FOREIGN REPRESENTATIVES IN US CHAPTER 11 CASES:
FILLING THE VOID IN THE LAW OF MULTINATIONAL INSOLVENCIES

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I. Introduction

In 1850, with $40 and a lot of hard work, Isaac Merritt Singer created “America’s greatest invention,” a revolutionary design for the sewing machine. He founded the Singer Sewing Machine Company in 1851, and in 1867 opened a factory in Scotland, making Singer the first American multinational manufacturing company.¹

In 1999, with little more than $40 in the bank, The Singer Company N.V. (“Singer”, successor in interest to the Singer Sewing Machine Company) was again responsible for a new invention — this time in the field of international insolvency. Singer and 46 of its affiliates (collectively, “Singer”) filed Chapter 11² petitions in the United States Bankruptcy Court for the Southern District of New York.³ With business operations in over 150 countries and creditors at the door throughout the world, it was feared that Singer would suffer a global meltdown. Yet, remarkably, Singer emerged from Chapter 11 just one year later, reorganized and revitalized as an international competitor, selling not just sewing machines but also numerous other consumer goods under the Singer® brand name. Isaac Singer would be pleased.

The insolvency reorganization, and even the orderly liquidation, of a multinational conglomerate like Singer presents one of the most complex situations in the current business environment. The trend toward globalization has led to the emergence of corporations whose business operations in various countries are closely interdependent. As intercompany debt and intercompany guarantees are used to allocate money within the conglomerate, the resulting web of intercompany obligations leads to an interdependency that has potentially disastrous results in the event of an insolvency of one of the entities within the conglomerate. Even an isolated insolvency of one of the companies can trigger cross-defaults throughout the corporate group, and even in the absence of a formal default, local creditors of foreign affiliates will often call in their credit lines and seek immediate repayment in full. As a result, a multinational conglomerate can be subject to insolvency proceedings in various countries, each with different insolvency laws reflecting different societal attitudes and cultural values.


² 11 U.S.C. §§ 1101 et seq. ("Chapter 11").

In such situations, the task of courts, management and international insolvency professionals is to preserve as much value as possible for the benefit of all concerned, either by working towards a global reorganization of the business on a going concern basis, or by coordinating an orderly liquidation process that minimizes the cost and maximizes the recovery of business shutdowns and asset sales around the world. Prior to Singer, the primary tools utilized in United States-based multinational insolvencies were the appointment of examiners and the negotiation of ad hoc “protocols” on a case-by-case basis.

Due to the unique circumstances of Singer, however, it was apparent that new tools and techniques were needed if Singer was to be saved. With necessity being the mother of invention, Judge Burton R. Lifland rose to the challenge by creating a new weapon in the American international insolvency arsenal: the “Foreign Representative.” Since then, other United States Bankruptcy Courts have also appointed Foreign Representatives to deal with multinational restructurings and orderly liquidations.

In Part II of this article, we discuss the void in international insolvency law that has created the need for ad hoc, innovative approaches to multinational insolvencies. Part III focuses on the appointment of Examiners and the creation of protocols as techniques for facilitating international insolvency cooperation and coordination. In Part IV, we discuss why examiners and protocols do not meet the needs of certain cross-border insolvencies. Finally, Part V discusses Singer and three other Chapter 11 cases in which Foreign Representatives have been appointed.

II. Identifying the Void in the Law of Multinational Insolvencies

In 1987, in an article called “The International Void in the Law of Multinational Bankruptcies,” the co-author and his partner described some of the barriers that interfere with efforts to coordinate insolvencies, including the absence of international conventions and the multiplicity and incompatibility of local insolvency laws. However, the authors were able to identify two areas in which some progress had already been made. First, bi- and multilateral bankruptcy treaties had been executed between states for years, in certain cases even centuries. As a significant step toward a coherent multilateral regime, the authors also point to the 1980 draft of the EEC Convention. Second, at a more basic level, is

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5 Id. at 309.
the unilateral recognition of foreign bankruptcy proceedings, both before and after the enactment of Section 304\textsuperscript{6} of the United States Bankruptcy Code.\textsuperscript{7}

Section 304, adopted in the wake of the \textit{Herstatt} insolvency, was seen by the authors as a promising step in the right direction. In 1974, the German Bankhaus IB Herstatt Kommanditgesellschaft auf Aktien collapsed. On June 26, 1974, at the close of business in Germany, Herstatt's banking license was revoked and its liquidation ordered. Unfortunately, there was no advance preparation for a coordinated proceeding. As the news of Herstatt's failure spread across the Atlantic to New York, where business was still active (because of the 6 hour time difference), creditors rushed to attach Herstatt's assets at the Chase Manhattan Bank in New York. Within a few days of Herstatt's closure, various New York State and Federal Courts had issued nineteen orders of attachment.\textsuperscript{8} The resulting legal battle with the German liquidator of Herrstatt, who wanted to include the attached assets in the German proceeding “dramatically increased awareness in the United States of the problems of the multinational bankruptcies.”\textsuperscript{9}

In large part in reaction to \textit{Herstatt}, the United States enacted Section 304.\textsuperscript{10} Among other things, Section 304 permits a “foreign representative”\textsuperscript{11} of a “foreign

\textsuperscript{6} 11 U.S.C. § 304 (“Section 304”).

\textsuperscript{7} 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

\textsuperscript{8} See Carl Felsenfeld, \textit{A Treatise on the Law of International Insolvency} at 6-2 (2000); Gitlin & Flaschen, \textit{supra} note 4, at 313-14.

\textsuperscript{9} Gitlin and Flaschen, \textit{supra} note 4, at 314.

\textsuperscript{10} 11 U.S.C. § 304. In relevant part:

Cases ancillary to foreign proceedings.

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, the court may –

(1) enjoin the commencement or continuation of –

(A) any action against –

(i) a debtor with respect to property involved in such foreign proceeding; or
proceeding”\textsuperscript{12} to seek ancillary relief in and cooperation from a US bankruptcy court.\textsuperscript{13} Over the years, Section 304 has been invoked with great success in a

(ii) such property; or

(B) the enforcement of any judgement against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with –

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

\textsuperscript{11} 11 U.S.C. § 101(24) defines “foreign representative” as a “duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.”

\textsuperscript{12} 11 U.S.C. § 101(23) defines “foreign proceeding” as a “proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.”

\textsuperscript{13} Section 304 also permits the U.S. Court to deny such relief and cooperation where appropriate. See Jay Lawrence Westbrook, \textit{Choice of Law in Global Insolvencies}, 17 Brook. J. Int’l L. 499, 518 (1991) (“The section 304 procedure in the United States reflects two sides of modified universalism. It serves universalism by providing specific procedures for international cooperation and deference to the home-country court. ... On the other hand, section 304(c)
variety of situations involving a number of foreign jurisdictions. Other countries have also enacted cross-border cooperation statutes with the same intent as Section 304 -- to provide assistance in appropriate circumstances to representatives of foreign insolvency estates.

More recently, due in substantial part to the efforts of international insolvency associations including INSOL International and Committee J of the International Bar Association, the United Nations Commission on International Trade Law ("UNCITRAL") has adopted the UNCITRAL Model Law on Cross Border Insolvencies (the "Model Law"). The Model Law is intended to serve as a guide for the enactment by countries, with local variations as appropriate, of domestic legislation explicitly authorizing local courts to provide assistance to foreign courts and foreign insolvency representatives in appropriate circumstances. The United

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14 See generally 1 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE ch. 10 (King ed. 2000), and numerous cases cited therein. For a general discussion of Section 304, see Todd Kraft and Allison Aranson, Transnational Bankruptcies: Section 304 and Beyond, 1993 Colum. Bus. L. Rev. 329; and Donald T. Trautman, Jay Lawrence Westbrook & Emmanuel Gaillard, Four Models for International Bankruptcy, 41 Am. J. Comp. L. 573, 610 (1993).


States has adapted the Model Law in the form of [proposed] new Chapter 15 of the Bankruptcy Code.

Also, after decades of frustration and failed attempts, the European Community has finally adopted the pan-European Regulation on Cross-Border Insolvencies (the "EU Regulation"). While the EU Regulation primarily focuses on insolvency liquidations, it represents another step forward in the international effort to increase avenues of cross-border insolvency cooperation.

From the US perspective, Section 304 still leaves a substantial void in the law of international insolvencies. If widely enacted, the Model Law will help to fill this void, but only in part, while the EU Regulation by its terms only applies within the European Union. Accordingly, techniques have been needed for seeking international cooperation in US cross-border Chapter 11 cases. Prior to Singer, the two principal techniques employed were the appointment of examiners and the negotiation of ad hoc protocols.

III. Examiners and Cross-Border Protocols

A. Maxwell Communication Corporation plc

Section 304 works well when a foreign debtor seeks assistance in the United States. The Chapter 11 case involving Maxwell Communication Corporation plc ("MCC"), however, was not that simple. MCC was the parent company of the

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12 [Note to editor: delete the word "proposed" if Chapter 15 has been enacted]


20 But see Horst Eidenmueller, Europaeische Verordnung ueber Insolvenzverfahren und zukuenftiges deutsches internationales Insolvenzrecht, IPRAX 2001, HEFT 1, 3, which considers the EU Regulation to be the main competitor of the Model Law in the worldwide efforts to harmonize international insolvency laws.


22 The following discussion is based on the co-author’s experience as counsel to the Examiner appointed in MCC’s Chapter 11 case, Richard A. Gitlin. For general discussions of MCC, see Felsenfeld, supra note 8, at 6-15; Evan D. Flaschen & Ronald J. Silverman, The Role of the
media conglomerate created by the late Robert Maxwell. MCC was an English company with its headquarters in London, but the majority (in value) of its assets were located in the United States. After Mr. Maxwell's sudden death in 1991 and the financial difficulties it exposed, MCC needed to file for insolvency relief.

What made MCC different was that management petitioned for insolvency protection not only in London, but also in New York. This immediately created the potential for conflict between the English High Court of Justice, which had jurisdiction over MCC's UK Administration proceeding, and the United States Bankruptcy Court for the Southern District of New York, which had jurisdiction over MCC's Chapter 11 case. To compound the situation, English law provided for the immediate appointment of Administrators to assume management and take control of MCC, while the Bankruptcy Code left existing management in place as the "debtor in possession."25

Whereas Section 304 contemplates a main insolvency proceeding in another country and an ancillary proceeding in the United States, MCC's situation presented two main insolvency proceedings in two different countries for the same debtor. As both countries apply their laws extraterritorially, it immediately became apparent that the participants in the Administration and in the Chapter 11 case would need to coordinate and cooperate in order to avoid international chaos. Judge Tina L. Brozman sought to fill the void by putting in place an estate representative with the mandate to facilitate the coordination of the Chapter 11 case with the Administration. She could have ordered the appointment of a Chapter 11 trustee, but this would have resulted in the trustee assuming the role of corporate management, which she did not consider to be warranted under the circumstances. Instead, she seized upon the examiner provisions of the Bankruptcy

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23 See Insolvency Act of 1986 (UK), which provides for a reorganization-oriented procedure that replaces existing management with an administrator, discussed in 2 EUROPEAN CORPORATE INSOLVENCY ch. 16 (Harry Rajak et al. eds., 2d ed. 1995).

24 See id.


26 Once a court has ordered the appointment of a Chapter 11 trustee or examiner, the United States Trustee makes the actual appointment. See 11 U.S.C. § 1104(d).

Examiners are normally appointed "to conduct an investigation of the debtor as appropriate," but in this case Judge Brozman took advantage of a statutory cross-reference to "any other matter relevant to the case" to order the appointment of an Examiner to fulfill the facilitation role she envisioned.

The Examiner could act as a disinterested party, as he was not affiliated with the Chapter 11 debtor (unlike management, which acted as debtor in possession). The Examiner was directed to facilitate the administration of the two primary cases, and because of the far reaching powers given to him, was in an ideal position to do so. His role was seen more as a mediator and facilitator, as he was appointed to search "for a means that would enable the two proceedings and the two


The precise scope of an examiner's power is a matter for the discretion of the court. Courts have tended to construe broadly the scope of an examiner's investigatory powers and otherwise 'to give the examiner additional duties as to circumstances warrant.' (citations omitted) For example, examiners have been empowered to sue to recover preferential payments and to set aside fraudulent conveyances, and to assume control of a debtor's business as an emergency remedy. Of immediate interest, examiners have also been specifically mandated to mediate negotiations among parties and to facilitate the resolution of differences to facilitate confirmation of a plan of reorganization. These powers are precisely the role according to the Examiner in MCC's Chapter 11 case. Utilization of the Examiner's position was instrumental in permitting an expeditious resolution in the MCC international insolvency, and it may serve the same function in other international insolvencies. In the exercise of his position, the Examiner, together with the Joint Administrators, has sought to balance, and minimize the differences between, the two legal systems, in an effort to focus energies and resources on maximizing the value of MCC's assets.
insolvency courts to coexist in a manner that would maximize the value of MCC for the parties concerned."

The Examiner and the UK administrators adopted another groundbreaking approach to international insolvencies. Instead of solely relying on the unilateral measures provided for by each legal system, the Examiner and the administrators sought to coordinate the procedures of the insolvency proceedings through the use of a Protocol.

Protocols are agreements entered into in bankruptcy proceedings, and may cover any range of issues. In the Maxwell Protocol, the issue was the coordination of the two insolvency proceedings in the UK and the US. The main provisions of the Protocol have been summarized as follows:

[The Protocol] tended to emphasize the creation and administration of a system for the disposition of assets of great value largely in England and in the United States. Similarly, it also dealt with the system to be applied to distribute the proceeds derived from the disposition of the assets to the Maxwell creditors.

In order to honor the statutory role of the United States Examiner, the Maxwell Protocol provided for the Joint Administrators to consult with the Examiner and to make a continuing good faith attempt to obtain the consent of the American-appointed Examiner when taking significant steps in the bankruptcy....

One significant function of the Protocol was to solidify the management of the precarious group of Maxwell companies, including the Macmillan publishing company and the Airline Travel Guide. The position of the administrators as existing management was confirmed; procedures were also established for orderly transitions. Among other provisions setting out in detail the functions of the Joint Administrators and the Examiner, the Protocol gave the Examiner powers to act as

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32 See Flaschen & Silverman I, supra note 22, at 626. For the perspective of the English High Court Justice adjudicating for MCC's Administration proceedings;, see Hoffmann, supra note 22, at 2514 ("The company management ... 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.")

33 See Flaschen & Silverman I, supra note 22, at 636 (text of Protocol).

34 See FELSENFELD, supra note 8, at 6-17.
a mediator should disputes arise and provided that both the Joint Administrators and the Examiner would be recognized as parties in interest in bankruptcy proceeding in both the United States and in England. The spirit of the arrangement under the Protocol is exemplified by the opening paragraph of Judge Brozman's approving Order, which "refers to the administration under English law and expresses 'a desire by this Court, the High Court (of England), the Examiner, the Joint Administrators and the Debtor (i) to harmonize the within proceedings with the Administration and (ii) to facilitate a rehabilitation and reorganization of the Debtor.'"\(^{35}\)

The Protocol and the appointment of the Examiner were successes.\(^{36}\) After the approval of the Protocol by both the US Bankruptcy Court and the London High Court, the Examiner and the Joint Administrators of the UK estate negotiated, within the frameworks laid out in the Protocol, the reorganization of MCC. A Chapter 11 Plan of Reorganization was approved by the US Court in only 18 months, quickly followed by UK Court approval of a related UK Scheme of Arrangement.\(^{37}\)

B. Joseph Nakash

With the appointment of an Examiner and the negotiation of a Protocol in MCC, the US insolvency community had a new mechanism for the coordination of two main insolvency proceedings in different countries. The combination of the appointment of an Examiner as a disinterested party charged with the coordination of the US proceedings with the foreign proceedings, and the subsequent negotiation of a Protocol to consolidate the substantive administration of the case and the distribution of the assets, had proven to be a workable solution.

The best known post-MCC Chapter 11 case in which an Examiner was appointed to coordinate international proceedings was *In re Nakash*.\(^{38}\) Joseph Nakash, the debtor, had a variety of business interests worldwide, including shipping operations, apparel (Jordache© jeans) and real estate. Among other

\(^{35}\) *Id.*?


\(^{37}\) *Felsenfeld*, *supra* note 8, at 6-19.

\(^{38}\) The following facts of the case are extracted from Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 Tex. Int'l L.J. 587, 593 (1998) (referred to as "Flaschen & Silverman II"); *see also* *Felsenfeld*, *supra* note 8, at 6-3.
things, he also was a member of the Board of Directors of the North American Bank ("NAB") in Israel, which was put into receivership after experiencing financial problems. A judgment was rendered against Nakash personally in the amount of $160 million, due to his role as a director of NAB. While that judgment was still on appeal, the Official Receiver of the State of Israel (the "Official Receiver"), who was appointed as the receiver of NAB, filed an involuntary bankruptcy petition against Nakash in Israel. The Israeli Court granted the petition, and Nakash appealed.

In the midst of the legal battle surrounding the insolvency petition in Israel, the Receiver obtained an order of attachment against Nakash in the federal court of New York. Three days after the order of attachment was granted, Nakash commenced voluntary Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York. As in MCC, the debtor in Nakash was subjected to two main uncoordinated proceedings, this time in the US and Israel. All of this was further complicated by the fact that the Official Receiver had filed a second involuntary bankruptcy petition in Israel order to correct possible deficiencies in the first insolvency. In connection with the second filing, the Official Receiver also took steps to attach assets of Nakash in Curacao, the Netherlands and Luxembourg. Back in the US, Nakash asserted that the Official Receiver's second bankruptcy filing and related asset attachments violated the US automatic stay, and the US Bankruptcy Court ultimately agreed.

In order to attempt to bring order to this international chaos, US Bankruptcy Judge Burton R. Lifland appointed Richard A. Gitlin to serve as Examiner. Ultimately, the Examiner negotiated a Protocol with the Official Receiver. The Nakash Protocol has been described as follows:

The need for a Protocol in the Nakash proceedings was critical. In the absence of a Protocol, litigation would continue unabated between the Debtor and the Official Receiver, and there would be a continuing and possibly escalating risk of undesirable conflict between the U.S. Court and the Israeli Court. Meanwhile, the value of the Debtor's worldwide

39 In re Nakash, Case No. 94-B-44840 (BRL) (Bankr. S.D.N.Y. 1984).
business operations would undoubtedly deteriorate amid such wasteful
and distracting litigation.\footnote{Flaschen & Silverman II, supra note 38, at 596.}

On a pragmatic level, the Protocol divided the world into “three spheres of
influence” for purposes of resolving issues. The parties agreed that for actions to be
taken in Israel or the United States, the Israeli or the US court, respectively, would
be the primary addressee for relief, and that each court would respect the
jurisdiction of the other. With respect to issues existing outside of the United
States and Israel, the parties agreed that they would coordinate their efforts “to
avoid conflict rulings whenever possible.” In order to do so, the parties and the
court agreed that they would use the Official Receiver and the Examiner to consult
with each other, and to have direct telephone conferences whenever possible.\footnote{Id.
at 597, see also Felsenfeld, supra note 8, at 6-34}

It is especially noteworthy that the \textit{Nakash} Protocol was the first Protocol that
was concluded between a common law country, in which the bankruptcy judges
traditionally enjoy wide discretion, and a civil law country, in which judges are
confined to the limits of their statutorily prescribed boundaries. The \textit{Nakash}
Protocol is also very unusual in that, not only was it not signed by the Debtor, but
also the debtor actively opposed its approval and filed appeals in both the US and
Israel.\footnote{Flaschen & Silverman II, supra note 38, at 594 n.49.} Ultimately, with the active mediation of the Examiner, the Debtor and the
Official Receiver resolved their differences consensually, and both the US and
Israeli bankruptcy cases were dismissed by agreement of the parties.

\textbf{C. Other Protocols}

After the success of the Protocols in \textit{Maxwell} and \textit{Nakash}, the insolvency
world was awash in Protocols between US Courts and various foreign jurisdictions,
especially Canada.\footnote{See generally Bruce Leonard, \textit{Coordinating Cross-Border Insolvency Cases}, in \textit{INTERNATIONAL INSOLVENCY IN THE NEW MILLENNIUM} (International Insolvency Institute CD-ROM, June 11-12, 2001); Flaschen & Silverman II, supra note 38.} For example, Protocols were approved in the cross-border
insolvency proceedings involving, in reverse chronological order: Matlack (US and
Canada),\footnote{In re Matlack, Case N. 01-1114 (MFW) (Bankr. D. Del. May 24, 2001); Case No. 01-CL-4109
(Ont. Super. Ct. Apr. 19, 2001). These cases and those at \textit{infra} notes 48-60 were taken primarily
from Leonard, supra note 46, at app. 2.} American Eco Corporation (US and Canada),\footnote{In re American Eco
Corporation, 125 B.R. 575 (D. Del. 1991).} AgriBioTech (US and
Canada), Manhattan Investment Fund (US, British Virgin Islands and Bermuda),
Inverworld (US, England and Cayman Islands), Philip Services (US and Canada),
Livent (US and Canada), Loewen (US and Canada), AIOC (US and Switzerland),
Solv-Ex (US and Canada), Tee-Com Electronics (US and Canada),
Everfresh Beverages (US and Canada), Commodore Electronics (US and Bahamas),
and Olympia & York (US and Canada).

48 In re American Eco Corp., Case No. 00-3253 (SLR) (D. Del. Aug. 4, 2000); Case No. 00-CL-


50 In re Manhattan Investment Fund Ltd., Case No. 00-10922 (BRL) (Bankr. S.D.N.Y. Apr.
2000).

51 In re Inverworld Inc., Case No. SA99-C0822FB (W.D. Tex. Oct. 22, 1999); UK High Court of
Justice (Ch. 1999); Grand Court of the Cayman Islands (Cayman Is. 1999).

52 In re Philip Services Corp., Case No. 99-B-02385 (MFW) (Bankr. D. Del. June 28, 1999);

53 In re Livent Inc., Case No. 98-B-48312 (AJG) (Bankr. S.D.N.Y. June 11, 1999); Case No. 98-

54 In re Loewen Group International, Inc., Case No. 99-1244 (PJW) (June 30, 1999); Case N. 99-

55 In re AIOC Corp., Case. No. 96-B-41895 (TLB), 2000 Bankr. LEXIS 1360 (Bankr. S.D.N.Y.
June 1, 2000).

56 In re Solv-Ex Corp., Case No. 11-97-14362-MA (Bankr. N.N.M. January 28, 1998); Case No.

57 In re Tee-Com Electronics Inc. (Bankr. D. Del. June 27, 1997); (Ont. Super. Ct. June 27,
1997).

58 In re Everfresh Beverages, Inc., No. 95-B-45405 (JHG) (Bankr. S.D.N.Y. Dec. 20,
discussion of the Everfresh case, see Bruce Leonard, Managing Default by a
Multinational Venture: Cooperation in Cross-Border Insolvencies, 33 Tex. Int'l L.J.

(Sup. Ct. Bah. May 27, 1995) (check whether these are the same cases?).
D. Shortcomings of Examiner Appointments

Although the appointment of an Examiner has proven to be quite helpful in the coordination of cross-border insolvency proceedings, it also has its drawbacks.

First, notwithstanding the creativity of US Bankruptcy Courts in adapting the Bankruptcy Code’s Examiner provisions, the typical role of an Examiner is “to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor,”61 not to coordinate international proceedings. This can lead to confusion and misapprehension in other countries as to the true nature of the Examiner’s role and responsibilities.62

Second, one of the primary functions of an Examiner in cross-border cases has been to mediate disputes between the US debtor in possession and the foreign court appointee. Not all cross-border cases immediately involve a dispute, however, thus potentially postponing the appointment of an Examiner.

Third, the mere filing of a Chapter 11 petition in the US can cause chaos for a debtor and its affiliates internationally. In most countries, it is very difficult (and sometimes not even legally possible) to reorganize a debtor company. As a result, foreign management and creditors typically perceive a Chapter 11 filing as the commencement of the debtor’s liquidation, and they seek to take quick action as to the local businesses and assets before they are dissipated altogether. Thus, it is desirable for international conglomerates such as Singer to plan for the potential international consequences before they file for Chapter 11.

In those situations where the US company might desire the appointment of an Examiner, however, this leads to a dilemma. By statute, an Examiner must be “disinterested,”63 meaning that, among other things, he or she cannot have any

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62 The co-author experienced this firsthand in his capacity as counsel to the Examiners in MCC and Nakash.

prior connections with the debtor. Yet, it would often be far preferable if the Examiner could be part of the prepetition planning process so that he or she can have the benefit of a running start, rather than starting from scratch.

E. Shortcomings of Protocols

Protocols, too, are not suitable in all cross-border insolvency situations.

First, Protocols have primarily involved Canada, England and other common law jurisdictions. Although the Nakâsh Protocol did involve a civil law jurisdiction, Israel’s insolvency laws are actually modeled on the English insolvency system, making it easier for the Israeli Court to approve the Protocol. The AIOC Protocol also involved a civil law country, Switzerland, but there the Courts were engaged in the much simpler process of coordinating a liquidation, not a reorganization. Whether Protocols can become a common feature of mixed common and civil law (or Roman/Dutch law, Arabic law, etc.) cross-border reorganizations remains to be seen.

Second, Protocols typically involve the courts on two countries, sometimes three. However, multinational corporations typically operate on a more international scale. Singer, for example, did business in more than 150 countries. While the negotiation of a Protocol between two or three countries is feasible, the negotiation of Protocols involving 10, 50 or 150 countries is not.

Third, Protocols are generally agreements between courts having jurisdiction over the same debtor. Most international businesses, however, operate locally through subsidiaries. Corporate laws around the world treat subsidiaries as separate and distinct legal entities from their parent companies, and the jurisdiction and duty of the local court is to act in the best interests of the local subsidiary, not the international corporate group.

Furthermore, the Examiner concept only works if (i) there is an actual insolvency, and (ii) if the parties can make the claim that there is a colorable controversy between two insolvency regimes involving the same entity.

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64 See 11 U.S.C. § 101(14) (definition of “disinterested person”).

65 See Flaschen & Silverman II, supra note 38, at 593 n.46.

66 In re AIOC Corp., supra note 55.

Therefore, the Examiner and Protocol are not an adequate means to address all issues arising in international insolvencies. Furthermore, the negotiation of the Protocol and the appointment of the Examiner are ex-post measures, which can only be taken after an insolvency filing has already occurred. However, it is advantageous for a multinational debtor to plan its insolvency at least several months before the filing, and to be able to control the process to a great extent. This may not be possible with the appointment of an Examiner, as it must be, by definition, a party independent of the debtor.

IV. Filling the Void: The Foreign Representative Concept

A. The Singer Situation: Worldwide Operations

The Singer cross-border insolvency proceedings presented all of the difficulties with Examiners and Protocols described above. Why was Singer different from the other cases where those concepts had proven successful? In the words of Singer itself:

[Singer presents] a different situation than either of the foregoing examples [involving cross-border Protocols and Examiners]. The current Debtors are variously incorporated in Australia, Austria, the Bahamas, Bermuda, Brazil, the British Virgin Islands, Germany, the Isle of Man, Italy, Mexico, the Netherlands, the Netherlands Antilles, South Africa, Spain and Turkey. Other members of the Singer Group are incorporated in such far-flung jurisdictions as Bulgaria, Chile, the Czech Republic, France, Guyana, Hong Kong (China), Japan, Singapore, Vietnam, and many more. Thus, it is highly probable that there will be foreign insolvency proceedings in which the local court and office holder may have statutory or cultural barriers to the recognition of the US debtors in possession as the appropriate foreign representative of the US estates.

At the same time, there are no major adversarial relationships or other sensitive situations relevant to the debtor's cases. Thus, there is no need at this time for the appointment of an Examiner or other independent office holder to serve as mediator.

In order to help plan for the Chapter 11 filings, Singer also involved the debtor's prepetition retention of the persons whom Singer intended to nominate as Court appointees. All of this left Singer in a situation where Protocols would be inadequate for the task and Singer's international advisers would be ineligible to serve as Court-appointed Examiners.

B. The Singer Solution: Foreign Representative

As noted above, Section 304 authorizes a US Bankruptcy Court to recognize and provide assistance to the "foreign representative" of a foreign insolvency estate. By way of analogy, for purposes of seeking recognition and assistance in other countries, the "foreign representative" of a Chapter 11 estate would be the US debtor in possession, i.e., existing management (unless a trustee had been appointed). However, very few countries have adopted the debtor in possession concept, preferring to install a Court appointee as management of the debtor's affairs. Indeed, in most countries, leaving existing management in charge is often regarded as leaving the "fox in charge of the hen house."

Given its unique situation at the time of its filing, Singer melded together the Bankruptcy Code's recognition of "foreign representatives" with the concept of an independent appointee to represent Singer internationally. The result was a proposal that the US Bankruptcy Court appoint joint "Foreign Representatives" of the Chapter 11 estate, with the nominees being the same individuals who helped Singer prepare in advance for the international aspects of its bankruptcy filing. The Singer Court granted the application, noting:

69 See supra notes 11 & 12 and accompanying text.

20 "[M]embers of the board of directors of United Kingdom or Bahamian companies involved in winding-up proceedings in those countries have been held to constitute foreign representatives on the ground that their position was analogous to a debtor in possession in the United States." 2 COLLIER ON BANKRUPTCY ¶ 304.02[2] (King ed. 2001) (citing In re Kingscroft Ins. Co. Ltd., 138 B.R. 121, 125-26 (Bankr. S.D. Fla. 1992)).


22 In the absence of any specific statutory authority relating to the appointment of Foreign Representatives, the Singer Court relied on the standard catch-all statute, 11 U.S.C. § 105, which authorizes a Bankruptcy Court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Order Pursuant to 11 U.S.C. § 105 Appointing Evan D. Flaschen and Richard A. Gitlin as Joint Foreign Representatives and Setting the Responsibilities of the Foreign Representatives, In re The Singer Company N.V.,
E. Pursuant to section 101(24) of title 11 of the United States Code (the “US Bankruptcy Code”), a “foreign representative” is recognized in United States insolvency proceedings as constituting the “duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.” Consistent with applicable United States laws, policies and traditions, this Court, the other bankruptcy judges in this District, [and] many other bankruptcy judges in the United States routinely recognize and accord appropriate status and respect to “foreign representatives” of insolvency proceedings opened or commenced outside the United States. It has also been the experience of this Court and many others that foreign courts and foreign office holders often desire cooperation and harmonization with United States insolvency proceedings.

G. Pursuant to United States law and jurisprudence, prepetition management of a debtor remains in place as postpetition management of the debtor in possession, except under rare circumstances not present here. Consistent with the foregoing, it is this Court’s desire that foreign jurisdictions, foreign courts and foreign stakeholders accord recognition to debtors in possession in United States chapter 11 proceedings as the duly authorized representatives of the debtors’ estates.

H. Notwithstanding the foregoing, it is the collective experience and learning of this Court and the other bankruptcy judges in this District and elsewhere that some foreign jurisdictions and foreign courts are not necessarily accustomed to the concept of prepetition management remaining in place as management of the postpetition debtor in possession. As a result, some foreign jurisdictions and courts, and some foreign office holders, by law or by custom, may be reluctant to recognize a debtor in possession as the representative of a US debtor’s estate.

I. In light of the foregoing ..., this Court is appointing the Foreign Representatives with the desire that, in foreign situations where they may be some reluctance to recognize a debtor in possession,
the Foreign Representatives be recognized as the official foreign representatives of the Debtors’ estates.\textsuperscript{73}

Essentially, the advantage of the export of the foreign representative concept is to allow a multinational Chapter 11 debtor to be represented in two different ways. Within the US, and with respect to business dealings, discussions and negotiations with US parties, management can make full use of its capacity as debtor in possession and deal directly with these matters. At the same time, in countries where the debtor in possession concept is received with skepticism, the Foreign Representatives can serve as the debtor’s representatives, often working in conjunction with management in order to coordinate an overall consistent approach to the overall corporate group.

In an interesting twist on the US appointment of a Foreign Representative to serve alongside the Chapter 11 debtor in possession, a Canadian court recently authorized a Canadian monitor -- a Court appointee who monitors management in a Canadian Companies’ Creditors Arrangement Act proceeding\textsuperscript{74} but does not displace management -- to constitute “a foreign representative of the [debtor] for the purpose of an proceeding in the United States of America.”\textsuperscript{75} The Canadian monitor then filed a Section 304 petition in the United States and was provisionally recognized as a duly authorized “foreign representative” under US law.\textsuperscript{76}

C. Responsibilities of Foreign Representatives

In the five Chapter 11 cases to date\textsuperscript{77} in which Singer-style Foreign Representatives have been appointed, the role and responsibilities of the Foreign Representatives have been delineated on a relatively consistent basis, largely modeled after the Singer Order. After formally ordering the appointment of the Foreign Representatives in Singer, Judge Lifland generally described their role as follows:

\textsuperscript{73} Id. at 3-5.


\textsuperscript{75} Initial Order ¶ 61, at 36, Re Consumers Packaging Inc., Case No. 01-CL-4147 (Ont. Super. Ct. May 22, 2001).

\textsuperscript{76} See Temporary Restraining Order ¶ 1, In re Petition of KPMG Inc., Case No. 01-1865 (PJW) (Bankr. D. Del. May 30, 2001). [update when final order entered]

\textsuperscript{77} See infra Part V.
The general mandate of the Foreign Representatives is to serve as the official United States representatives of the Debtors' estates in other countries and as this Court's emissaries to other courts in order to seek to coordinate and harmonize any Relevant Foreign Proceedings that may now or hereafter be opened or commenced with respect to any of the Debtors or any other members of the Singer Group.\textsuperscript{72}

The Singer Order then followed the general mandate with a list of seven more specific responsibilities, concluding with an eighth task to "act as facilitators in all of the foregoing matters."\textsuperscript{79} In essence, the Singer Order created the Foreign Representative as an international representative, facilitator and mediator, sufficiently independent from the debtor and the debtor's lead counsel to have a credible stand-alone role, but also part of the US team focused on preserving and maximizing values for all concerned.

D. UNCITRAL Model Law and Chapter 15

Adopted on May 30, 1997, the Model Law\textsuperscript{80} creates a 32-paragraph framework for the effective judicial administration of cross-border insolvencies.\textsuperscript{81} Similar to a Protocol, the Model Law does not seek the substantive harmonization of different local insolvency laws, but rather provides a mechanism for the smooth interdependent operation of various local laws, courts and court appointees.

\textsuperscript{72} Singer Order, supra note 72, ¶ 2, at 5. The Singer Order defined "Relevant Foreign Proceedings" as "situations where the Debtors and other members of the Singer Group are subject to insolvency proceedings outside the United States." \textit{Id.} ¶ D, at 2. Foreign Representative Orders entered in subsequent cases expanded the Foreign Representatives' mandate to include "Other Foreign Situations," defined as "other situations ... involving foreign governments, courts, regulators, creditors and other stakeholders that arise outside of Relevant Foreign Proceedings." See, e.g., Order Pursuant to 11 U.S.C. § 105 Appointing Evan D. Flaschen and Richard A. Gitlin as Joint Foreign Representatives and Setting the Responsibilities of the Foreign Representatives, ¶ D, at 3, \textit{In re Owens Corning}, Case No. 00-03837 (MFW) (Bankr. D. Del. Dec. 1, 2000) (the "Owens Corning Order"). A copy of the Owens Corning Order is set forth infra at Appendix A.

\textsuperscript{79} Singer Order, supra note 72, ¶ 3a-h, at 6-7. See substantially similar provisions in the Owens Corning Order, infra at app. A.

\textsuperscript{80} See supra note 16 and accompanying text.

\textsuperscript{81} A "model law is drafted as if it is a part of the legislation of a country that has enacted it," Berends, supra note 16, at 320.
Of relevance here, the Model Law expressly contemplates the existence of "foreign representatives" with whom, upon the submission to the local court of the proper credentials, the local court "shall cooperate with to the maximum extent possible," including providing access and a variety of forms of relief entitled to access to the local court for a variety of purposes. In other words, the "foreign representative" contemplated by the Model Law is precisely the type of Foreign Representative appointed in Singer and the other Chapter 11 cases discussed in the article. Indeed, the Singer Order and the Owens Corning Order both expressly refer to the Model Law:

This Court also takes judicial notice of the work of the United Nations Commission on International Trade Law (UNCITRAL) in promulgating the "UNCITRAL Model Law on Cross-Border Insolvency" (the "Model Law"). The Model Law, which UNCITRAL has recommended for adoption to the countries of the world, also recognizes the concept of a foreign representative to be recognized and accorded due respect in foreign jurisdictions in cross-border insolvency situations.

To date, only a few countries have enacted local versions of the Model Law; but "if the Model Law is widely adopted in domestic insolvency legislation around the world it will move international insolvency co-operation to an entirely new and

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82 Defined as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding." Model Law art. 2(d).

83 Pursuant to Model Law art. 15, the credentials can consist of a certified copy of the decision appointing the foreign representative, art. 15(2)(a), a certificate from the foreign court affirming the appointment of the foreign representative, art. 15(2)(b), or, in the absence of either of the foregoing, "any other evidence acceptable to the court of the ... appointment of the foreign representative," art. 15(2)(c).

84 Model Law art. 25(1) (emphasis added).

85 See, e.g., Model Law arts. 9, 11, 12, 15, 19, 21, 23 & 24.

86 Singer Order, supra note 72, ¶ F, at 3 (footnotes omitted); see similar provision in Owens Corning Order, infra at app. A, ¶ F, at 3-4

higher plane." Until such time, however, recognition of duly appointed US Foreign Representatives by other courts will remain discretionary, not mandatory.

If the current (or a similar) version of Chapter 15 is ultimately enacted into US law, there will be express statutory authority for US Bankruptcy Courts to appoint Foreign Representatives where appropriate. Specifically, proposed Section 1504, which would be applicable in all cases under the Bankruptcy Code, provides in relevant part that: "A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541."

V. Foreign Representative Appointments to Date

A. The Singer Company N.V.

At the time of its September 13, 1999, Chapter 11 filing, Singer was truly multinational conglomerate that had adapted its corporate culture so well to various social environments that in most countries it was actually perceived as being a domestic company, rather than a foreign (US) company. However, during the 1990s, Singer stretched too far, as its expansion into other fields (e.g. television sets, furniture) proved unsuccessful. By the late Summer of 1999, Singer concluded that it would likely need to commence a Chapter 11 in order to reorganize its businesses and its balance sheet.

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88 Id.

89 For the view that English courts would recognize a duly appointed US Foreign Representative, see Gabriel Moss, Co-ordinating Multi-National Insolvencies and Re-organizations: Brief Paper on “Singer” and “Foreign Representatives, in INTERNATIONAL INSOLVENCY IN THE NEW MILLENNIUM (International Insolvency Institute CD-ROM, June 11-12, 2001).

20 See supra note 18.

21 [update as appropriate]

22 The proposed legislation includes a new Section 103 of the Bankruptcy Code, 11 U.S.C. § 103(k), which would provide that the provisions of Chapter 15 will only apply in Chapter 15 ancillary cases, except that Section 1505 (and two other sections) will apply in all cases under the Bankruptcy Code.

23 As there is scant literature concerning the five cases discussed in this Part V, except where specific citations are provided, the discussions in this Part are based on the personal experiences of the co-authors as international counsel and Foreign Representatives in each of the cases.
As part of its Chapter 11 planning process, Singer retained both general bankruptcy counsel to provide overall bankruptcy planning advice and international bankruptcy co-counsel to provide advice specifically with respect to Singer's international operations. While the preparations were still in process, G.M. Pfaff AG, one of Singer's largest subsidiaries, filed for insolvency proceedings in Germany without prior consultation with Singer in the US. As Singer has guaranteed various of Pfaff AG's funded debt obligations, Pfaff's insolvency filing triggered cross-defaults to other Singer funded debt obligations, forcing Singer to commence Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York on an emergency basis.

Anticipating that its emergency filing could have serious ramifications for the continuing viability of its international businesses, Singer was anxious to implement a process to coordinate and manage international activities. Singer was concerned that pursuing the normal route of seeking the appointment of an Examiner might result in substantial delay and potentially irreparable damage while the Bankruptcy Court considered whether to authorize an appointment, the United States Trustee decided whom to appoint, and the appointee engaged in the process of becoming familiar with Singer's complex and decentralized international web of affiliates and branch office operations.

This desperate situation -- indeed, many close to the situation were unsure whether Singer would even survive for a week on an international going concern basis -- led to the novel request that two of Singer's lawyers who were already familiar with the situation be appointed as Foreign Representatives. After careful deliberation and consideration of the dire circumstances and the limited alternatives, Bankruptcy Judge Lifland granted Singer's emergency application and appointed Singer's two nominees as Foreign Representatives, who were then immediately put to the test:

Since the petition date, the primary function of the Foreign Representatives has been that of international representative and mediator of the Debtors to intervene in disputes between the foreign Debtors and foreign creditors to preserve the ongoing business of the Debtors. Or, to describe their role more colloquially, the Foreign Representatives have served as international firemen, seeking to extinguish or at least control the fires being started virtually every day by Singer creditors outside the US. ²⁴

The main task of the Foreign Representatives was to ensure that Singer’s reorganization that was being negotiated in the US was not impeded by uncoordinated, destructive actions of local creditors and even local management (as had been the case with Pfaff AG’s management in Germany). Pursuant to Judge Lifland’s instructions, they pursued the essential objective of ensuring that all creditors, wherever located, were treated equally. The corollary to this was that the Foreign Representatives needed to act where appropriate in order to prevent local creditors from attaching local assets in order to gain an unequal and more favorable treatment.

In order to achieve the objective, the Singer Foreign Representatives employed a “carrot and stick” approach. The “stick” was the US automatic stay, which applied throughout the world according to US jurisprudence. This was a particularly effective potential weapon with respect to those foreign creditors -- local banking institutions in particular -- that had branch offices or other assets in the US or had substantial business relationships in the US. But the stick was only used to get the attention of foreign creditors and, in fact, not once did Singer actually need to seek Bankruptcy Court relief with respect to potential violations of the automatic stay.

By far the more important tool employed by the Foreign Representatives was the “carrot” of equal treatment and value maximization. Essentially, the Foreign Representatives approached foreign creditors with the view that, once their attention was obtained, they would react reasonably to reasonable propositions and proposals:

[The] primary strategy was to make a persuasive business case to rational business people. This approach has worked exceptionally well because, in the end, business people tend to make rational decisions without regard to nationality, and it made a lot of business sense to maintain Singer’s global operation as a world-wide going concern.

Using that strategy, the entire Singer team -- management, lead debtor’s counsel and the Foreign Representatives/international co-counsel -- managed to avoid a global meltdown of Singer. The result was that, out of hundreds of operations around the world, foreign (i.e. non-U.S.) insolvency filings were needed

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26 A redacted example of a “carrot and stick” letter sent by one of the Singer Foreign Representatives is set forth infra at Appendix B.

27 Smits, supra note 94, at 24.
Brazil presents a good illustration of the role of the Singer Foreign Representatives. On September 13, 1999, as part of Singer’s international strategy, Singer Do Brasil Industria E Comercio Ltda ("Singer Brazil") commenced both a US Chapter 11 case and Brazilian preventative concordata proceedings. The commencement of concordata proceedings results in a stay of proceedings only as to general unsecured creditors, leaving secured creditors and certain priority creditors free to pursue their rights and remedies without regard to the filing. Because of this, the Foreign Representatives entered into negotiations with Singer Brazil’s major secured creditors with the objective of persuading them not to enforce their security interests, which enforcement would have effectively shut down Singer Brazil’s operations. While not a familiar concept in Brazil, the Foreign Representatives were able to negotiate US “adequate protection” arrangements with the secured creditors in exchange for their agreement to forbear from exercising their remedies:

Ultimately, because Singer Brazil operates an export and manufacturing facility that serves as the primary source of sewing machine inventory supply to the Debtors and non-debtor Singer entities around the world, and because the secured creditors had the right under Brazilian law to foreclose on their collateral, the parties consensually negotiated a court order authorizing Singer Brazil to enter into certain ‘adequate protection’ arrangements with these secured creditors in exchange for their continuing cooperation with the global restructuring operation.

In September 2000, virtually one year to the day after Singer enter Chapter 11, Singer (including Singer Brazil) emerged from Chapter 11 pursuant to a

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98 On November 8, 1999, the directors of Singer Electrogerate Vertriebsgesellschaft, mbH applied for voluntary liquidation in Austria in connection with the appointment of a new local distributor. On January 12, 2000, the Foreign Representatives arranged for the opening of Australian “corporate voluntary arrangement” for Singer Australia Limited in order to facilitate the transfer of Singer Australia’s assets to a new local distributor.

99 For a general discussion of Brazilian concordata proceedings, see PINHEIRO NETO--ADVOGADOS, 1 DOING BUSINESS IN BRAZIL ch. 11 (1997).

100 See 11 U.S.C. § 361 (description of types of treatment that would qualify as adequate protection of a secured creditor’s interest in a Chapter 11 debtor’s property).

101 Smits, supra note 94, at 25.
confirmed Chapter 11 plan of reorganization.102 The plan facilitated the worldwide reorganization of Singer's businesses, essentially changing Singer's focus from manufacturing to licensing and distributing. Unusually, while court appointments are typically terminated upon plan confirmation, Singer's Chapter 11 plan expressly continued the appointment of the Foreign Representatives so that they could continue to assist Singer on an as-needed basis with ongoing international matters, including consummation of the Brazilian concordata proceedings and monitoring the Hong Kong and Bermuda liquidation proceedings involving a Singer affiliate, Akai Holdings.103

B. Outboard Marine Corporation

Outboard Marine Corporation ("OMC") was one of the world's largest marine companies. OMC's products included world-famous brands, such as Johnson and Evinrude outboard motors, and Chris-Craft, Four Winns, and Seawisrl marine craft. OMC had worldwide manufacturing and sale operations and, in the year preceding its insolvency filing, revenues of US $1.1 billion.

OMC embarked on a new business strategy, based on the outsourcing of key competencies, including the manufacture of outboard engines. Unfortunately, the strategy proved unsuccessful, ultimately leading to OMC filing for Chapter 11 protection in the United States Bankruptcy Court for the Northern District of Illinois on December 22, 2000.104 As Singer had done, OMC also retained international counsel prior to the Chapter 11 filing in order to assist in the coordination of the OMC's international operations, which were in jurisdictions such as Australia, Belgium, Brazil, Canada, France, Germany, Hong Kong and Mexico. Again following Singer's example, OMC applied for the appointment of two


103 Other postconfirmation activities in which the Foreign Representatives were involved included the orderly winding up and dissolution of Amedo Sewing Machines (Jordan) Limited in the Bahamas and the voluntary winding up of The Singer Company (Proprietary) Limited in South Africa, in each case after arrangements had been made to appoint new local distributors for Jordan and South Africa. See, e.g., Foreign Representative Report for the Calendar Quarter Ending December 31, 2000 Pursuant to Section 14.2 of the First Amended Joint Plan of Reorganization of The Singer Company N.V. and Its Affiliated Debtors and Debtors in Possession Dated August 24, 2000.

104 In re Outboard Marine Corporation, No. 00-3745 (Bankr. N.D. Ill. 2000).
partners from the international firm as Foreign Representatives, and the Court approved the application and made the appointments on January 4, 2001.\textsuperscript{105}

That is where the similarities with Singer ended. In particular, while the focus of Singer was always the reorganization of the worldwide businesses, the OMC team knew that, due to inadequate capital resources and the inability to raise further funding, OMC would have to be liquidated. The main objective of the OMC Chapter 11 case, therefore, was to seek a quick sale of OMC's core businesses on a going concern basis, rather than a straight liquidation. The two primary tasks assigned to the OMC Foreign Representatives, therefore, were (1) to seek to preserve the key foreign operating businesses for long enough that interested parties could determine whether to bid for those businesses, and (2) to coordinate the liquidation of OMC's other international businesses in order to minimize the intercompany claims against OMC's estate relating to employee, tax, environmental and other local obligations.

In Canada, for example, the Foreign Representatives worked with OMC's management and lead counsel to preserve and sell one of the local subsidiaries, Altra Marine Products, Inc. In Mexico, on the other hand, the Foreign Representatives worked with local management and local counsel to ensure a rapid winding-down of the local subsidiary's operations. Outboard Marine de Mexico S.A. de C.V. employed over 500 employees and had substantial assets consisting of land, building and fixtures, all of which needed to be liquidated, preferably at limited expense to OMC.

The situation in Germany was somewhat different and more complex. OMC had licensed certain valuable technology for a direct fuel injection system for two-stroke motors from a German company called Ficht GmbH. The Ficht technology increased the efficiency of OMC's outboard engines, which was particularly important in enabling OMC to continue to meet the ever-tightening emission standards in the US. As the technology proved more and more essential for OMC, OMC acquired a 51% partnership interest in a joint venture co-owned by certain members of the Ficht family and OMC. At the date of the Chapter 11 filing, OMC was confronted with the unfortunate situation that (1) it was essential to retain the Ficht technology in order to sell OMC's engine business as a going concern, and (2) the relationship between OMC's management and the members of the Ficht family had slowly, but steadily, deteriorated over the years to a point at which almost no communications were possible. Even worse, it was essential for OMC to

ensure the cooperation of the Fichts, as the partnership agreement for the joint venture required the Fichts’ consent for every major transaction, including the sale or relicensing of the technology.

The Foreign Representatives undertook the primary responsibility for negotiating with the Ficht family. In fact, even prior to the Chapter 11 filing, an attorney with the Foreign Representatives’ law firm traveled to Germany to assess the situation. After the Chapter 11 filing, further trips were made to Germany, now formally in the name of the Foreign Representatives. Given the poor relationship between the Fichts and OMC management, the Foreign Representatives were able to utilize both their status as Court appointees and their pre-existing familiarity with German civil law concepts and with the German business culture to open a dialogue with the Fichts and, ultimately, to gain their trust and respect.

The negotiations with the Ficht family were difficult, eventually involving five weeks of almost continuous negotiations, several in-person meetings in Germany, and even a brief but intensive legal battle in Germany over corporate governance issues. Finally, the Fichts entered into a Letter Agreement on February 3, 2001, directly with one of the Foreign Representatives providing for the sale of the Ficht technology to a buyer of the engine business for $5.8 million. The Letter Agreement with the Fichts was the last major piece in place to enable OMC to execute an asset purchase agreement two days later for the sale of the engine business to Bombardier Motor Corporation of America for US $ 53 million.

C. Owens Corning

Owens Corning, perhaps best known for its Pink Panther© corporate mascot, is a world leader in the manufacture and sale of building material systems and composites systems, with over 20,000 employees around the world. On October 5, 2000, Owens Corning and 17 of its US subsidiaries, including Fibreboard Corporation, filed Chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware.\(^{106}\)

While most Chapter 11 debtors file for bankruptcy in order to address operational difficulties and/or overleveraged balance sheets, Owens Corning was one of a number of companies to seek Chapter 11 relief due to staggering existing and prospective liabilities related to the manufacture or distribution of products

\(^{106}\) In re Owens Corning, Case No. 00-3837 (MFW) (Bankr. D. Del. 2000). Although Owens Corning was initially assigned to Bankruptcy Judge Mary Walrath, the case was subsequently reassigned to Bankruptcy Judge Judith Fitzgerald and the Case No. was changed to 00-3837 (JKF).
containing asbestos. Although Owens Corning last distributed asbestos products in 1972, it received almost 120,000 personal injury claims just during 1998-2000.

Being a large multinational company, Owens Corning sells products throughout the world. These sales are made either directly by an Owens Corning subsidiary, or through a joint venture operated by Owens Corning with one or more foreign partners. Owens Corning provides credit support to the foreign operations, often including a guaranty of local funded debt obligations and lease transactions, and Owens Corning’s Chapter 11 filing triggered an event of default with respect to many of those obligations and transactions. To assist Owens Corning in coordinating its international operations and avoiding local enforcement actions and bankruptcies, Owens Corning applied for the appointment of joint Foreign Representatives. The Bankruptcy Court approved the application and made the appointment, and to date, the Foreign Representatives have assisted Owens Corning’s management and lead counsel with potential defaults and local creditors in such varied jurisdictions as Botswana, China, India and the Philippines.

D. Viatel, Inc.

Viatel, Inc. constructed and operated a state-of-the-art pan-European, transatlantic and metropolitan fiber optic network. Viatel also provided other telecommunication services in Europe and the US, operating more than 10,400 kilometers of fiber-optic cable linking 59 major cities in Europe. Viatel had placed itself in an ideal strategic position to compete in the heavily contested, but booming European telecommunications market. However, Viatel’s rapid expansion lead to a heavily leveraged balance sheet, and an ongoing slump in the European telecommunications market forced Viatel to commence Chapter 11 proceedings in the United States District Court for the District Court for Delaware on May 2, 2001. On the same day, Viatel filed an application for the appointment of joint


108 Owens Corning Order, supra note 78 & infra app. A.

109 As Owens Corning is a continuing Chapter 11 case, the authors are unable to comment further at this time.

110 In re Viatel, Inc., Case No. 01-1599 (JJF) (D. Del. 2001)
Foreign Representatives, and the District Court approved the application and made the appointment on June 21, 2001.  

The Foreign Representatives have been actively involved with the operations of Viatel's subsidiaries throughout Europe, including Belgium, France, Germany, the Netherlands and Switzerland. Also, while in Singer, Owens Corning and OMC, the law firm that employed the Foreign Representatives also served as international co-counsel to the debtors, emergency circumstances in Viatel led to yet a third role for the law firm. In order to address local liability issues, Viatel worked with the Foreign Representatives to prepare to petition for Administration for several of Viatel's UK subsidiaries (collectively, "Viatel UK"). In order to lodge an Administration petition, UK management must submit an independent report pursuant to Rule 2.2 of the Insolvency Rules 1986 (a "2.2 Report"). A 2.2 Report is typically prepared by a licensed insolvency practitioner and it must certify to the Court that, in the practitioner's view, the prospective debtor is likely able to achieve at least one of the four statutory objectives of Administration proceedings.  

At the Foreign Representatives' suggestion, management retained several practitioners with Ernst & Young (UK) to prepare the 2.2 Report for Viatel UK. Matters accelerated, however, and it became a matter of urgency to petition for Administration for Viatel UK and to seek an immediate sale of the business. The petition was granted and, as is typical, the preparers of the 2.2 Report were appointed as joint Administrators. Rather than slow down the process and risk irreparable harm while new counsel was retained and educated, the Administrators requested that the London office of the law firm that employed the Viatel Foreign Representatives be permitted also to serve as counsel to the Administrators, except as to matters where there was a potential conflict between Viatel's Chapter 11

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112 See EUROPEAN CORPORATE INSOLVENCY, supra note 23.

113 See id. If the Court finds that the debtor will likely not be able to achieve at least one of the four objectives, then the debtor will be immediately placed into winding-up (liquidation) proceedings. Id.

114 See Order, In re Viatel Global Communications Ltd., No. 3553 of 2001 (Ch. (UK) June 6, 2001).
estate and Viatel UK's Administration estate. With Viatel's consent and with appropriate disclosure in the US, the retention proceeded as requested.  

E.  
[discussion]  

VI. Conclusion  

The appointment of Foreign Representatives in US Chapter 11 cases, like the appointment of Examiners and the implementation of Protocols, is a practical solution to the problems faced by multinational corporate groups when seeking bankruptcy relief. If Chapter 15 of the Bankruptcy Code is adopted in the US, there will be express authority for the appointment of Foreign Representatives, and in other countries that adopt local versions of the UNCITRAL Model Law, there will be express authority for the recognition of Foreign Representatives. In the meantime, as is so often the case in multinational insolvencies, the practice has moved ahead of the law in order to deal with problems that cannot await a legislative solution. And, so far, the practice of appointing Foreign Representatives has been very successful.


As Viatel is a continuing US Chapter 11 case and Viatel UK a continuing UK Administration, the authors are unable to comment further at this time.

[Note to UConn editors: this Chapter 11 case should be filed prior to August 1, at which point we can provide a brief description if it is not too late]