition without any consideration of the substance of the foreign proceeding's insolvency law. Speed is aided by rebuttable presumptions, including the presumption that the debtor's place of incorporation is also its COMI.

Ignoring many important points of detail, there are three key elements of the Model Law. The first is that it provides for expedited control of the debtor's local assets and their protection from unilateral actions by creditors. It then gives the local court considerable discretion to grant all sorts of relief to an administrator from a foreign main proceeding. (Non-main administrators are eligible for considerably more limited relief.) In addition, that discretion is accompanied by a statutory mandate for cooperation. The local court is directed to use its broad powers to cooperate with foreign proceedings, subject to ensuring that the debtor and its creditors are adequately protected. (Note the statute does not require protection of


9 Some adopting countries have added such a requirement, although most have not.
local creditors or even of all creditors claiming locally, but mandates concern for creditors generally.\textsuperscript{10}

8.13 The structure permits very fast capture and protection of the debtor's assets and operations through a local moratorium or stay that follows automatically from the simple recognition process. The extent of the relief the local court will decide to grant is determined subsequently, once the court has more information about the case and the nature of the foreign procedures.\textsuperscript{11}

8.14 While the statute permits a locally filed insolvency proceeding to override the demands of a foreign proceeding, its long-term importance lies in the fact that it firmly establishes a hierarchy of insolvency: the main proceeding versus any others. For example, after a foreign main proceeding has been adopted, a local proceeding will generally govern only local assets, even though most insolvency laws provide for worldwide jurisdiction over a debtor's assets.\textsuperscript{12} That provision greatly reduces the chances of an international struggle over assets. Experience so far suggests that courts and creditors have often deferred to a main proceeding, rather than filing insolvency locally.

8.15 The Model Law followed, and was significantly influenced by, the draft of the European Insolvency Regulation,\textsuperscript{13} although the two differ in important respects. Of course, the Regulation operates only within the EU. With regard to Member State recognition of insolvency proceedings opened outside the EU, only a few of the Member States have adopted the Model Law as such, but recent reforms in a number of EU jurisdictions suggest that the Regulation and the Model Law are encouraging adoption of a cooperative attitude in those jurisdictions as well.\textsuperscript{14}

\textsuperscript{10} Model Law, Article 22. The statute states a general rule forbidding discrimination against foreign creditors. Model Law, Article 13.
\textsuperscript{11} The Model Law also provides for provisional remedies while the recognition request is pending. Model Law, Article 19.
\textsuperscript{12} Model Law, Article 28.
\textsuperscript{14} One example is Germany. See Judgment of 13 October 2009—X ZR 79/06 German Federal High Court of Justice (Bundesgerichtshof—BGH) (automatic recognition of United States Chapter 11 proceeding). Eberhard Braun (ed), Commentary on the German Insolvency Code (Düsseldorf: IDW-Verlag, 2006).
Coordination in International Corporate Insolvencies

Just a Bit of Theory and Policy

Underlying the history of international cooperation in insolvency matters and the adoption of the Model Law is a long-standing debate between territorialism and universalism. Territorialism is the traditional view that each country should seize whatever assets it can (hence the name ‘grab rule’), sell them, and pay out the realized value under local law. Universalists reject this piecemeal approach, hoping ideally for a unified, worldwide proceeding for both maximization of value and a single distribution. The ideal view has been tempered by the realities of a world of nation states, leading to a version often called ‘modified universalism’, which takes the universalist ideal as its pole star, but adapts flexibly to achieve results as close to a single worldwide process as is pragmatically possible.  

Most academics and those active in insolvency practice have embraced modified universalism. At least one territorialist has reacted to the virtues of modified universalism by proposing ‘cooperative territorialism’ in which courts seek to maximize value by cooperation but then distribute the realized value according to local priorities. Another attempted compromise is ‘universal proceduralism’, which would concentrate procedural power (eg the moratorium) in the main court, while leaving substantive insolvency law questions (eg distribution priorities) to local rules. Nonetheless, and notwithstanding all of the scepticism about the willingness of nations to cooperate, the leading American territorialist concedes that the Model Law represents a step toward universalism and recent decisions suggest that most national judges are leaning toward a universalist future.

Corporate Groups

The Model Law did not address the problem of corporate groups, which is now the subject of a new project at UNCITRAL. It is one of the most difficult aspects of

18 See LoPucki above n 16–17.
19 eg In re Condor Int Ltd 2010 WL 961613 (5th Cir 2010); In re Maxwell Comm Corp 93 F 3d 1036 (2d Cir 1996); In re HIH Casualty and General Insurance Ltd EWHC 2125 (Ch) (2005); Judgment of 13 October 2009—X ZR 79/06 German Federal High Court of Justice (Bundesgerichtshof—BGH) (automatic recognition of United States Chapter 11 proceeding). Of course, the progress is inevitably marked by two steps forward and one back.
international insolvency and offers no easy solutions. However, it strikes me as likely that it may be more manageable in some respects in the banking context, because of the availability of regulatory tools to require structures and corporate relationships that will lend themselves to coordinated, cooperative treatment.

8.19 The central difficulty with corporate groups is the tension between the reality that many groups are managed as if they were one company and, on the other hand, the need to vindicate creditor expectations by maintaining the legal distinction among corporate entities as pools of value for creditors of those entities. The balance between these elements varies from group to group. In one group, holding companies may be passive investors, but another group may deal with creditors as a single business with a global brand and creditors may even be unclear concerning which subsidiary is their legal counterparty. Furthermore, particular subsidiaries within one group may fall at different points on this centralized—decentralized spectrum, ranging from mere legal fictions to separately branded and funded businesses.

8.20 The group problem has proven much more intractable than the issues that were addressed by the Model Law. The main reason is that the Model Law issues involve problems largely solved at the national level, so the only difficulties that had to be addressed were those arising from their rotation into the fourth dimension of multinational law. By contrast, the issues regarding the financial distress of groups are largely unresolved in domestic systems. Transporting unsolved problems into the multinational space just makes them harder.

8.21 International coordination is more difficult because each corporate entity may be subject to different rules of domestic and international jurisdiction. For example, a Polish holding company may file in Poland while its five European subsidiaries as stand-alone companies would normally file in five different European countries. Even though the EU Regulation would require those countries to recognize an opening of proceedings for the subsidiaries in Poland, would the Polish courts accept that they have international jurisdiction over these foreign corporations? Certainly a number of jurisdictions would not. Aside from nationality, will Poland accept a filing by a subsidiary that is not itself insolvent? If the answer is negative in either instance, how will the courts cooperate, given that neither the regulation nor the Model Law solves these problems?

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22 For an overview and copious detail, see Philip I Blumberg's magnificent work: Phillip I Blumberg, Kurt A Strasser, Nicholas L Georgakopoulos, and Eric J Gouvin, Blumberg on Corporate Groups, 2nd edn (New York: Aspen Publishers, 2010).

23 On the corporate side, the term ‘ring fencing’ is not so often used as in banking. However, subsidiaries in corporate groups often present the same sort of problem.
Another important problem arises from intra-group claims and the consolidation of subsidiaries in a reorganization plan. Where creditors do not have strong reasons to claim special rights in a given subsidiary, it is common in domestic cases to consolidate the entities. Indeed, in such cases it might be prohibitively expensive—or at least intolerably wasteful—to try to isolate the separate obligations of each subsidiary to affiliate companies or to third parties. Yet problems of jurisdiction and coordination make consolidation challenging in some cases.

The Key Elements in the Growth of Cooperation

Notwithstanding the problem of corporate groups, management of the insolvency of corporate debtors has made considerable progress. Each positive step in increasing cooperation has served to build confidence and momentum, because each one tends to disprove the assumption that nations will usually react to a shared difficulty in a short-sighted and parochial way. The early cases in various countries were both positive and negative, but the negative cases were merely instances of judges applying the same old ideas, whereas each positive (cooperative) decision attracted attention as a judicial innovation in the internationalist direction. Some academic writing of a similar import may have made a modest contribution as well.

Exemplary is the Maxwell case. It was highly publicized because of the great size of the company and the spectacular death of its colourful leader. It began with the US and UK courts at daggers drawn, but was resolved with a wise and steady cooperation among excellent judges and lawyers, resulting in the most universal and successful global insolvency plan in history. Among other things, it dealt with an entire, massive corporate group despite the existence of subsidiaries and assets in a number of countries. It ended with management of the insolvency in the United Kingdom even though the USA had the greatest concentration of assets. The result was admired and celebrated throughout the professional and financial world. It thus had a greater impact than some other rulings where a court may have denied cooperation while insisting on a niggling concern with relatively minor legal differences based on a distrust of foreign notions.

These cases helped build the base that encouraged UNCITRAL to take up what became the Model Law project. The UNCITRAL process made an independent contribution to the evolution of pro-universalist attitudes in a number of countries by bringing together expert and non-expert diplomats to negotiate. The delegates taught each other that the basic principles of insolvency law are found nearly everywhere, while educating each other about the elements in various

24 In re Maxwell Comm Corp 93 F 3d 1036 (2d Cir 1996).
national insolvency systems that are diverse. That process created a cadre of leading persons in a number of countries who had begun to understand the problems and the potential of cooperative solutions. The World Bank contributed in several important ways, notably by sponsoring meetings of commercial law judges from around the world as well as by holding global seminars on the subject. The International Monetary Fund advocated domestic and international insolvency reform from an early date and produced an important book explaining insolvency principles, including the need for international cooperation. Finally, the American Law Institute, a major law reform organization in the USA best known abroad for the Restatements of the law and the Uniform Commercial Code, carried out a major project establishing principles governing insolvencies in the NAFTA area.\(^{25}\)

8.26 The promulgation of the Model Law by the United Nations gave it a crucial seal of approval. As it began to be adopted by important commercial countries, the universalist principles it embodied were enhanced in visibility and prestige. The UNCITRAL Guide to Enactment fairly discussed the law, but emphasized its cooperative aspects more than its backward-looking provisions that gave a prominent place to local proceedings. And, of course, in each adopting country the provisions of the Model Law had the force of domestic law and required enforcement.

8.27 The success of the Model Law in turn led to a second UNCITRAL project, which began the long journey toward harmonization of insolvency laws by producing the Legislative Guide on Insolvency. The most immediate effect of this second UNCITRAL success was to expand greatly the educational process started in the Model Law negotiations.

8.28 One result was a growing number of cooperative rulings. I am completing an empirical study of the operation of the Model Law in the USA which will show hundreds of cases of recognition granted and only a handful of denials. These cases recognize main proceedings in other jurisdictions around the world. Furthermore, a new positive ruling often cites a favourable ruling from the other jurisdiction. So, success breeds success. While a requirement of reciprocity is often a poison pill, reciprocity in action is a sweet sauce that invites sharing.

\(^{25}\) Above n 15, appendix B. Those principles are now being adapted to a broader use beyond North America in a joint project of the American Law Institute and the International Insolvency Institute whose reporters are professors Ian Fletcher of University College London and Bob Wessels of the University of Leiden. International Insolvency Institute, Committees—Working Group on ALI Principles of Cooperation in International Cases, <http://www.iiiglobal.org/committees/ali-principles-cooperation-international-cases>.
The Corporate Experience as it Relates to Banking

Based on what I have learned from my distinguished fellow authors, including experts in banking law and supervision, I may have some sense of what elements of the corporate experience might be most helpful in improving international cooperation with regard to distressed financial institutions. In particular, I want to discuss initiation, expedition, leadership, distribution and priorities, communication, formal agreements of two kinds, and special relationships.

Initiation

One of the great difficulties in corporate insolvency both domestically and internationally is the problem of initiation (commencement of proceedings). The debtor’s managers know all about its financial problems, but often have too many disincentives to initiate a proceeding that may cost them their jobs. The creditors have more appropriate incentives, but too little information, so they may act rashly or belatedly. These problems should be avoidable with regulated entities. Regulators should be able to obtain ample financial information and should be given the authority to initiate resolution proceedings when appropriate. Lobbyists brandishing fantasies of governmental conspiracy have muddied that authority in the recent US legislation, but the power should be clear and should be discretionary, subject to the normal protections against arbitrary governmental action (including compensation) found in most well-developed legal systems.

Expedition

In cases of financial distress, speed is everything. The standard trope in insolvency practice is the debtor whose principal asset is a shipload of fish, but the principle is applicable in nearly all cases. In advanced domestic insolvency systems, judges are available ’24/7’ to provide immediate relief where it is required to preserve value and maintain the status quo. The Model Law has at its heart the expedited system of recognition—an expedition buttressed by presumptions and an explicit disclaimer of formal requirements—followed by an automatic invocation of the local form of moratorium on all asset transfers and creditor enforcement. By providing ‘status quo’ relief quickly, while reserving more complete relief (eg turnover of assets to be distributed under main-proceeding rules) for later court consideration in light of the interests of creditors, the Model Law provides an acceptable balance.

Leadership

The element of leadership refers to the need to have a main proceeding to which others defer to one degree or another. The court or administrative authority in the main jurisdiction need not be a dictator, but should be something more than primus
The experience in jurisdictions with successful reorganization systems demonstrates that where negotiation is required, the law should structure a centre around which the negotiations can be conducted. Domestically, the administrator, trustee, or debtor-in-possession may provide that centre. The centre can be seen as the logical proposer of possible solutions and the convener of negotiations.

8.33 Negotiation is always required in a multinational case because of the need to coordinate court actions. Maxwell is again a good example, with the US court deferring to the leadership of the British court and administrator, but appointing a monitor (an outstanding veteran lawyer named Richard Gitlin) in the American Chapter 11 case to work with the administrator, safeguard American interests, and keep the US court informed. Thus leadership fell to the United Kingdom, appropriately on the facts despite the presence of very substantial assets in the USA but accommodation permitted the US court to be comfortable with that deference. Similarly, in the collapse of the Riechmann real estate empire, the US courts deferred to the Canadian main proceeding. Those courts also deferred to Argentina in the large telecom insolvencies in that country. There are a number of other examples.

Financing

8.34 Closely related is the question of financing. In virtually all major corporate insolvencies, there is a need for financing, even if liquidation is contemplated. The need is greater if the business is to be sold as a going concern or if financial guarantees are required to support the sale of certain assets. Naturally, the institution providing the necessary financing will have a considerable say about the direction of the proceeding. The same may be true of a buyer of the business who imposes certain conditions on the sale.

Distribution and priorities

8.35 One of the most difficult problems in multinational corporate insolvency arises from differences in distribution priorities among national systems. Although pari passu distribution is the mantra almost everywhere, priorities are the reality. Britain has reduced priorities in recent reforms and Germany has abolished most of them, but they remain important everywhere. They also vary greatly. It is true that the three Great Priorities—for employees, tax authorities, and secured creditors—are found in nearly all systems, but the type and extent of these priorities vary and

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many other priorities join them in line for distribution ahead of general creditors. If every jurisdiction insists on its own priorities, then a unified proceeding is simply impossible, so any approach to universalism or even cooperation requires some accommodation in this regard.

The specifics of priority problems are too complex for a summary discussion, but the core difficulty is that courts otherwise willing to cooperate may feel bound to the letter of their local statutory priorities, requiring that the value of the assets they can seize be distributed according to the local scheme. Yet such a result may in turn reduce or eliminate cooperation across the board. For example, if the local court requires that locally seized value be distributed under the local plan, then it may refuse to cooperate in the sale of a multi-jurisdictional division of the debtor company because of the difficulty in agreeing on the allocation of the proceeds of the sale to each local component of the division. Instead, it may insist that each component be sold separately even if that reduces realization for all concerned. That is, the requirement of local distribution may impede multinational realization.

Aside from this contagion of localization, application of local distribution rules is often arbitrary both normatively and economically. The two main reasons are that virtually all countries distribute value to claimants regardless of nationality and that the local rules are often not tied in any real sense to the assets seizable locally. Applying local insolvency law may grant a local priority to contractors in distributing the proceeds of a company aeroplane found at the airport at the moment of filing or the proceeds of sale of a local patent on a product unrelated to any local activity. The proceeds of inventory seized locally might be distributed to local employees although the inventory was produced and marketed by employees in another country. Furthermore, part of the proceeds may be distributed to international lenders or suppliers who claim everywhere despite having no connection with the local jurisdiction or the assets found there.28

It is my sense that in the banking sector some of the problems of priorities might be mitigated by financial regulation and the required use of local corporations. With regard to banks, brokerages, and other financial institutions, local non-insolvency regulations may grant priority to customers or investors. Because those regulations long pre-dated financial distress, are not found in insolvency law, and are likely to have a strong relationship to the local assets, they do not present nearly the same difficulties as does application of local insolvency laws. Those regulations generally require that a local corporation be established or they treat a branch as if it were a separate legal entity for insolvency purposes, creating pre-distress expectations

28 Foreign creditors receive distributions without discrimination on the basis of nationality in virtually all countries, subject to the effects of certain priorities. Of course, local creditors have the usual 'home team' advantage as is true in all litigation.
not inconsistent with insolvency policy or cross-border cooperation. Of course, if local law requires a cross-guarantee from the global group, then the problems discussed above re-emerge.

8.39 Many of these points are illustrated by the HIH case in the United Kingdom. HIH was an Australian insurance company. The issue was whether certain assets situated in England should be distributed under English law or Australian law. The priority systems of the two countries as applied to that case would have produced markedly different results for various claimants, because Australian law gave priority to policy holders over general creditors, while the applicable English law would have treated the creditors pari passu. The lower courts held that the English courts were bound to apply English priorities for assets located in England. The House of Lords panel unanimously reversed, although with a deep split as to the rationale.

8.40 The differing legal rationales for the result are discussed below, but here our interest should be the facts, which illustrate the points just discussed. The assets 'in' England were reinsurance agreements. HIH might as readily have entered into such contracts with the same reinsurers in Zurich or New York or elsewhere. It seems unlikely that creditors, English or otherwise, relied on an English distribution system as to this pool of assets, while it is highly likely that policy holders in many countries relied on Australian law to protect them against failure of the company and to prefer them if it failed nonetheless. English creditors, including policy holders in England, might have relied on English law, but that is rather different from relying on assets that happened to be in some sense in England. Obviously, the opposite would be true if English law required the presence of a certain pool of assets to protect local policy holders or other creditors, but apparently it did not.

8.41 To anyone familiar with multinational civil litigation generally, it will by now be obvious that the problem of priorities is a choice of law problem. What 'contacts' should be controlling in determining which distribution scheme to apply? Should we be focused on the physical or deemed location of assets, the debtor's COMI, the representations or appearances presented to creditors, shared policy preferences for certain types of creditors, the requirements of a regulatory system, or some other factor? While these questions can occupy an article—or perhaps a book—I hope this summary illustrates that it is problematic to apply local law to seizable assets where there is little relationship between that local law and the assets or the expectations of creditors. The difficulty serves to emphasize the importance of

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29 In re HIH Casualty and General Insurance Ltd [2005] EWHC 2125 (Ch).
ex ante agreements on such matters and to excuse some elements of apparent arbitrariness that such agreements might require. In any case, the distinctions suggested may be helpful in considering the position of creditors of distressed multinational financial institutions and their corporate affiliates.

Communication

From a procedural perspective, the most radical innovation of the Model Law was the express authorization of direct communication among courts and administrators.31 In traditional civil litigation communication between courts was full of 'ribbons and feathers', an affair of endless certification and legalization, red glossy seals authenticating slightly smaller red glossy seals, and often great delay. The instrument of communication was the 'letter rogatory' or, in more modern terminology, the 'letter of request'. Insolvency was the field in which the courts started to move to more modern and rapid types of communication because the control and realization stages of an insolvency case operate in real time, with value being lost in a multinational case if courts cannot cooperate quickly in protecting and selling assets, among other things.

The common law courts, especially those in Canada, the United Kingdom, and the USA began early on to communicate directly or through the administrators. In one well-known case, Cenargo,32 the US and UK courts were effectively enjoining each other until a telephone call between judges, with the lawyers on the call and a transcript taken, enabled them to resolve the jurisdictional and practical issues involved. Yet this form of direct communication was not authorized by statute in many civil law countries and therefore judges could not participate. The Model Law provides the necessary explicit statutory justification.

There remain, of course, many practical difficulties, starting with a traditional reluctance to engage in such newfangled conduct, along with problems of language. There are also very legitimate concerns about due process, ex parte contacts, and secret decision making. The American Law Institute has been a pioneer in its Transnational Insolvency Project in providing a set of procedures for such communications approved by both common law and civil law lawyers and judges.33 The International Insolvency Institute has been translating these procedures into a growing number of languages and making them available to courts and professional groups around the world.34

31 Model Law, Article 26.
32 In re Cenargo Int'l, 294 BR 571 (Bankr SDNY 2003).
8.45 The role of this sort of communication—among officers, professionals, and courts—cannot be overemphasized. Cooperation and coordination require communication, which leads us to the matter of protocols.

Protocols

8.46 The Model Law and various court decisions have been helpful in providing the beginnings of an infrastructure for multinational corporate insolvency, but they have left many gaps to be filled. No process has been more important in the successes of international coordination than the negotiation of protocols to fill those gaps in a particular case.

8.47 Protocols are formal agreements typically negotiated through professionals representing major interests involved in the insolvency, including the debtor's management or administrator. They are generally negotiated post hoc, soon after the opening of an insolvency proceeding. They are usually approved by some or all of the various courts who have control of the debtor's assets and thus become binding upon the parties and in some sense upon the courts involved as well. They have emerged as an essential tool in multinational cases.

8.48 One of the first protocols was in the Maxwell case. The American 'examiner' (Gitlin) and the UK receiver (Mark Holman) negotiated an agreement largely procedural in nature. As noted above, it rested on the idea that the English side would govern the case, but the American side would be included appropriately in crucial discussions and decisions. Among its provisions was agreement on what actions would require notice or notice and consent by the American side. It also provided for disputes to be resolved by the courts involved on both sides of the Atlantic. The protocol itself was approved by the two courts. The protocol minimized and channelled potential conflict and regularized decision making.

8.49 Around the same time, a number of protocols were generated in the increasingly routine interactions of the US and Canadian courts in insolvency matters. This body of experience and formal agreement has often led to seamless cooperation, including coordinated hearings, simultaneous entry of orders, and even joint video-conferenced court proceedings where necessary. One of the most important lessons learned from this substantial body of experience was that protocols should be negotiated early, before the interests of the parties have become so known and fixed as to make negotiation difficult.

8.50 The classic case for the use of protocols was Inverworld. The parent company was a US investment vehicle for investors from Latin America. Its assets, both

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35 267 BR 732 (Bankr WD Tex 2001). I should disclose that I was appointed as special counsel to the trustee in the USA proceeding for the purpose of developing an analysis of the numerous choice of law issues in the case.
Coordination in International Corporate Insolvencies

those owned directly and those owned through subsidiaries, were located principally in the USA, the United Kingdom, and the Cayman Islands. Insolvency proceedings were brought in all three jurisdictions, each of which had different insolvency rules concerning distributions. The differences in rules threatened to generate international litigation that would have consumed much of the estate. To stop the bleeding, the attorneys and accountants involved negotiated a protocol that was approved by each of the insolvency courts. It called for the British case to be dismissed, but with a guarantee that British creditors would not as a result be made worse off. It allocated functions to the two remaining courts. In particular, it provided that the US court would resolve priority issues, while the Caymans court would manage the distribution of proceeds. The case ended by being settled, with much higher returns to investors as a result of multi-court cooperation.

A number of exemplary protocols are now available to provide guidance in new cases. The ALI Project has an appendix with some of the most noteworthy.\(^{36}\) Others are found, inter alia, on the website of the International Insolvency Institute. Recent protocols have included one in the Federal Mogul case and another in the Lehman case. I mention these last two because in both cases there has been less than perfect international cooperation, but the parties report that the protocols have been helpful in a variety of ways, even though they have not governed all of the procedures employed.

The next step in the development, I predict, will be the appearance of more general protocols agreed between governments to govern specific areas, especially those subject to regulation. Larger agreements relating to multiple industries or corporations generally may appear in the form of new model laws or treaties. But the most immediate category of general agreements may be in the form of `special relationships' on a bilateral or multilateral basis.

Special relationships

As mentioned earlier, in the HIH case in the UK's House of Lords there was a sharp division among the judges. While some of them found a basis for transferring the reinsurance assets to the Australian liquidators based on a strain of universalism in British common law, others relied on Section 426 of the Insolvency Act. That provision permits British courts to apply foreign insolvency law in all respects if the foreign jurisdiction is listed on a schedule of countries maintained by the executive branch of the government. Thus the executive can authorize very close cooperation with another country in insolvency matters by designating it under Section 426. Australia had been so designated and thus the honouring of Australian priorities in the UK courts was justified.

\(^{36}\) See eg above n 15, appendix C, 123.
8.54 Statutes of this sort would be very helpful in advancing international cooperation, although they should not substitute for larger agreements embracing many jurisdictions. They can provide a bridge to such larger agreements, while a widening range of cooperation with other countries will develop confidence, identify problems to be solved, and lay the groundwork for additional steps. Such provisions could be tailored to particular industries and thus could focus on implementation of resolution of financial institutions headquartered in another jurisdiction. Upon the addition of a jurisdiction to a country's cooperative list, the courts and relevant administrative authorities of the country would be bound by the statute to cooperate with that jurisdiction in dealing with the financial distress of a financial institution headquartered in that jurisdiction, absent some overriding public policy difficulty in the particular case.

8.55 The appropriate minister would add a jurisdiction to the full cooperation list upon being satisfied that the other jurisdiction had proper laws and would cooperate in a similar way (perhaps pursuant to a formal agreement). In the background might be the possibility that a breakdown in agreement at some future time would lead to removal of that jurisdiction from the list, providing an incentive on each side to find useful understandings in each case. In that way, agreements would have real binding effect, but would be much more flexible than model laws or treaties.

Conclusion

8.56 In closing, I would emphasize three points: statutory authority, leadership, and education. Officials in each jurisdiction connected with a financial institution in distress should be able to look to a statute that authorizes or even mandates cooperation. That cooperation should be by way of deference to the leading role of the country in which the financial institution has its COMI. In the regulatory context, that COMI should normally be identified in advance. If the financial institution is of a sort that has recently arisen and is unregulated, the identification of its COMI may sometimes generate litigation, but the right answer will usually be quite apparent.

8.57 Finally, education is key to cooperation. By education, I mean not only a growing expertise in the laws of other jurisdictions but also personal contacts with those who administer those laws. The working groups at the IMF, the negotiations at UNCITRAL, and the colloquia organized by the World Bank have contributed enormously to the education of experts in the field of corporate insolvency, both in and out of government, and also to their personal contact with each other. In the midst of crisis, the fact that one's counterpart is a human being one has met
Coordination in International Corporate Insolvencies

and with whom one has discussed solutions to common problems is of great significance.

In a larger sense, the approaches needed to coordinate management of the financial distress of a multinational institution are responses to the anomaly of a global marketplace governed by a political system of nation states. Overcoming the consequent difficulties is a great and wonderful challenge.