International Insolvency Law: Future Perspectives

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Editorial Preface

In Prague, on 8 October 2004, a small gathering of academics met in a room off the main conference hall to explore the formation of an Academic Wing of INSOL Europe. With Professor Sebastian Kortmann (until recently Rector Magnificus of the Radboud Universiteit Nijmegen) leading it, the group began life. From those modest beginnings, the Academic Forum (as it was re-baptised in 2007) has now reached its 10th Anniversary. Marking the occasion has been a logo redesign and a number of anniversary publications, including the present tome.

In the time since its foundation, the primary mission of the Academic Forum has been to represent members interested in insolvency law and research, to encourage and assist in the development of research and teaching initiatives in the insolvency field, particularly by younger members, and also to participate in the activities organised by INSOL Europe. The membership of the Academic Forum now includes insolvency academics, insolvency practitioners with recognised academic credentials as well as those more generally engaged in the research, study and teaching of insolvency.

A roll-call of meetings in the life of the Academic Forum could read like a road-map of the Continent. Although normally following the parent organisation for its main conference annually, the Academic Forum has also held joint events with Law Schools and other research and teaching institutes in Europe. From the inception of the conference series, events have had a solidly international focus. They have attracted academics and the academically-minded from all across Europe and the World, the list of participants at each meeting never representing fewer than 15-20 jurisdictions. Conferences have always been thoughtful, though also convivial, occasions. The delivery of papers has always been punctuated by a reception and an Academic Dinner, often with a guest speaker, where over the table friendships are formed and renewed each year, while the discussions range over topics both serious and frivolous! The sense at these occasions is often that of a large community, who may meet each other only occasionally, but who always find a pleasure in catching up with news and re-forming old acquaintances.

Out of the conferences have come many things, principally the reports of conference proceedings, which have been published regularly since 2009. In that year, the Leiden and Barcelona 2008 papers appeared to join the earlier inaugural volumes in the Technical Series. By end-2014, publications included all conference papers given up to end-2013, making a grand total of 15 academic contributions to the series. As they are published, these texts contain the latest information and form a cogent documentation of papers given at Academic Forum events. They are also a good reflection of the state and quality of insolvency research and teaching in Europe and elsewhere, forming a handy library of the ideas and themes associated with each conference.

They are not the only products of these occasions. Ideas have flowed with a vital part being played by the presentations that have stimulated many other research papers and projects. Some of these have also been authored through collaborations set up at conferences, while projects have often been undertaken by academic members relying heavily on input from colleagues met through Academic Forum activities. The networking at events has also led to consultations on formal and informal bases with many members of the group meeting at other national and international forums, colloquia and seminars. There are close links too between the Academic Forum and other academic bodies, including the INSOL International Academic Group, which holds its meetings under the aegis of the body of which INSOL Europe is also a part.

The Academic Forum was fortunate early on in being offered the opportunity of sponsorship by Edwin Coe LLP, a firm of insolvency practitioners based in London. This support has enabled a number of things to occur, chiefly the provision of research and travel grants, the latter to provide for younger academics as well as those from post-2004 accession countries and candidates to come present at events. In recent years, the provision of travel grants has seen up to 5 young scholars attend and deliver papers at each conference, in some cases speaking to an international audience for the very first time. Prizes have also been offered for outstanding legal scholarship awarded on the basis of monographs and publications. The funding has also permitted the inauguration of a series of lectures given by judges, practitioners and academics of international repute and eminence. These lectures have greatly added to the annual conferences, permitting an insight into the great themes of insolvency law existing today, as well as offering an eye towards future developments in the subject area. These are the lectures that are the subject of updating and re-publication in the present volume.

All this, though, would not have been achieved without the participation and assistance of a great number of people, not least the presenters and attendees at each of the conferences and events. The Academic Forum has been also fortunate in the men and women at its helm. After Professor Kortmann (2004-2007), Professor Bob Wessels (2007-2010) and Professor Stefania Bariatti (2010-2013) have in turn become Chair. Each has taken the organisation forward, offering a unique contribution to the workings of the group. Bob was instrumental in helping set up the Young Academics' Network (YAN), which brings together doctoral candidates and post-doctoral early career researchers in a supportive environment. By this means, they are able to form collaborations and are supported in giving papers at the sessions devoted to YAN presentations at each of the annual conferences. Stefania helped lead the group through the early stages of responding to the consultation on and proposals for the reform of the European Insolvency Regulation. She also acted crucially in fostering links with the Academy of European Law in Trier, which led to a successful conference there in early 2013. Professor Christoph Paulus, who took the reins of leadership in 2013, will take the Academic Forum through the next critical period, which will see the conclusion of the reform project. These are exciting times indeed!

Though the Chairs have been key in the life of the Academic Forum, others have played significant roles. Myriam Mailly and Emmanuelle Inacio became YAN Co-Chairs when the group was first founded and led it through till end-2013, when they ceded their place to Dr Rolef De Weijs. Of immense pleasure (and relief!) to the organisation, both will still be involved in Academic Forum activities, Myriam carrying on as YAN Secretary, while both she and Emmanuelle will continue as INSOL Europe Technical Officers, offering support at the conferences of both INSOL Europe and the Academic Forum. On the management side, the Academic Forum has had the advice and assistance of its Management Body, whose members include Florian Bruder, Jessica Schmidt and Michael Veder, as well as members of the Supervisory Body representing the wider academic community across Europe. As publications editor, mention must also go to Professor Rebecca Parry, who took over responsibility for the production of conference booklets at the Milan 2011 event with impeccable discharge of her duties. Within the INSOL Europe parent body, wholly deserved mentions must go to Marc Udink, who first had the idea for what was to become the Academic Forum, and Caroline Taylor, who liaises with the group and, with her team, ensures that events always run smoothly and efficiently.

After ten years, the Academic Forum looks to be on firm foundations. What next though? Conferences and meetings apart, there is the challenge of seeing through the reform of the European Insolvency Regulation and its eventual implementation. Modifications are continuing to happen to domestic laws in many jurisdictions. Once concluded, the emphasis will shift to understanding how the new rules work and will be implemented, necessitating the sharing of ideas and best practices as well as the production of good quality commentary. There are also the changes happening to academia in many European jurisdictions, where the profession is in a state of flux as funding and regulatory models alter to adapt to a globalised world. There is also the way in which insolvency, as a subject of research and teaching, continues to fast mutate, requiring considerable ingenuity to keep up with its evolution. There is also the consequent need to ensure that the profession and the subject continue to attract a new generation of researchers and teachers, who will in turn assume the responsibility of leadership of the Academic Forum in times to come! It has been a good first ten years, but here's to the next!

In summary, we would like to express our appreciation to all those who have assisted in making the project a success, not least the contributors themselves. If not otherwise noted by the contributors, the law is stated as at 8 October 2014.

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A Note on the Academic Forum

The INSOL Europe Academic Forum, founded in 2004, is a constituent body of INSOL Europe, a Europe-wide association of practitioners in insolvency. The Academic Forum's primary mission is to engage in the representation of members interested in insolvency law and research, to encourage and assist in the development of research initiatives in the insolvency field and to participate in the activities organised by INSOL Europe. The membership of the Academic Forum includes insolvency academics, insolvency practitioners with recognised academic credentials as well as those engaged in the research and study of insolvency. The Academic Forum meets annually in conjunction with the main conference of INSOL Europe and also arranges half-yearly conferences around suitable themes of interest to the practice and academic communities. Previous meetings have taken place in Prague (2004), Amsterdam (2005), Monaco (2007), Leiden and Barcelona (2008), Brighton and Stockholm (2009), Leiden and Vienna (2010), Milan, Venice and Jersey (2011), Nottingham and Brussels (2012), Trier and Paris (2013) as well as Leiden and Istanbul (2014).

At Paris, Professor Christoph Paulus, of the Humboldt University Berlin, where he is the Chair of Civil, Civil Procedural, Insolvency and Roman Laws, was elected Chair of the Management Board for a three-year term. Paul Omar (Nottingham Trent University, the United Kingdom) serves as Secretary to the Board, while Florian Bruder (Max Planck Institute, Germany), Jessica Schmidt (University of Bayreuth, Germany), Rolef de Weijs (Chair of the Young Academics' Network), Emmanuelle Inacio and Myriam Mailly (INSOL Europe Technical Officers) as well as Professor Michael Veder (Radboud University Nijmegen, the Netherlands) are ordinary members of the Board. Professor Rebecca Parry (Nottingham Trent University, the United Kingdom) is the Editor of the Conference Proceedings series and ex officio a member of the board. A Supervisory Committee has also been established as a consultative board for Academic Forum projects whose membership includes senior insolvency academics and practitioners.

With sponsorship made available by Edwin Coe LLP over a seven-year period from 2007-2014, the Academic Forum has been able to offer young scholars travel grants to attend its conferences, research grants for scholarly projects as well as prizes for outstanding legal scholarship awarded on the basis of monographs and publications. Edwin Coe LLP has also kindly sponsored an annual lecture to be given by a scholar of international repute. These have included Professor Jay Westbrook (University of Texas, the United States), Gabriel Moss QC (3/4 South Square, Gray's Inn, the United Kingdom), The Hon Mr Justice Ian Kawaley (Supreme Court of Bermuda), Professor Dr. Karsten Schmidt (President of the Bucerius Law School, Germany), Professor Bob Wessels (Leiden Law

School, the Netherlands), Professor Ian Fletcher (University College London, United Kingdom) and Professor Rosalind Mason (Queensland University of Technology, Australia).

A series of publications arising from Academic Forum conferences was inaugurated in 2009 by reports from the 2008 Leiden and Barcelona events. These have now been joined by conference proceedings booklets from most of the conferences listed above with others yet to come. Overall, the publications are intended to form a comprehensive report of the conferences and contain accounts of recent research in the insolvency field useful for academics and practitioners alike. The series inaugurated by the Academic Forum has also served to stimulate debate and discussion in the academic arena and are a useful indicator of current themes and future developments in the subject area.

The Academic Forum's next events are scheduled to take place in cooperation with the Academy of European Law on 19-20 March 2015 in Trier and the Nottingham Law School and Radboud Universiteit Nijmegen on 25-26 June 2015 in Nottingham. The Academic Forum will also have its annual meeting on 30 September-1 October 2015 in conjunction with the INSOL Europe conference in Berlin. Further conferences are being planned for 2016 and beyond. Details of academic conferences will be posted at the Academic Forum website at: www.insol-europe.org/academic/ as and when available. Further information about the work of the Academic Forum can also be obtained via the website as well as a dedicated Facebook page.

A Note on Edwin Coe LLP

Edwin Coe LLP is a commercial law firm based in the heart of London's historic legal district in Lincoln's Inn. Founded in 1913, we have grown from our litigation origins to become a thriving and modern practice, providing a comprehensive range of legal services to meet the needs of a wide variety of businesses, individuals and organisations based throughout the UK and overseas.

Our collegiate approach provides clients with efficiency and cross-disciplinary support where necessary to ensure that their needs and objectives are fully supported and met in a cost-effective manner. Legal advice is led by partners whose experience and expertise means that they are able to get to the heart of matters quickly and to come up with insightful, practical and commercial solutions in the shortest possible time frame. For most clients this is preferable and more cost-effective than if work is carried out by junior lawyers, however, we discuss this on an individual basis with clients to ensure the most suitable arrangements for them. Clients regularly rate us as "excellent" in terms of efficiency, understanding their business needs, and keeping them informed of progress and developments.

Many of our partners are involved at a high level in professional bodies and associations, or are contributors and authors of established legal texts. This gives us an invaluable practitioner's standpoint and means that we are well placed to assist clients with forward-planning, helping them to avoid many legal problems altogether.

Further information about Edwin Coe LLP can be obtained via the website at: www.edwincoe.com

Chapter 1

The Present and Future of Multinational Insolvency

Professor Jay L. Westbrook

I – Current Issues* **

Among the multitude of issues currently being litigated in the field of multinational insolvency, the following five broad areas stand out as the most important to discuss:

- the Model Law on Cross-Border Insolvency;
- choice-of-law;
- discharge or enforcement of bankruptcy judgments;
- denationalized bankruptcy; and
- corporate groups.

The Model Law on Cross-Border Insolvency

Since the adoption of the Model Law on Cross-Border Insolvency, the most intense litigation has been with regard to recognition of a foreign proceeding as a main or non-main proceeding. A two-sided rule may be emerging: an insolvency proceeding will not receive recognition and assistance as a main proceeding, if it is brought in a jurisdiction with little or no economic relationship to the debtor, whereas a business that actually relocates its most important economic or administrative functions to a new jurisdiction may be allowed to enjoy whatever legal benefits that move might provide, if it then files for insolvency.

* I am grateful to Jessica Bennett, Texas '09, for expert research assistance. I must claim any remaining errors.

** This is a re-edited version of a piece first published under the same title in Chapter 12 in B. Wessels and P. Omar (eds), *The Intersection of Company and Insolvency Law* (2009, INSOL Europe, Nottingham) (111-125).

The rule against recognition of proceedings from jurisdictions with minimum connections with the debtor is found in the *In re Bear Stearns*[1] case from the United States and the *Eurofood* case[2] from the European Court of Justice. Although the debtors in Bear were incorporated in the Cayman Islands, the court ruled that the Cayman proceedings could not be recognized as either main or non-main proceedings because the debtors had too little real contact with the islands for them to constitute the "centre of main interests" ("COMI") and therefore the home of the primary insolvency proceedings. The court further ruled that naked incorporation was not enough even to permit recognition as a non-main proceeding.[3] In *Eurofood*, the European Court of Justice similarly stated that a "letter box" presence was insufficient to make a jurisdiction eligible for hosting a primary proceeding. Thus, it appears that remote jurisdictions will not be entitled to receive recognition under either the Model Law or the European Insolvency Regulation.

Recent articles have supported a "third way" process for recognition, beyond recognition as a main or non-main proceeding under the Model Law.[4] Given that the fact that non-recognition as an insolvency proceeding merely precludes the granting of relief under the Model Law but does not preclude extension of cooperation short of that,[5] it is not entirely clear what difficulty their authors seek to avoid.

On the other side of things, recent European decisions suggest that a company that actually relocates its principal office to another jurisdiction may thereby make that jurisdiction its COMI for a subsequent insolvency filing.[6]

1 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

2 *Bondi v. Bank of America, N.A. (In re Eurofood IFSC Ltd.)* [2006] ECR I-3813, at 18-19, ¶35, 2006 WL 1142304 (ECJ 2 May 2006).

3 A similar result was reached by another Southern District judge. *In re Basis Yield Alpha Fund (Master),* 381 B.R. 37, at 46-47 (S.D.N.Y. 2007): "In this case, genuine issues of material fact exist as to the location of Basis Yield's COMI. While the Court does not in any way rule out the possibility that facts could be adduced at an evidentiary hearing sufficient to make a case for entitlement to recognition, the JPLs are not now entitled to recognition as a matter of law."

4 A. Ranney-Marinelli, "Overview of Chapter 15 Ancillary and Other Cross-Border Cases" (2008) 82 *American Bankruptcy Law Journal* 269, at 303: "[A] third approach is to interpret §1509(f) broadly, permitting many types of relief to fall under the rubric of 'collecting or recovering a claim which is property of the debtor," so that Chapter 15 recognition is not required."; D. Stromes, "The Extraterritorial Reach of the Bankruptcy Code's Automatic Stay: Theory vs. Practice" (2007) 33 *Brooklyn Journal of International Law* 277; J. Pottow, "The Myth (and Realities) of Forum Shopping in Transnational Insolvency" (2007) 32 *Brooklyn Journal of International Law* 785.

5 11 U.S.C. §§15, 25-27.

6 *Official Receiver v. Eichler* [2007] BPIR 1636, at [14], [16] (Ch. D.) (noting the right of a debtor to change his centre of main interests); *Shierson v. Vlieland-Boddy* [2005] EWCA Civ 974, at [55] (Ct. of App. Civ. Div.).

Although the Model Law has been operating successfully in a number of countries,[7] it is disappointing that some jurisdictions, such as Germany[8] and Spain,[9] have recently reformed their laws without adopting the Model Law, resulting in only general provisions to guide their courts in cooperating with countries outside the "EU club".

Choice-of-Law

Three elements in choice-of-law deserve special attention: the dichotomous analysis of insolvency and non-insolvency law; choice-of-law issues in application of the avoiding powers; and the interaction of choice-of-law and choice-of-forum.

Generally: Two Choices

The choice-of-law analysis in insolvency is two-sided. One part concerns the law that created and governed a contract or property right prior to bankruptcy ("non-insolvency law"), such as a counterparty's entitlement to a contract claim against the insolvent business, while the other identifies the insolvency law that will govern its treatment in the insolvency proceeding, such as the enforceability of the contract claim and the fixing of the amount actually to be paid.

However, the cases often reflect a confusion of the two elements, as if the court believes that one law will govern both aspects of the claim. A classic example

7 For United States Chapter 15 cases, see www.chapter15.com.

8 E. Braun, *Commentary on the German Insolvency Code* (2006, IDW-Verlag, Düsseldorf), at 69; N. Farid, "The Fate of Intellectual Property Assets in Cross-Border Insolvency Proceedings" (2008) 44 *Gonzalo Law Review* 39; B. Wessels, "Mutual Trust, Comity, and Respect Among States in International Insolvency Matters", Part II § 1 ¶8 in W. Norton, Jr. and R. Lieb (eds), *Annual Survey of Bankruptcy Law* (2005, Thomson West, New York NY); J. Greene, "Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies" (2005) 30 *Brooklyn Journal of International Law* 685, at 724; C. Farley, "An Overview, Survey, and Critique of Administrating Cross-Border Insolvencies" (2004) 27 *Houston Journal of International Law* 181, at 206; A. Heidbrink, "The New German Rules on International Insolvency Law" (2003) 22(9) *American Bankruptcy Institute Journal* 16; J. Goffman and E. Michael, "Cross Border Insolvencies: A Comparative Examination of Insolvency Laws of Industrialized Countries" (2003) 12 *Journal of Bankruptcy Law and Practice* 5, Art. 1.

9 J. Westbrook, "Chapter 15 At Last" (2005) 79 *American Bankruptcy Law Journal* 713, at 721: "The primary disappointment to date has been the failure of Germany and Spain to adopt the Model Law despite having enacted some new international provisions."; but see E. Bruce Leonard, "The International Scene: The International Year in Review" (2003-2004) 22(10) *American Bankruptcy Institute Journal* 22, at 78: "Legislation also has been passed in Spain that is to become effective in 2004; it has international insolvency provisions that parallel, and in fact, may be more extensive than those in the model law, but that also reflect the EU Regulation on Insolvency Proceedings."; A. Mechele Dickerson, "Conference on Sovereign Debt Restructuring: The View from the Legal Academy: A Politically Viable Approach to Sovereign Debt Restructuring" (2004) 53 *Emory Law Journal* 997, at 1041: "Only Mexico appears to have fully embraced and implemented principles contained in the UNCITRAL Model Law in enacting domestic insolvency legislation [whereas]…Spain ha[s] adopted legislation that contains many of the principles of the Model Law." The United Nations Commission on International Trade Law (UNCITRAL) does not list Spain as an adopting country: www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

is the *Lernout* case in the United States and Belgium.[10] The lower courts failed to see that two different choice-of-law questions were presented under the differing priority rules in the two countries: one of non-insolvency law and one of insolvency law.

Once an issue has been identified as governed by insolvency law, the next step is the identification of the applicable insolvency law. I suggest a general rule applying the law of the primary proceeding on a global basis, with exceptions for local claims of employees, suppliers, and tort claimants whose expectations of local law application should be vindicated.[11]

Avoidance (Paulian) Actions

Two considerations should dominate choice-of-law for avoidance: a realistic concern for predictability and the connection between avoidance and distribution.

Predictability is important where the substantial differences among national laws create expensive uncertainty in multinational transactions. On the other hand, there are real limits on the extent to which predictability is obtainable.[12]

The second element is the relationship between avoidance and distribution. All avoiding powers require a balance between two policy objectives. The avoidance of fraud and achievement of distribution equality among creditors of equal rank[13]

10 *Lernout & Hauspie Speech Products N.V. v. Stonington Partners, Inc*., 268 B.R. 395 (D. Del. 2001), *rev'd*, 310 F.3d 118 (3d Cir. 2002), on remand *In re Lernout & Hauspie Speech Products N.V*., 301 B.R. 651 (Bankr. D. Del. 2003). See J. Westbrook, "Universalism and Choice of Law" (2005) 23 *Penn State International Law Review* 625 (discussing *Lernout* at length); J. Westbrook, "International Judicial Negotiation" (2003) 38 *Texas International Law Journal* 567 (referring to *Lernout* in footnotes); J. Pottow, "Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to 'Local Interests'" (2006) 104 *Michigan Law Review* 1899 (discussing *Lernout*); L. Salafia, "Cross-Border Insolvency in the United States and its Application to Multinational Corporate Groups" (2006) 21 *Connecticut Journal of International Law* 297, at 332 (discussing *Lernout*); K. Beckering, "United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment" (2008) 14 *Law and Business Review of America* 281, at 308-309 (referring to *Lernout* in footnote); L. LoPucki, "Global and Out of Control?" (2005) 79 *American Bankruptcy Law Journal* 79, at 92 (discussing Lernout); J. Pottow, "Procedural Incrementalism: A Model for International Bankruptcy" (2005) 45 *Virginia Journal of International Law* 935 (2005) (discussing *Lernout* in footnotes).

11 As to choice of labour law, for example, see J. Westbrook, "Multinational Financial Distress: The Last Hurrah of Territorialism" (2006) 41 *Texas International Law Journal* 321, reviewing L. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (2005, University of Michigan Press, Ann Arbor MI).

12 For example, in the COMI context, I have argued that "too exclusive a focus on predictability is…a mistake, especially if it leads to a rule that would choose legal 'havens' as COMIs." J. Westbrook, "Locating the Eye of the Financial Storm" (2007) 32 *Brooklyn Journal of International Law* 1019, at 1028.

13 This factor is further supported in some countries, like the United States, by a desire to provide comfort to creditors in a workout situation that an effort by other creditors to steal a march during negotiations will be set aside if an insolvency proceeding is brought. Thus the avoiding powers can serve as an important support for a stand still agreement, especially if not all creditors have agreed.

must be balanced against the threat every avoidance poses to the stability of commercial transactions.[14]

Given countries' differing avoidance policies and distribution priorities, the choice of applicable avoidance law should depend on which proceeding will be distributing the proceeds of an avoidance recovery.[15] In a universalist system, that will mean the primary proceeding. In a territorialist system, that will mean each country that opens a proceeding and permits an attack on the transaction.[16] Some might propose a middle solution where the choice-of-law rule would be the situs of the transaction. However, even if one can identify *the* place of the transaction, in many cases the situs chosen by the parties would be a law that would *not* permit avoidance.

The Interaction Between Choice-of-Law and Choice-of-Forum

Finally, the *HIH* case exemplifies the third key to choice-of-law decisions.[17] HIH, an Australian company with substantial assets in the United Kingdom, entered insolvency proceedings in Australia. A provisional liquidation was opened in England. The two jurisdictions had different priority rules.[18] The lower courts decided they were bound by the English priority rules and therefore could not release the assets to Australia. The House of Lords held the assets could be released, but sharply split as to the rationale for the result.

The Australian court's request enjoyed the benefit of the United Kingdom Insolvency Act 1986,[19] which permits English courts to cooperate fully with courts from countries like Australia designated by the government under section 426. On that basis, two of the five judges resolved the problem by holding that section 426 permitted them to choose to apply Australian law. However, Lord Hoffmann and another judge adopted a choice-of-forum approach, holding that English common law permitted the English court to act in an ancillary role and to turn over assets to the primary court as part of a long-standing commitment to a universalist approach, quite apart from the impact of section 426. The fifth judge

14 The adverse effect on other commercial transactions is no doubt lower in avoiding a transaction that is fraudulent in fact, because parties know that such transactions are legally vulnerable.

15 J. Westbrook, "Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases" (2007) 42 *Texas International Law Journal* 899.

16 One of the numerous difficulties with a territorialist system is that the transaction might be attacked by liquidators from several jurisdictions with plausible connections to the transaction, resulting in inconsistent results and perhaps multiple recoveries.

17 *McGrath v. Riddell* [2008] UKHL 21 ("*HIH*").

18 Ibid., at [51].

19 Section 14, Insolvency Act 2000 (c. 39) (United Kingdom); section 426, Insolvency Act 1986 (c. 45) (United Kingdom).

accepted section 426 as resolving the issue in the case, but did not take a position as to the universalism theory. Thus, in a case from a jurisdiction not covered by section 426 (for example, the United States) the vote of this panel would be two no, two yes, and one unknown.

Discharge and Enforcement

The effect of discharge becomes important in corporate cases where the effectiveness of a reorganization plan or scheme is dependent upon the recognition and enforcement of the court orders approving the plan by the courts in other jurisdictions.

According to the Principles adopted in the Transnational Insolvency Project of the American Law Institute ("ALI"),[20] a party should be bound by the plan if it asserts a claim, if it otherwise seeks to benefit from a reorganization proceeding or to influence its outcome,[21] or if it accepts payment under the plan.[22] Furthermore, a judgment should be binding if the court had proper international jurisdiction and the claimant had notice and a fair opportunity to be heard.[23] Otherwise, a reorganization plan should have no binding effect for a creditor that did not have sufficient connection with the jurisdiction approving the plan to justify jurisdiction in an ordinary civil suit involving the same or a closely related subject matter.

An example of discharge issues in multinational reorganizations is found in the cases where British insurance companies used the administration procedure in Britain to "run off" insurance obligations. Because these run offs often affect a large number of United States policyholders, these companies have come to

20 American Law Institute, *Principles of Cooperation among the NAFTA Countries* (2003, ALI, Philadelphia PA), at 86-88 ("Principles").

21 Ibid., at 84: "The key to reorganization law in each of the three NAFTA countries is the ability to bind interested parties to an agreed and approved plan. Not only must those who have agreed to be held to their agreement, but dissenters who have been outvoted by the legally required majorities must also be bound."; American Law Institute, *Restatement (Third) of Foreign Relations Law: Foreign Judgments and Awards* (1987, ALI, Philadelphia PA), at §481: "[A] final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States."; American Law Institute, *Restatement (Second) of Conflict of Laws: Recognition of Foreign Nation Judgments* (1971, ALI, Philadelphia PA), at §98: "Judgments rendered in a foreign nation…will be accorded the same degree of recognition to which sister State judgments are entitled. This is because the public interest requires that there be an end of litigation." See *Baldwin v. Iowa State Traveling Men's Association,* 283 U.S. 522, 525 (1931). A foreign nation judgment will be recognized in the American court where "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction." See *Hilton v. Guyot,* 159 U.S. 113, 202 (1895); C. A. Wright *et al.*, *Federal Practice and Procedure* (4th ed) (2008, Thomson Reuters, New York NY), at §4404: "A res judicata ruling by a court in another country also commands respect as itself res judicata, although without the compulsion of full faith and credit or federal supremacy."

22 Principles, above note 20, at 88 (specifically, illustration 2).

23 Idem (specifically, Procedural Principle 27).

the United States to obtain United States recognition of their run off schemes.[24] Despite a cogent attack on these schemes, at least four cases have already approved them under Chapter 15.[25]

Denationalized Insolvency Proceedings

A "denationalized" insolvency may result where a forum court has two characteristics: it is prepared to accept an insolvency filing from a corporation that has only a limited connection with the forum jurisdiction and it applies its own insolvency law to all insolvency issues.

Jurisdictions possessing these legal characteristics could attract filings, and the accompanying fees, by adopting insolvency laws pleasing to the debtors that decide where to file the proceedings.[26] The result may be a "denationalized" bankruptcy that is not governed by the laws of any jurisdiction that has a real connection to the debtor and its creditors and that has been biased in favour of the debtor.

Two related lines of cases in the United States may influence the future of denaturalized proceedings, even though the United States is not itself a "haven" jurisdiction. One line permits the filing of cases in the United States purporting to affect assets worldwide even where the United States is not the COMI of the debtor. The second line refuses recognition to proceedings that do not qualify as main or

24 See generally, S. Johnston, "Why U.S. Courts Should Deny or Severely Condition Recognition to Schemes of Arrangement for Solvent Insurance Companies" (2007) 16 *Journal of Bankruptcy Law and Practice* 6, Art. 2, 1.

25 See *Lion City Run-Off Private Limited,* Case No. 06-B-10461 (Bankr. S.D.N.Y. 13 April 2006); *In re Gordian Run-Off (UK) Ltd.,* Case No. 06-11563 (Bankr. S.D.N.Y. 28 August 2006); *In re Europaische Ruckversicherungs-Gesellschaft in Zurich (European Reinsurance Company of Zurich),* Case No. 06-13061 (Bankr. S.D.N.Y. 22 January 2007); *In re Lloyd,* No. 05-60100, 2005 Bankr. LEXIS 2794 (Bankr. S.D.N.Y. 7 December 2005).

26 Professor LoPucki has argued strongly that a similar sort of management-favouring forum shopping has been rampant *within* the United States. LoPucki, above note 11, at 16: "Beginning in 1990, the bankruptcy forum shopping produced an unexpected dynamic…within six years, nearly 90 percent of all large public companies filing bankruptcy in the United States filed in Delaware." While in my view Professor LoPucki's rhetoric has gone too far, I have little doubt he is correct that a system that permits the parties great flexibility to choose the forum of an insolvency case will lead inevitably to selector-favourable legal rules, because the attraction of insolvency cases is a large economic incentive that legislators and judges are unlikely to resist, consciously or unconsciously. Attracting a really large case—say taking Enron from Texas to New York—is like getting a new Honda plant. See generally, *In re Enron Corp.,* 274 B.R. 327 (S.D.N.Y. 2002) (deciding to maintain venue in New York, not Texas). The professional fees in Enron have approached $1 billion and the case is not finished. B. Wysocki Jr., "Rising Fees Charged in Bankruptcy Cases Elicit a Backlash" (*Wall Street Journal*, 4 August 2007), at B1; M. Pacelle, "Enron Bankruptcy is Fee Bonanza—Lawyers' Laundry and Bar Tabs Among $280 Million in Charges" (*Wall Street Journal*, 11 December 2002), at C1. Of course, certain powerful creditors may have effective control of management and may be the venue choosers, but in that case their interests and those of management will often coincide. See generally, H. Hu and J. Westbrook, "Abolition of the Corporate Duty to Creditors" (2007) 107 *Columbia Law Review* 1321, at 1372: "Under current bankruptcy law, the management of the debtor corporation in Chapter 11 controls the proceeding. If other parties – for example, secured creditors – control management, then they effectively control the corporation's reorganization proceeding through management."

non-main under the Model Law, Chapter 15 of the United States Bankruptcy Code. The two lines of cases seem to be in some conflict.

The first line of cases includes two different types of situations. One type, typified by *In re Cenargo*,[27] presents no substantial contacts with the United States except the presence of assets within its territorial boundaries. In Cenargo, the debtor filed Chapter 11 in the United States just before its creditors filed in the United Kingdom, the debtor's home country. Although the judges in the two jurisdictions sorted out the matter, the United States court did claim worldwide jurisdiction on the basis of the debtor's minimum contacts with the United States.[28]

The second type of case is *In re Avianca*,[29] where the principal Colombian airline filed for a Chapter 11 reorganization in New York. The court refused dismissal sought by the aircraft lessors, arguing that the United States had a better law for the case than Columbia because the United States law would give the debtor more bargaining power with the lessors by not permitting "rejection" of the leases. Colombia's legislature had recently adopted a new insolvency law and apparently decided not to advantage debtors in the relevant respects. The United States court's ruling effectively overrode that decision. The United States case had a much stronger connection to the debtor in *Avianca* than in *Cenargo*. Nonetheless, *Avianca* was not a "main" proceeding in the sense used in the Model Law, yet the court approved a plan with global effect.

The other line of cases is lead by *In re Bear Sterns*.[30] Most observers agree that these cases have established a rule that the United States will not recognize minimum-contact cases under Chapter 15. Insofar as a non-main proceeding is recognized, Chapter 15 of the United States Bankruptcy Code, enacting the Model Law, would permit relief only as to assets closely related to the non-main jurisdiction, rather than giving that court's rulings global effect.[31] It would seem anomalous that the United States would exercise global jurisdiction in either type of case when it would not recognize such jurisdiction exercised by other courts.

27 *In re Cenargo International, PLC,* 294 B.R. 571 (Bankr. S.D.N.Y 2003).

28 See also *In re Yukos Oil Co*., 321 B.R. 396 (Bankr. S.D.Tex. 2005), which upheld *Cenargo*-like technical jurisdiction, but was dismissed on the grounds of prudence rather than traditional bases like *forum non conveniens* or abstention.

29 *In re Aerovias Nacionales de Colombia S.A. (In re Avianca)*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003). My analysis of this case first appeared in M. Monti *et al*. (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (2007, Nomos Verlag, Baden-Baden), at 777.

30 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. 122 (Bankr. S.D.N.Y. 2007), aff'd 389 B.R. 385 (S.D.N.Y. 2008); *In re Basis Yield Alpha Fund (Master),* 381 B.R. 37 (S.D.N.Y. 2007); *In re Tri-Continental Exchange Ltd.,* 349 B.R. 627 (Bankr. E.D. Cal. 2006).

31 Bankruptcy Code, §1521(c).

However, the United States courts should take jurisdiction of either type of case where there is no other proceeding pending for the limited purpose of seizing and realizing upon United States assets for the benefit of creditors.[32]

Corporate Groups and the UNCITRAL Project

Great difficulties arise from the fact that most multinationals do business through subsidiaries incorporated, headquartered, and operating in many different jurisdictions.[33] From the largest perspective, it is not justifiable either to ignore the corporate form or to treat these entities as entirely separate.

No jurisdiction has very good answers in their own domestic laws to the host of questions created by corporate groups, and therefore it is best to focus on the specifically international aspects of the problems.[34] Solely for the purposes of international recognition and cooperation, it is possible to define a corporate group on a "one-way" basis, which describes a certain set of corporate relationships as a corporate group and identifies the parent in that group without attempting to resolve other situations that are less common or more controversial.

For example, we could define a parent corporation as one having an ownership interest when it legally controls the selection of the company's board of directors. We could use that definition to define a corporate group. We could then adopt a limited set of rules for that instance. For example, where a parent of a corporate group files in the parent's COMI jurisdiction, that jurisdiction could be the COMI for the whole group, as defined.

An approach like this would not address all instances but would act as the same sort of first-step approach as was taken with the Model Law on Cross-Border Insolvency.

II - The Future of Insolvency: Public or Private?

Insolvency law is nearing a global crossroads in determining whether proceedings will be primarily public or primarily private. While some advocate adoption of "contractualist bankruptcy," which would permit parties to contract in advance

32 J. Westbrook, "Multinational Insolvency: A First Analysis of Unilateral Jurisdiction", in W. Norton, Jr. and R. Lieb (eds), *2008 Norton Annual Review of International Insolvency* (2009, Thomson West, New York NY).

33 P. Blumberg *et al.*, *Blumberg on Corporate Groups* (2nd ed, Supp. 2007) (2007, Aspen Publishers, Waltham MA), at §1.01.

34 A substantial caveat to that conclusion is that UNCITRAL Working Group V is working hard on suggestions for domestic reform, as well as international cooperation: www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

for a legal scheme managing any future general default,[35] others contend that public control is necessary both to protect important public interests implicated in a general default and to correct market failures.[36]

Legal systems around the world present these two choices. The United Kingdom and many common law countries have operated the insolvency system largely as a private one, with little or no attention to a public or third party interest. On the other hand, most civil law systems, such as the French system, have treated financial distress as implicating public and third party interests. While the rights of creditors were taken seriously in these systems, they were often subordinate to a number of other concerns.[37]

The United States system has been somewhere in between. While secured credit law in the United States has had greater scope and given more control to the secured party than in the French system, United States bankruptcy law has exerted strong control over the exercise of the secured party's rights.

The Contractualist Position

A number of scholars have argued for privatizing the insolvency laws by proposing *ex ante* contractual arrangements.[38] For example, Professor Robert Rasmussen proposed a "bankruptcy [insolvency] menu" consisting of a series of standard schemes for default management, where a firm picks a set of provisions it thinks best. The choice could not be changed without the agreement of all creditors, with some exceptions such as for involuntary creditors.[39]

35 See, e.g., D. Baird and R. Rasmussen, "The End of Bankruptcy" (2002) 55 *Stanford Law Review* 751, at 754-55.

36 See, e.g., E. Warren, "Bankruptcy Policymaking in an Imperfect World" (1993) 92 *Michigan Law Review* 336; E. Warren and J. Westbrook, "Contracting Out of Bankruptcy: An Empirical Intervention" (2005) 118 *Harvard Law Review* 1197; J. Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (2003, University of Toronto Press, Toronto).

37 R. Blazy *et al*., "Financial versus Social Efficiency of Corporate Bankruptcy Law: the French Dilemma?" (2007) CREFI-LSF Research Working Paper, no. 0702, copy available at: ssrn.com/abstract=1116681.

38 See, e.g., R. Rasmussen, "Debtor's Choice: A Menu Approach to Corporate Bankruptcy" (1992) 71 *Texas Law Review* 1.

39 For voluntary creditors, he argues as follows: "This problem is easily remedied. It is beyond peradventure that mandatory rules can be justified as protecting third parties. It is clear that non-consensual creditors need such protection. They do not, however, need the protection of a mandatory bankruptcy regime. The question of the appropriate treatment of non-consensual claimants when a firm is insolvent is the subject of a rich literature. This Article does not, and need not, enter this debate. Rather, once policymakers decide the optimal treatment of non-consensual creditors, this treatment should be unalterable by any debt contract. In other words, the priority status of tort claimants should not depend on which bankruptcy option a firm selects. Thus, a bankruptcy regime consisting primarily of default rules can readily accommodate the existence of non-consensual claimants." Ibid., at 66-67.

Professor Alan Schwartz proposes an insolvency contract that will pay management to choose the right alternative, because he believes "private" benefits to those controlling the firm acts as the main obstacle to efficient default management.[40] Other scholars, such as Professor Tracht,[41] are content to leave insolvency law as it is, but want to give debtor and creditor freedom to waive the legal rules in advance.

Developments in the United States

The trend toward privatization of insolvency in the United States has three main components:

- the increase in dominant security interests, granted after a company has become financially distressed;
- broad exemptions from bankruptcy for unregulated financial institutions; and
- the increasing use of privately appointed insolvency trustees.

The Rise of Secured Party Control of Chapter 11

Creditors have increased their control of United States reorganization cases through dominant security interests. In many cases the "bankruptcy veto" has transformed DIP control into secured party control. Because Chapter 11 may be used for liquidation and most companies file for Chapter 11 rather than Chapter 7, the secured party controls both liquidations and reorganizations.

This development differs from the traditional common law practice and from the contractualists' theories because the dominant security interest is granted after the company is in financial distress, often by larger businesses that had resisted granting broad security rights prior to their financial distress. Because the secured party will control any subsequent liquidation or reorganization, the grant of the dominant security interest is, in effect, a private bankruptcy.

40 This approach has been called a "bribe" to management. Note that this sort of solution is necessary, because these authors want to avoid any public official from making any important decisions in these matters, so that right conduct must be "incentivized"—that is, bought—rather than prescribed.

41 M. Tracht, "Contractual Bankruptcy Waivers: Reconciling Theory, Practice, and Law" (1997) 82 *Cornell Law Review* 301. See also S. Schwarcz, "Rethinking Freedom of Contract: A Bankruptcy Paradigm" (1999) 77 *Texas Law Review* 515, at 517-18, explaining that scholars are debating not only whether debtors should be allowed to waive bankruptcy protections "but also whether parties should be allowed to contract for bankruptcy procedures that are different from those supplied by the state."

So far, there is no theory supporting the economic benefit of these post-distress security interests.[42] Although post-distress priority permits financing that enables an out-of-court settlement, opaque resolution is not necessarily preferable in this age of greater financial transparency. Furthermore, one of the principal theoretical justifications for security interests is that they make default results predictable, thus lowering transaction costs. Yet post-default security interests make pre-distress credit extension by other creditors substantially riskier, because at any future time a secured creditor might obtain a priority over the pre-existing debt.

The Exemption of Financial Assets from Insolvency Proceedings

A second element of privatization in the United States has come from the recent expansion of an exemption from insolvency of certain types of financial assets, making insolvency proceedings irrelevant for quasi-financial companies whose balance sheets consist mostly of such assets. Because the moratorium of bankruptcy does not apply to these assets, the counterparties to the transactions represented by these assets may walk away with their value, leaving nothing for an insolvency administrator to administer.[43]

Privately Appointed Administrators

"Turnaround managers" and "Chief Reorganization Officers" are privately appointed, often by influential insiders, even though they perform the duties of a publicly appointed insolvency administrator.[44] It is not clear why the choice of an administrator to take over a struggling business should be made in the dark by insiders who have their own interests at stake in the proceeding.[45]

42 The theoretical justifications for security interests have focused on ex ante, pre-distress lowering of transaction costs and the development of long-term relationships with lenders. See J. Westbrook, "The Control of Wealth in Bankruptcy" (2004) 82 *Texas Law Review* 795, at 841-42; R. Scott, "A Relational Theory of Secured Financing" (1986) 86 *Columbia Law Review* 901, at 917-19.

43 *Lehman Brothers, Sharper Image, Bennigan's, and Beyond: Is Chapter 11 Working?: Hearing Before the Subcomm. On Comm. and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of J. Westbrook, Professor, University of Texas School of Law).

44 One duty that is arguably neglected is that of investigation of pre-insolvency wrongdoing by insiders.

45 Although these appointments must be approved by the bankruptcy judge, they are presented as a change in the management of the DIP, so the tradition of DIP control in Chapter 11 leaves most courts prepared to accept any qualified person presented by the "DIP". The nominee generally being highly qualified as a technical matter, there is little consideration of the source of his or her appointment. One of the abiding theoretical weaknesses of United States bankruptcy scholarship is the failure to figure out who this DIP entity really is and under what circumstances the DIP right to control has ceased to have a rationale.

International Developments

Because dominant security interests are the key to privatization of insolvency, the international context seems more daunting for the contractualists than the United States domestic market. So far, secured credit law remains quite parochial, although substantial efforts are underway to make some security interests enforceable internationally.[46]

The Public Interest

These moves toward privatization implicitly assume that no great public interest is at stake in insolvency cases, beyond providing a mechanism for enforcing private rights. In general, free-market societies vary greatly as to what sorts of contract and property rights will be enforced, while adhering to the overall theme of party autonomy. On the other hand, insolvency law has been an area where mandatory rules exist in every jurisdiction, reflecting public interests that are seen to transcend bargains between private parties. In the case of private contracts overriding public insolvency rules, these externalities may be divided into two categories: effects on identifiable third parties and effects on society at large.

Third-Party Effects

An insolvency affects three categories of identifiable third parties: employees and suppliers, involuntary creditors, and quasi-involuntary creditors.

<u>Employees and Suppliers</u>

Employees have two distinct interests in their employer's financial crisis, as creditors and as jobholders. Virtually all insolvency systems give some priority to employees as creditors whereas some insolvency systems give employees sufficient influence over the reorganization process that they may be able to protect their interests as jobholders.

In many systems, suppliers are given a priority as creditors through the device of a vendor's lien, but they rarely have rights as to their interests in preserving an on-going customer.

46 A. Veneziano, "Uniform Law on Secured Transactions and Insolvency: The Approach of the Cape Town Convention and of the UNCITRAL Legislative Guide on Secured Transactions", in C. Andersen and U. Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer* (2008, Wildy, Simmonds and Hill, London), at 527. See www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html.

Involuntary Creditors

The two most prominent types of involuntary creditors are tort victims and taxing authorities.

Virtually all commentators in the United States agree that tort creditors should be protected, although those committed to contractualism are more likely to believe the protection should come in some scheme outside the insolvency system with no effect on recoveries within that system.[47] However, in almost all countries tort victims have been given no special priority in insolvency.[48]

Although taxing authorities have been far more successful than tort claimants in gaining priority treatment, there has been a recent retreat from granting tax priorities.[49] Yet the public purse is an involuntary creditor that has no opportunity to bargain for its built-in extension of credit and failure to replenish the treasury has important ramifications for public policy.[50]

Quasi-Involuntary Creditors

Some creditors, such as public utilities and landlords, have a relationship with the debtor that is not entirely involuntary, but is so constrained by law and circumstance that they may be considered to fall into the category quasi-involuntary.[51]

47 Whether the notion that tort issues should be ignored in insolvency debates is sensible is a subject for another day. Suffice to say here that there are substantial objections to that notion, including the fact that the problem of fixing compensation for tort victims is fully resolved in tort law in most countries. It is precisely in the case of insolvency that the victims face the risk of non-payment, so it seems odd to think the solution to that risk lies somewhere outside the insolvency system.

48 Professor LoPucki proposed some years ago that tort victims be given a priority over secured parties. L.M. LoPucki, "The Unsecured Creditor's Bargain" (1994) 80 *Virginia Law Review* 1887, at 1896, crediting B. Adler, D. Leebron, M. Roe, C. Painter, R. Rasmussen and P. Shupack with writing on the subject of tort creditors' priority over secured creditors. The idea was that a secured party would be careful to ensure that the debtor maintained adequate insurance to the benefit of all concerned. Idem, at 1906-1907. This idea was so sensible and fair that it has been completely ignored.

49 *Protecting Employees and Retirees in Business Bankruptcies Act of 2007 (H.R. 3652): Hearings Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. 61 (2008) (testimony of B. Ceccotti) (One lawyer testified that "while it may be appealing to say 'we are giving a greater priority to employee benefit claims,' it is important to keep in mind that by doing so, you are likely to be diminishing the recovery of other types of creditors, such as taxing authorities."); M. Balz, "Equity Auctions and a New Concept of Priority: Two Bankruptcy Reform Proposals" (1 March 2001), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=264511 (discussing the overall inefficiencies of granting priorities to certain creditors, including taxing authorities, as well its inconsistency with the notion of creditor equality); I. Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002" (2004) 5 *European Business Organisation Law Review* 148: "Section 251 [of the Enterprise Act] achieves a significant reform of the treatment of company assets in insolvency by eliminating the preferential status formerly conferred on Crown debts."

50 E. Warren and J. Westbrook, "Contracting Out of Bankruptcy: An Empirical Intervention" (2005) 118 *Harvard Law Review* 1197. Note that in most countries taxing authorities are granted special powers of collection under non-insolvency law.

51 Ibid., at 1216.

Societal Interests

There seem to be three sorts of societal interests in insolvency cases separate from the interests of identifiable parties: effects on sectors of society; social process; and the risk of systemic economic crises.

Effects on Sectors of Society

Although rarely reflected in legislation, major justifications for reorganization rather than liquidation include protection of employment and the substantial interest communities have in the stability created by long-established economic activity.[52] There are also certain sectors of private activity that have a strong direct connection to larger interests, as with financially distressed nursing homes and utilities.

Social Processes

In recent years there has been a powerful worldwide trend toward greater transparency in economic activity.[53] Transparency in insolvency matters has several benefits, including the following:

52 E. Warren, "Bankruptcy Policymaking in an Imperfect World" (1993) 92 *Michigan Law Review* 336; J. Sarra, above note 36.

53 B. Biais *et al.*, "European Corporate Bond Markets: transparency, liquidity, efficiency", Centre for Economic Policy Research (May 2006), copy available at: www.cepr.org/PRESS/TT_CorporateFULL.pdf (discusses the consequences and desirability of transparency in the European bond market.); P. Dunne *et al.*, "European Government Bond Markets: transparency, liquidity, efficiency", Centre for Economic Policy Research (May 2006), copy available at: www.abi.org.uk/BookShop/ResearchReports/TT%20GovernmentFULL.pdf (states that "transparency is a key attribute of a typical financial market."); P. Geraats, "ECB Credibility and Transparency", European and Financial Affairs (June 2008), copy available at: ec.europa.eu/economy_finance/publiations/publication_summary12716_en.htm (argues that ECB credibility will be enhanced by embracing greater transparency about the ECB's objectives, macroeconomic forecasts and decision-making.); European Commission: European Economy, Public Finances in EMU – 2008 (2008), copy available at: ec.europa.eu/economy_finance/publications/publication12832_en.pdf (transparency of budgetary projections is the ultimate goal for Member States of the European Commission.); European Commission: European Economy, Public Finances in EMU – 2007 (2007), copy available at: ec.europe.eu/economy_finance/publications/publication338_en.pdf (includes a budget transparency index and states that there has been a focus on results and budget transparency in OECD member countries.); Financial Stability Forum, "Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience" (April 2008), copy available at: www.fsforum.org/publications/r_0804.pdf (analyzes the importance of transparency in increasing the resilience of markets and institutions.); U. Dadush and J. Nelson, "Governing Global Trade", *Finance & Development* (December 2007), copy available at: www.imf.org/external/pubs/ft/fandd/2007/12/dadush.htm (credits the trading system's transparency as one reason amongst others that the multilateral trade system is succeeding worldwide); D. Burton and A. Zanello, "Asia Ten Years After", *Finance & Development* (June 2007), copy available at: www.imf.org/external/pubs/ft/fandd/2007/06/burton.htm (briefly mentions that the IMF has been involved in transparency initiatives throughout Asia); A. Eftimie and M. Stanley, "Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector: Background Paper on Government Tools for Sector Sustainability" (December 2005), copy available at: www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/04/28/000090341_20060428104852/Rendered/PDF/359430Governme1d0to0ESM31001PUBLIC1.pdf (describes the Extractive Industry Transparency Initiative which requires transparency in revenues from mining companies in Africa).

- Improvement of public understanding of economic changes that often substantially disrupt the lives of people and communities;
- Reduction of corruption through institutional arrangements that provide independent scrutiny of the process;[54]
- Providing incentives for the major actors to act in socially responsible ways because of reputational concerns;
- Protection against political pressures, especially concerning necessary but unpopular economic decisions.

Systemic Crises

Financial distress may arise in two different contexts, "ordinary course" insolvency and systemic financial crisis. It may be necessary to provide distinct standards and processes for each context. Ordinary course insolvencies that come along in a stable and growing economy present a different balance of private and public interests than does a systemic crisis. In the latter case, the public interest becomes much more important, government involvement may be necessary as well as inevitable, and creditor interests may in some respects take a back seat to larger concerns.[55] Recent economic difficulties may carry forward more focus on systemic crises and the public interest in insolvency proceedings.

54 For example, this element is provided in the United States by the United States Trustee system. 28 U.S.C. §581(a) (Oct. 27, 1986) (Duties of United States Trustee). See A. Resnick and H. Sommer, *Collier on Bankruptcy* (15th ed, revised 2008) (2008, LexisNexis, Dayton OH), in App. Pt. 4(d), at 95-98, 108-109, explaining that the creation of the United States trustee "will eliminate the cronyism that exists in many parts of the country in the appointment of trustees by bankruptcy judges" and "will go far toward reducing the appearance of the bankruptcy system as run by a 'bankruptcy ring'." See D. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* (2001, Princeton University Press, Princeton NJ), at 76.

55 J. Westbrook, "Systemic Corporate Distress: A Legal Perspective", in S. Claessens *et al.* (eds), *Resolution of Financial Distress* (2001, World Bank Institute, Washington DC).

Chapter 2

New World and Old World: Symphony or Cacophony?

Gabriel Moss QC

Introduction

The concept of "centre of main interests", or "COMI" as it is known even in non-English speaking countries, is perhaps the most important undefined central concept in European or international insolvency law.

The Virgos-Schmit Report tells us that:

> "The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties."

The Virgos-Schmit Report was, of course, going to be the explanatory report on the draft convention which failed to come into effect. Nevertheless very similar words were incorporated into the Recitals to the European Insolvency Regulation ("EIR") as Recital 13:

> "The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties."

It is unlikely that any great difference was meant to be introduced by replacing "must" in paragraph 75 of the Virgos-Schmit Report with "should" in Recital 13 to the EIR.

As previously explored in the case law, Recital 13 has simply lifted the introductory sub-paragraph of paragraph 75 of the Virgos-Schmit Report and the paragraph needs to be read as a whole.

Much of the national case law is well known and I will not go over it all again, but will simply take as my starting point recent cases which hopefully give us some clarity as to where we are in Europe. I will then contrast the position with the way in which the concept of COMI has been interpreted under the UNCITRAL Model Law in the United States and England.

The Current Position in European Case Law

Before dealing with the case law itself, it is important to establish the function of COMI in the EIR. The primary function of COMI is to establish international jurisdiction as between Member States of the European Union (except Denmark, which will not be mentioned again) to open main proceedings under Article 3(1). That is the direct function of COMI. However, there is also a critical indirect function in that a judgment opening insolvency proceedings handed down by a court of a Member State, which has jurisdiction under Article 3, has to be recognised in all other Member States under Article 16. Thus, the presence of COMI in one Member State, and the opening of main proceedings on that basis, is required to be recognised throughout the European Union.

Furthermore, under Article 17, the opening of a main proceeding pursuant to the presence of COMI in a Member State, produces the same effects in any other Member State as it does under the law of the State of the opening, subject to the exceptions set out in the EIR and as long as no proceedings under Article 3(2), i.e. territorial proceedings, are opened in that other Member State.

In addition, the liquidator appointed by a court which has jurisdiction under Article 3(1), i.e. on the basis of the presence of COMI, may exercise all the powers conferred on him by the law of the State of opening in any other Member State, subject to certain restrictions set out in Article 18 and elsewhere in the EIR.

Accordingly, as far as the EIR is concerned, COMI has a primary direct function of allocating international jurisdiction within the European Union as between different Member States, but also has a critical indirect function of providing the platform for main proceedings whose effects operate directly in other Member States and whose liquidator can exercise his powers in those other Member States, subject to the restrictions and exceptions set out in the EIR.

By a contrast, in the scheme of the UNCITRAL Model Law, COMI is not used, directly at least, to allocate international jurisdiction but has the function of providing a basis for recognition of foreign proceedings as main proceedings. The indirect effect here is that if one is planning upon one's proceedings being recognised as a main proceeding under the Model Law, then one needs to ensure that the proceeding will be commenced in the place where COMI is located. Moreover, as a matter of planning, if COMI is not located in the jurisdiction where a main proceeding is designed to take place, there may well be an opportunity to move COMI to that place before the opening.

The Interpretation of the European Court of Justice ("ECJ")

The *Eurofood* case[1] is rather too well known to require elaboration but, in the context of the other case law, it is important to note what it does and does not decide. *Eurofood* concerned a group of companies in the Parmalat Group and it emphasises the fact, which is clear from the wording and approach of the EIR, that each company in a group has to be looked at separately for the purposes of assessing COMI.

The only specific points of interpretation that the ECJ lays down in *Eurofood* are that facts which are sought to be used to displace the presumption based on the place of registered office have to be objective and, secondly, that they have to be ascertainable by third parties. Neither proposition was really in any doubt.

Specifically, in relation to the questions put to the ECJ in that case, the ECJ points out that the fact that the economic policy of a subsidiary is dictated by the parent does not mean that the COMI of the subsidiary located in the place of the COMI of the parent. Again, nothing really controversial there.

Although there is little specific guidance in the judgment as to when the COMI of a subsidiary will be held to be in the same place as its parent, one example given is that of a company which carries out no business in the place of registration.

It is important to note that the ECJ decision itself does not expressly say anything about the "head office functions" test. Again, the case law on this test is long standing, detailed and has been written about a great deal, so I will only deal with some recent cases. Before going to those, it is, however, necessary to remember that the "head office functions" test or approach was expressly endorsed by the Advocate-General in his Opinion[2] at paragraphs 111-112.

Before leaving the ECJ, it also needs to be mentioned that outside the European Union, and in particular in the United States, there appears to be a widespread, although perhaps understandable, misunderstanding as to its role and as to the nature of its judgments. In particular, we need to emphasise that the ECJ does not hear appeals in EIR cases like *Eurofood:* it simply decides preliminary issues

* This is a re-edited version of a piece first published under the same title in Chapter 10 in B. Wessels and P. Omar (eds), *The European Insolvency Regulation: An Update* (2010, INSOL Europe, Nottingham) (145-165).

1 *Eurofood IFSC Ltd* (Case C–341/04) [2006] BCC 397.

2 [2005] BCC 1021.

which are put to them by the final Court of Appeal of a Member State. Since the ECJ has to answer preliminary issues, it is very largely dependent on which issues are put to them by which courts and how the questions are framed.

Thus, in the *Eurofood* case, of the two rival sets of proceedings in Ireland and Italy, the shorter appellate structure and the relative speed of progress of Irish case law meant that the reference to the ECJ from Ireland long preceded any opportunity to make a similar reference from Italy. As a result, the ECJ ended up answering questions put by the Irish Supreme Court from the Irish point of view and very much designed to supply the answers which the Irish courts desired in order to protect their special tax privileges in relation to companies such as *Eurofood*. In particular, no question was asked about the "head office functions" test or about the rather nominal nature of *Eurofood*, given that it had no office or employees of its own and no business other than raising money for the Italian parent.

My understanding is that the ECJ, even though, strictly speaking, limited to the questions they are asked, can in practice give more comprehensive and helpful answers and can embarrass the requesting court by pointing out that the questions are somewhat loaded. It is a pity that this opportunity was not taken in the *Eurofood* case.

Despite the limitations of the process, the rulings in *Eurofood* in relation to COMI are binding throughout the European Union and have to be followed in national courts. Given that there was nothing new, surprising or really controversial about the very limited points decided by the ECJ in relation to COMI, it cannot be a surprise that the national courts have generally speaking continued with the previous case law, applying the head office function test, but ensuring that any factors used to rebut the presumption based on the location of the registered office are objective and ascertainable by third parties.

Re Lennox Holdings Plc[3]

This was another case of a group of companies. The holding company, Lennox, was listed on the Alternative Investment Market ("AIM") in London and supplied food products to British people in Spain. It is well known that some British people preferred to eat unhealthy English food soaked in animal fat and containing large quantities of added sugar rather than eat the healthy Mediterranean diet to be found in Spain. Nevertheless the group had gotten into financial difficulties and Lennox's shares were suspended on the AIM.

3 [2009] BCC 155.

Lennox had a number of subsidiaries, including two companies which had their registered office in Spain. The issue arose as to whether the English court had jurisdiction in relation to Spanish registered companies to open administration proceedings as main proceedings. Mr Justice Lewison held that it had.

In doing so the judge applied the "head office functions" test as approved by the Advocate-General in his Opinion[4] in the *Eurofood* case at paragraphs 111 and 112.

Mr Justice Lewison also, unfortunately, quoted paragraph 113 of the Advocate-General's Opinion, in which he accepted a submission which I had put to the ECJ that "ascertainability by third parties" was not central to the concept of "centre of main interests", since the terms of Recital 13 show that it is *because* the Corporation's head office functions are exercised in a particular Member State that the centre of main interests is ascertainable there. Of course, if this is properly understood, it simply points out that the focus is on where the head office functions are exercised but does not deny the need for ascertainability by third parties. It simply emphasises the fact that ascertainability arises from the exercise of such functions in a particular place, i.e. in a way in which they can be ascertained and not for example covertly.

Mr Justice Lewison then cited the parts of the ECJ decision itself,[5] which laid down that the presumption based on the location of the registered office could only be rebutted if factors which were both objective and ascertainable by third parties enabled it to be established that an actual situation exists which is different from the registered office.[6] Mr Justice Lewison cited the example of the "letter box" company mentioned not carrying on business in the territory where the registered office is situated at paragraph 35. He also mentions the ruling that, where a company does carry on business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption.[7]

At paragraph 9 of his own judgment, Mr Justice Lewison states that the two examples given by the ECJ are at two opposite and extreme ends of the spectrum. He considered that the facts of the case he was dealing with, like many others, lie somewhere between the two extremes. On that basis, he found the approach of

4 [2005] BCC 1021.
5 *Eurofood*, above note 1.
6 Ibid., at paragraph 34.
7 Ibid., at paragraph 36.

the Advocate-General particularly helpful and decided to concentrate on the head office functions of the two Spanish companies.[8]

Mr Justice Lewison then went on to consider the evidence that the head office functions of the two Spanish registered companies were in fact carried out in England. At paragraph 11 of his judgment, he was satisfied of these facts. The facts themselves, as listed by Mr Justice Lewison, were clearly open and known to creditors and were easily ascertainable by them, although this point is not specifically mentioned. Nevertheless, Mr Justice Lewison clearly had it in mind that the ECJ had set down a binding requirement that the facts which are used to rebut the presumption based on the place of registered office have to be objective and ascertainable by third parties.

Stanford International Bank Limited[9]

Mr Justice Lewison had to revisit the question of COMI and his judgment in the *Lennox* case when considering the dispute between the liquidators of Stanford International Bank Limited appointed by the High Court of Antigua and Barbuda on the one hand and the United States Receiver appointed by the United States Court in respect of that Bank.

Unlike the *Lennox* case, this hearing was fully contested by the two rival candidates for recognition in the United Kingdom and also, interestingly, on behalf of Mr Stanford himself! It was clearly very generous of him to contribute to the legal debate on this important subject at a time when he was facing such serious charges of fraud but, of course, under Anglo-American jurisprudence, he is presumed to be innocent unless and until he is found guilty.

The other difference from the *Lennox* case was that COMI was being considered here in the context of the enactment in Great Britain (i.e. England and Scotland) of the UNCITRAL Model Law[10] and the issue was not jurisdiction, as in *Lennox*, but recognition. Each of the United States and the Antiguan parties claimed that COMI was in its own jurisdiction.

Importantly, and in my view correctly, Mr Justice Lewison held that the undefined concept of COMI had the same meaning both under the EIR and under the UNCITRAL Model Law. The United Kingdom at present appears to be in a

8 *Lennox*, above note 3, at paragraph 9.

9 [2009] EWHC 1441 (Ch) (3 July 2009).

10 As the Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

unique position of having both the EIR and the Model Law in force, but with priority being given to the EIR in relation to the European Union.

Although the hearing was fully contested, the only evidence before the court was written evidence and none of it was tested by cross-examination. Mr Justice Lewison therefore asked himself how the court was going to resolve any disputed questions of fact. He held, at paragraph 10 of his judgment, that the court should apply by analogy the test that applies in deciding questions of jurisdiction under Regulation 44/2001 (the Jurisdiction and Judgments Regulation). The test used by the English Courts in this context is that the court must be satisfied, or as satisfied as it can be, having regard to the limitations which an interlocutory process imposes, of the necessary facts.[11] Applied to COMI, that means being satisfied, or as satisfied as it can be, having regard to the limitations which an interlocutory process imposes, that the company's COMI is not in the state in which its registered office is located.

It is not necessary in this lecture to go into all the factual detail of the *Stanford* case and why Mr Justice Lewison held that the Bank's COMI was in Antigua rather than the United States. However, I need to mention sufficient of the facts to be able to understand why the question of ascertainability arose.

The Bank was incorporated in Antigua and had its registered office there. The Bank occupied a huge building, pictures of which many of us will have seen on television, which was leased from another Stanford company. Photographs of this magnificent building and its columned portico were used in the Bank's marketing material. The Bank employed 93 members of staff, 88 of which worked in Antigua and the remaining 5 in Canada. The Bank had its own accounts department, human resources department, IT department, payroll department and operating software, all of which were based in Antigua. The Bank also held out its offices in this magnificent building as its "primary offices". It also claimed that its "primary business" was the investment of funds deposited with it at the Bank. The Bank was only regulated in Antigua. Also in the marketing material, the Bank claimed to be domiciled in a "low tax jurisdiction", which was obviously a reference to Antigua. Another brochure specifically stated that the Bank conducted its business with the world from its headquarters in Antigua. Pursuant to Antiguan legislation, the Bank was actually prohibited from accepting deposits from Antiguan citizens and only took deposits from outside.

11 *Bols Distilleries BV v Superior Yacht Services Limited* [2007] 1 WLR 12, at paragraph 28.

Both the United States Receiver and the Antiguan liquidators agreed that Mr Stanford had engaged in a massive and fraudulent Ponzi scheme.[12] Mr Stanford, unsurprisingly, did not agree. The United States Receiver relied on the fact that many strategic decisions were taken in the United States and that a majority of those taking them were domiciled and resident in the United States and carried out their work there. Stanford himself was a citizen both of the United States and Antigua, where he had been knighted, hence his title "Sir Alan". Other connections with Antigua included building the Stanford Cricket Ground and ownership of Antigua's largest newspaper.

At paragraph 43 of his judgment, Mr Justice Lewison refers to the fact that the concept of COMI was taken from the European Convention on Insolvency Proceedings 1995 and that the report on the work of the 30th Session of UNCITRAL suggested that:

> "…the interpretation of the term in the context of the Convention would be useful also in the context of the Model Provision."

It was on this basis that Mr Justice Lewison held, at paragraph 45, that the concept in the Model Law was meant to have the same meaning as the concept in the EIR. At paragraph 46, he considered that the absence of any equivalent of Recital 13 from the Model Law does not alter the position.

Having considered paragraphs 111 and 112 of the Advocate-General's Opinion in *Eurofood*, which deal with the head office functions test, Mr Justice Lewison then revisited paragraph 113 and the statement that ascertainability was not central to the concept of COMI. He then looked at subsequent paragraphs, being paragraphs 118, 121, 122 and 124, which refer to the requirement of ascertainability.

At paragraph 58 of his judgment, Mr Justice Lewison suggests that these later paragraphs:

> "…take a rather different approach from his earlier acceptance of the submission that ascertainability by third parties is not central to the concept of COMI."

I would respectfully suggest that there is no real inconsistency. At paragraph 113, the Advocate-General points out that the focus is on where head office functions are carried out and that they become ascertainable as a result of being carried out. This is plainly not dealing with cases of concealment or denying that ascertainability is

12 In England, called a "pyramid" scheme, under which unrealistic returns are credited and/or paid out to early investors to draw in more and more subsequent investors, most of whom eventually lose all or most of their money.

necessary. The later paragraphs which emphasise the need for ascertainability are therefore not in reality "*a rather different approach*".

In any event, the ECJ had, prior to *Lennox*, made clear the need for ascertainability and this requirement was never in doubt. As I have already suggested, in *Lennox* there was no issue as to ascertainability: the head office functions of the two Spanish registered companies were openly carried out in England to the knowledge of the creditors and no ascertainability issue arose.

In the context of Mr Stanford's alleged frauds and the allegation that he was ostensibly running an international bank in Antigua, but in practice running a Ponzi fraud in the United States, and that in any event strategic decisions of the Bank were taken there, the issue of ascertainability in the *Stanford* case was clearly a controversial one. At paragraph 61 of his judgment, Mr Justice Lewison recites the argument of counsel for the Antiguan liquidators who criticised his approach in *Lennox* on the grounds that it failed to consider ascertainability. This was, in fact, a thoroughly unfair criticism, since on the facts set out in the judgment in Lennox and the evidence available to Mr Justice Lewison, the head office functions being carried out in England was ascertainable and there was no potential issue about ascertainability.

Unfortunately, Mr Justice Lewison allowed himself to be persuaded that he had been wrong in his approach in *Lennox* and went so far as to state:

> "Pre-Eurofood decisions by English courts should no longer be followed in this respect. I accept Mr Zacaroli's submissions that COMI must be identified by reference to factors are both objective and ascertainable by third parties."

I am not myself aware that any pre-*Eurofood* decision by the English Courts had failed to take ascertainability into account or had not required it to be present. All the previous English cases, including *Shierson v Vlieland-Boddy*,[13] concerned situations where COMI was only held to be in England because the head office functions were taking place in England and there was no doubt that the facts were ascertainable to third parties.

It seems to me to be entirely obscure why Mr Justice Lewison had to, as the Americans put it, "beat himself up" over his perfectly correct decision in *Re Lennox* case, where the facts were ascertainable and there was no dispute as to ascertainability. In short, Mr Justice Lewison's argument with himself was in my

13 [2005] 1 WLR 3966, at paragraph 55 (per Chadwick LJ).

view what we call in England a "storm in a teacup" and does not in any way affect the legal position established by the case law. In particular, there is no effect on the "head office functions" test which has always been subject to "ascertainability" and since the ECJ decision, subject to the requirement in a binding way.

Mr Justice Lewison went on to consider the meaning of "ascertainable", a discussion just as relevant to the EIR as to the Model Law.

At paragraph 62 of the judgment, Counsel for the United States Receiver is recorded as having argued that "ascertainability" applied even if a fact was not in the public domain but would have been disclosed as an honest answer to a question asked by a third party. Mr Justice Lewison refused to accept this on the basis that this would reduce the requirement of ascertainability "almost to vanishing point". He held that:

> "…what was ascertainable by a third party was what was in the public domain, and what a typical third party would learn as a result of dealing with the company."

At paragraph 63 and following, Mr Justice Lewison dealt with the issue of the importance of the presumption in favour of the registered office. Mr Justice Lewison interpreted the ECJ's emphasis on the need for objective facts ascertainable by third parties to be able to rebut the presumption as giving the presumption importance. He considered that the previous decision of *Re Ci4net.com Inc*, which gave little weight to the presumption, was wrong and no longer should be followed. *Ci4net* was a pre-Eurofood decision. He pointed out that the Guide to Enactment in relation to the Model Law at paragraph 122 refers to the presumption. At paragraph 65 of his judgment, Mr Justice Lewison considered that the reference to the presumption in the Guide did not detract from the force of the decision in *Eurofood.*

Mr Justice Lewison was referred in the arguments of Counsel to the cases in the United States on the Model Law which gave little weight to the presumption.[14] Mr Justice Lewison considered that the American case law had diverged from the approach of the ECJ. He speculated that this was connected with the change of wording from "proof" to the contrary in the Model Law to the use in United States Chapter 15 of the Bankruptcy Code of "evidence" to the contrary. It seems to me that this change could not possibly have made any difference and the American interpretation is more to do with the Americans ignoring the international origins

14 See *Re Tri-Continental Exchange Limited* 349 BR 629, 635 (per Judge Klein) and *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited* 374 BR 122 (per Judge Lifland).

of the text and applying the general approach in Anglo-American jurisprudence of regarding presumptions as having little weight and disliking the idea of deciding any case on the basis of a presumption rather than full evidence.

At paragraph 66, Mr Justice Lewison recites some expert evidence from Professor Westbrook, who gave the first Edwin Coe lecture last year, and is undoubtedly one of the leading minds on the subject in the United States to the effect that United States case law regards COMI as lying in the jurisdiction where the most material "contacts" are to be found, especially management direction and control of assets. In my view the "contacts" approach, familiar in United States private international law, is alien both to United Kingdom and, as far as I know, European jurisprudence.

It is a great pity that the United States cases have failed to root themselves in the European concepts and case law from which the COMI concept originates. The Americans are, like everyone else who adopts the Model Law, required by the Model Law to interpret it in the light of its international origin.[15]

Mr Justice Lewison's reading of the American case law at paragraph 67 was that it did not require ascertainability of these "contacts". I am not at all sure that is a correct reading: it is rather more likely that, as in Mr Justice Lewison's own case of Lennox, the question of ascertainability did not arise or was not called into question. Obviously, if the American jurisprudence had rejected the need for ascertainability, their approach would be inconsistent with the ECJ in *Eurofood* and their case law would have taken a wrong turning in this respect also.

The *Stanford* case raised the interesting issue as to whether a special approach needs to be taken in the case of an ostensibly legitimate business which is in fact used as a vehicle for fraud. At paragraph 68, Mr Justice Lewison recites the submission of Counsel for the United States Receiver that, when a company is used as a vehicle for fraud, the court should investigate the COMI, not of the company itself, but of the fraudsters pulling the strings of the company. Mr Justice Lewison rejected this submission, in my view quite rightly. To ignore the facts about the company and only look at facts relating to the fraudsters would be a plain departure from ascertainability, at least in the usual case where the fraudsters' behaviour is concealed from creditors. As Mr Justice Lewison pointed out at paragraph 69, the very nature of the existence of the fraud behind the scenes makes it unlikely to be ascertainable by third parties.

15 Article 8, Model Law.

The question of a debtor company being used for fraud had already arisen in the *Tri-Continental* case,[16] referred to by Mr Justice Lewison. The debtor companies were insurance companies registered under the laws of St. Vincent and the Grenadines and became subject to winding up proceedings in the Eastern Caribbean Supreme Court. The debtor company's only offices were in St. Vincent, where there were approximately twenty employees. However, by the time the question of recognition arose, there was neither a business nor employees. This was because the business of the debtor companies had been the unlawful sale of insurance policies in the United States and Canada without insurance licences, using false representations that the coverage was backed by licensed and rated insurers.

The "impresario" of the fraud was a United States individual on the run from different states for different financial offences.

No point appears to have been taken or argued in the case or discussed in the judgment with regard to the fact that the business had been fraudulent throughout. No suggestion appears to be have been made that this changed the COMI from an inquiry relating to the debtor company to an inquiry looking at the facts relating to the fraudster. The approach in *Tri-Continental* is therefore consistent with the approach taken by Mr Justice Lewison in *Stanford.*

Whilst on the subject of the *Tri-Continental* case, it is worth mentioning that the judgment exemplifies the United States case-law view that the presumption of registered office is a weak presumption:

> "In effect, the registered office (or place of incorporation) is evidence that is probative and that may in the absence of other evidence be accepted as a proxy for, "center of main interest." The registered office however does not otherwise have special evidentiary value and does not shift the risk of non-persuasion, i.e. the burden of proof, away from the foreign representative seeking recognition as a main proceeding.
>
> Thus, if the foreign proceeding is not in the country of the registered office, then the foreign representative has the burden of proof on the question of "center of main interests." Correlatively, the foreign proceeding is in the country of the registered office and if there is evidence that the center of main interests might be elsewhere, then

16 *Re Tri-Continental Exchange Limited* 349 BR 629.

> the foreign representative must prove that the center of main interests is in the same country as the registered office.
>
> It follows that the burden of proof as to the "center of main interests" is never on the party opposing "main" status and that such an opponent has only a burden of going forward to adduce some evidence inconsistent with the registered office warranting a conclusion of "main" status…"

In my view, this is a reflection of the approach of Anglo-American courts, as mentioned above, which does not like to decide any case simply on the basis of a presumption if there is evidence upon which a proper finding can be made. Although the quote here conforms to the classic Anglo-American views of procedural burden and evidence, it does suggest too weak a role for the presumption and thereby ignores the international origin of the presumption. The presumption, as is well known, reflects the compromise between the certainty of allocating jurisdiction to open main proceedings on the basis of the registered office as against the "real seat" theory of civil lawyers. To say that, once there is any evidence that might suggest that COMI is in a place other than the place of registration, this puts the onus on the liquidator to prove that COMI is in the place of registered office pays too little regard to the force of the presumption which arises from the desirability of certainty. The presumption based on the place of registered office should not lightly be upset and reliance upon, for example, the head office functions test should always involve detailed evidence of the carrying out of head office functions, of course in a way ascertainable to third parties, in the jurisdiction concerned.

The *Stanford* case also has interesting and relevant points about the nature of the Antiguan and United States proceedings and whether they qualify as "foreign proceedings" under the Model Law, but those interesting questions are beyond the scope of this talk.[17]

The Timing Issue

One of the features of the COMI enquiry, which is highlighted by the cases of fraudulent businesses such as *Tri-Continental* and *Stanford*, is the question of the relevant point at which COMI is to be judged. In particular, it is sometimes the case,

17 Subsequently to the giving of this talk, the Court of Appeal ([2010] EWCA Civ 137) upheld Lewison J.'s approach to COMI, but, in effect, allowed the United States criminal confiscation order to be enforced in England, so as to leave it to the United States authorities (and not to either the Antiguan liquidators or the United States receiver) to distribute assets recovered in England to the victims of the alleged fraud.

as in *Tri-Continental*, that the fraudulent business no longer exists and indeed may well have been closed down by the commencement of insolvency proceedings.

On this subject, it has to be recalled once again that the EIR uses COMI as a test of allocation of international jurisdiction between Member States. That in turn has indirect consequences as described above for recognition and enforcement. In the case of the Model Law, COMI in any direct sense only applies as a test for recognition as main proceedings. However, it should be noted that this has, in turn, implications for the question of jurisdiction. Unless jurisdiction is taken in a place which is going to be recognised to have the COMI by the court supplying the Model Law, recognition as a main proceeding will not be available, whatever the view of jurisdiction taken by the original court which opens insolvency proceedings. Thus where recognition is to be sought, as part of a reorganisation or insolvency procedure in a foreign jurisdiction which has the Model Law, and the success of the proceeding depends or may depend on recognition as a main proceeding, the requirements of the Model Law as understood in the relevant jurisdiction need to be anticipated.

This became particularly acute in the *Bear Stearns* case.[18] In that case, Cayman Islands registered entities were put into liquidation proceedings there. The Cayman Islands law regarded the only place where main proceedings could be started as the Cayman Islands themselves. The investors moreover had contracted into Cayman law. Nevertheless, the United States courts refused to recognise the Cayman proceedings as main proceedings, because COMI was not in the Cayman Islands: the business was not really run from there.

I have chronicled and detailed elsewhere the problems caused by this approach and the sense of shock in the offshore jurisdiction world at the abrupt reversal of the previous very helpful attitude to recognition on the part of the United States courts.[19]

As I have pointed out elsewhere,[20] the American U-turn results from a flawed transposition of the Model Law, which is expressly meant to provide an additional mode of judicial assistance,[21] in a way which makes it substantially the sole

18 *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited* 374 BR 122.

19 "Mystery of the Sphinx" (2007) 20 *Insolvency Intelligence* 4, "Beyond the Sphinx" (2007) 20 *Insolvency Intelligence* 55, "Death of the Sphinx" (2007) 20 *Insolvency Intelligence* 157, "Bear Necessities" (2008) 21 *Insolvency Intelligence* 27, "Basis Yield" (2008) 21 *Insolvency Intelligence* 57, "Hawaiian Eye-Opener" (2008) 21 *Insolvency Intelligence* 76, "Refusal of Recognition" *Insol World* (Second Quarter 2008) 14, "Bitter Pill" (2008) 21 *Insolvency Intelligence* 118.

20 Idem.

21 Article 7, Model Law.

statutory mode of access to the United States courts for the purposes of judicial assistance for foreign proceedings. I have elsewhere argued,[22] at some length, that the United States courts should hold that this mis-legislation can and should be supplemented by the use of a common law (i.e. judge made) discretionary mode of judicial assistance for cases such as *Bear Stearns*, at least in situations where there is no concern about the interests of local United States creditors, which in *Bear Stearns* there may well have been. Although this is not the time or place to explore my views in detail, I cannot help noting that a distinguished United States bankruptcy judge, Samuel L Bufford takes up my suggestion in his new book:[23]

> "The United States common law of comity applies to such cases even though they fall outside the scope of Chapter 15 and its recognition provisions."[24]

As far as the EIR is concerned, there has not been a great deal of discussion of the timing issue as far as I am aware in the cases. The express wording of the EIR suggests that the relevant time for the existence of COMI is the point at which proceedings are opened. This is expressly stated to be the position by the English Court of Appeal in the case of *Shierson v Vlieland-Boddy*.[25] The Court of Appeal specifically holds that the facts have to be looked at the relevant time for determination.

The question of timing was critical in that case because the debtor had, as far as the untested evidence went, moved his COMI effectively to Spain before any bankruptcy proceedings were brought, but at a time when he could obviously see them coming.

The other well known case in which a timing issue arose is the ECJ's decision in *Staubitz-Schreiber*.[26] In this case, the ECJ agreed that the time for looking at COMI is the time when proceedings are opened but also held that if there was jurisdiction, i.e. COMI was in the place where main proceedings were begun, at the time of the "request" to open proceedings, then jurisdiction was not lost by a move of COMI between the time of the "request" and the time of the "opening". This is the principle of *perpetuatio fori.*

22 Above note 19.

23 S. Bufford, *United States International Insolvency Law 2008-2009* (2009, Oxford University Press, New York NY), at 45.

24 Citation omitted.

25 [2005] EWCA Civ 974, at paragraph 55.

26 [2006] BCC 639 (Case C-1/04).

No case that I am aware of has so far considered head on the further possibility that COMI should be treated as still subsisting, for the purposes of the EIR, in a jurisdiction where the debtor has left behind assets and/or liabilities which still need to be the subject of insolvency proceedings. There is such a doctrine in English domestic law and it remains to be seen whether it is also the correct approach to the EIR.

The EIR does appear to have been interpreted in Germany, however, as meaning that a fraudulent move of COMI is not to be recognised. One must however be careful to distinguish fraudulent steps designed to defeat or delay creditors from a tactical move of COMI designed to facilitate reorganisation and to benefit creditors: see the views on forum shopping of Advocate-General Colomer in his Opinions both in the *Staubitz-Schreiber*[27] *and Seagon*[28] *cases.*

Terminated Activities

The question arises under the EIR, in relation to the taking of jurisdiction on the basis of COMI, as to the correct approach where the debtor has not moved COMI but has simply terminated its activities. The very helpful and intelligent suggestion has been made by Judge Andrea Csöke in her book on cross frontier insolvency proceedings.[29] She suggests that an analogy can be drawn with the situation of a terminated establishment in the case of secondary proceedings.[30] If the domestic insolvency law of the Member State allows for the opening of proceedings in such a situation, it would make sense to interpret the EIR so as to allow the opening of main proceedings where COMI has not moved but the relevant activity has ceased. The place where the terminated relevant activity used to be located and where COMI would have been found does seem to be the natural place from which to run a main insolvency proceeding in such a case.

With regard to the Model Law, the *Tri-Continental* case, without any discussion of the point, is perhaps some support for the idea that a proceeding where an activity has been discontinued can still be regarded as the COMI, although in that case COMI could have been found in the same place simply on the basis of the location of the registered office, even in the absence of any evidence of business activity.

27 Idem.

28 *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] BCC 347.

29 *A Hataron Atnyulo Fizeteskeptelensegi Eljarasok, hvgorac* (2008, CompLex, Budapest).

30 See the judgment of the Tallinn District Court in *RAB* (14 June 2006).

Timing and Planning

Given the extraordinary shift in the position in the United States as a result of their mis-enactment of the Model Law as the sole statutory means of judicial assistance for foreign proceedings, legal minds have had to work overtime to find ways in which to try and ensure that off shore proceedings are recognised in the United States.

Clearly the lesson of the *Bear Stearns* case[31] and the subsequent *Basis Yield* case[32] of Judge Gerber on 16 January 2008 is that the question of COMI has to be settled in the right direction before any application is made to the United States Bankruptcy Court for recognition.

On the assumption that COMI has to be in the right place at the time that the foreign insolvency proceeding is opened, it is possible to make sure that the relevant facts are in place by the time those proceedings are opened. The correct approach seems to me to ensure that as far as possible the filing takes place in the registered office, but in any event, it must be the case that the debtor company and its business is run from the place where proceedings are to be opened and in particular the "head office" functions are carried out there in a way which is ascertainable to third parties, particularly creditors. Just to make sure, in case there is any problem with COMI, it also makes sense to ensure that there is something which conforms to the definition of "establishment" in the relevant version of the Model Law and for this purpose it makes sense for there to be a functioning office of the debtor company in the jurisdiction of where proceedings are to be commenced. Assuming that these steps are put in place for the benefit of creditors and not in a fraudulent way, there should be jurisdiction to open proceedings under the EIR and there should be mandatory recognition under the Model Law.

I have myself advised on a successful process such as this which led to recognition in the United States under Chapter 15 of the United States Bankruptcy Code. It is true, however, that in that case there was opposition and the matter would have been contested had there not been a settlement.

With regard to shifts of COMI for the purposes of founding jurisdiction under the EIR, there have been a number of successful cases and the well known unsuccessful case of *Hans Brochier*,[33] which emphasises the need to get one's facts right before filing.

31 *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited* 374 BR 122.

32 Judge Gerber, SDNY (16 Jan 2008).

33 *Hans Brochier Holdings Ltd v Exner* [2007] BCC 127.

An example from personal insolvency can be found in the case of *Official Receiver v Eichler*.[34] Dr Eichler had creditors in Germany. He also used to have a property in Germany but had transferred it into his wife's name. The creditors were not very happy about this. German bankruptcy is of course notoriously unfriendly to debtors. Dr Eichler moved to England and lived in temporary accommodation, working as a locum radiologist. He had no creditors in the United Kingdom. Looking at the date of the filing of the request for bankruptcy, Registrar Baister concluded on the limited evidence available to him that Dr Eichler's COMI was in the United Kingdom, on the basis that he had succeeded in changing his COMI from Germany. The United Kingdom was where, at the time of filing, he was conducting the administration of his interest on a regular basis, readily ascertainable by third parties. Registrar Baister pointed out that there was no minimum period required before it can be said that COMI has been established in a new Member State. He added, at paragraph 19:

> "Common sense would seem to indicate that a few days (or even a few weeks) would be unlikely to suffice because that would be at odds with conducting the administration of ones interest in a place "on a regular basis" (as well as being at odds with the idea of an "habitual residence")."

The situation under the Model Law is rather more complicated because one is looking directly at recognition and not jurisdiction and therefore the question arises as to whether for recognition purposes under the Model Law one should be looking at the place of COMI at the time the foreign proceedings were opened or at the time the question of recognition arises, or possibly at some other point.

As a matter of logic and common sense, and in line with the origin of the concept in the EIR, it seems to me that the relevant time for judging COMI must, under the Model Law, also be at the time that the foreign proceedings are opened. On the face of it, there needs to be certainty from the time of opening of the foreign proceedings whether they are to be regarded in countries affected by the Model Law as main proceedings, just as it is essential for European Union countries to know immediately whether a proceeding opened in another Member State is or is not a main proceeding. Incidentally, it is very regrettable that in some countries, unlike the United Kingdom, there is no requirement for the document opening proceedings to state whether or not they are "main" proceedings.

34 Registrar Baister, High Court of Justice, London (22 June 2007).

As against this, taking a different date, such as the date when the question of recognition is considered, would allow liquidators in the foreign proceeding a great deal more flexibility to align COMI with the place of opening. This would be a useful tool in cases where it is designed to benefit creditors, as would normally be the case with liquidators, but of course could also facilitate manipulation and fraud in the rare case where the liquidator is in league with dishonest management or creditors.

Article 2 of the Model Law defines "foreign main proceeding" as:

> "…a foreign proceeding taking place in the State where the debtor has a centre of its main interests."

This is copied word-for-word into Article 2 of Schedule 1 to the Cross-Border Insolvency Regulations 2006, being the implementation of the Model Law in Great Britain (i.e. England and Scotland). Section 1502 of the United States Bankruptcy Code has a slight change of wording:

> ""Foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests."

The Model Law wording, as enacted both in Great Britain and the United States, uses the present tense in referring to "taking place" or "pending". Each refers to the relevant State or country as the place where the debtor "has" its COMI. On a literal reading, therefore, it could be said that the time to assess COMI is not when proceedings were opened in the foreign jurisdiction, but at the time when the question of recognition is being considered.

There is an interesting discussion of this area in "The Unraised Issue in *Re Bear Stearns*: What is the Temporal Framework for Determining the Center of Main Interests?" by Mark Lightner, a law clerk in the United States Bankruptcy Court in New York.[35] Mr Lightner in fact identifies the fact that there are no less than five different possible times which could be used for judging COMI. These include at "lookback" point prior to filing the foreign proceeding, the date of the commencement of the foreign proceeding, the date of filing the application for recognition, a "lookback" period prior to filing of the application for recognition and the date of hearing the application for recognition. Mr Lightner points out that the literal wording appears to favour either the time of filing of the application for recognition or the date when recognition is considered.

35 (2009) 6(4) *International Corporate Rescue* 230.

Mr Lightner argues that European decisions are only of limited influence because they relate to the question of COMI for the purposes of jurisdiction. However, it should be remembered that the United States Courts are directed by their own legislation to look at the international origins of the Model Law and therefore European decisions on the meaning of COMI and the relevant time for ascertaining it under the EIR cannot be so easily devalued. Under the EIR itself, as we have seen, exactly the same relevant date must apply for looking at COMI both for the purposes of jurisdiction and recognition. It would be very odd if the Model Law took a different approach, although one could see the practicability of such an approach.

In the case of *Re Yuval Ran*,[36] a prominent Israeli businessman emigrated from Israel to the United States in April 1997. In July 1997, the bank instituted receivership proceedings against him and a temporary receiver was appointed. Subsequently he was appointed a trustee of Mr Ran's property. Mr Ran took up permanent residence in the United States on a legal basis and was employed there together with his wife. Although the facts as set out in the judgment are not entirely clear, it looks as if it may not have been until 28 October 1999, when the former temporary receiver was appointed trustee of the property of Mr Ran that an insolvency proceeding actually began, the order declaring that Mr Ran "went bankrupt". The trustee was seeking recognition under the United States enactment of the Model Law in Chapter 15 of the United States Bankruptcy Code.

The judge pointed out that to be recognised as a foreign main proceeding, the foreign proceeding had to be "pending" in the country where the debtor had his centre of main interests. He also referred to the presumption based on an individual debtor's "habitual residence" under the Model Law. The judge found that Houston, Texas had been the centre of Mr Ran's main interests since 1997. Accordingly, "the proceeding pending in Israel" was not a "foreign main proceeding" under section 1502(4). It was therefore not entitled to recognition under Chapter 15.

It can be seen from the above that, on these facts, it was only if the foreign insolvency proceedings could be said to have started with the bank's appointment of a receiver in July 1997 and if, by that stage, Mr Ran had not changed his habitual residence to the United States that it could reasonably be argued that his centre of main interests was still in Israel. Given that footnote 1 to the judgment explains that Ran had left Israel after his car and his brother's office had been firebombed, his brother's car destroyed in an acid attack, his parents harassed and he and his

36 Chief Bankruptcy Judge Brown, Southern District of Texas (22 May 2007).

wife had received death threats as well as threats to kidnap their children, it would not have been a surprising conclusion to find that Mr Ran's habitual residence actually changed in April 1997 when he arrived in the United States. Moreover, it must be very doubtful whether a bank instituted receivership was really the start of collective insolvency proceedings. The order of the District Court of Tel Aviv on 28 October 1999, when Mr. Lavie was appointed trustee of the property of Mr. Ran, seems to be a much more likely candidate. By that date, there could hardly be any doubt that Mr Ran's habitual residence was in the United States. In these circumstances, it is hardly surprising that the judgment contains no discussion of the relevant date for looking at COMI and merely refers to the "pending" wording in the statute.

In the case of *Betcorp Limited*, Judge Markel in the District of Nevada produced a lengthy judgment on 3 December 2008, which was entered on the docket on 9 February 2009. This covered a number of issues. *Betcorp* was an Australian registered company which had ceased operations after changes in United States law made its business model unworkable. The shareholders voted to liquidate the company through a members' voluntary winding up under Australian law. This involved the appointment of at least one liquidator registered with the relevant regulator. The judge found that, although *Betcorp* was involved through subsidiaries in business operations in several countries, Australia remained its administrative and executive nerve centre. As a result of a change in United States law relating to internet gambling on 13 October 2006, *Betcorp* was prevented from receiving funds transfers relating to gaming activities from United States customers. Immediately after the passage of this statute, the company ceased operations in the United States and eventually ceased all operations completely. Thus, liquidators were appointed by the members at a time when the business of the company had ceased. A considerable part of the judgment concerns the finding that the members' voluntary winding up is a foreign proceeding within the Model Law. At page 24 of the judgment begins the consideration of the question of the location of centre of main interests. In considering the location of COMI, the judge followed the approach in *Bear Stearns* and elsewhere in the American case law to the effect that the foreign liquidator could not simply rely on the presumption based on the place of incorporation.

The judge also refers to various views of Professor Westbrook including the use of substitute terms such as "principal place of business", "chief executive offices" or "real seat" to be found in statutes in the United States and elsewhere. With respect to Judge Markel and Professor Westbrook, it can be dangerous to take terms other than the autonomous term invented for the purposes of the EIR and borrowed by the Model Law. In particular, it is a misunderstanding to think, as the learned judge apparently thought, on the basis of Professor Westbrook's views, that the adoption of the term centre of main interests in Chapter 15 was:

> "…not intended to create a new concept of location but to build up on existing concepts."

As must be clear from *Eurofood* and the Virgos-Schmit Report, "centre of main interests" was chosen as a new, autonomous concept providing a compromise between the Anglo-Scandinavian emphasis on the place of registered office as opposed to the other continental lawyers' emphasis on "real seat". Given that this is a new, autonomous term, its meaning needs to be understood from the wording, context and case law connected with the EIR. Otherwise, that other important point made by Professor Westbrook and quoted by Judge Markel, namely that:

> "The drafters of Chapter 15 believed … that such a crucial jurisdictional test should be uniform around the world and hope that its adoption by the United States would encourage other countries to use it as well."

would not be met. Of course, when Professor Westbrook refers to "jurisdictional test", that is correct in the original context of the EIR, but in the context of recognition or judicial assistance should, as the Model Law intended, only be an additional basis for judicial assistance.

Unlike the *Ran* case, *Betcorp* does contain an express discussion of the issue of timing, starting at page 31 of the judgment. The objectors in that case argued that the COMI determination should be made with reference to a company's operational history and not merely by assessing where COMI lies at the "petition date". Judge Markel rejected this argument:

> "To accept it would frustrate the goals of using COMI to "harmonise" insolvency proceeding recognition transnationally, and it would make the determination of COMI imprecise and often incorrect."

Judge Markel cited the *Ran* case as:

> "…a prime example as why the court cannot make the COMI determination with an eye toward a debtors operational history. Timing was a decisive issue in *Ran* because, in his past, Mr Ran had substantial interests in Israel, upon the date of the petition for recognition, he had effectively no interests in that country."

Judge Markel regarded *Ran* as an illustration of why looking to a debtor's operational history would increase the likelihood of conflicting COMI determinations as court may tend to attach greater importance to activities in their own countries or may simply weigh the evidence differently. Judge Markel also stressed ascertainability by third parties at pages 32-33 of the judgment.

Judge Markel considered that the decision in *Ran* held that the appropriate time to determine COMI was when the Chapter 15 case commenced. As pointed out, however, it seems to me that in the *Ran* case even if one looked back to the probable start of the insolvency proceedings, the result would make no difference.

Judge Markel stated, at page 33, that looking to the time when the Chapter 15 case commenced was:

> "…consistent with English cases interpreting the EU Regulation, which seemed to select a time linked to commencement or service to the relevant insolvency proceeding." (citing *Shierson v Vlieland-Boddy* and *Collins & Ackman)*

appears to be inexact, with the greatest of respect to Judge Markel. The English cases interpreting the EIR focus on the date of opening of the insolvency proceeding whereas Judge Markel was focusing on the date of the commencement of the recognition proceeding ("the Chapter 15 case"). On the facts of *Betcorp*, of course, there was no material difference between the two dates and the only argument was whether one should look back beyond the commencement of the Australian proceedings.

Interestingly, perhaps because the point does not appear to have been argued, there appears to be no discussion of the fact that *Betcorp's* business had been terminated both by the time the liquidation proceedings started and also by the time the application was made for Chapter 15 recognition. It appears simply to have been assumed that, given that the members' voluntary liquidation followed the termination of business, that one looked to the business that was being carried on immediately prior to termination.

In his article on timing, Mr Lightner makes an interesting point in relation to the *Bear Stearns* case which produced such an unsatisfactory result from the point of view of offshore jurisdictions. He points out that, after the appointment of liquidators, the companies were controlled from the Cayman Islands and, if the date of applying for Chapter 15 recognition or the date upon which recognition was being considered had been taken as the critical date for timing purposes, the result might have been different. As Mr Lightner points out:

> "The apparent inequity and practical problem of administering the Funds' US assets, as identified in *Re Bear Stearns 1* would also have disappeared. The creditors' expectation (that an orderly insolvency proceeding would be forthcoming) would have been honoured and the goals of value maximisation, certainty, predictability, and harmonisation would have been furthered. The Bankruptcy Court could also have tailored relief based on the unique circumstances of the case if it felt that US interests were not being properly protected, and clearly would not have been bound to apply Cayman Island's law to issues properly governed by US law [citation omitted]."

I entirely applaud the potential utility of such an approach, and as Mr Lightner points out it is consistent with a literal reading of the wording of the Model Law. However, it is difficult to believe that such an approach was intended or that it can properly reflect the origin of COMI and the approach to timing in the EIR.

Conclusion

Even a talk of this expanded length can only give you a taste of the richness and variety of European and Anglo-American case law on the concept of COMI as explored in relation to both the EIR and the Model Law.

To summarise the key points explored here, I can conclude that the concept of COMI was undoubtedly meant to be the same under the EIR and the Model Law. As far as English case law is concerned, subject to the appeal pending in *Stanford*, the concept has the same meaning in both places. A number of points follow.

Firstly, whilst the "head office functions" test remains in place, the requirement of ascertainability by third parties as laid down by the ECJ in *Eurofood* must be observed.

Secondly, the presumption based on the place of registered office is a strong one and the onus is on the party seeking to disprove it to do so: the United States approach is entirely mistaken in this regard and has failed to follow the European approach. The use of slightly different wording in the United States version of the Model Law is no basis for taking a different approach.

Thirdly, the concept of COMI cannot be substituted by other concepts such as "principal place of business", however helpful those may be by way of explanatory analogy. Here again, the approach in the United States cases goes off on a false trail.

Fourthly, none of the case law in Europe or in the United States has really faced up to the issue of discontinued businesses but it seems that, at least as long as the insolvency proceeding follows immediately or shortly after the discontinuance, the position will be treated as having continued in the State in which it was in at the last moment of the carrying on of business. The approach here in the European cases and American cases is consistent, albeit not spelt out in either.

Fifthly, it is clear that under the EIR the time for considering COMI is the time of opening of the proceedings, or, if COMI has moved since the time of the filing of the request, the date of the request.[37]

As far as the Model Law is concerned, the origin of COMI suggests that, although the Model Law is dealing with recognition and judicial assistance, and not (at least directly) with jurisdiction, consistency suggests COMI should be judged as at the time of the opening of the proceedings sought to be recognised (or possibly, incorporating the *Staubitz-Schreiber* decision into this), the time at which the request for the opening in the foreign jurisdiction was made. This would promote consistency and certainty, albeit at the price of flexibility and the ability to correct the chaos and injustice caused by the *Bear Stearns* decision. The reality is that the problem caused by *Bear Stearns*, which stems mainly from the wording of the United States version of the Model Law, results from the mis-legislation of the Model Law by making it the sole statutory mode of obtaining recognition or judicial assistance, whereas it was intended to be an additional ground by the express wording of the Model Law, as explained by the Guide to Enactment. The best way to cure the statutory deficiency is to accept that:

> "US common law of comity applies to such cases, even though they fall outside the scope of Chapter 15 and its recognition provisions."[38]

Sixthly, there is no objection to jurisdiction being taken on the basis of a move of COMI or recognition being granted on the basis of such a move if the move is genuinely in the interests of creditors and not a fraudulent move designed to frustrate creditors. This is clear from the opinions of Advocate-General Colomer[39] in relation to the EIR but remains to be explored by the United States case law.

37 That is, at least, if one is considering the jurisdiction of the requested court: it is not clear whether, if the requested court fails to open the proceedings, it is open to the court of the place where COMI has shifted to open main proceedings instead.

38 Judge Bufford (above note 23).

39 See above notes 27 and 28.

Chapter 3

Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities

Mr Justice Ian Kawaley

Introduction

> "The office of the scholar is to cheer, to raise, and to guide men by showing them facts amidst appearances. He plies the slow, unhonored, and unpaid task of observation. He is the world's eye." (Ralph Waldo Emerson)

Bermuda may be said to be part of the British Atlantic and Caribbean world, if one defines this regional construct as encompassing those eighteen formerly and currently British territories located in the Caribbean and adjacent Atlantic and South/Central American areas (Belize and Guyana).[1] This regional grouping cumulatively has a combined population of approximately 6.5 million.[2] While Bermuda itself has a population of less than 70,000 people, the other British Overseas Territories (Anguilla, British Virgin Islands ("BVI"), the Cayman Islands, Montserrat and Turks and Caicos Islands) are even smaller in population terms. What binds them together as a coherent group in legal terms is that they are almost all common law jurisdictions with company and insolvency law regimes heavily influenced by British antecedents. Save for the larger agro-industrial countries of Guyana, Jamaica and Trinidad and Tobago, the remaining fifteen sovereign states and dependencies all depend to greater or lesser extents on offshore financial services and are home to insolvencies with strong cross-border elements, linked to either each other or the United States, Europe and the Far

* This is a re-edited and updated version of a piece first published under the same title in Chapter 14 in B. Wessels and P. Omar (eds), *Insolvency and Groups of Companies* (2011, INSOL Europe, Nottingham) (167-212).

1 The independent, formerly British, states are in fact usually referred to as the Commonwealth Caribbean. The "British" nomenclature assigned to them in this paper is partly for linguistic convenience, but also because of the enduring historical British influence on the insolvency regimes throughout almost all the region.

2 While some in modern Bermuda seek to distinguish Bermuda from the Caribbean region, there are longstanding historical grounds for viewing Bermuda and the Caribbean territories as part of a linked Atlantic world, as the title of the following recent publication suggests: M. Jarvis, *In the Eye of All Trade: Bermuda, Bermudians and the Maritime Atlantic World* (2010, University of North Carolina Press, Chapel Hill NC).

East (principally Hong Kong and Singapore). The present paper will focus on Bermuda with passing references to the other offshore financial centres ("OFCs") for comparative purposes and will seek to identify a few unique cross-border insolvency law challenges and opportunities.

The main narrow and pragmatic point which will be made is that, when considering the question of the extent of cross-border judicial cooperation powers enjoyed by common law courts in jurisdictions lacking modern statutory international cooperation and/or corporate rescue regimes, the bare statutory position will often be of limited significance. This enquiry will be pursued with a view to more consciously reflecting on what the primary function of insolvency law is. At the coalface of most insolvency proceedings and constituting the main focus of companies, liquidators and creditors alike, the following question demands an answer: how much precious value can be eked out of the ruins of the venture which was intended to guarantee prosperity? Preservation of assets, claims against directors and officers, debt restructurings and distribution rules are areas typically addressed with all concerned using the goal of "maximizing the return to creditors" as a mantra. According to the Cork Committee Report 1982, which preceded the enactment of the United Kingdom Insolvency Act 1986:

> "It is a basic objective of the law to support the maintenance of commercial morality and encourage the fulfilment of financial obligations."

Insolvency law, then, claims for itself a very elevated role as the moral face of commercial law, while other fields, such as mainstream corporate law and the law of obligations, the context of remedies apart, are very much the material face of commercial law. To what extent this role appears to be served by the insolvency law frameworks of the region will also be considered, somewhat tentatively, below.

The British Atlantic and Caribbean World Defined

The Jurisdictions Identified

Looking at a typical map of the Caribbean (see Figure 3.1.), one could narrowly construe Bermuda as an isolated mid-Atlantic territory closer to North America than any Caribbean island and meriting attention in its own right. Such a view would be subject to strong accusations of chauvinism, perhaps, despite strong geographical justifications. But, more critically, such an approach would be philosophically incongruous for the writer to take in the context of a paper prepared for the regional division of an international body, the INSOL Europe Academic Forum. The European Union is the mother of modern regional cooperation in cross-border insolvency cases. It seems logical to seek to place Bermuda, with less than 70,000 residents and land-space of little more than 35 square kilometres, into some kind of regional perspective. Belize is geographically in Central America (but bordering the Caribbean Sea), while Guyana, in South America, is also omitted from many typical Caribbean maps.

Figure 3.1. Map of the Caribbean
Source: www.theodora.com

The logical grouping for most legal purposes is the (British) Commonwealth Caribbean broadly defined: eighteen territories embracing both the now independent former British colonies and the remaining British Overseas territories. This is reflective of the Caribbean Community ("CARICOM") region's membership (excluding Surinam, the former Dutch dependency), which also includes nine members of the Organisation of Eastern Caribbean States ("OECS"). The subject territories are set out in Table 3.2. below.

Table 3.2. Insolvency Law Profiles I
Source: Author's Own.

Territory	Statutory International Cooperation Powers	Statutory Corporate Rescue Provisions	Modern Insolvency Law Statute
Anguilla * **	No	No	No
Antigua and Barbuda **	Yes	Yes	Yes
Bahamas	No	No	No
Barbados	Yes	Yes	Yes
Belize	No	No	No
Bermuda *	No	No	No

Contd...

British Virgin Islands * **	Yes (but not in force)	Yes	Yes
Cayman Islands *	Yes	Yes	Yes
Dominica ** (Civil Code)	No	No	No
Grenada **	No	No	No
Guyana	No	No	No
Jamaica	No	No	No
Montserrat * **	No	No	No
St. Kitts-Nevis **	No	No	No
St. Lucia ** (Civil Code)	No	No	No
St. Vincent & Grenadines **	No	No	No
Trinidad and Tobago	Yes	No	No
Turks and Caicos Islands *	No	No	No

* British Overseas Territories   ** OECS members

Of the eighteen subject territories, a substantial minority of six are still British Overseas territories, albeit with their own autonomous legal systems, while twelve are sovereign nations which are fully fledged members of CARICOM. While all of the six British territories are to some extent reliant on offshore business as a major industry, 75% of the independent states are as well. Only three of the twelve (Guyana, Jamaica and Trinidad and Tobago, representing more than 75% of the whole group's population) could obviously be described as primarily agricultural and/or industrial countries. The smaller independent territories rely on varying mixes of tourism, offshore finance and agriculture as well. It has been argued elsewhere that offshore financial centres provide a useful field of study for cross-border commercial legal purposes because of the highly internationalised nature of their legal transactions.[3] Both Jamaica and Trinidad and Tobago are regional economic giants, home to banks and other entities which operate on a regional basis.

So all of the subject territories are likely to be involved, albeit to varying extents, in private international commercial relationships which, when insolvency supervenes, will bring into play the need for cross-border judicial cooperation frameworks as well. The common British legal flavour which runs through the legal systems of all jurisdictions also adds coherence to the group and enables a native of Bermuda to make not wholly uninformed observations about what the law of other jurisdictions is likely to be. Nothing said here about any jurisdiction is intended in any way to be a substitute for formal legal advice. The grouping collectively will be referred to as the British Atlantic and Caribbean world ("BACW").

3 I. Kawaley, A. Bolton and R. Mayor (eds), *Cross-Border Judicial Cooperation in Offshore Litigation: The British Offshore World* (2009, Wildy Simmonds and Hill, London), Chapter 1.

Insolvency Law Profiles

On the insolvency law front, most BACW jurisdictions appear to have company legislation based on the Companies Act 1948 (United Kingdom) (or earlier equivalents in insolvency law terms); that is the position in Bermuda. However, at least two jurisdictions have moved forward to the United Kingdom Insolvency Act 1986 regime (BVI, the Cayman Islands). Two others appear to have followed the Canadian Bankruptcy and Insolvency Act (Barbados, Trinidad and Tobago).[4] These jurisdictions all have explicit statutory frameworks for international cooperation and corporate rescue; however, BVI has yet to bring its international cooperation provisions into force. The overwhelming majority of the selected territories have no express statutory powers relating to judicial cooperation in cross-border insolvency cases at all. Although most have company law provisions relating to schemes of arrangement, which can be deployed in the insolvency context, they have no statutory provisions which explicitly empower the court to supervise a debtor-in-possession financing. However, this challenge is matched by the opportunity to utilize common law powers of judicial cooperation. It is beyond the scope of the present inquiry to explore the scope of operation of the common law in those two jurisdictions which are believed to possess Napoleonic-derived Civil Codes.[5]

The applicable legislation in each jurisdiction is believed to be as follows:

Table 3.3. Insolvency Law Profiles II
Source: Author's Own.

Territory	Insolvency Law Statute
Anguilla	Companies Act (2000 revision), Part 5
Antigua and Barbuda	The Companies Act 1995, Part IV
Bahamas	Companies Act 1992 (2001 revision), Part VII
Barbados	Bankruptcy and Insolvency Act 2002
Belize	Companies Act, Chapter 250 (2003 revision), Part IV
Bermuda	Companies Act 1981, Part XIII
BVI	Insolvency Act 2003
Cayman Islands	Companies Law 2007, as amended by Companies (Amendment) Law 2007, Part V

Contd...

4 See the *Americas Restructuring and Insolvency Guide* (2008/09, Price Waterhouse Coopers), copy available at: www.americanrestructuring.com/08, noting the Bankruptcy and Insolvency Act 2002, 1 L.R.O. 2002, Cap 303 (Barbados) and the Bankruptcy and Insolvency Act 2007, No. 26:2007 (Trinidad and Tobago).

5 In the case of Dominica, the question seems to turn on the construction of the provisions of the Eastern Caribbean Supreme Court (Dominica) Act, Chapter 4:02. On the face of these provisions, it appears that the rules of common law and equity do in fact apply save as modified by statute. In Saint Lucia, it is clear that the common law applies to some extent: see e.g. Eastern Caribbean Court of Appeal, HCVAP 2009:006, *Wilson v James et al*., Judgment dated 6 July 2009, where the common law rules on fresh evidence were applied in relation to a Civil Code claim. Regretfully, the Saint Lucian Supreme Court Act has not been reviewed.

Dominica (Civil Code)	Companies Act 1994, Part IV
Grenada	Companies Act 1994[6]
Guyana	Companies Act, Cap 89:01 (1998 revision), Part V
Jamaica	Companies Act 2004, Part V
Montserrat	Companies Act, Chapter 11:12 (2002 revision), Part IV
St. Kitts-Nevis	Companies Act 1996, Parts XXI-XXIV
St. Lucia (Civil Code)[7]	International Business Companies Act, (2001 revision), Part 9[8]
St. Vincent and Grenadines	Companies Act 1994, Part IV
Trinidad and Tobago	Bankruptcy and Insolvency Act 2007
Turks and Caicos	Companies Ordinance, Cap 122 (1998 revision), Part V

Challenges and Opportunities

The most obvious challenge in relation to an international insolvency case involving a BACW jurisdiction with no modern international insolvency provisions is to determine whether or not international cooperation is possible. The most obvious opportunities are the flexible nature of the common law discretionary powers of cooperation with foreign insolvency courts, which will be discussed in further detail below.

A less obvious challenge, but potentially a more daunting one, is the need for a statutory regime conceptually similar to the European Insolvency Regulation within the new Caribbean Single Market Economy ("CSME"). The intent of the CSME is to lower national boundaries for commercial purposes which will render the traditional national insolvency law regime approach, even supported by modern international cooperation provisions, largely obsolete (at worst) and not fit for purpose (at best). As the present writer has noted in an earlier paper:

> "Why the Common Law Approach is likely to be Inadequate
>
> In these circumstances, the case of Surinam apart (legislation to support recognition may be required there), the common law might appear to be sufficiently flexible to deal meet the needs of the CSME in a more consumer-oriented manner than the more rigid and highly formal EU Insolvency Law regime, at least on an interim basis. But serious weaknesses will exist if cross-border judicial cooperation in insolvency cases is to operate more smoothly than would be

6 The Act itself has not been reviewed. However, it clearly applies to local and international business companies incorporated in Grenada: Supreme Court of Grenada, Claim No. GDAHCV2008/0361, In the Matter of Bank Crozier Limited (in liquidation), Margaret Findlay J, Judgment dated 9 June 2010, copy available at: www.eccourts.org/judgments.html.

7 The Civil Code of Saint Lucia was considered by the Judicial Committee of the Privy Council in National Insurance Corporation v Winmark Ltd [2008] UKPC 36.

8 The local companies' legislation has not been reviewed.

expected in relation to cases involving two or more foreign and unconnected States.

The main weaknesses of the common law regime appear to be practical and commercial problems flowing from: (a) the lack of an automatic recognition elsewhere of main proceedings commenced in the COMI forum, (b) the lack of an automatic recognition elsewhere of a liquidator appointed in the COMI or secondary proceeding, and (c) the absence of common law rules providing for automatic recognition of foreign non-money judgments, such as orders made in a foreign winding-up proceeding. Cross-border insolvency proceedings in the CSME are likely to be excessively costly and slow, and subject to jurisdictional disputes, absent some form of legislative action.

A CARICOM Model Law on Cross-Border Insolvency?

One solution for the problems of cross-border insolvency within the new CSME may be for the Legal Committee in consultation with the Associate Institutions to draft a Model Law on Cross-Border Insolvency. This instrument could borrow from the experience of the EU Insolvency Law, and seek to improve upon its weaknesses. The COMI concept could perhaps be formally defined, and financial services not excluded. Because most CSME jurisdictions are common law jurisdictions, the adoption of a Model Law could, before formal implementation in the domestic law of Member States, furnish the common law courts with a coherent set of persuasive principles to be applied in the interim.

Another approach would be to adopt a treaty which could then be implemented directly in domestic law. The drafting process might be problematic because of the local legal idiosyncrasies which might have to be addressed by individual Member States. A Model Law could be implemented by local legislatures with such modifications as might be required to bring it into conformity with local law.

These are all matters for the regional institutions (in consultation with insolvency practitioners and other key stakeholders) to decide."[9]

9 "Tackling the Problems of Judicial Cooperation in Cross-border Corporate Insolvency Cases: is Common Law Fluidity or Statutory Solidity the Better Solution?" (Paper presented at UWI Faculty of Law Commercial Law Workshop, Port-of-Spain, Trinidad and Tobago, 18-19 August 2008), at 28-29.

If one focuses solely on improving traditional international cooperation between different national insolvency systems, however, the Eastern Caribbean Supreme Court, which links the nine OECS territories, offers a unique and interesting opportunity for developing both common law and statutory judicial cooperation in cross-border insolvency cases between those territories. This unique regional court structure embracing legally separate national Magistrates Courts, High Courts and a single composite regional Court of Appeal links six sovereign States and three British Overseas Territories. Its administrative base is in Saint Lucia. All judges are appointed by a regional Judicial Service Commission, and may potentially be assigned to any territory. However, each territory continues to be governed by its own national laws.[10] Presently, appeals lie to the Judicial Committee of the Privy Council in London, although recourse may in the fullness of time be had instead to the CARICOM-inspired Caribbean Court of Justice ("CCJ").[11] To date, only Belize, Guyana and Barbados have amended their constitutions to replace the Privy Council with the CCJ as their highest appellate courts.

The President of the new British Supreme Court has strongly hinted, extra-judicially, that independent Commonwealth countries should relinquish their historic ties to the Judicial Committee in London and utilize final appellate courts of their own.[12] Chief Justice Ivor Archie of Trinidad and Tobago, in his 16 September 2010 speech on the opening of the new Law Term, also implicitly speaking of the independent Commonwealth Caribbean, made the following eloquent plea:

> "After 48 years of supposed independence, it astonishes me that there is even a debate about whether the Caribbean Court of Justice – the CCJ - should be our final Appellate Court. If we have the moral and intellectual capacity to run our own countries in the region, why can we not judge ourselves? This region has produced many intellectual giants including world class legal luminaries who sit on international courts, so the notion that somehow we will receive a superior form of justice from London bespeaks a self-doubt and an unwillingness to take responsibility for our jurisprudential self-determination. The irony is that, when we have had the courage to do so and to articulate our position, the Privy Council acknowledges that local judges are best placed to understand the context in which laws and regulations are passed and should be applied…

10 See generally: www.eccourts.org.

11 See: www.caribbeancourtofjustice.org.

12 See M. Peel and J. Croft, "Privy Council hampers Supreme Court" (*Financial Times*, 20 September 2009), copy available at: caribbeancourtofjustice.blogspot.com/2009/09/privy-council-hampers-supreme-court.html.

We have, located in this jurisdiction, the Caribbean Court of Justice, comprising some of our best legal minds. We already subscribe to it by reason of our obligations under the Revised Treaty of Chaguaramas. Contrary to some perceptions conveyed in the media, it is not a big drain on our resources. The running expenses of the Court are paid out of the income from a trust fund that was established several years ago. It is already paid for! Accessing the appellate jurisdiction will not cost us any more and it will certainly be more affordable for litigants. What is more, the procedures for the appointment of its Judges and the financing of the CCJ are being studied and hailed internationally as models for assuring judicial independence. Those who resist the adoption of the CCJ as our final appellate Court owe us better explanations than the ones that have been proffered thus far."[13]

The Availability of Remedies for Creditors of Debtors Based "Offshore": Separating Fact from Fiction

"Safely in harbour is the king's ship; in the deep nook, where once Thou callest me up at midnight to fetch dew from the still-vex'd Bermoothes, there she's hid…" (Shakespeare, The Tempest, Act 1, Scene II)

By the early 21st century, nearly 400 years after Shakespeare first projected Bermuda onto the imaginative screen of the English-speaking world, the growth of international business in a global sense has impacted on these "offshore"/"onshore" tensions in two significant ways. More broadly, the significance of private international law has increased in exponential terms, in line with the mushrooming of commercial and personal transactions with an international element. More narrowly, however, as regards the traditionally clearly-defined jurisdictional boundaries between the "onshore" and "offshore" worlds, leading low-tax jurisdictions are becoming increasingly interconnected with the wider world in legal terms. This may be illustrated by examining the extent to which legal mechanisms exist in Bermuda, a prominent example of an "offshore" jurisdiction, to facilitate judicial cooperation with other forums in insolvency matters. Bermuda's Chief Justice Richard Ground, writing extra-judicially, has observed:

13 Copy available at: www.ttlawcourts.org. For a more detailed analysis of the importance of the CCJ for independent members of the Commonwealth Caribbean, see Hon. Justice A. Saunders, "The Fear of cutting the Umbilical Cord… The Relevance of the Privy Council in Post Independent West Indian States" (2nd Annual Eugene Dupuch Annual Lecture, Nassau, the Bahamas, 28 January 2010), copy available at: www.edls.edu.bs.

> "Modern Bermuda is a thriving financial centre, with all the physical trappings of success. In particular, Hamilton, the capital and business centre, has undergone its own sea-change into something rich and strange, and the haunted islands of the imagination where Shakespeare set his Tempest are long gone…"[14]

In the early years of the evolution of OFCs such as Bermuda, in the 1960s and 1970s, such jurisdictions were widely perceived as debtor-friendly and "tax havens". The suggestion that creditor remedies are non-existent or seriously deficient does not withstand even a cursory review of Bermuda's modern insolvency law history. Substantial and effective relief has also doubtless been obtained by international creditors of entities elsewhere in the BACW, most notably in BVI and the Cayman Islands. This is not to suggest that the substantive law and procedural remedies are flawless; rather, it is contended that, in very broad and general terms, offshore jurisdictions such as Bermuda are no less creditor-friendly than major metropolitan countries which are home to leading international financial centres. In the case of the subject territories, the substantive and procedural law relating to commercial creditors' rights is very similar to the law of England and Wales.[15] While this point may well be advanced by some for purely promotional purposes, it is a point which finds support in objective data.

Sources of Data on Insolvency Law and Creditors' Rights in the BACW

An important source of legal data on Bermuda and the OFCs is what might be described as commercial or promotional writing. Such material aims to promote the legal or other services provided by the authors or their firms for commercial purposes and might be said to lack the objectivity and critical dimension expected of academic writing. Such writing, typically in the form of short articles, is in reality simply a modern and more user-friendly version of the more academically rigorous and respected practitioner's text. This very practical material stands or falls on its ability to accurately portray legal developments in the relevant field in a manner which will assist international practitioners to effectively serve their clients. There appears to have been a substantial growth in international practitioner legal scholarship in recent decades commensurate with both the huge growth of the practising legal profession globally and the related massive growth in volume and dollar value of international legal transactions. Some of this has

14 Foreword in P. O'Neill and J. Woloniecki, *The Law of Reinsurance in England and Bermuda* (2nd ed) (2004, Sweet & Maxwell, London), at xi.

15 The focus of the present enquiry is the commercial creditor, not the ordinary consumer. The international creditor of a Bermuda insolvent company will invariably be a corporate entity or a sophisticated individual investor.

been more academic in that it is designed to prepare students of law for legal practice; some has been both academic and practical designed for use by both practitioners and the courts. The short commercial article is more designed for commercial consumption alone.

An Australian writer, who had the privilege of working as a full-time legal scholar, as a full-time legal practitioner and as a full-time judge, is perhaps uniquely qualified to characterise, on an experiential basis, the various species of legal writing. Justice Robert Austin has noted the low light in which "trade writing" is viewed by academics:

> "Legal scholarship in fields such as jurisprudence, criminology, international law or comparative law has a function and purpose that is self-evident. Reflection about the province and function of law, the causes and effects of, and ways of dealing with crime, the role of law in the resolution of international disputes, and the insights that can be gained by understanding and comparing different national solutions to legal problems, are not only fundamentally important enterprises. They are enterprises to be undertaken principally within an academic institution. Those who do that work 'belong' to the community of scholars whose ranks include philosophers, anthropologists, psychologists, sociologists, political scientists, economists and historians. They are occasionally heard to say (quite wrongly, in my experience) that their work is insufficiently appreciated by the legal profession and the wider community, but their security within the academic community is enviable.
>
> In comparison with those subjects, the academic pursuit of company law and equity necessarily involves exposition and analysis of legal principles, activities that some might regard as having a questionable claim to scholarly status. Even Professor Tilbury, who takes a catholic approach to the province of legal scholarship, draws a contrast between 'scholarly' and 'trade' material. In the eyes of some academics other than him (including, in my experience as a head of department, many of the non-lawyers on promotions committees), any expository and analytical writing on, say, company law, that might be useful to judges and legal practitioners is likely to be discounted as merely 'trade' material."[16]

16 R. Austin, "Academics, Practitioners and Judges" (2004) 26 *Sydney Law Review* 463, copy available at: sydney.edu.au/law/slr/docs_pdfs/editions/slr_v26_n4.pdf.

In the same paper, he went on to distinguish the role of the academic lawyer from that of the legal practitioner and judge, concluding as follows:

> "Endeavours of all these kinds have in common the element of placing the products of our legislative, judicial and practitioner colleagues, and the academics and practitioners of other disciplines, within a wider pattern, with a focus on the identification and evaluation of the pattern. In this way, law becomes for academic lawyers a cultural phenomenon rather than simply a process of dispute resolution. The academic does not, qua academic, marshal arguments to advance a particular factual case."

Justice Robert Austin then went on to reflect upon his commercial practice and the distinctive approach to legal scholarship in that domain:

> "My practice as a commercial solicitor was focused almost entirely on transactions and events involving large corporations. While I continued my teaching, research and writing, my main enterprise was to steer corporate clients through the legal thicket towards their commercial objectives. There was no need to justify this activity, whose purpose was self-evident. There was no sense of insecurity. I adopted, of necessity, a utilitarian approach to relevant legal scholarship, except during the limited part of my working week when I could slip again into my comfortable academic cardigan. I found, however, that there was a certain kind of legal academic writing that was of great assistance. Interestingly, I was not much assisted by expository or even analytical writing. I was forced in my daily role to be completely abreast of the relevant legal materials, and to think about them long and hard, in their practical application. The practical application helped me to understand how the legal principles worked, and ultimately to gain a better understanding of the scope and the impact of legal rules than had been possible through pure academic reflection. While I paid attention to expository and analytical writing, I used it principally to make sure that there were no gaps in my perception of the legal landscape.
>
> What proved to be more important was the academic writing on regulatory policy… The principal issue for the regulators is to ascertain the policy parameters of the problem. Where, on novel issues, is policy to be found? In my experience, the policy debate in these areas is conducted primarily in the academic literature of law,

> economics and finance. Work in those fields is a resource of great value to the practitioner."

Finally, he identified the main value of legal scholarship from the perspective of the judge:

> "It follows that, without subscribing to any form of judicial activism, a judge at first instance in a superior court in Australia may be asked to determine uncertain points of law fairly often, and will need to obtain such assistance as is available. Occasionally, but infrequently, there will be competing lines of authority. More often, the question will be whether to distinguish a proposition formulated in the course of solving an arguably different problem. Sometimes, not as infrequently as one might imagine, new problems arise for decision because of legislative change, or because developing commercial activity tests the scope of a law or the principle upon which it is based.
>
> In my experience over the last five years, such as it is, I have noticed that some kinds of academic work are distinctly more helpful than others. Mere exposition of a line of cases is, as you would expect, less helpful than analysis. Professor Tilbury aptly cites Lord Goff's observation that a crumb of analysis is worth more than a loaf of opinion. But even good analytical work tends to be superseded by counsel's submissions, which are likely to adopt what is pertinent from the academic analysis.
>
> I find that three kinds of academic work are particularly useful. The first is academic work that places the issue for determination in its wider social and economic context. One can see, again and again, the influence of such work in the important judgments of appellate courts…
>
> The second kind of academic work takes up a categorically new legal development, and explores its implications and outworkings. This is particularly helpful for the judge who is required to make a decision in the new area. The judge must always beware of making a determination which may have unforeseen consequences. Rigorous academic literature will assist to identify the pitfalls.
>
> Thirdly, I value academic writing that brings into focus legal developments in other countries, particularly the United Kingdom, Canada, New Zealand and the United States, countries whose judicial

experience is most likely to be helpful to judges here. The pressure of judicial work is such that we cannot keep abreast of overseas academic developments in all of the areas in which we are required to make decisions..."

The present paper is informed in general terms by all the three strands of legal scholarship identified by Justice Robert Austin in "*Academics, Practitioners and Judges*", his 20 November 2003 address to the Sydney Law Review 50th Anniversary Dinner. It draws on practitioner as well as more rigorous academic scholarship, seeks to hint at points of theoretical interest as well and also (in discussing developments in several countries) hopefully collates data which may be of interest to judges as well as practitioners and scholars.

The law relating to winding-up and restructuring is described in the reinsurance context in the first scholarly practitioner's text to deal extensively with Bermuda law.[17] The civil and commercial law and procedure of Bermuda is also described in a text first published in loose-leaf and online in 2009 with Bermuda the only member of the BACW to be initially included.[18] Insolvency and other creditor remedies available under the law of both Bermuda and some other regional jurisdictions are discussed in other more practical books and numerous shorter articles all written by practitioners.[19] There is another important body of legal scholarship which must not be overlooked.

Most BACW territories have neither law faculties nor law schools. However, the Commonwealth Caribbean is served by a regional university, the University of the West Indies ("UWI"), with a Law Faculty based in Barbados and Law Schools based in Guyana, Jamaica, Trinidad and Tobago and (more recently) the Bahamas. In addition, the Cayman Islands boast the Cayman Islands Law School, which is linked to the University of Liverpool for academic purposes, but which issues its own vocational qualifications. An invaluable online summary guide to Commonwealth Caribbean legal research listing relevant books and regional law

17 P. O'Neill and J. Woloniecki, *The Law of Reinsurance in England and Bermuda* (3rd ed) (2010, Sweet & Maxwell, London), Chapters 17-18.

18 See N. Hargun and B. Adamson, "Bermuda" in A. Colman (ed), *Encyclopaedia of International Commercial Litigation* (2008, Wolters Kluwer, Alphen aan den Rijn), copy available at: www.kluwerlawonline.com.

19 See e.g. G. Moss, I. Kawaley, H. Seife and N. Montgomery (eds), *Cross-Frontier Insolvency of Insurance Companies* (2011, Sweet & Maxwell, London), Chapter 3 (Bermuda), Chapter 5 (Barbados) and Chapter 7 (Cayman Islands); C. Bickley, *Bermuda, British Virgin Islands and Cayman Islands Company Law* (2nd ed) (2007, Sweet & Maxwell Asia, Hong Kong), Chapter 17; Kawaley *et al*. (eds), above note 3, Chapters 3-5, 10-12 and 17-19 on Bermuda, BVI and the Cayman Islands respectively; J. Fraser, "Bermuda" in P. Smale and C. Jennings (eds), *The International Comparative Legal Guide to Corporate Recovery & Insolvency 2008: A Practical Insight to Corporate Recovery & Insolvency* (2008, Global Legal Group, London); K. George and P. Mitchell, "Bermuda" in *Americas Restructuring and Insolvency Guide*, above note 4.

journals published by the New York University Law School is the "*Globalex-Guide to Caribbean Law Research*".[20] This website interestingly defines the Caribbean legal region as including all members of the BACW, and gives an overview of the various legal systems. While a number of texts appear to be of general interest, none appear to deal with creditors' rights and remedies or insolvency law in detail.[21] However, the most comprehensive source of actual Commonwealth Caribbean legal materials appears to be the UWI Cave Hill Barbados Law Faculty Library, which actually retains regional periodicals and books as well as provides links to various websites for legislation and judgments.[22] Most courts have websites affording free access to electronic copies of judgments.

An initial review of those sources which can readily be identified by means of internet research suggests that the primary sources of legal materials considering the law of BACW territories relating to creditors remedies and insolvency in any detail are practitioners' articles or texts of one form or another, principally focussing on the leading OFCs. To the extent that insolvency law is studied at the postgraduate level, one can imagine that primary reliance in the academic context would be placed on British or other Commonwealth texts. This would merely be consistent with the legislative schemes in the Commonwealth Caribbean being heavily influenced by British or Canadian precedents. Should this speculation be correct, this would also suggest that the insolvency law of the subject jurisdictions will potentially either:

(a) remain subject to higher level and non-self-interested academic analysis by academics in major metropolitan centres beyond the region; or

(b) be at risk of arrested development in the absence of fertilisation by purely theoretical academic analysis.

In the field of cross-border insolvency, it might be argued, an internationalist approach would be welcome, embracing a philosophical approach which has gained international rather than merely local acceptance in any event.

20 Copy available at: www.nyulawglobal.org/globalex/Caribbean1.htm.

21 An exception is A. Burgess, *Law of Corporate Receivers and Receiver-Managers* (2002, Caribbean Law Publishing Company, Kingston). However, books of general interest in this regard include W. Anderson, *Elements of Private International Law* (2003, Caribbean Law Publishing Company, Kingston) (Professor Anderson is now Justice Anderson of the Caribbean Court of Justice); R-M. Antoine, *Commonwealth Caribbean Law and Legal Systems* (2008, Routledge Cavendish, London); C. Denbow, *Life Insurance Law in the Commonwealth Caribbean* (2nd ed) (2009, Bloomsbury Professional, London); D. di Mambro, A. Saunders and L. di Mambro, *The Caribbean Civil Court Practice* (2nd ed) (2011, Lexis-Nexis, London) (forthcoming publication); R. Ramlogan and N. Persadie, *Commonwealth Caribbean Business Law* (2nd ed) (2010, Routledge–Cavendish, London).

22 See: lawlibrary.cavehill.uwi.edu. Libraries are obviously maintained at the three UWI Law Schools as well.

But if legal academics are not focussing on the policy merits of adopting such a legislative approach (in a region where most territories lack modern statutory international cooperation provisions) and the various legal subtleties which inevitably arise from the distinctive local commercial and public policy contexts, the vacuum may have to be filled by practitioner scholars, who may well be required to stretch the traditional parameters of practical legal scholarship.

Are the OFCs Creditor-Averse Debtor Havens?

It is submitted that an abundance of credible legal data exists to rebut the uninformed negative stereotype which suggests that OFCs like Bermuda are fora where creditors' rights are either diluted or non-existent. A recent study, which only directly considered three of the eighteen subject territories, reached the following conclusions:

> "Overall, the position of the British offshore world[23] in relation to judicial cooperation may be summarised as follows. With respect to obtaining evidence for use in foreign proceedings, the subject territories' domestic law is consistent with the applicable international law rules. With respect to enforcing foreign judgments, there is scope for further legislative improvements even though there are no globally adopted reciprocal enforcement rules. As far as cross-border insolvency is concerned, the subject territories have adopted varying statutory approaches but have a demonstrated track-record of providing common law assistance to foreign insolvency courts. The externally-focused nature of the commercial environment in the offshore domain could over time result in these British jurisdictions generating a distinctive body of jurisprudence dealing with cross-border legal concerns. And with their economies heavily dependent on international business, and commercial litigation with an international element enjoying a high profile, the courts in the subject territories appear to be firmly committed to an internationalist rather than a protectionist approach."[24]

Although the position in the BACW generally has not been actually considered here, it is possible to make the following tentative suggestions. The law relating to obtaining evidence in support of civil proceedings abroad is likely to be similar, in most of the region, to the Bermuda, BVI and the Cayman Islands positions.

23 The term "British offshore world" was restricted to six British Overseas Territories in this text.

24 Kawaley *et al.* (eds), above note 3, at 309.

The 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents applies to all six subject territories and five independent states (Antigua and Barbuda, the Bahamas, Barbados, Belize and St. Vincent and the Grenadines) as well. The 1970 Convention on the Taking of Evidence Abroad in Civil and Commercial Matters only formally extends to Anguilla and the Cayman Islands, but the substantive law of Bermuda and BVI has been shown to comply with this Convention in any event.[25] Only Barbados is further formally bound by this Convention.[26] It is possible that domestic legislation giving effect to this Convention exists in other subject jurisdictions which are not bound at the public international law level.[27] The Civil Procedure Rules ("CPR") adopted throughout most of the region, substantially based on their English equivalent, are believed to contain provisions facilitating obtaining evidence for use in foreign courts.

As far as the enforcement of foreign judgments is concerned, all of the independent Commonwealth Caribbean attained independence after Britain oversaw the enactment of reciprocal enforcement of judgment legislation in various colonial territories in the late 1950s. In Bermuda, the Judgments (Reciprocal Enforcement) Act 1958 applies to United Kingdom money judgments and money judgments from, *inter alia*, Anguilla, Antigua and Barbuda, the Bahamas, Barbados, BVI, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia and St. Vincent and the Grenadines. Beyond the BACW, the Bermuda Act applies to judgments from the Australian states and territories and Nigeria as well.[28] It is reasonable to infer that reciprocal legislation does exist in the territories to which the Bermuda Act applies. This regime provides for automatic registration which results in the domestication of the foreign judgment, not unlike the European Union judgment enforcement regime. However, the common law position, which probably appertains throughout the BACW, is that all foreign money judgments (and non-money judgments as well) can be enforced by means of an action on the judgment, following (subject to local statutory modifications) the same principles which would be followed by the English courts.

As far as international cooperation in cross-border insolvency cases is concerned, operative statutory powers only appear to exist in three (Barbados, the Cayman Islands and Trinidad and Tobago) of the eighteen subject territories. The scope of common law judicial cooperation will be considered in further detail below. What

25 Ibid., at 306.

26 See: www.hcch.net.

27 See e.g. the Evidence (Proceedings in Other Jurisdictions) Act 1975, Ch 5:07 (Dominica).

28 Kawaley *et al.* (eds), above note 3, at 137-139 (Bermuda), 142-143 (BVI) and 154 (the Cayman islands, the relevant legislation of which only applies to Australia).

remains to consider by way of background is the general legal framework within which creditors may seek relief.

It has already been mentioned that much of the region has adopted procedural rules based on the English CPR model. The operation of the CPR regime for commercial litigation has been modified in England and Wales for the Commercial Court.[29] Bermuda has adopted the overriding objective of the English CPR regime but retained rules substantially based on the pre-Woolf reforms Supreme Court Practice 1999.[30] Throughout the BACW, therefore, the position is likely to be that civil procedure has a distinctly British (but not Scottish!) flavour.[31] More importantly still, and the Civil Code jurisdictions of Dominica and St. Lucia apart, the substantive common law and equitable remedies for breach of contract, torts, breaches of fiduciary duty and fraud will reflect principles developed in England and Wales and elsewhere in the British Commonwealth, independent and dependent. While local statutory idiosyncrasies, public policy interests and judge-made law refinements will undoubtedly exist, in the international commercial context it is reasonable to expect an internationalist approach to be adopted in the context of the adjudication of creditors' claims.

Offshore Challenges to Creditors' Rights

The countries of the BACW may all broadly be characterised as emerging jurisdictions which have either comparatively recently (within the last 50 years) attained statehood or which remain British dependencies. Those which would claim developed country status are geographically small with economies heavily dependent on potentially volatile externally driven engines. In competing with each other and global financial centres for lucrative business, the OFCs in particular invariably promote a "light-touch" regulatory approach, while at the same time seeking to satisfy international regulatory bodies that local regulation meets international standards. As far as insolvency law in the mature OFCs is concerned, there is a distinct trend towards ample protection of creditors' rights despite the obvious public policy need to attract new potential debtors. Nevertheless, where to draw the legislative policy line will always be potentially controversial.

29 A. Colman, V. Lyon and P. Hopkins, *The Practice and Procedure of the Commercial Court* (6th ed) (2008, Informa Law, London), at 18.

30 Rules of the Supreme Court 1985; Rules of the Supreme Court Amendment Rules 2005.

31 The adoption of the Eastern Caribbean Civil Procedure Rules 2000 and the Trinidad and Tobago CPR is discussed by Justice A. Saunders in "Witness Statements and the New Civil Procedure Rules: The OECS Experience", copy available at: www.caribbeancourtofjustice.org/papersandarticles.

Although Bermuda is generally regarded one of the top two (or three) reinsurance centres in the world, its regulatory regime has often been criticised, often for political or commercial reasons. The suggestion by an anonymous United States insurance broker that Bermuda reinsurers are "*almost-pirates of the almost-Caribbean*"[32] can only sensibly be construed as partly rhetorical and partly made in jest. It is true that Bermuda's regulatory system relies heavily on industry self-regulation, but corporate self-regulation is increasingly recognized as an important tool in promoting responsible corporate behaviour.[33] Yet, while the principal challenges to creditors' rights are perceptual, the need for scholars to look critically and not solely commercially at legal frameworks is ironically more likely to promote the long-term commercial interests of the jurisdictions concerned. In this regard, the following critique of Bermuda's current director liability law is significant:

> "It is now open to a company incorporated in Bermuda to enter into a contract exempting its directors, officers and auditors from all liability (including the liability which previously existed in cases of wilful default and wilful neglect), save in cases of fraud and dishonesty. The amendment appears to allow directors of Bermuda companies to be lazy, incompetent and stupid. But they must not be dishonest."[34]

Section 98 of the Bermuda Companies Act 1981 was amended in 1996[35] to delete the bracketed words from the following provisions:

> "Exemption, indemnification and liability of officers, etc.
>
> 98 (1) Subject to subsection (2), a company may in its bye-laws or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempt such officer or person from, or indemnify him in respect of, any loss arising or liability attaching to him by virtue of any rule of law in respect of any negligence, default, breach of duty or breach of trust of which the officer or person may be guilty in relation to the company or any subsidiary thereof.

32 See: www.theledger.com/Article/20101024.

33 O. Dilling, M. Herberg and G. Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (2008, Hart Publishing, Portland OR).

34 O'Neill and Woloniecki, above note 17, at paragraph 16-036.

35 Companies Amendment Act 1996, 1996:21.

(2) Any provision, whether contained in the bye-laws of a company or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempting such officer or person from, or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any [wilful negligence, wilful default,] fraud or dishonesty of which he may be guilty in relation to the company shall be void…"

The effect of the original indemnity provisions in practical terms was that under the indemnity provisions contained in standard Bermuda bye-laws, if a liquidator wished to sue a former director or officer, a claim would be liable to be struck-out as disclosing no reasonable cause of action if it alleged simple negligence or ordinary breach of duty. The claim would have to particularize allegations of wilful negligence or wilful breach of duty.[36] The 1996 amendment had the effect of permitting Bermuda companies to indemnify their directors and officers not just in respect of simple negligence but in respect of deliberate breach of duty (falling short of fraud and dishonesty as well). It is unclear what international standards exist (if any) with respect to such indemnity provisions, but section 98(2) on its face is not easy to justify.

If it were to be the case that the scope of indemnity could be shown to be inconsistent with the preponderance of international legislative practice in this regard, creditors aggrieved with having to meet such a high standard of liability to recover compensation from an insolvent company's former officers might be able to contend that section 98(2) is invalid because it compulsorily acquires their property rights in breach of section 13 of the Bermuda Constitution. Section 13 prohibits the compulsory acquisition of property save:

(a) in the public interest, provided compensation is payable and its assessment by the Crown can be appealed to the Court (section 13(1)); and

(b) in specified cases including "*as an incident of... a contract*" (section 13(2) (a) (iii)).

The relevant indemnity permitted by section 98(2) is arguably an incident of a contract between the company and its directors. And section 98(2) might be construed as permitting contracts which take away the right of creditors to sue

36 See e.g. *Focus Insurance Co. (in liquidation) v Hardy et al.* [1992] Bda LR 25; [1992] Bda LR 47.

(through a liquidator) former officers whose deliberate breach of duty contributed to a company's insolvency. Savings provisions of section 13(2)(a) are not absolute; each provision applies:

> "…except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

So domestic legislative policy considerations notwithstanding, the extent of director liability exemptions Bermudian companies can provide, a matter of some import to the moral efficacy of insolvency law, may ultimately be subject to any international best practice standards which may be established in any event. Most territories in the BACW are ahead of Britain in having written constitutions with entrenched fundamental rights and freedoms provisions, which the legislative arm of Government may not depart from save by way of a constitutional amendment.

The lack of modern insolvency law frameworks may, it must be admitted, adversely impact on creditors' rights in a variety of ways, particularly in jurisdictions which do not have a wealth of insolvency law expertise or experience. One example may helpfully be cited because it also provides a potential solution to the problem concerned. Bermuda's insolvency law framework (and likely the counterpart schemes in most of the BACW region) only explicitly recognises the right to petition to wind up:

> "…either by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories, or by all of those parties, together or separately." (section 163(1)).

In England, the counterpart provision had been held by the High Court to require a company petition to be authorised by the shareholders unless the bye-laws or articles of association expressly authorised the directors to file a petition.[37] The effect of this decision was reversed by statute in the United Kingdom when section 124(1) of the Insolvency Act 1986 provided that a petition could be presented:

> "…either by the company, <u>or the directors</u>, or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories, or by all of those parties, together or separately." (emphasis added)

37 *Re Emmadart* [1979] Ch 540.

It was seemingly not commonplace for the directors to be authorised by the bye-laws to present a winding-up petition and problematic for directors advised to urgently file to be required to obtain shareholder approval. In *Re First Virginia*,[38] the Bermuda Supreme Court, faced with a winding-up petition presented by a company on the authority of the directors in circumstances where the bye-laws were silent on the authority to petition issue, declined to follow *Re Emmadart*. Instead, the Court preferred the contrary decision of the New South Wales Supreme Court in *Re Inkerman Grazing*[39] and made the appointment of the provisional liquidator sought on the company petition presented on the authority of the directors alone. This case offers a solution to the question of whether directors may determine to present a winding-up petition when neither the bye-laws of the company nor the insolvency statute expressly confers such authority on them. It implies (without deciding) that the position would be different if the bye-laws of the company had expressly required shareholder approval. The decision was based on two main grounds.

Firstly, and operatively, the need for shareholder approval for the presentation of the petition by the insolvent company was dispensed with on the ground that once insolvency supervenes, the management is required to act in the interests of the unsecured creditors rather than the shareholders:

> "52. If it be right that directors in carrying out their general management duties are required, after the onset of insolvency, to have primary regard to the welfare of the company's creditors, why should their powers be construed as excluding the right to take what may be the most important steps towards achieving that goal, absent shareholder approval? The primary duties of directors are set out in section 97(1) of the Companies Act in provisions which are generally accepted as reflecting the common law.
>
> "DUTY OF CARE OF OFFICERS
>
> 97 (1) Every officer of a company in exercising his powers and discharging his duties shall–

38 *Re First Virginia Reinsurance Ltd* (2003) 66 WIR 133; [2003] Bda LR 47.

39 *Re Inkerman Grazing Pty Ltd* [1972] ACLR 102. The learned authors of the Bermuda chapter in the *Encyclopaedia of International Commercial Litigation*, above note 18, at paragraph A1.2, assert that English decisions are not only highly persuasive but also "are invariably followed in practice", based on *Remington v Remington*, Civil Appeal 1977:1. This statement must be read as implying, by necessary implication, that there is no cogent reason not to follow the relevant English decision.

(a) act honestly and in good faith with a view to the best interests of the company; and

(b) exercise the care, diligence and shall that a reasonably prudent person would exercise in comparable circumstances."

53. Does the duty to act in the "best interests of the company" not mean, in the insolvency context, the "best interests of the creditors"? If the interests of creditors dictate that a winding up petition should be filed and shareholders (who may wish to improperly extract funds from the company or recklessly incur further credit in the vain hope that a recovery may be achieved) consider this course is undesirable, does the Act intend that the company drift, in limbo, until an informed creditor or an enlightened shareholder presents a third party petition? This construction of the Act is both illogical and absurd. If the interests of the insolvent company are synonymous with the interests of creditors, the wishes of shareholders become all but irrelevant and it should not be legally possible for shareholders to approve action contrary to the company (and its creditors') interests. On this fundamental ground of principle, shareholder approval cannot be required for a bona fide decision by directors of a company which appears to be insolvent to present a petition for its winding-up in the name of the company. This analysis has the greatest force in circumstances where the bye-laws of a company do not mandate shareholder approval, even though it must be doubted whether bye-laws can validly deprive directors of an insolvent company of the right to present a petition without shareholder approval.

54. Support for this reasoning may be found in the following passage from Palmer's Company Law, Vol 1 25th ed. (Sweet & Maxwell: London, 1992, R, 86: July 2002) at paragraph 8.506:

'There is now a growing body of dicta in the English courts to the effect, that, when the company becomes insolvent or is nearly so, then the interests of the company include the interests of the creditors as well as, perhaps in some cases instead of, those of the shareholders. This view is supported by a number of Commonwealth authorities. An important consequence of this change in the definition of the company for the purposes of directors' duties is that actions of the directors which have adversely affected the value of the company's assets but which, whilst the company was solvent, could have been ratified by the shareholders, may no longer be so ratified.'

55. While this analysis of directors duties, and re-casting of the identity of a company, may only have been articulated in reasoned judgments with the growth of complex cross-jurisdictional insolvency in comparatively modern times, it is entirely consistent with the United Kingdom practice before *Emmadart*, and the New South Wales practice before and after *Emmadart*. This practice did not develop in a vacuum; it can only have been inspired by the textual framework of statutory insolvency law, which once considered makes it obvious that shareholder approval for a company winding-up petition based on insolvency cannot sensibly be required. Indeed, the principle that on a creditor's petition little weight will ordinarily be given to the views of contributories (shareholders) has been established since the mid-19th century (see, e.g., *Re Camburn Petroleum Products Ltd.* [1979] 3 All ER 297 at 303c-d). This practice flows from the umbrella core principle of both corporate and personal insolvency law, that neither shareholders nor the bankrupt may participate in distributions from the estate until creditors are paid in full. This principle is embodied in section 72 of the Bankruptcy Act ("Right of bankrupt to surplus") and section 225 as read with section 158(g) of the Companies Act. Where creditors cannot be paid in full, the shareholders in practical terms have no recognizable interest in the administration of the insolvent estate.

56. In addition, in interpreting the scope of directors powers to authorize winding- up proceedings based on insolvency under the Bermudian Companies Act, regard must be had to the policy of the Act and the commercial context in which it operates. In this regard, I unreservedly adopt the reasoning of Street, J. in *Re Inkerman Grazing Pty Ltd.*, in the above-cited passage on which Mr. Hargun relied. In cases such as the present, it is important that directors be able to take prompt action to preserve assets for the benefit of creditors. In the modern context, particularly in a domicile such as Bermuda where many insolvencies involve far flung creditors and assets, with potentially huge sums at risk, shareholders would not in the insolvency context expect to be consulted on winding-up proceedings. They would probably not be consulted (with a view to giving them a veto power) in the United States or the United Kingdom, the jurisdictions with which we have

> the closest commercial and legal ties. Indeed, it has been suggested that the traditional notion of shareholder control of litigation is dead: Derek French, 'Applications to Wind up Companies' (Blackstone Press: London, 1993), at page 387."

Secondly, and alternatively, the Court held that any implied statutory requirement for shareholders to approve the presentation of a petition in the name of an insolvent company should be rejected as a matter of construction since it would be an impermissible procedural impediment to the constitutional right of access to the Court, protected by section 6(8) of the Bermuda Constitution construed in accordance with European Court of Human Rights case law on Article 6 of the European Convention on Human Rights:

> "65. The legal character of shareholder approval, procedural or substantive, is relevant for the following reason. It is probably true that the right of access to the Court can only be infringed by procedural impediments, and is not infringed by substantive law requirements: *Re Deep Vein Thrombosis and Air Group Litigation* [2003] 1 All ER 935 at 971. For the reasons just stated above, it seems to me that where shareholder approval has no substantive significance in the determination by an insolvent company that a winding-up petition should be presented, any statutory requirement that such approval be obtained would be merely procedural. The position would be otherwise in the case of a solvent company, the vital interests of which cannot be determined without reference to the shareholders. The general rule, that the interests of the company are synonymous with those of the shareholders and on whose behalf all major decisions are taken, would then come into play.
>
> 66. For this additional reason, should the statutory position be considered ambiguous, I would resolve any doubts in favour of the conclusion that no shareholder approval was, in the circumstances of this case, required."

This illustrates that while statutory frameworks may not explicitly provide for matters impacting on creditors' rights, there are often corresponding opportunities through the deployment of creative "lawyering" to fill the apparent statutory gaps. This is perhaps modern law at its best: construing rules that have been codified based on the civil law tradition in a pragmatic way focused on doing justice in the case at hand, following the spirit of the common law tradition. Is this perhaps also an example of what Professor Bob Wessels has described as the "*creeping* *convergence of civil procedural law and common procedural law*"?[40] It is the application of this legal technique which is involved in adapting pre-corporate rescue insolvency frameworks for use in corporate rescue proceedings. As far as judicial cooperation is concerned, however, the application of substantive common law principles to supply rules which can neither expressly nor impliedly be found in statutory rules is required.

Common Law Judicial Cooperation in Cross-Border Insolvency Cases

> "Even though it is possible to discover an underlying concurrence between domestic insolvency laws with regard to some of the most fundamental matters of principle, it must be acknowledged that the dissimilarities are so numerous, and so substantial, as to oblige the realist to accept that the world essentially consists of separate, self-contained systems. When confronted by a case of insolvency containing international elements, national systems have responded by developing their rules of private international law, employing traditional techniques and concepts, to determine issues of jurisdiction, choice of law, and international recognition in conformity with locally accepted norms of decision. The ensuing diversity has been unusually intense, even by the standards of private international law, with the result that the quest for unifying principles has so far proved to be elusive. What can be discerned is an historic struggle between opposing principles, espoused at various times by different schools of thought whose global influence has fluctuated. In so far as a prevalent tendency seems to be emerging at the current time, the rate of progress is slow and the results uneven."[41]

The Origins of Common Law Cross-Border Judicial Cooperation

The modern common law rules on judicial cooperation are built on rules developed in the context of personal bankruptcy in the 18th and 19th centuries. An internationalist approach developed in response to Britain's internationalist commercial and political interests of the period. As Lord Hoffman, writing extra-judicially, has put it:

40 B. Wessels, "A Break Through for Judicial Cross-Border Communication in Europe?" (October 2010), at 2, copy available at: bobwessels.nl/wordpress-content/wp/uploads.

41 I. Fletcher, *Insolvency in Private International Law* (2nd ed) (2005, Oxford University Press, Oxford), at paragraph 1.11.

"British attitudes to cross-border insolvency are a product of its history and its legal and commercial culture… First, British bankruptcy law was formed during the eighteenth and nineteenth centuries, when Britain was the foremost trading nation in the world. The law therefore developed to reflect the needs of a mercantile community in which the assets of an insolvent trader might be situated in any part of the world. Secondly, Britain was an Empire, composed of many countries with widely different legal systems but all subjects of the British Crown. Notwithstanding the differences in legal systems, courts of the Empire were expected to cooperate with other courts and particularly with the courts of the United Kingdom. The right to claim assistance from courts in other jurisdictions and the duty to render assistance to those courts has long been a part of the British system…"[42]

However, it seems clear that the English courts initially developed common law rules of private international law through citing the texts of Continental European scholars.[43] It has been suggested that a 14th century Italian scholar, Bartolus of Saxoferrato, first conceived of the notion of the courts of one forum applying the laws of another forum. However, Dutch theorists appear to have dominated the 16th century, with Hugo Grotius now recognised as the father of public international law. In the 17th century, the most influential text for the two centuries which followed is said to have been written by a Roman-Dutch scholar Ulrich Huber, "*De Conflictu Legum*", which contributed to:

(a) the notion of comity as a rationale for giving effect to foreign law; and

(b) the idea that when one forum is said to be applying foreign law, it is merely recognising vested rights acquired under foreign law.[44]

Against this background, it is quite apposite that Professor Ian Fletcher45 identifies as one of the earliest British cases to articulate the universalist approach to personal bankruptcy in an early 19th century cross-border case which came from British Guiana (now Guyana, part of the BACW region), then a Roman-Dutch

42 L. Hoffmann, "Cross-Border Insolvency: A British Perspective" (1996) 64 *Fordham Law Review* 2507, at 2507-2508.

43 Fletcher, above note 41, at paragraph 1.20.

44 K. Barnes, "The Role of the European Union in the Harmonisation of International Private Law: A Theoretical Perspective" [2009] *Cambridge Student Law Review* 124, at 126-127.

45 Fletcher, above note 41, at paragraph 1.24.

law jurisdiction,[46] and which was decided at first instance by a judge who made extensive reference to Dutch and other civil law treatises.[47] It has been noted of the trial judge:

> "Although… Jabez Henry, was common-law trained, he was equally at home in Roman-Dutch law, having served as President (ie Chief Justice) of Essequibo-Demerara from 1813-1816 and authored a ten-volume translation (published in 1828) of van der Linden's Institutes of the Laws of Holland…"[48]

This historical legacy suggests that common lawyers can only fairly boast of creating a more flexible case by case means of deciding what substantive law rules apply in the context of judicial cooperation in individual cross-border insolvency cases, while owing a heavy debt in terms of legal content to civil lawyers generally and Dutch lawyers in particular. And the case of *Odwin v Forbes* itself provides an helpful illustration of common law judicial cooperation at play. The continuing significance of this early 19th century judgment is amply demonstrated by the recent re-publication of Jabez Henry's own subsequent post-retirement book commenting on the principles articulated in the decision.[49]

Odwin v Forbes reports the Privy Council decision affirming the first instance decision three years earlier of the court of Demerara, with the bulk of the report summarizing the judgment in the court below. It describes the key facts as being that the Plaintiffs were planters in Demerara, British Guiana, who shipped sugar to a firm in London (Turnbull, Forbes & Co.), of which the Defendant was a partner. For payment, the Plaintiffs drew bills on the firm until its bankruptcy, after which the bills were not honoured. Having obtained a certificate of discharge from his bankruptcy, in which the Plaintiffs did not prove, the Defendant migrated to Demerara where he was sued for the pre-discharge debt. The Defendant successfully contended that the English discharge order should be recognised by the Demerara Court as discharging his liability to the Plaintiffs under British Guiana law. The first instance decision is fully set out in Jabez Henry's recently re-published book and runs to almost 90 typed pages, only one of which summarises the facts.

46 The Civil Law of Guyana Act, Cap 6:01, enacted on 1 January 1917, seems to have effectively abrogated Roman-Dutch law for most purposes and introduced the rules of common law and equity in its place.

47 *Odwin v Forbes* (1817) 1 Buck 57 (PC).

48 J. Glenn, "Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing" (2008) 12(1) *Electronic Journal of Comparative Law* 1, at 13 (note 57), copy available at: www.ejcl.org/121/art121-10.doc.

49 J. Henry, *The Judgment of the Court of Demerara, in the Case of Odwin v. Forbes (1823)* (1823, S. Sweet, London) (reprinted 2010, Kessinger Publishing LLC, Whitefish MT).

The court of Demerara (chaired by Henry but also comprised of six other panel members) firstly analysed the extent to which certain laws, such as those relating to bankruptcy, lunacy, marriage, wills and estates, were generally regarded (in various European countries) as having universal effect based on the domicile of the person concerned. The judgment stated:

> "Having now considered the general principles, as they bear upon this subject, and shewn how far, according to the third proposition of Huber, one country gives effect to the laws of another, from a principle of comity and mutual convenience, we shall proceed to the second part of the question, which is to consider the nature and effect of the English bankrupt laws, and whether the admission of them would be within the principles we have just considered..."[50]

The first instance judgment notes that English bankruptcy statutes, dating back to 34 and 35 Henry VIII, chapter 4, had consistently provided that an assignment of the bankrupt's assets for the benefit of his creditors took place upon bankruptcy creating a fund over which the debtor neither had title nor control. 5 George II, chapter 30 provided that:

(a) the issue of a certificate to the bankrupt operated as a release and discharge from all debts due under the bankruptcy commission; and

(b) in dealing with property located abroad, the statute was clearly intended to have universal operation.

The Demerara court then went on to consider:

> "…how far other independent states have admitted this ubiquity, either in principle, by assuming the same power and right in their own bankrupt laws; or in practice, by giving effect to those of Great Britain."[51]

This was a very sophisticated analysis. The court, having concluded that foreign laws were only recognised and given effect to on the basis of "*comity and mutual convenience*", tested the contention that the bankrupt's discharge in England should be given effect to under British Guiana colonial law by reference to:

(a) how far other nations asserted universality for their bankruptcy laws; and

50 Ibid., at 99-100.

51 Ibid., at 100.

(b) how far other nations recognised British bankruptcy law as having extra-territorial effect.

This approach indicates that in 1814, long before the late 20th century advent of internal self-government for British Overseas Territories, colonial legal systems were (to some extent at least) wholly independent legal systems which dealt with conflict of law issues within the Empire in the same manner as conflicts between the law of the colony and an entirely foreign state.

However, in *Odwin v Forbes*, there was the further distinction that the formerly Dutch territory had retained Dutch civil law; the court concluded that the issue before it:

> "…being a *casus omissus* in our laws, must be regulated by the laws of Holland, or our customs; and in failure the civil law, so far as those laws can guide us..."

The court's decision, which instrumentally fed the well of "English" common law principles relating to the discretion to recognise foreign insolvency proceedings and their effects, was primarily based on an analysis of Dutch conflict of law principles! The Court concluded:

> "It is therefore only upon the question, how far on the general principle of mutual comity between independent and foreign tribunals, we can give effect to the certificate without prejudice to our own citizens, that this court can take notice of it as a defence, and give it equitable consideration. There are many cases in which this court could not, without great prejudice and injustice to its own citizens, give effect to English bankruptcy laws; but in this case, as no such prejudice appears, as no positive law or statute intervenes, and the question is perfectly *res integra*, we may give equitable circumstances and general principles their due weight in our decision.
>
> The court therefore, considering that the assignment under the English commission is compulsory on the part of the bankrupt; that it divests all his property out of him wheresoever situate; that by its universal and penal effect it deprives him of the means of compounding with his foreign creditors; and further considering that the laws of Holland give effect to this assignment: that this court also does it, and has done

> it under this commission; we think it but equitable that we should give equal effect to the certificate..."[52]

It is a testimony to the breadth and depth of the analysis to be found in the first instance judgment of the Court of Demerara that the Judicial Committee of the Privy Council affirmed the decision and saw no need to furnish additional reasons.[53] The fact that the case was reported demonstrates that the principles enunciated by the Caribbean Court were considered to be of general application. Almost 200 years later, the judgment, undoubtedly written substantially by Jabez Henry himself, is still relevant in explaining the otherwise hidden and mysterious roots of the modern common law discretion to recognise the effects of foreign bankruptcy and insolvency orders and the proceedings in which they are made. It is based on the concept that most countries intend their bankruptcy laws to have universal effects and recognise the common intent of other countries in this regard, but is subject to a reservation of the right to decline recognition where recognition would conflict with compelling countervailing local interests.

Recognition of Foreign Winding-Up Orders and the Status of Foreign Liquidators

The oldest and most fundamental common law power in the field of cross-border judicial cooperation in the insolvency field, therefore, is the recognition of foreign winding-up orders and the recognition of the right of liquidators appointed by a court in the company's place of incorporation to act on behalf of the insolvent company. This marries two conflict of law rules; the first, and arguably, most important concerns what law is regarded as governing matters of corporate status, while the second and subsidiary rule concerns the rules governing the recognition of foreign judgments. In describing the content of these rules, it is helpful to remember what the relevant legal sources are. The leading practitioners' text in this field, Dicey and Morris, describes the three sources as statutes, case law and the writings of jurists and 17 years ago regarded statute law as increasingly the primary source.[54] However, the learned authors go on to acknowledge:

> "There remain large areas of conflict of laws where case law is still the most important source, and the courts still have a creative part to play."[55]

52 Ibid., at 100.

53 *Odwin v Forbes* (1817) 1 Buck 57, at 64.

54 L. Collins (ed), *The Conflict of Laws* (Volume 1) (12th ed) (1993, Sweet & Maxwell, London) ("Dicey and Morris"), at 7-8.

55 Ibid., at 8.

In Bermuda and much of the BACW region, conflict of law rules relating to the insolvency of companies incorporated abroad is not dealt with by statute. The relevant case law is distilled into various concise rules in Dicey and Morris, which is routinely relied upon in the courts of Bermuda as highly persuasive authority as to the relevant common law rules.

Dicey and Morris Rule 154 states as follows:

> "(1) The domicile of a corporation is the country under whose law it is incorporated.
>
> (2) A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries then the corporation is resident in each of these countries."

Rule 155 states as follows:

> "The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England."

Rule 156(2) provides as follows:

> "All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

So, before one considers the specific context of insolvency, it is apparent that the common law conflict of law rules would apply the law of a company's place of incorporation to:

(a) questions relating to the existence or dissolution of a foreign company; and

(b) questions relating to its constitution, however such issues arise in proceedings before the local court.

Within this conceptual framework, it is only logical that Rule 160 provides as follows:

> "The authority of a liquidator appointed under the law of the place of incorporation is recognised in England."

Although Dicey and Morris acknowledge that recognition may also be given to a liquidator appointed by some other competent court, Rule 160 states the normal rule as clearly established by judicial authority.[56] As Professor Fletcher points out, this approach is strongly reflective of the position in personal bankruptcy.[57] That these principles form part of the common law not just in England, but in the BACW region as well, is illustrated by the Eastern Caribbean Court of Appeal Anguillan decision in *Re Globe-X*,[58] where Gordon JA opined as follows:

> "[13] In Smart's 'Cross Border Insolvency' at Chapter 6, a large number of examples are given of the practice of courts, both common law and non-common law, recognizing the effect of a winding-up order made in the country of domicile of the company being wound up. As learned Queen's Counsel for the Respondent put it in his argument, it is a necessary concomitant of the recognition accorded to a body corporate established under a foreign legal system. I am therefore satisfied that the High Court of Anguilla has the necessary jurisdiction to recognize the Winding-up Order made by the Bahamian court."

The previous year in BVI, the Eastern Caribbean High Court recognised a German insolvency representative without statutory authority. In *Autland*,[59] Rawlins J (now Chief Justice of the Eastern Caribbean Supreme Court) held in his 16 April 2004 judgment:

> "International Recognition
>
> [11] According to the evidence of Mr. Fritz, by virtue of the principle of universality, every German insolvency proceeding is entitled to international recognition. There is reciprocity and comity. He said that the principle of universality also extends to foreign insolvency proceedings where assets are located within the German jurisdiction. He cited Article 102 of the Introduction Act to the Insolvency Code as authority for this. According to the deponent, this Article mandates that foreign insolvency proceedings must be recognized in Germany. He said that, in particular, the assets of a foreign company that is the subject of such proceedings outside of Germany are part of the foreign proceedings. Additionally, foreign insolvency proceedings

56 Dicey and Morris, in the absence of clear authority, suggest a similar rule applies to the recognition of foreign receivers (Rule 161(2)).

57 Fletcher, above note 41, at paragraph 3.91.

58 *Re Globe-X*, Civil Appeal 2003:No. 4, Judgment dated 23 May 2005.

59 *Autland Heavy Equipment & Construction v Holzmann International (by Ottmar Hermann, as the Insolvency Trustee appointed by the District Court of Frankfurt/Main, Germany),* BVIHCV: 2002/0111.

are enforced in Germany in relation to the assets of insolvent foreign companies that have assets in Germany.

[12] In passing, Mr. Fritz afforded an insight into the recent regime for reciprocity within the European Community. This, he said, falls under the European Community Regulation on Insolvency Proceedings that came into effect on 1st June 2003. The effect of it is that insolvency proceedings that are instituted within any member state of the Community are automatically recognized in all Community States.

Findings and Order

[13] No evidence was presented by or on behalf of Autland on the issue that is for consideration on this further hearing. The evidence that was presented on behalf of Holzmann is unchallenged. It is cogent and convincing. I accept that Holzmann is in the process of insolvency proceedings in Germany, and that from 1st June 2002, when the insolvency trustee was appointed, Holzmann's assets vested in the insolvency trustee. This is under German law. I also accept that under German law, this applies to the assets of Holzmann in foreign countries.

[14] Whether this Court would recognize the insolvency proceedings in Germany is a matter of our law. We have no provisions for the reciprocal recognition and/or enforcement of Orders that issue from a German Court. I am not aware of any relevant Treaty provisions that Her Majesty's Government extended to this Territory. This Court recognizes the importance of extending and accepting recognition of Judgments by comity, particularly in commercial cases. I indicated in the Judgment that was delivered in this case that I would be willing to extend it, once there was sufficient evidence to satisfy me that, under German law, the assets of Holzmann, including its foreign assets, vested in the insolvency trustee prior to the institution of the claim in this case."

Conversely, liquidators appointed by a foreign court over a local company cannot ordinarily expect to be recognised in the company's domicile, especially if liquidators have already been appointed there. In such a case, the Cayman Grand Court (Henderson J) was nevertheless willing to confer the status of *amicus curiae* on Singapore liquidators and to give them limited recognition.[60] Recognition of the appointment in a third forum (the Bahamas) of liquidators, whose status in the company's place of incorporation (Minnesota) was unclear, was also declined by the Cayman Grand Court (Levers J).[61]

To be contrasted with this settled position is the somewhat fluid question of whether or not a foreign liquidator appointed in a forum other than the company's domicile will be recognised. The Eastern Caribbean Court of Appeal recently declined to recognise the appointment in the United States of receivers over a Nevis company on the grounds that there was, on the evidence, insufficient connection between the company and the United States.[62]

A significant practical limitation on common law recognition of foreign winding-up proceedings, to be contrasted with modern statutory international recognition provisions, is the view the English common law takes on the impact of a foreign liquidation on assets within the jurisdiction. The position is that, until an ancillary winding-up is commenced before the local court, the assets of the foreign insolvent company neither vest in the foreign liquidator nor receive the benefit of a liquidation stay.[63] This unsatisfactory situation creates challenges which can only probably be resolved through statutory solutions. The restrictive English view may not necessarily be followed elsewhere. The BVI High Court in *Autland* appears, albeit in a case where the point does not appear to have received the benefit of full argument, to have recognised both:

(a) the appointment of the foreign liquidator; and

(b) the vesting of the assets of the company in the liquidator under foreign law.

If this was a conscious departure from the English rule that a foreign liquidation may be recognised but the effects on the status of the company's foreign assets may not be, the approach adopted by Rawlins J finds broad support in the analogous approach taken by Lord Hoffman and the Judicial Committee two years later in *Cambridge Gas*.[64] In the latter case, where this nice conflict of laws point was also not expressly addressed, share rights governed by Manx law were held to have been validly extinguished by United States corporate rescue proceedings involving an Isle of Man company, which the Manx Court recognised. While the latter case did not

60 *Re Orient Networks Holding Ltd* [2004-2005] CILR 540.

61 *Re Univest Multi-Strategy Fund II Ltd* [2006] CILR 452.

62 *Millennium Financial Ltd v Thomas McNamara et al.*, HCVAP 2008:012, Judgment dated 15 March 2010.

63 Fletcher, above note 41, at paragraph 3.95.

64 *Cambridge Gas Transport Corp. v Official Unsecured Creditors Committee (of Navigator Holdings PLC and others)* [2006] 3 All ER 829.

deal with the specific question of the title to company assets, it did effectively decide that a foreign insolvency order could be recognised even if it affected rights under property located in the jurisdiction of the local court and governed by local law.

Also problematic, at the end of a foreign liquidation proceeding, is the fact that the discharge of debts in that proceeding will only clearly be recognised at common law if the relevant debts are governed by the law of the overseas liquidation forum, but not otherwise. As Professor Fletcher has pointed out, this rule is inconsistent with the generous approach of recognising the foreign winding-up proceedings generally:

> "Therefore the paradox is sustained whereby English law, acting in one mode, can recognize the foreign liquidation in the general sense and also recognize the standing of the foreign liquidator, while conducting those proceedings, to claim English assets. In contrary mode, however, if the foreign proceedings have concluded with the supposed discharge of all provable claims, any that happen to be governed by a law other than the lex concursus are not considered to be discharged in the eyes of English law, but could be re-asserted if, for example, further assets come to light in this country."[65]

It is submitted that this problem has been partially resolved by the robust approach taken in recent years to judicial cooperation in relation to foreign corporate rescue proceedings, which will be discussed below.

The Judicial Assistance Discretion

The judicial discretion to assist foreign insolvency courts appears to be a substantive common law power which supplements the primary private international law rule that a foreign liquidator appointed in the company's place of incorporation will be recognised. According to Dicey and Morris:

> "A prominent and distinct feature of the private international law of insolvency has been the development of procedures whereby English courts have a discretion to provide assistance in aid of foreign proceedings. Although there were no statutory procedures in the context of corporate insolvencies until the Insolvency Act 1986, it was clear that the principle of cooperation was recognised at common law...."[66]

65 Fletcher, above note 41, at paragraph 3.101.

66 Dicey and Morris, above note 54, Volume 2, at 1140.

This power has been widely utilised in Bermuda. It may be reasonably assumed that, absent any conflicting local statutory provisions, the power will be held to exist by the courts throughout the BACW region. The forms of common law assistance which have taken place fall into three broad categories:

(a) assisting foreign liquidators with or without the commencement of ancillary local proceedings;

(b) coordinating concurrent liquidation proceedings on a reciprocal basis; and

(c) assisting foreign corporate rescue proceedings, including proceedings in which the foreign proceedings serve as the main proceedings in relation to a local company.

Judicial Cooperation in Practice: Recent Case Law from the British Atlantic and Caribbean World

Assisting Foreign Liquidators with or without the Commencement of Ancillary Local Proceedings

> "...it is now well established that in an appropriate case the Bermuda Court would assist a foreign court in a cross-border insolvency on the basis of well-established common law principles."[67]

In *Re Foundation Partners*,[68] the Supreme Court of Bermuda (Kawaley J) responded to a Letter of Request from the Cayman Grand Court by:

(a) recognising the winding-up order and appointment of the joint liquidators in respect of a Caymanian company made by the Caymanian Court; and

(b) granting a stay of proceedings against the company, without commencing ancillary winding-up proceedings.

The reasons for this decision included the following:

> "11. It is true that these broad statements of principle leave to be answered on a case by case basis the precise parameters of the scope of particular forms of assistance which this Court may provide to a foreign liquidator. However, there seems now to be no doubt that this Court may at least empower a foreign insolvency representative to do all acts in Bermuda (in relation to Bermudian located assets

67 O'Neill & Woloniecki, above note 17, at paragraph 17-072.

68 *Re Foundation Partners Ltd* [2009] SC (Bda) 36 Com (29 July 2009).

of the company in liquidation abroad) as could be performed by a local liquidator if ancillary proceedings were commenced here. In *Cambridge Gas Transportation Corp. –v- Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 A.C. 508 at 518, Lord Hoffman opined as follows:

'22 What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction". At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.'

12. In *Re Dickson Holdings Limited* [2008] Bda LR 34; (2008) 73 WIR 102, I indicated that this Court might have reservations about recognising the foreign liquidation of a Bermudian company without the commencement of local proceedings if local public policy issues were engaged. Such reservations would not likely arise when the assistance sought relates to a proceeding in the insolvent company's own domicile, as in the instant case. More pertinently, however, an order similar to the specific order sought in the present case was granted by the English High Court in *Re Phoenix Kapitaldienst GmbH* [2008] BPIR 1082, a case which was also referred to in the course of the hearing. In that case, statutory recognition of the foreign proceedings under section 426 of the Insolvency Act 1986 was not available in respect of a German insolvency proceeding. Nor did the EC Council Regulation on Insolvency Proceedings 2000 apply as the company was an investment undertaking. Following the *Cambridge Gas* case, Registrar Jaques made the following order:

“(1) the appointment of Frank Schmitt, Attorney-at-Law, Olof-Palme-Strasse 13, D-60439 Frankfurt (the applicant) as Insolvency Administrator of Phoenix Kapitaldienst GmbH by the Local Court Frankfurt (Insolvency Court) pursuant to an order made on 1 July 2005 a copy of which together with the certified translation thereof is appended hereto in the proceedings (the Proceedings) more particularly set out in the schedule hereto be recognised by this Honourable Court;

(2) without prejudice to the generality of the order made in para (1) the applicant as such administrator be empowered or otherwise entitled to exercise and/or enjoy all such rights, powers, duties and obligations contained in and afforded to Licensed Insolvency Practitioners appointed as officeholders pursuant to or otherwise made in connection with the Insolvency Act 1986 including but not limited to the right to exercise any and all powers available to such officeholders arising under or otherwise available in connection with s 236 of the Insolvency Act 1986, such powers to be exercised in relation to the proceedings.”

13. No direct authority was cited for the stay sought by the JPLs which was effectively in terms mirroring the statutory stay which is no doubt in force in Cayman and which would undoubtedly be triggered under section 167(4) if there were ancillary winding-up proceedings instituted here. However, it seemed clear to me that little practical purpose would be served in recognising the appointment of the JPLs and empowering them to collect and preserve assets if this Court was not also willing to grant a stay of any proceedings here against the Company.

14. There can be no question that if Bermudian liquidators had been appointed, they would [be] empowered to “bring or defend any action or other legal proceeding in the name of and on behalf of the company”: Companies Act, section 175(1)(a). They would accordingly be able to apply, under section 165 of the Act, to stay any pending proceedings against the Company between the date of the presentation of the petition and the making of a winding-up order. By necessary implication, the liquidators would also likely be able to apply preemptively to restrain the institution of proceedings in breach of the statutory stay (by, for instance, purported secured creditors), invoking the general jurisdiction of the Court to grant injunctions

> to prevent interference with the applicant's legal or equitable rights. Such injunctive relief might more typically be sought, perhaps, with a view to preventing the dissipation of assets rather than the institution of proceedings, but the Court's jurisdiction to grant injunctive relief to protect the interests of the insolvent estate would in such context be fundamentally the same."

This decision did not result from an *inter partes* hearing following full argument and so has limited authoritative effect. It will likely be the exception rather than the rule, when limited relief is sought by foreign liquidators, that effective judicial assistance will be available without the far clearer statutory support afforded by ancillary winding-up proceedings. In another 2009 *ex parte* ruling which did not result in any considered judgment, the Bermuda Supreme Court (Bell J) on an unopposed basis granted an ancillary winding-up order to BVI liquidators of two affiliated insolvent BVI companies which had conducted business from Bermuda. The companies were Bernard Madoff feeder funds and the foreign liquidators wished to utilize the statutory examination provisions of section 195 of the Companies Act 1981 to obtain information from their Bermuda-based former auditors. The jurisdiction of the Bermuda Court to wind up an overseas company operating in Bermuda without a permit was subsequently confirmed by another judge in the context of acceding to the liquidators' document production application, although this first instance decision is currently subject to a pending appeal.[69]

In *Re Stanford*,[70] the High Court of Antigua and Barbuda (Thomas J) removed the joint liquidators, in part, to facilitate more effective cooperation with office holders and proceedings abroad. This order was directly made on the application of a creditor, but the grounds for removal included complaints that the liquidators had failed to:

(a) cooperate with a United States Receiver; and

(b) seek recognition from a competent Canadian court before taking various actions there.

This case did not involve assisting foreign liquidators of an overseas company as the bank was a local company with substantial connections abroad.

An elegantly pragmatic approach to the recognition of a foreign liquidator of a local company was recently adopted by the Cayman Grand Court (Quin

69 *Re Kingate Global Fund Ltd; Re Kingate Euro Fund Ltd* [2010] SC (Bda) 47 Com (20 August 2010).

70 *Re Stanford International Bank (in liquidation)*, Claim No. ANUHCV2009/0149, Judgment dated 8 June 2010.

J), based on common law principles before the current statutory international cooperation provisions were brought into force. A Caymanian company with primary commercial ties to the United States was placed in liquidation there and a Chapter 7 trustee was appointed. Shareholders subsequently presented a winding-up petition in the Cayman Islands and sought to appoint liquidators there. The directors opposed the application on the grounds that it was unnecessary, in light of the appointment of the Chapter 7 trustee, and might result in complications; alternatively, they sought a stay of any order appointing Caymanian liquidators. The Grand Court appointed one liquidator (not the two sought) as:

(a) the primary liquidation proceedings were those in the United States and the Chapter 7 trustee might at some point seek recognition in the Cayman Islands; and

(b) certain important matters never fell to be resolved in the place of the company's incorporation.

In addition, the appointment order was stayed to permit the Cayman liquidator to liaise with the trustee with a view to potential cooperation.[71] As Quin J observed:

> "48 I should state that at this stage the Chapter 7 trustee has not made any application to be recognized by this court, nor has he appointed attorneys to make any representations on his behalf. I do acknowledge that Mr. Peterson requested to join the hearing of the petition by telephone, but I was of the view that, without meaning any discourtesy whatsoever to Mr. Peterson, a more formal approach should be made on the first occasion. Proceedings in both the Grand Court of the Cayman Islands and the US Bankruptcy Court for the Northern District of Illinois are at a very early stage, and it is reasonable to assume that as Chapter 7 trustee, Mr. Peterson is extremely busy coming to terms with the facts behind the failure of the substratum of the company. However, as matters stand, this court has not received any letter of request for assistance from Mr. Peterson, or from the US Bankruptcy Court for the Northern District of Illinois.
>
> 49 I did state, when we adjourned on November 6th, that this court embraces the concept of co-operation and co-ordination as reflected by the principles of international judicial comity. I would have thought

71 *Re Lancelot Investors Fund Ltd* [2009] CILR 7.

that it must be in the best interests of the Cayman petitioners and indeed all the creditors of the Cayman company for co-operation and assistance between the two jurisdictions to be actively encouraged."

Coordinating Concurrent Liquidation Proceedings on a Reciprocal Basis

In Bermuda, the coordination of parallel insurance liquidations twinned with parallel schemes of arrangement in Bermuda and London became common place in the 1990s. By the early 21st century, the emphasis had shifted to concurrent corporate rescue proceedings, principally between Bermuda and the United States and Bermuda and Hong Kong (see further below).

The most notable modern example of judicial cooperation in respect of concurrent liquidation proceedings in the BACW region remains the BCCI case, in which the Grand Court of the Cayman Islands was involved in the worldwide liquidation of the affiliates of the Caymanian Bank of Credit and Commerce International (Overseas) Ltd. Smellie CJ recently determined that a single exchange rate as at the winding-up date should be used for converting other currencies into USD, the worldwide liquidation currency. In the course of his judgment, he reviewed the history of the liquidation (covering a period when only common law judicial cooperation powers were available under Caymanian law) and explained the most recent problems being addressed by the various courts concerned. The issues arose from the paradoxical fact that creditors in jurisdictions such as the Cayman Islands, whose assets were ring-fenced for their "protection" and had not participated in the global pooling arrangements, had achieved returns substantially less than the eventually impressive and unforeseen global dividend of more than 85%. These creditors were now seeking to invoke the universalist principle to top up their dividends under the English hotchpot rule:

> "1 The worldwide liquidation of the BCCI companies is now in its final stages. The bleak prospect of recoveries at the date of liquidation has since been transformed into the reality of actual dividends paid to creditors in the global liquidation of 86.5% to date. A major reason for this level of success has been the close co-operation between the global liquidators of the principal BCCI companies. The question now arising for resolution by this court is this: At what rate of exchange should dividends be paid in meeting the hotchpot claims of the so-called "rump creditors" of the BCCI Overseas liquidation?
>
> 2 A brief overview of the history, as taken from the latest report of the joint official liquidators to this court, will set the relevant context. At

the outset of the global liquidation, the global liquidators recognized that, in a number of material respects, the BCCI Group had conducted its affairs as a single entity, without clearly identifying which company or entity within the group was concerned with or responsible for any particular transaction. It became the decided view of the global liquidators and their legal advisers that the intermingling of the affairs of BCCI S.A. and BCCI Overseas was such that it would have been impracticable without considerable delay and enormous expense (and might well have been impossible) to determine, as between those two major companies, their respective assets and liabilities. In addition, many of the different companies in the BCCI Group and the branches of BCCI S.A. and BCCI Overseas became the subject of a multiplicity of separate "ring-fencing" local liquidations or similar proceedings in the jurisdictions in which they were incorporated or located.

3 In order to avoid the expense, difficulty and delay which would otherwise have arisen, a pooling agreement was negotiated between the principal BCCI companies and executed in November 1994. In brief, the pooling agreement provides for the pooling of the assets of the principal BCCI companies (and their branches which agreed to participate), and for admitted creditors to all receive the same rate of dividend out of the pooled assets. Although the pooling agreement contained specific provisions for participation by the branches of BCCI S.A. and BCCI Overseas, very few of the branches actually participated. China was the only branch of BCCI Overseas which entered into a branch participation agreement and of the BCCI S.A. branches, only Japan, Cyprus, Bahrain, and the United Arab Emirates participated.

4 This low rate of participation of the branches in the pooling agreement was due largely to decisions taken very early on in the liquidation process by the local regulatory authorities in the countries in which the branches operated. They appointed their own local liquidators, who acted in the separate interest of the local creditors by "ring-fencing" local branch assets and by purporting to deal to some extent with the branch liabilities.

Branch Ring-Fencing

5 The laws of the Cayman Islands, under the principle of universality, do not recognize a branch as being a separate legal entity from the

head office (see *Wight v Eckhardt Marine GmbH* [2003] CILR 211).[72] Accordingly, where a branch had been ring-fenced but the process put in place at its location of business did not result in the complete discharge of its obligations owed to creditors, those creditors—but not those whose obligations had been entirely assumed or discharged—would continue to have a provable debt in the liquidation of the head office.

6 Such claims would, however, be limited by the *pari passu* principle which, in order to ensure fairness to all creditors, has been deemed to apply globally, throughout the liquidation of the principal BCCI companies. Although the liquidators attempted to take control of the BCCI Overseas branch network, the operations of all 27 branches of BCCI Overseas outside the Cayman Islands were individually ring-fenced under local laws and were treated by the local regulators as separate legal entities with local authorities appointed over their affairs (although China later participated in the pooling agreement). In some countries, the ring-fencing was effected by way of a local law that gave a separate legal existence to the BCCI Overseas operations in that country. However, in most cases the ring-fencing occurred on a practical level by way of local laws that prohibited the repatriation of funds from the country, controlled the conversion of local currency to foreign currency, or gave preference to local creditors from the branch assets.

7 The decision of the local regulatory authorities to ring-fence particular branch operations was probably influenced by the low initial dividend assessment of the global liquidators. These were necessarily conservative and exclusive of the possibility of recovery from the majority shareholders, the US Government, former auditors, major debtors and other third parties—recoveries which have since then been realized. Taking into account the negative factors then prevailing, the original estimate of the global liquidators of return to creditors participating in the pooling arrangements was in the range of 5% to 10%.

8 In most cases, the return to local creditors was estimated by local authorities to be higher than the initial pooling estimate if the ring-

72 Citation inserted.

fenced assets of the particular branch were realized and paid for the benefit of the local creditors, and the local authorities rejected the pooling arrangement accordingly. Although from this ring-fenced competitive process distributions to creditors were higher than 10%, in a number of cases the return to creditors is less than the 86.5% global dividend rate now achieved and paid to date from the BCCI Group companies who are participants in the pooling agreement (with even a bit more expected before final winding up).

9 In keeping with the principle of universality, although these ring-fenced branches are not signatories to the pooling agreement, their creditors are eligible to participate in 'top up' or hotchpot payments from the BCCI Overseas head office liquidation provided that the liquidators can obtain information from the respective branch to verify their claims. While this verification process remains a major challenge for the joint official liquidators because, in particular, of the lack of control over branch records; provisions must be made for the potential verification of the claims of these creditors, now conveniently classified as 'rump creditors'.

Branch 'Rump Creditors'

10 Of 2,597 such claims submitted with a value of [USD] 738m., 1,113 have been admitted with a value of [USD] 408m. Of the 1,113 admitted claims, the top-up dividends applicable to 486 of them are valued at [USD] 17.8m. This amount will remain blocked until satisfactory evidence has been received of the closure of the relevant branch liquidation or of there being no possibility of further dividends being paid on such branch liquidation (the China branch having subsequently remitted its assets to the global pooling arrangement, its creditors have now been paid the 86.5% global dividend rate by the joint official liquidators).

11 This issue has been raised before the Luxembourg court by the liquidator of the Dutch branch of BCCI S.A. supported by the liquidator of the German branch. It relates to the top-up dividends to be paid to rump creditors who have received dividends in their local branch liquidations.

12 Applying the hotchpot principle and in keeping with the principle of universality already discussed, it is accepted by the global

liquidators that such creditors are entitled to claim in the principal liquidations, but subject to bringing into account dividends received from their branch liquidations. The issue then becomes that which was identified first above, that is what rate of exchange shall be applied to the dividends received in the branch liquidation in local currency for conversion into [USD] (the currency of the global liquidation) for bringing those dividends into hotchpot? From the earliest dates of the global liquidation, all debts which are proved in the principal liquidations have been converted (where necessary) and paid in [USD].

13 In the case of BCCI Overseas, it was ordered by this court on [19 June 1992] that as at the date of liquidation ([14 January 1992]), the currency into which all debts shall be converted is to be [USD]. In so ordering, this court applied r. 4.91 of the English Insolvency Rules 1986, which applied to Cayman liquidations in appropriate circumstances until replaced by local insolvency rules in 2009. In the Cayman Islands (as, indeed I am advised, in London and Luxembourg as well) this practice has resulted in a fixed rate approach.

14 Having so fixed the value of these claims, the approach of the Cayman liquidators has been to convert all local distributions made by branch liquidators in local currency into [USD] at the same [14 January 1992] exchange rate, rather than to use fluctuating exchange rates since [14 January 1992]. This approach has been followed on the basis that it is one which is equitable to creditors overall and appropriate in the complex situation arising from the existence of 27 BCCI Overseas branches. For example, it avoids the need to receive, process and verify information such as payment dates, and to identify varying conversion rates. It is the view of the joint official liquidators that by fixing the exchange rate at [14 January 1992], for both the claim value and for valuing subsequent payments by the local branch liquidator in local currency, the dividend rates paid calculated in local currency will exactly match dividend rates paid if calculated in US dollars.

15 When the issue was raised in Luxembourg by the Dutch liquidator, the Cayman approach was set out in a memorandum dated [24 January 2008], prepared by one of the joint official liquidators, Mr. Michael Pilling. This approach, I am told, found favour with the Luxembourg liquidator and ultimately with the Luxembourg court

at first instance. The matter has, however, been taken on appeal to the Luxembourg Court of Appeal by the Dutch liquidator with the support of the German liquidator.

16 The Dutch liquidator has contended for a different approach in relation to the conversion of the six previous [EUR] interim distributions to the Dutch creditors into [USD]. I am told that his argument is that, as a matter of Dutch law, the determination of the amount of the distribution has to be made on the basis of the conversion rate applicable on the day of the distribution. This is said to be consistent with the European Convention known as the CEME-Treaty of 1968. The argument then put forward is that in the absence of any provision to the contrary in other relevant EU or Luxembourg law, the system of the CEME-Treaty and the Dutch law should be followed, and therefore the conversion rate at the moment of the distribution to the creditors concerned in the Dutch insolvency proceedings should apply. It must be recognized, however, that if this approach prevails, then all the uncertainties of fluctuating rates of conversion, as discussed above, would attend the process of top-up payments.

17 A third alternative approach put forward by the Luxembourg liquidators would require conversion at the time of actual payment in the principal liquidation in Luxembourg. While there may be an apparent logic to this approach, it gives rise to a practical problem: as top-up payments will only be made in the future when branch liquidations are closed and so branch dividend payments will have been concluded, it would not be possible, using this third alternative approach, to make accurate provision in advance for such top-up payments.

18 The matter was brought to the attention of this court by way of the joint official liquidators' application on [11 May 2009]. Then it was ordered that the joint official liquidators should apply the fixed rate of conversion to future top-up payments as it had been applied for all other purposes of the liquidation since 1992. Any other approach would create significant differences in treatment as between creditors on the basis of arbitrary changes in their national exchange rates as against the [USD] since January 1992. It would also create significant and possibly insuperable operational problems for the administration of the liquidation estates.

19 A quick illustration will show the potential arbitrariness and unfairness. If, at the date of liquidation, a foreign debt was, at the rate of exchange then prevailing (say four units of local currency to one [USD]) worth [USD] 1m., that same debt if the rate of exchange became 2:1, would be worth [USD] 2m. Conversely, if the rate of exchange changed in the other direction.

20 As in every exchange of currency someone gains and someone loses, the recipient of a favourable varying rate of exchange would gain at the expense of those other creditors who are not in that position. Such an outcome is anathematic to the concept of equal treatment upon which the fundamental *pari passu* principle is based.

21 Those creditors who are to be paid in [USD]—the denominated currency of the liquidation estate—are not at fault *vis-à-vis* the foreign currency creditors. The BCCI companies are the defaulters. The creditors are all, so to speak, together in the same boat. There is therefore no clear reason why the risk of depreciation (or appreciation as the case might be) in the value of the [USD] as against the foreign currency pending distribution of the assets should be borne by those creditors whose claims were from the outset denominated in [USD].

22 In addition to those sound practical reasons discussed above, there is sound legal basis as well for directing that the fixed rate of conversion should apply. I now turn to a discussion of the legal reasons, as a matter of Cayman and, indeed, English law…"

Assisting Foreign Corporate Rescue Proceedings

In terms of understanding how judicial cooperation has taken place in recent case law in its most fertile field, the domain of corporate rescue, two introductory points must first be addressed. How has corporate rescue been possible in a statutory framework which has no explicit equivalent of administration proceedings (United Kingdom), interim receivership (Canada) or Chapter 11 proceedings (United States)? What guiding principles inform the shape that cooperation takes?

The main legal and commercial objects of corporate rescue proceedings, inspired by the early 1930s Depression vintage original version of Chapter 11 of the United States Bankruptcy Code, are to:

(a) preserve the insolvent entity as a going concern while a restructuring takes place with the protection of a liquidation stay of proceedings against the debtor; and

(b) restructure the insolvent entity without displacing the existing management, albeit that the interests that the directors represent are creditor rather than shareholder interests.

Under the United Kingdom Companies Act 1948 winding-up regime still in force in Bermuda and many other jurisdictions in the BACW region, it was for many years assumed that a provisional liquidator could only be appointed to displace the company's management altogether as a prelude to a winding-up order and a "full-blown" liquidation. This view was, in hindsight, based more on an uncritical observation of the circumstances in which provisional liquidators were appointed than on a critical analysis of the relevant statutory provisions themselves. The genius of the provisions is that, although they are ultimately derived from bankruptcy law provisions developed in the 19th century, an era when bankruptcy was considered to be a crime, they are flexible enough to meet the rescue demands of the modern corporate commercial rescue environment.

Firstly, when considering powers a liquidator appointed by a court has, their scope is most amply and generically defined as follows:

> "Powers of Liquidator
>
> 175(1) The liquidator in a winding-up by the Court shall have power, with the sanction either of the Court or of the committee of inspection —
>
> (a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;
>
> (b) to carry on the business of the company so far as may be necessary for the beneficial winding up thereof;
>
> (c) to appoint an attorney to assist him in the performance of his duties;
>
> (d) to pay any classes of creditors in full;
>
> (e) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(f) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof.

(2) The liquidator in a winding up by the Court shall have power—

(a) to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels;

(b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal;

(c) to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;

(d) to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(e) to raise on the security of the assets of the company any money required;

(f) to take out in his official name letters of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;

(g) to appoint an agent to do any business which the liquidator is unable to do himself;

(h) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers."

These powers are very broad and cumulatively undoubtedly envisage a situation both before and after a winding-up order where the liquidator has displaced the directors altogether. They are based on section 245 of the Companies Act 1948 (United Kingdom), which was in turn based on section 191 of the Companies Act 1929 (United Kingdom).[73] However, the Bermudian statute also permits the Court to tailor the liquidators' powers to suit the needs of particular cases when a liquidator is appointed provisionally.[74] It is this simple express statutory power that has been used in the corporate rescue context to allow what amounts to debtor-in-possession restructuring proceedings to take place, with the provisional liquidators representing the interests of creditors by supervising the directors who remain in office:

"Power of Court to Appoint Liquidators

170(1) For the purpose of conducting proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.

(2) The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person.

(3) <u>When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him.</u>" (emphasis added)

73 H. Buckley, *Buckley on the Companies Acts* (13th ed) (1957, Butterworths, London), at 515, citing 19th century case law on many of these powers.

74 Ibid., at 505, based on section 184, Companies Act 1929 and section 238, Companies Act 1948.

The typical order appointing provisional liquidators in the context of parallel corporate rescue proceedings would include terms along the following lines:

> "1. Larry Lazarus and Peter Phoenix are hereby appointed as Joint Provisional Liquidators ("JPLs") of the Company with the following powers:
>
> (a) to oversee the continuation of the business of the Petitioner under the control of the Petitioner's Board of Directors and under the supervision of this Court;
>
> (b) to oversee and otherwise liaise with the existing Board of Directors of the Petitioner in effecting a reorganization and/or refinancing of the Petitioner under the supervision of this Court [etc.]
>
> 2. To seek to enter such protocol or other agreement as the JPLs deem appropriate for the coordination of these proceedings, and any other like proceedings for the restructuring and/or reorganization of the Company and other companies within the Company's group and to seek the approval of such protocol or other agreement by this Court, the and any other courts in which such proceedings are brought, as appropriate.
>
> 3. If deemed appropriate, to draft a scheme of arrangement under the provisions of [section] 99 of the Companies Act 1981 between the Company and its creditors and/or shareholders to give effect to and/or facilitate a reorganization and/or refinancing…"

So the traditional insolvency law provisions permit, partly by implication, an insolvent company to petition for its own winding-up and to apply for the appointment of provisional liquidators who will supervise the implementation by the directors of a restructuring. However, there is no express or implied statutory power to cooperate with a foreign court. In this regard, any assistance the Bermudian court affords to foreign corporate rescue proceedings reflects the exercise of a common law discretionary power. The leading Bermudian judicial statement on the scope of this discretionary power, exercised by way of recognising United States Chapter 11 proceedings as the primary restructuring proceeding in relation to a Bermuda domiciled company, is the judgment of Ward CJ (now Sir Austin Ward, Justice of Appeal) in his 26 November 1999 judgment in *Re ICO*:[75]

75 *Re ICO Global Communications (Holdings) Ltd,* Civil Jurisdiction 1999: No. 288, at 2-3.

"A look at the background to the application may be instructive. On [27 August 1999] a Petition was filed by the company which was insolvent seeking the appointment of joint provisional liquidators. There was no prayer that the company be wound up immediately. On the same date the company filed for protection under Chapter 11 of the U.S. Federal Bankruptcy Code to allow it to consider a re-financing/re-organisation which, if successful, would result in the company continuing business.

An Order was made that Messrs. Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court.

I do not accept that because the company is a Bermuda registered company therefore the Bermuda Court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a U.S. Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously. In this case proceedings are being conducted in the USA and in the Cayman Islands as well as in Bermuda. The aim of the proceedings is to enable the company to re-finance in the sum of [USD] 1.2 billion or to re-organise so as to continue in operation. Under such circumstances the Court should co-operate with Courts in other jurisdictions which have the same aim in relation to the affairs of the company. It is not a question of surrendering jurisdiction as much as harmonisation of effort. Moreover, the joint provisional liquidators are officers of this Court who submit confidential Reports informing the court of progress being made in the liquidation from time to time. I am satisfied that proceedings in many jurisdictions relating to the same subject matter may properly be conducted at the same time where there is

> a connecting factor. *Barclays Bank plc v Homan and others* [1993] BCLC 680."

This judgment set out reasons for a decision made on an *ex parte* basis. It implicitly applies the UNCITRAL centre of main interest ("COMI") principle and explicitly adopts a universalist approach emphasising the need for the various proceedings to be harmonised towards the common goal of ensuring the company's continuation as a going concern. This at once principled and pragmatic approach has informed parallel restructuring proceedings involving Bermuda and other jurisdictions (most frequently the United States and Hong Kong) ever since.

In addition to these common law cooperation principles, one important statutory concept deserves special mention. Bermuda and most of the BACW jurisdictions have company provisions relating to schemes of arrangement with late 19th century British antecedents.[76] These provisions may be utilised for solvent modifications of shareholder (or creditor) rights and for insolvent modifications of creditors' rights. Like a Chapter 11 plan of reorganisation, if the statutory majority of the creditors or separate classes of creditors approve the arrangement, the dissenting minority are bound by the vote of the majority. Sections 99-100 of the Bermuda Companies Act 1981 require:

(a) leave of the Court to summon the meeting(s);

(b) an explanatory statement to be sent with a copy of the proposed arrangement to those whose support is sought;

(c) an affirmative vote of a majority in number representing three-quarters in value of all creditors voting (or, where applicable, all creditors in each class); and

(d) court sanction of the arrangement with dissenters having an opportunity to contend that the arrangement ought not to be approved.

Accordingly, the content of parallel restructuring proceedings is informed not simply by common law judicial cooperation rules; such proceedings may also involve the coordination of a statutory scheme of arrangement in Bermuda and a statutory plan or scheme abroad.

76 Section 167, Bahamian Companies Act 1992 ("arrangements"), is not derived from the same source and appears to be less streamlined than the scheme of arrangement provisions in Bermuda and elsewhere. The "proposal" concept under the Barbadian and Trinidadian Bankruptcy and Insolvency Acts appear on the face of the statutory provisions to create a far more complicated and regulated regime than the comparatively sparse scheme of arrangement regime. This view may reflect in part the writer's lack of familiarity with the relevant provisions. The British statutory antecedents include the Joint Stock Companies Arrangement Act 1870; section 153, Companies Act 1929; sections 206-207, Companies Act 1948.

The most significant recent case dealing with this topic is the Judicial Privy Council's decision in *Cambridge Gas*.[77] This case is significant for the BACW region not just because it is a rare modern example of a judgment following a contested hearing on the scope of the common law discretion to assist foreign corporate rescue provisions. It is also highly pertinent because it comes from the highest appellate tribunal for most of the subject territories and so the reasoning is binding on the courts of the overwhelming majority of the territories concerned. Ironically, the case arose in the unusual factual context of a shareholder seeking to challenge a creditor reorganisation in relation to an insolvent company. Typically, shareholders accept that, once a company becomes insolvent, their interests in the company are for most purposes extinguished altogether. Why this occurs is that most insolvency law statutes provide that in a winding-up shareholders are only entitled to receive any distributions if creditors have been paid in full. The relevant Bermudian provision is found in section 225 of the Companies Act 1981:

> "Distribution of Property of Company
>
> 225 Subject to this Act as to preferential payment the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu*, and, subject to such application, shall, unless the bye-laws otherwise provide, be distributed among the members according to their rights and interests in the company."

Once a winding-up petition is presented against an insolvent company, which will likely result in the company being wound up, shareholders ordinarily lose any realistic prospect of receiving any return on their investment. This principle applies with equal force in circumstances where a restructuring is being implemented designed to ensure that the debtor continues as a going concern and whether or not a company is being restructured in its place of incorporation or as a foreign debtor under a Chapter 11 plan. In the *Cambridge Gas* case, Navigator Holdings plc was a holding company which owned ships forming part of the insolvent business and which was funded by investments in the New York bond market. The United States Bankruptcy Court confirmed a plan under Chapter 11 of the United States Bankruptcy Code, under which the shares of Navigator (an Isle of Man company 70% owned by Cambridge Gas) would be transferred to the creditors. The United States Court sent a Letter of Request to the Manx High Court seeking an order of that court vesting the shares in the creditors' representatives. This was presumably based on the fact that United States conflict of law rules regarded the

77 Above note 64.

situs and governing law of the shares as being the law of the company's place of incorporation, so that there was a practical need to implement the transfer of the shares provided for by the plan under Manx law. Cambridge Gas, a Caymanian company, opposed the application on the grounds that:

(a) it had never submitted to the jurisdiction of the United States Court (although its parent had proposed a rival shareholder plan which was rejected); and

(b) the United States Court had no power to affect the rights of property located in the Isle of Man.

The High Court refused to recognise the plan, accepting both of Cambridge Gas' main submissions. The principal conflict of law finding was that the confirmation order was a judgment *in rem* and judgments *in rem* can only deal with property located within the jurisdiction of the court. The Court of Appeal found that the confirmation order was a judgment *in personam*. The Judicial Committee found that:

(a) insolvency orders were *sui generis* and did not fall into either category;

(b) the effect of the plan could have been achieved through a scheme of arrangement under Manx law; and

(c) at common law, the Manx Court had a discretion to recognise the plan and assist the creditors to implement it under local law.

In words which echo those of Court of Demerara in 1814, Lord Hoffman, on behalf of the Privy Council, concluded as follows:

> "21 Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance."

Without much explicit analysis, this decision supported the unreasoned judicial practice in jurisdictions, such as Bermuda, over several years, which expanded the traditional common law rule that only foreign "main" proceedings in the company's domicile would be recognised to embrace the modern COMI concept. However, the Bermuda practice has almost invariably entailed the commencement of parallel proceedings in Bermuda in relation to a Bermudian incorporated company. The Judicial Committee seemingly had no difficulty with the fact that the only formal insolvency proceeding afoot was in a jurisdiction other than the company's domicile. It has recently been judicially noted that public policy objections to an insolvency proceeding designed to result in the debtor's ultimate liquidation without any parallel proceeding may give rise to public policy concerns in the company's place of incorporation:

> "24. Nevertheless, it may be useful to note that persons incorporating companies in Bermuda which are substantially managed abroad ought not to expect this Court to give "rubber-stamp" recognition to foreign principal winding-up proceedings which are commenced without parallel proceedings here. In most cases, commercial logic will likely be the best guide as to whether it is appropriate to commence winding-up proceedings abroad in respect of a local company without also commencing proceedings here. Legally, a Bermuda company can never be wound up and dissolved for all purposes without a dissolution taking place under Bermuda law. Even if a company is struck off the register and dissolved without a winding-up under Bermuda law, any disgruntled creditor (or perhaps, a shareholder as well) may subject to limitation constraints apply to set aside a dissolution and open a winding-up under local law. In any liquidation of substance, it will be impossible for the place of incorporation to be ignored. And where the way in which a Bermudian company is wound up has implications for the reputation of Bermuda as an international financial centre, public policy may well dictate that this forum ought to play a more significant role than purely commercial concerns might otherwise dictate."[78]

Lord Hoffman's landmark judgment in the *Cambridge Gas* case also tentatively explored the somewhat cloudy issue of the precise limits of the forms judicial assistance may take:

> "22 What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do… At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in

78 *Re Dickson Holdings* [2008] Bda LR 34; [2008] SC (Bda) 37 Com (9 May 2008) (per Kawaley J).

> the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

It is suggested that commercial factors will usually dictate whether or not ancillary proceedings are commenced as part of an insolvent restructuring process taking place outside the debtor's domicile. The risks of not implementing a plan through a parallel scheme (or plan) in the place of incorporation (in terms of potential challenges in the company's domicile) may often outweigh the benefits of not incurring the costs involved. It is also subject to argument whether or not the forms of assistance are in law limited to what the assisting court could have done under local law.

In the context of parallel proceedings at least, the Bermuda Court has routinely recognised various orders made in the course of related parallel Chapter 11 proceedings without any analysis of whether substantially similar orders could have been made under local law. Lord Hoffman's *dictum* is probably most accurately read as applying to assistance with regard to matters which are governed substantively by local law, such as the transfer of the shares of Navigator Holdings plc. Where recognition is sought of orders made in respect of matters governed by the law of the overseas forum, in principle it ought not to matter whether or not the effect of the order could have been achieved under local law, public policy concerns apart. This is consistent with the *sui generis* nature of many orders made insolvency proceedings, neither wholly personal nor wholly *in rem*, as affirmed by the Judicial Committee in *Cambridge Gas* and as recognised by the Court of Demerara in *Odwin v Forbes*.[79] The universalist principle has the effect of modifying the application of the conflict of law rules that might otherwise apply in relation to non-insolvency judgments.

Is the form of assistance which can be provided limited to remedies which are available under local law? The answer may be affirmative in any case where substantive relief is sought from an assisting court outside of the context of parallel proceedings. The answer may be negative if one is considering whether or not the assisting court will recognise various orders and procedural mechanisms of a foreign "main" proceeding. For instance, when schemes of arrangement are implemented under Bermuda law in tandem with a Chapter 11 plan, the Bermuda

79 Henry, above note 49, at 100.

Court will often approve voting classes and priority rules for the purposes of the Bermuda scheme which derive from the United States Bankruptcy Code and which do not have precise equivalents under Bermuda insolvency law. But the authority for sanctioning a scheme is statutory and accepted as permitting creditors to contract out of the usual insolvency law regime. If purely common law assistance is involved, with no local insolvency proceedings or scheme afoot (as in *Cambridge Gas*), the forms of assistance which can be provided may very well be limited to those available under local law.

Section 77 of the Bahamian Insurance Act 2005 (Cap 308) permits an insurer or the Commission to petition the court to place an insurer which is in financial difficulties under judicial management. The same section also empowers the Commission to seek similar relief in respect of an insurer incorporated and in liquidation abroad, but with a branch office in the Bahamas, to be placed under judicial management. These statutory corporate rescue and judicial cooperation provisions in the insurance context do not appear to be replicated in the non-insurance sphere.

A recent ongoing example of common law cross-border cooperation involving a Bahamian insurer placed under judicial management in its domicile on 8 September 2009 is the British American Insurance Company Ltd. case, where the following orders have reportedly been made:[80]

Table 3.4. Orders in the British American Insurance Company Ltd. Case
Source: www.baico-intl.com

Judicial Management	Judicial Administrator	Provisional Liquidation	Judicial Manager Order Recognized
Antigua and Barbuda	Anguilla	Bermuda	Turks and Caicos Islands
Montserrat			Dominica
St Kitts and Nevis			
St. Vincent and the Grenadines			
Grenada			
St. Lucia			

It is believed to be the case that express statutory support exists for the making of the various non-Bahamian orders in respect of the overseas business of the Bahamian company, but that the coordination of the proceedings in the various

80 See: www.baico-intl.com.

fora has taken place in the exercise of common law discretion powers to assist foreign courts in the restructuring of a multinational enterprise.[81]

Court to Court Communications in Cross-Border Insolvency Cases

> "One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to ensure the maximum available benefit for the stakeholders of financially troubled enterprises."[82]

The need for court to court communications arises in the context of parallel insolvency proceedings where complex coordination issues arise. Through a Practice Direction issued on 1 October 2007, Bermuda's Commercial Court adopted the ALI/III "*Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*".[83] The original guidelines were adopted with a view to facilitating cross-border insolvency adjudication in the NAFTA region. They would seem to be a useful precedent for the BACW region, in particular for members of the CSME. They set out a procedural code for court to court communications designed to promote communications subject to guarantees of due process and transparency. INSOL Europe was involved in the development of the European Communication and Co-operation Guidelines for Cross-Border Insolvency of 2007, which were clearly influenced by the earlier North American precedent.

Similar statutory rules, based on Articles 25-27 of the UNCITRAL Model Law, have more recently been adopted by three European countries, a development which provides further (albeit indirect) support for the credibility of the ALI/III Guidelines as a code which can bridge the common law-civil law divide. The main European trigger for this development appears to be the Model Law. According to Professor Bob Wessels:

> "As a result, in autumn 2010, the following European countries have adopted rules concerning communication and co-operation in cross-

81 See e.g. section 61, Nevis Insurance Act 2009, which provides for the local business of a foreign insurer to be placed under judicial management. The Act does not appear to have any further judicial assistance provisions.

82 American Law Institute, *Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries* (2003, ALI, Philadelphia PA) (adopted by the American Law Institute on 16 May 2000 and the International Insolvency Institute on 10 June 2001).

83 See: www.gov.bm (see "Publications" on the Judiciary's homepage under the Ministry of Justice sub-community).

border cases: United Kingdom, Poland, Rumania and Greece, whilst in new legislation proposed in Slovenia and the Netherlands similar provisions are under way..."[84]

Conclusion

The above review of cross-border judicial cooperation rules in the BACW shows that no standard statutory framework exists, even amongst CARICOM Member States. Only a minority of territories have enacted modern statutory international cooperation and corporate rescue rules (BVI, Barbados, the Cayman Islands and Trinidad and Tobago). However, BVI's international cooperation provisions have yet to be brought into force. Nevertheless, common law discretionary cooperation powers exist, while traditional statutory provisional liquidation rules are flexible enough to serve the needs of modern corporate rescue proceedings. The extensive common law cooperation powers, first articulated in the region in the early 19th century by the Court of Demerara in what is now Guyana, owe their theoretical existence to Dutch civil law writers. These powers (in the context of recognition of foreign insolvency proceedings) essentially represent an internationalist segment of common law conflict of law rules developed in the sphere of personal bankruptcy and heavily influenced by the notion that the law of an individual's domicile ought ordinarily to determine most matters relating to his personal status. In the modern corporate rescue context, however, this approach has been modified so as to contemplate principal proceedings taking place in the debtor's commercial rather than legal domicile.

The intellectual cross-pollination in the international insolvency arena continues. Although the modern trend appears to be in the direction of a civil law-style codification of the law, inspired by the UNCITRAL Model Law, the more fluid common law litigant and judge driven approach clearly has much to offer, particularly in the quintessentially fact-sensitive corporate rescue context. This conclusion is demonstrated by the ample role the common law has played in cross-border cases in jurisdictions such as Bermuda, BVI and the Cayman Islands without statutory international cooperation rules. It also demonstrated by the recent adoption in the European region of both a 2007 European version of the United States lawyer and judge driven "*Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*" as well as UNCITRAL Model Law-inspired statutory equivalents. This further illustrates how creative insolvency professionals (broadly defined, be they academics, judges or practitioners) are

84 Wessels, above note 40.

capable of both shaping cross-border practice and inspiring legislative action as well.

The most important lesson to draw from the above analysis of the BACW region is that the apparent problem of the absence of statutory cross-border insolvency solutions will likely be counterbalanced by a range of practical and legally efficacious common law solutions. While the flexible common law approach to handling insolvency cases has much to commend it, the need for clarity in cross-border cases straddling the common law and civil law traditions suggests that legislative codification is the preferred option. What Professor Ian Fletcher has observed, in relation to the English approach to concurrent proceedings,[85] applies with equal (if not greater) force to the BACW:

> "Although the English approach has been emulated in other Common Law jurisdictions... the full possibilities that exist under English law are less widely known than they deserve to be. This is possibly on account of the relative inaccessibility of case law, as opposed to legislation, when viewed from the standpoint of those operating outside the common law tradition."[86]

Postscript (2014)

This is a postscript to a paper based on an Edwin Coe Lecture, delivered in Vienna in late 2010, titled "*Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities*", which was published three years ago. Before proceeding to briefly summarise recent case law dealing with one aspect of this paper, it may be helpful to set the scene.

Eight years ago the Judicial Committee of the Privy Council, through Lord Hoffman, gave its imprimatur to the idea that there was still a place for common law judicial cooperation in the modern world in *Cambridge Gas*.[87] A resounding cheer went up amongst the ranks of insolvency lawyers and judges in offshore jurisdictions such as Bermuda whose attempts to plant the seeds for modern statutory international cooperation rules had fallen on stony ground. Their longstanding efforts to "muddle through" by creatively using insolvency law provisions crafted in Britain in the post-war era to serve modern cross-border liquidation and restructuring goals had at last received, albeit in very general terms, high judicial approval.

85 Writing, it must be noted, before the adoption of UNCITRAL Model Law-inspired legislation which answered, to some extent at least, his plea for a statutory restatement of the law.

86 Fletcher, above note 41, at paragraph 3.105.

87 Above note 64.

Lord Hoffman, it is worth recalling, made the following crucial observations which had resonance well beyond the confines of the narrow facts of the *Cambridge Gas* case:

> "19. The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English moveables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in *Solomons v Ross, or in which he submitted to the jurisdiction: Re Davidson's Settlement Trusts* (1873) LR 15 Eq 383. It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property.
>
> 20. Corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company's assets in some other person. They remain the assets of the company. But the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of *Re African Farms* 1906 TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, "recognition carries with it the active assistance of the court". He went on to say that active assistance could include:
>
>> "A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the courts may impose for the protection of local creditors, or in recognition of the requirements of our local laws."
>
> 21. Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of

> creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance.
>
> 22. What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction." At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

The narrow finding was that the Isle of Man Court had a discretion to recognise and assist a foreign insolvency court (the United States Bankruptcy Court) and to give effect to under local law a plan of arrangement approved in relation to an Isle of Man company subject to Chapter 11 proceedings in the United States by order of the US Court. This narrow finding was later, in a somewhat different context, suggested to be wrong by the United Kingdom Supreme Court (Lord Collins) on the grounds that it impermissibly stretched traditional conflict of law rules: *Rubin v Eurofinance* and *New Cap Re v AE Grant* [2012] UKSC 46; [2013] 1 AC 236 ("*Rubin*").

However, the broader pronouncements in *Cambridge Gas* about the breadth and flexibility of the common law discretion to assist foreign insolvency courts where the overseas forum is also the insolvent debtor's domicile were affirmed in *Rubin*. An important practical consideration which the Judicial Committee in *Cambridge Gas* did not have to decide is to what extent, and based on what principles, can the common law assisting court apply local law in aid of the foreign insolvency representatives and/or court. These problems do not arise if the foreign representative can deploy statutory recognition provisions which explicitly trigger the application of local insolvency law rules to the "assistance proceeding".

The Bermudian, BVI and Caymanian courts have had to confront the question of the extent to which local insolvency law can be deployed in aid of common law assistance since "*Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities*" was written, three years ago. The result of the Bermudian analysis, with conflicting results at the Supreme Court (trial court) and Court of Appeal levels, remains somewhat uncertain although it is possible that greater clarity will be provided through a final appeal to the Judicial Committee of the Privy Council. The Caymanian position is also "up in the air", with the Grand Court having decided, but the Court of Appeal adjudication still incomplete. The BVI position is quite nuanced, with a recent decision giving comfort to both the advocates and opponents of a broad common law cooperation approach.

An important distinction exists between the Bermudian, on the one hand, and the BVI and Cayman position, on the other. In the latter two jurisdictions, statutory international cooperation provisions exist so the need to rely upon common law rules appears to be significantly muted. In the case of Bermuda, no statutory rules exist and considerable doubt exists over the scope of the jurisdiction to wind-up overseas company; accordingly, the need for clarity as to the availability of common law assistance powers takes on a heightened significance.

Bermuda: Can Liquidators of Caymanian Companies request the Bermudian Court to provide Assistance by compelling their Former Auditor, Resident in Bermuda, to produce a Wider Range of Documents than can be obtained under Caymanian Law?

The Supreme Court Decision

The Supreme Court answered this question in the affirmative in *Re Saad Investments Company Ltd (in Official Liquidation); Re Singularis Holdings Ltd (in Official Liquidation)* [2013] Bda LR 28. The facts may be summarised as follows.

As regards Saad Investments Company Ltd ("SICL"), the company already in Caymanian Official Liquidation, petitioned for its winding-up in Bermuda on 17 August 2012 under the Companies Act 1981. A winding-up order was made by the Supreme Court on 14 September 2012. On 13 February 2013, the ancillary Bermudian joint liquidators applied under section 195 of the Companies Act 1981 for its former auditor, a Bermuda exempted partnership managed in Dubai ("PwC"), to produce documents and be examined. An *ex parte* order was granted on 4 March 2013. An application to set aside the *ex parte* order was refused on 15 April 2013.

No issue of common law cooperation arose in respect of SICL. The examination/production order was challenged on merits and scope grounds before the Supreme Court, which was bound by an earlier Court of Appeal for Bermuda decision to the effect that the jurisdiction to make a winding-up order could not be made in the ensuing liquidation: *PwC (a Firm) v Kingate Global Fund Ltd; Kingate Euro Fund Ltd* [2011] Bda LR 31. The jurisdiction to wind-up SICL was raised by the former auditor before the Court of Appeal for Bermuda, which rejected the decision by a majority (Geoffrey Bell JA (Acting), Edward Zacca, P; Sir Robin Auld JA (dissenting): *PricewaterhouseCoopers (exempted partnership No. 7420 v Saad Investment Company Ltd; Singularis Holdings Ltd* [2013] CA (Bda) Civ (28 November 2013).

The controversy (only resolved by the Judicial Committee's decision in *PricewaterhouseCoopers v Saad Investments Company Ltd* [2014] UKPC 35) as to whether any general statutory jurisdiction to wind-up overseas companies existed under Bermudian law explains why the liquidators of Singularis Holdings Ltd ("SHL"), a company related to SICL, sought to obtain comparable documents from PwC through the parallel route of an application for common law assistance. As far as SHL is concerned, the Supreme Court was required to confront head on the question of:

(a) whether it could make a production/examination order either applying section 195 of the Companies Act or by analogy with that statutory power, and

(b) assuming that the Court could potentially make such an order, whether it should do so in circumstances where the scope of relief sought by the Caymanian liquidators was broader than that available under SHL's domiciliary law.

The Supreme Court held (applying *Cambridge Gas* and *obiter dicta* in *Rubin*):

(a) it could grant the relief sought:

  (i) by applying local insolvency law remedies on the basis that local procedural law governed the common law assistance proceedings (*Frank Schmitt v Henning Deichmann* [2012] EWCH 62 (Ch); [2013] Ch 61 (Proudman J) ("*Re Phoenix*"); *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al v Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated 14 January 2013 (Andrew Jones J) ("*Primeo*")); or

  (ii) by analogy with the local statutory insolvency powers (*Re Impex Services Worldwide Ltd* [2004] BPIR 564 (Deemster Doyle) ("*Re Impex*")); and

(b) the fact that the relief sought was unavailable in the principal liquidation did not constitute discretionary grounds for refusing to assist the foreign liquidators: *Re Phoenix*, at paragraph 44).

The Court of Appeal Decision in Relation to SHL

The Court of Appeal majority (Bell JA (Acting), Zacca P concurring) found it unnecessary to decide whether the common law jurisdiction to provide the assistance sought by the Caymanian liquidators existed. It was quite obvious that even if such jurisdiction did exist, it should not be exercised on discretionary "forum-shopping" grounds, principally:

(a) the fact that similar relief was not available in SHL's domicile; and

(b) the fact that the connections of all parties to Bermuda were tenuous.

Auld JA, however, grasped the scope of the common law jurisdiction to provide assistance question without compunction and found it seriously wanting. He rejected unequivocally the notion that the examination/production order could be made as against SHL at common law in circumstances where section 195 of the Companies Act 1981 did not apply. He tempered this somewhat radical rejection of well-established notions of common law recognition and assistance with the following sage remarks:

> 57. I conclude by echoing the views of many others, more knowledgeable and experienced than I am in cross-border insolvency proceedings. There is an urgent need for an internationally coherent and readily identifiable set of legal norms and forensic tools in this field to provide a speedy, practical and inexpensive service to the commercial community for resolution of jurisdictional disputes and other enforcement issues. With respect to the many and distinguished judges who, individually, have had to grapple with the problem on a case-by-case basis over many years, the collective product of their endeavours is a poor service to creditors and debtors alike in coping with the serious, urgent and costly pressures of insolvency. As Lord Collins[88] and many others highly experienced in the field of insolvency law have demonstrated and urged, international agreement and statutory implementation is the way to go about it, not piecemeal judicial "legislation"…"

88 *Rubin,* at paragraphs 133 to 155.

Auld JA (at paragraph 58(2) (b), and for somewhat different reasons) agreed with the majority that, in any event, the Caymanian liquidators' application should be refused on discretionary grounds because:

> "…it would offend the private international law principle of comity by vastly exceeding powers in corresponding provisions in the overseas country, Cayman, where the principal and/or sole winding-up orders were made."

In the insolvency context that is a somewhat surprising formulation of comity, because it implies that a foreign court would not wish to empower its officers to take advantage of more generous remedies available under foreign law. In practice, the contrary disposition on the part of the primary liquidation court is often likely to be the case.

The SHL liquidators appealed to the Judicial Committee of the Privy Council against this decision; PwC appealed against the dismissal of its appeal against the winding-up order and statutory production order made against it in the SICL winding-up proceedings.

The Judicial Committee of the Privy Council Decision

Bermuda's highest appellate Court decided the SHL appeal (*Singularis Holdings Ltd v PwC* [2014] UKPC 36 ("*Singularis*")) by upholding the Court of Appeal for Bermuda decision in substance but for reasons which provided some degree of comfort and discomfort for judges at the various local court levels. The unanimous decision of the Court of Appeal that assistance should be refused on forum grounds was unanimously upheld. However, none of the Judicial Committee considered the question of whether the jurisdiction to provide assistance existed at common law was an academic question which did not need to be decided or opined upon.

The Privy Council majority (Lords Sumption, Collins and Clarke) found that a specific common law power to compel the former auditors to produce the information sought existed, as a complement to the common law discretion to recognise the foreign liquidators and provide them assistance generally. The source of the specific assistance power was the common law itself, hence no need to apply general or local statutory provisions, whether directly or by analogy, arises. This was a direct and eloquent response to the trial judge's plea for appellate guidance on how a first instance judge should determine what forms of assistance can be provided at common law. It is responsive to the reality that jurisdictions such as Bermuda which lack statutory ground rules for international recognition and assistance in cross-border insolvency cases are wholly dependent upon the common law. The majority approach is not entirely unproblematic in that it not only awakens the common law from what Professor Fletcher described as its "*arrested state of development*", but arguably also enlivens judicial law-making to an extent that many modern common law judges find uncomfortable at best and objectionable at worst. The majority's decision implies that whenever new forms of common law assistance are sought in a cross-border insolvency case, the court is not just permitted but required to determine afresh whether the power to grant the specific form of relief can be found to exist as part of the common law.

Most common law judges are more attuned to the more constrained tasks of statutory interpretation and/or defining the scope of common law claims and remedies the existence of which was settled centuries ago. The minority dissenting views of Lords Neuberger and Mance in SICL, broadly viewed, reflect philosophical anxieties about judges assuming such a broad law-making role and, perhaps, a conviction that jurisdictions which lack modern cross-border insolvency legislation should leave the "Dark Ages" and join the fold of "Modernity". This writer has sympathy with these anxieties and shares the conviction that statutory ground rules represent international best practice for the cross-border insolvency field. But as a first instance judge in a jurisdiction which presently lacks the requisite statutory tools, the preferred practical and philosophical disposition must be to exploit the ancient magic of the common law to the fullest extent possible in providing common law assistance to foreign liquidators who properly request it.

At first instance in SHL, the Court analysed the scope of the common law power to assist in the following way. The power to assist was a discretionary power consisting of a fundamental decision as to whether to recognise and, as an incident of recognition, to grant assistance. When it came to determining what remedies could be granted by way of assistance, these remedies had to be found in the existing remedies available in either the generally applicable law of the forum or, ideally (but more difficult to justify in the case of SHL on the hypothesis that SHL could not be wound up under Bermudian law) the local insolvency statute itself. While preferring the argument that the *lex fori* governed the relief to be granted and that the effect of recognising the foreign winding-up and liquidator appointment orders was to confer on the foreign liquidators the same status as liquidators appointed under the local statute, the first judge accepted that this required a somewhat convoluted reading of the insolvency provisions. The primary finding made was that a production order could be made by analogy with an order under section 195 of the Companies Act 1985, because the Court possessed a broad general power under its rules to order discovery in the action commenced by the Caymanian liquidators for recognition and assistance.

The Privy Council majority judgments on the nature of the assistance power are seemingly far more ample and generous. They appear to characterise the forms of assistance which may be provided as themselves emanating from the common law, rather than remedies which exist under existing generally applicable rules of local law which simply have to be shaped to meet the distinctive facts of the relevant assistance application. It is respectfully suggested that it is far easier for a court dealing with a common law assistance application to shape the remedy from a toolkit which already exists under local law than to fashion an entirely new common law remedy. The following passage in Lord Sumption's leading judgment is pertinent in this regard:

> "19... In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so."

This statement follows an historical review of the nature and scope of the common law power to recognise and assist, which characterises the power as primarily designed to enable a foreign liquidator to exercise in the assisting forum the liquidation powers conferred on him by the debtor's domiciliary law. The judgment then proceeds to explore whether a common law power to compel the production of evidence exists. After conceding that a statutory base is required to compel the production of evidence for use in foreign proceedings, it is concluded that what was sought here was information to assist the foreign liquidators to discharge their functions, and that no statutory base was required to exercise this power:

> "23. The present case is not a Norwich Pharmacal case. The significance of Norwich Pharmacal in the present context is that it illustrates the capacity of the common law to develop a power in the

> court to compel the production of information when this is necessary to give effect to a recognised legal principle. In the Board's opinion, an analogous power arises in the present case. Relief is not being sought by way of assistance to a litigant who can rely on ordinary forensic procedures for the purpose. It is being sought by the officers of a foreign court. The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can. The Bermuda court has properly recognised the status of the liquidators as officers of that court. The liquidators require the information for the performance of the ordinary functions attaching to that status. Their acknowledged right to take possession of the company's world-wide assets is of little use without the ability to identify and locate them, if necessary with the assistance of the court. The information is unlikely to be available in any other way…"

Lord Collins in a separate but concurring judgment robustly rejected the analysis upon which the liquidators had relied in arguing their appeal, namely that the common law power could simply be found by applying by analogy the statutory winding-up provisions which did not apply. He concluded:

> "64. In my view to apply insolvency legislation by analogy "as if" it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function."

This conclusion, which purports to reject an argument which found favour with the first instance judge, is difficult to marry with the findings which were actually made. Obviously it is wrong as a matter of principle to simply apply statutory provisions to circumstances where they are not intended to apply. On the other hand there is nothing revolutionary or unconstitutional about delineating the scope of a common law power by reference to a corresponding statutory provision which does not apply to the case at hand. A well-recognised example of applying a statute by analogy is where courts dealing with equitable claims, which are analogous to corresponding common law claims, apply "by analogy" the statutory limitation periods which do not directly apply to the equitable claims: see e.g. *Companhia de Seguros Imperio v Heath (Rebx) Ltd et al* [2000] EWCA Civ 219. The first instance judge's primary finding was that the power to order the production of the information sought could be found in the Court's general discovery powers, which could be exercised in the following two ways:

(a) by compelling the production of documents relevant to the action for recognition and assistance; and

(b) applying by analogy the conditions for granting relief which would apply in the case of a domestic insolvency under section 195 of the Bermudian Companies Act 1981.

The trial judge did express a preference for an alternative basis for applying the local statute which he acknowledged was more radical. That was:

(a) viewing local procedural law as governing the form of assistance to be given; and

(b) construing the local insolvency statute as applying not just to liquidators appointed under the statute but also to liquidators whose common law recognition clothed them with the same legal status as a local liquidator.

This direct application of the statute was contended for by the judge on the hypothesis that the statute was intended by necessary implication to apply to a liquidator recognised at common law. This alternative analysis may fairly be rejected as being based on a convoluted and unsupportable statutory construction, but not on the basis articulated by Lord Collins. In fairness to Lord Collins, it appears from his judgment (paragraph 78 et seq.) that the arguments advanced before the Privy Council, as frequently occurs, did not completely mirror the findings made at first instance on these issues.

The complexity of identifying the scope and extent of "purely" common law powers begs the following question: was the Privy Council majority bound to conclude that the relevant assistance power had to be found in the common law itself? Lord Mance (with whom Lord Neuberger agreed) seemed to consider that it would have been preferable to base the application for information on more easily recognisable general common law or statutory powers. It appears from the judgments that the liquidators sought to justify the existence of the power on the basis of the most obtuse legal basis articulated by the first instance judge rather than on the most prosaic basis. The notion that Order 24 has no application to an action commenced for recognition and assistance in the form of obtaining information because the information sought is distinguishable from "evidence", for instance, seems a highly technical and artificial distinction, especially if it is accepted that the information sought is not analogous to evidence for use (at trial) in foreign proceedings. Because the Privy Council majority prudently avoided making wide generalisations about different scenarios, it is only fair to acknowledge that other forms of assistance may give far less difficulty in terms of identifying the existence of the relevant common law power. Nevertheless it must surely be the case that generally applicable statutory provisions can be deployed in aid of exercising the common law assistance power.

It is respectfully suggested that it would be far more straightforward and consonant with the generally applicable conflict of law rules to adopt the following approach to common law assistance applications:

(a) there is a common law power to recognise and assist foreign liquidators appointed in an insolvent company's place of incorporation;

(b) the forms of assistance available in the proceedings for recognition and assistance are governed by the *lex fori*;

(c) the laws of the forum which may be applied include generally applicable statutory provisions and generally applicable common law rules;

(d) the conditions applicable to deciding whether to grant relief and if so in what particular form are governed by common law cross-border insolvency rules;

(e) in exceptional cases where generally applicable local law affords no adequate remedy, the court may have to embark on an enquiry as to whether appropriate relief can be fashioned using purely common law powers.

Lord Mance in his dissenting judgment (on the issue of the existence of a common law power) made the following trenchant observations:

> "147...I am not at present persuaded that it is appropriate to extend the common law power to assist by ordering the provision of information beyond categories which have some recognisable basis in current law, that is cases where there is (a) evidence that the person ordered to

> provide the information or documentation has property belonging to the insolvent company, or (b) evidence of some wrongdoing by the person so ordered or (c) evidence of some wrongdoing by another person in which the person so ordered was or is innocently mixed up. A general common law power to order the disclosure of information and documentation by, and the questioning of, anyone, either because a foreign liquidator shows that this may assist him identify or recover assets anywhere in the world or, a fortiori, because it would enable him understand the company's affairs, goes not only beyond anything which it is necessary to contemplate on this appeal, but is also beyond anything that I can, as at present advised, regard as permissible or appropriate."

These remarks reflect an understandable anxiety about the notion of a general common law power to order the production of information wholly detached from the mainstream body of relevant law. It is submitted that the assistance sought, properly analysed, could indeed be granted within existing general legal principles, be they discovery (flexibly construed) or *Norwich Pharmacal*. Lord Neuberger agreed with Lord Mance, but was also reluctant to deal on an *obiter* basis with issues which it was not strictly necessary to decide. He noted:

> "154...The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance – see the judgment of Lord Hoffmann on behalf of the Board in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, all five opinions in the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, and the judgment of Lord Collins for the majority of the Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, discussed by Lord Sumption at paras 16-19, and the judgment of Lord Collins in this case."

It is respectfully suggested that because the topic of common law assistance to foreign liquidators is such a "tricky topic", the guidance given by the Privy Council in *Singularis* will be of considerable value to judges and practitioners in jurisdictions which presently lack statutory international cooperation provisions. Those jurisdictions, incidentally, include jurisdictions with strong commercial ties with the British offshore world, such as Hong Kong and Singapore. As Lord Clarke concluded (at paragraph 115):

> "…there is no reason why the common law should not be developed, provided that the development is measured and supports a recognised principle."

In this regard it is to be hoped that in future cases the unanimous view that it was "forum shopping" for the liquidators to seek relief they could not obtain under Caymanian law from the Bermuda court may be reconsidered. The principle that this finding is based upon was described by Lord Sumption in the following terms:

> "29...It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as 'forum-shopping'. In the opinion of the Board it is correct."

The quoted passage appears to blur the admittedly unclear lines of demarcation between the legal basis for recognition (giving extra-territorial effect to the foreign winding-up order) and the legal basis upon which assistance is granted. It is clearly consistent with the fundamental character of common law assistance that foreign liquidators should not seek to do abroad what they are not empowered to do by the law of the only forum in which they have been appointed. It is less obvious that the same constraint applies to the pursuit of distinctive remedies in a foreign forum. No such constraints appear to apply where an application for assistance is made pursuant to statutory international cooperation provisions so it is unclear why a different rule should apply to common law assistance. Even if historically assistance has been justified by reference to permitting the foreign liquidator to carry out their foreign law defined duties in the assisting forum, the remedial phase has surely always been defined by what is possible under local law. Moreover, the focus has been on maximum assistance possible rather than seeking to minimize the assistance given by reference to procedural law idiosyncrasies in the primary liquidation forum.

From the perspective of the primary liquidation court, liquidators are typically appointed in international liquidations on terms that generally empower them to seek such assistance from foreign courts as may be required. Judges making such appointment orders are, it is submitted, unlikely to view themselves as authorizing the liquidators to obtain assistance from a foreign court pursuing only remedies which are available in the primary liquidation court, without more. The goal of the primary liquidation court would be for the liquidators to recover the maximum assets and/or information as can be obtained from the foreign court. The reasoning appears to be that the foreign liquidators seeking recognition and assistance are pursuing what approximates to a claim governed by foreign law, so that any local remedies should mirror those available in the foreign forum. This approach seems somewhat artificial as, in the case of an application for common law assistance made in Bermuda, the assistance "claim" is clearly governed by Bermudian law. It seems odd not to apply Bermuda law remedies to a Bermuda law claim pursued in a Bermudian in circumstances where the foreign court would be bound to endorse rather than disapprove extending to its liquidators invaluable relief which the foreign court was unable to itself extend. This flies in the face of the various public policy considerations which underpin the common law assistance power and potentially produces absurd results.

This aspect of the *Singularis* decision, adopted by common accord as if the point was self-evident, is perhaps the most puzzling part of the Privy Council's decision. One can only speculate whether the result was subliminally influenced by the somewhat unusual procedural history of the information gathering exercise. Rather than commencing proceedings in Bermuda on the basis that PwC was resident there, the liquidators first applied to the Caymanian court and PwC submitted to the jurisdiction. In general civil litigation terms, pursuing a "second bite of the cherry" in Bermuda appeared to be a classic case of "forum shopping". It is submitted that in the insolvency law arena proper (i.e. excluding adversarial litigation to which liquidators are parties), the concept of forum shopping has always enjoyed and should continue to enjoy a distinctive connotation than it does in the context of adversarial litigation.

In the interests of not unduly restricting the scope of common law assistance in cross-border insolvency cases, it is hoped that the "forum-shopping" aspect of *Singularis* will come to be seen as coloured by the facts of that particular case. However, the judgments of the majority have provided the clearest possible support for the vitality of the common law and its ability to provide assistance to foreign liquidators.

The Cayman Islands: Does the Cayman Grand Court have Jurisdiction to assist a Foreign Insolvency Representative at Common Law and, if so, can Local Statutory Insolvency Rules be applied?

In *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al v Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated 14 January 2013 (Andrew Jones J) ("*Primeo*"), a first instance court also found that the common law power to assist foreign liquidators had not been diminished by the *Rubin* decision. These questions arose in the context of the determination of preliminary issues.

The applicant in this case was the Trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS"), a New York corporation with limited ties to the Cayman Islands. The respondent ("Primeo") had invested monies with BLMIS. The Trustee wished to recover payments made by BLMIS to Primeo within the six months prior to the commencement of the insolvency proceeding in New York. BLMIS could not be wound-up under Caymanian law. However, the Trustee sought to rely upon, *inter alia*, Caymanian statutory insolvency avoidance provisions and, alternatively US avoidance provisions.

Statutory powers to provide assistance to foreign representatives do exist in Cayman, under Part XVII of the Caymanian Companies Law. However, Jones J found (at paragraph 19) that those powers did not include the deployment of avoidance provisions. He went on to consider the common law position, and held that:

> *Rubin* did not undermine the holding in *Cambridge Gas* that common law assistance embraced the notion of active assistance by the local court (at paragraph 33);
>
> "It remains open to this Court to accept Lord Hoffman's answer to the question I have to decide. I conclude, as Proudman J did in [*Re Phoenix*], that the scope of the assistance available at common law includes the power to entertain an avoidance claim under section 145 (or its predecessor section)" (paragraph 35);
>
> Courts granting assistance at common law can apply local insolvency law, subject only to the limitation that "*the common law cannot bring into play a statutory provision to achieve a purpose which is different from the object of the statute*" (at paragraph 40, applying *Al Sabah v Grupo Torras* [2005] 2 AC 233 (PC)).

The Grand Court's decision has been appealed to the Caymanian Court of Appeal, and it was hoped that a judgment will be delivered on these intriguing questions in the course of 2014. In the event, the Court of Appeal decided to await the judgment in *Singularis* which effectively determined that the *Primeo* case was wrongly decided. Lord Collins after considering the *Primeo* decision that common law assistance could take the form of applying local statutory anti-avoidance provisions opined as follows:

> "102. The Court of Appeal did not reach the question whether Jones J was entitled to apply the Cayman anti-avoidance provision at common law. The court had been informed that an issue central to that question, namely whether *Cambridge Gas* should be followed, was before the Court of Appeal of Bermuda. Because the matter was before this Board and shortly to be heard, the Court of Appeal was invited to hand down an interim judgment dealing only with the issues on the mutual assistance statutory provisions. The appeal has now been settled. It follows from what I have said that the decision of Jones J on the present aspect of the case was wrong."

The British Virgin Islands: Can a Foreign Representative whose Appointment is recognised solely at Common Law be clothed with the same Statutory Powers as a Duly Appointed Local Liquidator?

In *Re C (a Bankrupt)* Claim No BVIHC (COM) 0080 of 2013 (Bannister J, Acting, 31 July 2013), many of the authorities considered by the Bermudian and Caymanian courts in *Re Saad Investment Company Ltd* and the *Primeo* case, were revisited by the BVI Commercial Court. Regretfully, the *Saad* case was not itself considered. Trustees of a Hong Kong bankrupt applied for common law recognition and sought an order under the inherent jurisdiction of the court conferring on them the same powers that would be conferred on trustees appointed under Part XII of the Insolvency Act 2003.

Following an exceptionally lucid and concise analysis of the various authorities, Bannister J held that there was no basis supported by authority upon which the trustees could be conferred the composite basket of powers, either at common law or under the Court's inherent jurisdiction, which a trustee appointed under the 2003 Act would vested with (paragraph [20]). He opined that Proudman J's contrary ruling in *Re Phoenix*, decided before *Rubin*, was wrong (paragraph [15]). He declined to follow the Cayman Grand Court's decision in *Primeo*.

The following portions of the BVI Commercial Court judgment explained the scope of assistance which Bannister J considered could properly be given in aid of common law recognition as follows:

> "[13] Each of the varied examples given by Lord Collins in the passage which I have set out above from *Rubin v Eurofinance* will similarly be seen to be an example of specific assistance given by local to foreign Courts as a matter of discretion in each case for the purposes of preserving the integrity of their insolvency procedures. In none of them, including *Re Impex Services Worldwide Ltd*,[89] upon which Miss Harris relied strongly, is there any suggestion that at 'common law' a foreign insolvency practitioner, once recognized, is to be treated as entitled to exercise the powers which he would have had had he been appointed pursuant to the insolvency laws of the given jurisdiction. The cases mentioned by Lord Collins all stress the discretion of the assisting Court to decide what, if any, assistance to provide to the foreign Court through its officer.
>
> [14] As for *Impex*, what the Manx Court did was to use its own powers to compel the attendance of witnesses for examination. It did not do so under the Manx Companies Act, which it held was not available to it because the applicant was not the liquidator of a Manx company. It did it under its inherent jurisdiction and by way of assistance – just as, no doubt, it could have granted *Norwich Pharmacal* relief to the applicant Impex is not authority for the conferring of local statutory powers or rights upon a foreign office holder. If anything, it is authority to the contrary. It is authority, however, for the proposition that the local Court will use its own inherent powers to provide assistance to the foreign office holder."

So Bannister J firmly rejected the notion that local statutory insolvency powers could be engaged in the context of common law assistance, whether those powers were sought collectively or individually. His forceful analysis suggests that assistance ought to be:

(a) tailored to allowing the foreign representative to do specific things; and

(b) limited to permitting the representatives to deploy powers that the Court can confer on them under its general and/or common law powers.

89 [2004] BPIR 564.

Point (a) appears to this writer to be a more compelling point than does point (b). Point (a) is broadly consistent with the principle which Andrew Jones J in *Primeo* extracted from the Judicial Committee of the Privy Council decision in *Al Sabah v Grupo Torras* [2005] 2 AC 233. As Jones J opined (at paragraph 40 of his judgment in *Primeo*):

> "…the common law cannot bring into play a statutory provision to achieve a purpose which is different from the object of the statute."

It is also not made explicitly clear why common law assistance can be provided based on selected "inherent" general powers which are often of statutory derivation, but cannot be provided based on selected statutory insolvency powers. Perhaps it is implicit in Bannister J's compressed reasoning (and, indeed, the similar approach taken by Deemster Doyle in *Re Impex*) that general statutory powers are designed for general use in any proceedings before the local court. By way of contrast, statutory insolvency provisions are only designed for use in proceedings commenced under the relevant insolvency statute, and not otherwise.

The approach of Bannister J in *Re C a Bankrupt* is so closely aligned with the majority judgments of the Privy Council in *Singularis* that only one word of further commentary is required: bravo!

Conclusion

Despite the enactment of statutory international cooperation provisions in BVI and Cayman, the courts of those jurisdictions, alongside Bermuda's courts, have had to grapple with the question of the extent to which common law forms of assistance can be given in aid of foreign insolvency proceedings.

The Judicial Committee of the Privy Council in *Singularis* delivered insolvency lawyers with a veritable five course feast. The majority (Lords Sumption, Collins and Clarke) confirmed that the power to assist foreign liquidators at common law under what has been described as the principle of modified universalism is very much alive, and extends to ordering parties in possession of information relevant to a company's assets and business to produce the relevant information. This finding was strictly *obiter*, and while Lords Mance and Neuberger disagreed with the existence of the relevant power, they did not dissent from the proposition that as regards various other forms of relief, the common law power to assist foreign liquidators does exist.

It is obviously possible to quibble with some of the finer points of analysis, notably the surprisingly unanimous view that relief may not be granted by the assisting court in terms more generous than is available in the primary liquidation forum. This finding seems to elide two distinct concepts:

(a) what the foreign liquidators are empowered to do by virtue of their appointment (e.g. commence proceedings, collect assets); and

(b) what remedies are available to them under the law of the assisting forum.

It is submitted that as the common law assistance claim is substantively governed by the law of the assisting forum, relief available under the same law should not be trimmed back to conform with corresponding relief in the primary liquidation forum. The position may well be different if a foreign claim is being prosecuted abroad by foreign liquidators.

However, the decision as a whole has provided the clearest possible support for the vitality of the common law and its ability to provide assistance to foreign liquidators. As Lord Neuberger has aptly pointed out (at paragraph 154), reflecting on the difficulties that this topic has presented even at the highest appellate levels:

> "…The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic…"

The challenges of the past will, to some extent, continue in the future so long as recourse must be had to common law assistance remedies lacking any statutory fortification. Future analysis of this topic will be considerably enriched by the judgments delivered in the Privy Council in *Singularis*. It is crystal clear, as 2015 dawns, that the vitality of common law judicial assistance in cross-border insolvency cases will remain undiminished in the British Atlantic and Caribbean World.

Chapter 4

Interaction of Corporate Law and Insolvency Law: German Experience and International Background

Professor Dr Karsten Schmidt

Introduction and Preliminary Observations

A Domestic View on a Global Affair

The topic of my Edwin Coe Lecture is devoted to the question: To what extent does insolvency law interfere with business law? And: In what respect is the evolution of insolvency law influenced by corporate law? In other words: I will be talking about the evolution of corporate law, brought into action by insolvency law, and vice versa.

My presentation will start with some very general preliminary observations. The first one is that insolvency law policy has become a global affair due to persistent competition of insolvency law concepts.[1] And this competition increasingly affects corporate law in particular and business law in general. The perspective will be based on the experience of German legislation and the approach may appear rather academic. I am hopeful, however, that this approach will reveal a number of questions targeting practitioners' tasks and legal policy all over the world.

Corporate Distress: Subject both to Insolvency Law and Corporate Law

Corporate distress is subject both to insolvency law and corporate law.[2] At first glance this seems to go without saying. Quoting Gertrude Stein's famous "a rose is a rose is a rose" nobody would hesitate to conclude that a corporation is a corporation is a corporation, even in case of crisis or insolvency. The coincidence of corporate law questions and insolvency law questions would be a simple task if insolvency law rules merely referred to procedural issues and the total of company

* This is a re-edited and updated version of a piece first published under the same title in Chapter 16 in R. Parry (ed), *Substantive Harmonisation and Convergence of Laws in Europe* (2012, INSOL Europe, Nottingham) (213-231).

1 H. Eidenmüller/T. Frobenius/W. Prusko, NZI 2010, 545 et seq.; H. Eidenmüller, ZGR 2006, 467; H. Eidenmüller, ZZP 121 (2008), 273, 274 et seq.

2 See K. Schmidt, ZHR 174 (2010), 243 et seq.

law rules was not affected by impending insolvency or the opening of insolvency proceedings. This, however, is not the case as:

- Corporate governance includes coping with crisis management.
- Impending insolvency casts its shadow on corporate finance and governance.
- The directors and sometimes even the shareholders participate in the opening procedures.
- The corporate finance rules will not be the same after the commencement in insolvency proceedings.
- Insolvency proceedings will interfere with corporate structure and corporate governance.

Accordingly, it is sometimes difficult to find out if a rule affecting a distressed corporation is part of corporate law or insolvency law. In England e.g. the Insolvency Act 1986 deals with company voluntary arrangements,[3] whereas the Companies Act 2006 deals with the schemes of arrangement.[4] The question will be: does this conclusively mean that the first belongs to insolvency law and the second belongs to corporate law? As we will see, this qualification issue becomes crucial in conflict of laws cases. It may, however, be relevant for legal policy issues, too. In 2008, German legislation shifted some mandatory provisions about corporations from the corporate law codes to the Insolvency Code,[5] e.g. the rules about shareholder loans[6] and wrongful trading.[7] One of the unadmitted ideas behind this step was to make these provisions applicable to foreign law corporations with a real seat in Germany, particularly English private limited companies. Following the incorporation theory, these corporations are governed by the rules of their domestic company law.[8] In case of insolvency procedure, however, insolvency law prevails as *lex fori*,[9] now including former company law provisions. At first glance,

3 Sections 1-7, Insolvency Act 1986.

4 Sections 895–901, Companies Act 2006.

5 Gesetz zur Modernisierung von des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) of 23 October 2008, BGBl. I, 2026.

6 Sections 39, 135 Insolvency Code (InsO), instead of section 32a/b, Limited Liability Companies Code (old version) (GmbHG a.F.).

7 Section 15a, Insolvency Code (InsO), instead of section 92(2)-(3), Corporation Code (AktG), section 64, Abs. 1, Limited Liability Companies Code (old version) (GmbHG a.F.); section 130a, Abs. 1, Commercial Code (old version) (HGB a.F.).

8 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) [1999] ECR I-1459; *Überseering BV v NCC Nordic Construction Company Baumanagement GmbH* (C-208/00) [2002] ECR I-09919; *Kamer van Koophandel en Fabricken voor Amsterdam v Inspire Art Ltd* (C-167/01) [2003] ECR I-10155.

9 See Article 4(1), European Insolvency Regulation; section 335, Insolvency Code (InsO).

this recent extension of insolvency law may appear as a poor trick of German legal policy. However: these rules are acknowledged as part of insolvency law in most countries outside Germany as well. Consequently, this legal policy strategy is acceptable, yet not due to its allocation in the respective codes, but rather for common sense reasons. In July, the Insolvency Law Chamber (Senat) of our Federal Court held that, even prior to the new legislation, the special provisions about shareholder loans had been insolvency law rules, as far as they required the opening of insolvency proceedings.[10] We learn from all this that the qualification issue is more difficult than it seems.

The Traditional Division between the Two Legal Disciplines

The history of corporate insolvency law is a story of increasingly intensive links between both disciplines.[11] In Germany, academic and legislative tradition neglected these links. Originally insolvency law only dealt with liquidation and equal treatment of creditors. The Konkursordnung of 1877 was based on the historical ideas of procedural execution, inspired by Salgado de Somoza's famous, but 350 year old work "*labyrinthus creditorum*", and did not show the footprints of commerce and business. The first attempts to extend the goals of insolvency law to business reorganisation were made during the depression between the two World Wars. Legislation introduced the instrument of majority arrangements (in Germany: "Zwangsvergleich"[12] and "Vergleich"[13]), which already came close to the idea of insolvency plans. These reorganisation procedures, however, did not establish themselves in business reality. Additionally, a formal division between the bankruptcy proceedings leading to liquidation and the arrangement proceedings as a turnaround instrument was responsible for the disappointing results of this reform.

The present Insolvency Code ("Insolvenzordnung") of 1994 tries to integrate the task of corporate restructuring into insolvency law by:

- extending the grounds for opening of insolvency proceedings (imminent illiquidity is sufficient);
- introducing the institute of "debtor in possession" (Eigenverwaltung) in favour of the company's management; and,
- implementing the Chapter 11 idea of an insolvency plan.

10 BGH, 21 July 2011 - IX ZR 185/10, ZIP 2011, 1775 ("*PIN*").

11 See K. Schmidt, *Wege zum Insolvenzrecht der Unternehmen* (1990, Kommunikationsforum, Köln), at 23 et seq.

12 Section 160 et seq., Bankruptcy Code (Konkursordnung).

13 Section 1 et seq., Arrangement Code (Vergleichsordnung).

This was a promising attempt. But still, although enacted with the best of intentions, these turnaround instruments in the “Insolvenzordnung” again proved to be disappointing. For this reason, the aforementioned reform bill of 2008 (“MoMiG”) strengthened the impact of insolvency law on business law. So, actually, the relation between corporate law and insolvency law is no longer the same. And, as I will show, German legislation will take a second reform step pointing in the same direction this very year.

Insolvency and Corporate Governance

The Traditional Concept

A Management Affair

Let us, however, first look at business law as such. Avoiding business distress and reacting on an emerging crisis is, first of all, a corporate governance concern.[14] Worth mentioning among directors’ duties is:

- the continuous observation of liquidity and solvency;
- the immediate reaction on any symptom of a crisis; and
- the timely resort to restructuring measures.

The management board of a German stock corporation is expressly committed by section 91 of the Stock Corporation Act to establish a monitoring system. In a limited corporation, which is a close corporation, this formal rule does not apply. However, the general duty to protect the business is an unwritten, yet binding general corporate governance rule affecting the limited corporation as well.

The relevant measures at hand may, e.g., consist of:

- changing business strategies;
- substitution of employees and managers;
- financial reconstruction; and
- other rehabilitation measures.

In a listed stock corporation, the directors are responsible for most of these strategies. In a close corporation, the strategic matters are in the hands of the

14 K. Schmidt in K. Schmidt and W. Uhlenbruck (eds), *Die GmbH in Krise, Sanierung und Insolvenz* (4th ed) (2009, Beck, München), at 19 et seq. (paragraph 1-2 et seq.).

shareholders. It is, however, up to the directors to inform the shareholders or the supervisory board about any imminent threat to the business. Directors neglecting the relevant duties may be personally held liable for any damage arising from this negligence.

Consequently, avoiding solvency problems and surmounting the emergence of a crisis is, predominantly, not an insolvency law concern, but a concern of:

- business administration; and
- business law (in particular: corporate law).

No Fiduciary Duties Prior to Insolvency Proceedings?

On the other hand, in the common view, corporate governance in general and directors' duties in particular are deemed to protect the company and its shareholders, but not its creditors. Admittedly and as everyone knows, the creditors will indirectly benefit from good governance, as a properly managed business can be expected to meet its debts. Yet, the point of reference of director's duties still is the business itself.

Some academics, however, question this principle, substantiating their doubts with a landmark decision of the Delaware Court of Chancery.[15] Under strict circumstances,[16] this court acknowledges fiduciary duties of directors for the benefit of creditors, particularly in cases of "insolvency in fact".[17] At first glance, this opinion may appear exotic. You may be surprised when I tell you that German law follows a similar approach ever since. Insolvency in fact is the moment of truth, or let us say: the moment when the directors have to disclose the financial situation of the company.

The Moment of Truth

German law defines *de facto* insolvency in two insolvency code provisions under the label "illiquidity" (section 17 of the Insolvency Code) and "overindebtedness" (section 19 of the Insolvency Code). Looking at the structure of our Insolvency Code, these provisions merely appear as triggers for the opening of insolvency proceedings. And indeed, filing for bankruptcy proceedings and a court decision upon this request requires the existence of a ground for insolvency proceedings. Yet this state of *de facto* insolvency is not only a reason for opening bankruptcy

15 For detailed references, see L. Klöhn, ZGR 2008, 110, 120 et seq., 130 et seq.

16 *Blackmore Partners v. Link Energy,* 2005 WL 2709639 (Del. Ch.), 6.

17 *P. Geyer v. Ingersoll Publications Company,* 621 A.2d 784, 18 Del. J. Corp. L., 658, 668.

proceedings, but also indicates the moment of truth *vis-à-vis* the creditors. We will now see, how German legislation tries to define these crucial situations.

The Relevant Provisions

It may be regarded a very German idea to define the moment of truth in the law. In accordance with section [18] of the Insolvency Code, the debtor and only the debtor is entitled to request the commencement of insolvency proceedings when faced with imminent illiquidity. This provision is supposed to serve as an incentive to file for bankruptcy at an early stage.18 I will, however, ignore this interesting rule for two reasons:

- First: From the directors' perspective this particular insolvency ground would compare to a promise rather than a moment of truth.
- Second: The German experience is that this incentive is not effective.[19] This indicates, that insolvency proceedings in Germany are not attractive to distressed businesses and ought to be subject to reform.

"Moment of truth" means, that the business crisis has to be revealed to the creditors and to the court. This is the case of actual illiquidity or overindebtedness. In accordance with section 17(2) of the Insolvency Code, the debtor shall be deemed illiquid, if he is unable to meet his mature obligations to pay. The objectives of section 17(2) seem to be very clear and convincing, particularly since we do not find any prognostic element in its wording. However, case law has added some prognostic elements to this definition of illiquidity, because the courts make a distinction between illiquidity and a momentary holdup of payments.[20]

Section 19, however, which is applicable only to businesses without unlimited personal liability, contains a much more crucial rule about the moment of truth. Its name is "overindebtedness", although I doubt, that this term hits the nail on its head. The "overindebtedness" concept is more than 100 years old. The definition of section 19(2) is much younger. In its literal sense, "overindebtedness" means that the assets of a business no longer cover its debts. The expression implies a mere balance sheet test. In the past, however, business people, lawyers, and judges found out that the result of this test depends on the valuation of the assets, and this assessment depends on the prospects of the business: going concern or

18 J. Drukarczyk, in H-P. Kirchhof *et al.* (eds), *Münchener Kommentar zur Insolvenzordnung* (2nd ed) (2007, Beck, München), § 18 para. 1 et seq.

19 W. Uhlenbruck, in F. Richter *et al.* (eds), *Festschrift für Drukarczyk* (2003, Vahlen Franz, München), at 441 et seq.

20 BGH, 24 May 2005 - IX ZR 123/04, BGHZ 163, 134.

liquidation? This understanding led to a case law test of overindebtedness which, after an intense discussion, was adopted by the Insolvency Code in 1994:

> "Over-indebtedness shall exist if the assets owned by the debtor no longer cover his existing obligations to pay. In the assessment of the debtor's assets, however, the continuation of the enterprise shall be taken as a basis, if according to the circumstances such continuation is deemed highly likely."[21]

As for myself; I was not convinced by this definition. In my research work I had proposed a different test,[22] which in the end had been adopted by the Federal Court, but was rejected, when the Insolvency Code was enacted. This definition sounds, but only sounds, similar to that of 1994:

> "Over-indebtedness shall exist if the assets owned by the debtor no longer cover his existing obligations to pay, unless the continuation of the enterprise is highly likely under the circumstances."[23]

The difference lies in the function of the prognostic element. In the first definition, the prognosis serves as a mere premise for the valuation of the assets. In the second definition a positive prognosis as such may justify the continuation of the business. This means, continuation is lawful as long as the assets cover the debts or (!) the prognosis seriously promises the business's sustainability. The difference in the approach is obvious, although there is an ongoing discussion about the disparities in the results. In the second definition the prognosis is much more effective. It may, in itself, justify the continuation of the business in spite of a lack of assets.

The original definition of overindebtedness worked pretty well as long as there was no general financial crisis in Germany. The moment, however, the recent crisis was on, policy was concerned with the future of our banks. Instantaneously, legislation shifted to the alternative definition in order to prevent a disastrous collapse of the banking system in the wake of the Lehman Brothers insolvency.[24]

Again, one might ask, whether this was a poor trick of legislation: rescuing banks by bringing the law in line with the expected result. For my part, however, I see this as a historical chance to make up for the legislator's mistake of 1994. The moment of truth is the point of time, when the company no longer deserves the

21 Section 19, Insolvency Code (InsO) in the version of 5 October 1994, BGBl. I, 2866.

22 K. Schmidt, AG 1978, 334, 337 et seq.; Schmidt, above note 11, at 50 et seq.

23 BGH, 13 July 1992 - II ZR 269/91, BGH 119, 201.

24 Finanzmarktstabilisierungsgesetz of 17.10.2008, BGBl I, 1982.

confidence of the creditors. I admit, this criterion is contrary to the German ideal of drafting a crystal-clear definition. Business life, however, tells us that this idea is a mere illusion. A realistic view reveals that fighting the protraction of insolvency proceedings cannot be based on a clearly defined delimitation of the crucial point of time. The English rule about wrongful trading e.g. only requires that the director:

> "…knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation." (section 214 of the Insolvency Act 1986)

The present understanding of "overindebtedness" in Germany comes close to this concept. A rather secondary question is whether the term "overindebtedness" is still adequate under this prognostic approach. What is in a name? Call it the way you prefer! But stick to the prognosis as part of directors' responsibility in business.

Duties to File for Bankruptcy

What does the moment of truth mean to the company's directors? According to the German Insolvency Code, the directors now are bound to file for the commencement of bankruptcy proceedings without undue delay but after three weeks at the latest (section 15a of the Insolvency Code). The violation of the duty to file for insolvency is a civil and criminal offense. It is a violation of both German tort law (section 823(2) of the Civil Code) and public interest (section 15a(4)-(5) of the Insolvency Code). In the perspective of comparative law, the duty to file for insolvency is said to be based on a unique concept. In my view, however, it is nothing but the German version of wrongful trading.[25] By the way, it is more than one hundred years old. It had been inserted as a corporate law rule in the relevant codes during the nineteenth century. Only three years ago, legislation shifted this rule to the Insolvency Code. Its application does not – unlike section 214 of the English Insolvency Act 1986 – presuppose the opening of insolvency proceedings, although in most cases this will happen. In a following insolvency liquidation, the insolvency receiver is authorized by section 92 of the Insolvency Code to claim the overall damage caused to the company and the creditors as a whole by the delay. This claim is brought in a civil procedure, and the amount to be paid will be estimated by the civil court (section 287 of the Civil Procedure Code). And again, this civil law sanction comes very close to the concept of section 214 of the English Insolvency Act 1986, where:

25 Schmidt, above note 14, at 971 (paragraph 11.1); K. Schmidt, in M. Lutter (ed.), *Legal Capital in Europe* (2006, De Gruyter, Berlin) at 144, 155, 159 et seq.

> "…the court, on the application of the liquidator, may declare" that the director "is to be liable to make such a contribution … to the company's assets as the court thinks proper."

Obviously there remain technical differences between these two concepts. In Germany:

- the decision is made in a separate civil procedure.
- the amount to be paid to the company's assets is defined as the overall damage of stakeholders.
- the offense is defined as the violation of duties to file for bankruptcy.

The general attempt, however, is amazingly similar. For this reason, I try to convince my German colleagues and German judges that even in our country the unlawful behavior of directors in section 15a cases is not the failure to initiate bankruptcy proceedings but rather the continuance of the business. Consequently, it is not unjust that even shadow directors can be punished or held liable for damages, although they are not authorized to file for the opening of bankruptcy proceedings. And this, in the result, is what German courts do.[26]

As I already told you, the German wrongful trading rule is part of the Insolvency Code since 2008, but has been derived from corporate law rules, which had been in force for more than 100 years, now replaced by section 15a of the Insolvency Code. Again this brings me to the question: Is section 15a of the Insolvency Code an insolvency rule or rather a corporate law rule about directors duties? I guess that most of you will agree to this insolvency law approach, which actually is accepted by practitioners and academics in my country, too. And yet: the relevant duties have to be observed prior to insolvency proceedings.

This leads to some remarks about shareholders' liability in wrongful trading cases.

German law acknowledges shadow directors' responsibility for wrongful trading.[27] Shareholders can be sued as shadow directors, but just under very narrow circumstances. For this reason there had been a flourishing "funeral services" market for distressed corporations. Their strategy was to acquire a company's shares, make the directors resign from their positions, and liquidate the company outside insolvency proceedings without taking up director's duties. In order to prevent this abuse the reform bill of 2008 contains a special rule about the

26 BGH, 11 July 2005 - II ZR 235/03, ZIP 2005, 1550.
27 BGH, 11 July 2005 - II ZR 235/03, ZIP 2005, 1550.

shareholders' responsibility for wrongful trading in the case of leadershiplessness (section 15a(3) of the Insolvency Code).

Directors' Duties for the Benefit of Creditors

So, let me conclude. German company law does not acknowledge directors' duties in favour of creditors prior to *de facto* insolvency. There are, however, a number of corporate governance rules with indirect effect in favour of the creditors, although the creditors cannot sue the directors for specific performance or damages. It is up to the shareholders or the supervisory board to enforce the relevant duties. Yet things change completely in a situation of *de facto* insolvency, as defined in the Insolvency Code.

The interrelation between corporate law and insolvency law regarding this issue therefore works:

- indirectly in absence of de facto insolvency on the basis of corporate government rules; and
- directly from the beginning of de facto insolvency under wrongful trading rules.

In both cases, a future insolvency receiver will be able to enforce the civil sanctions claiming for payment to the insolvency estate.

Business Organisation and Insolvency Proceedings

Debtor in Possession or Court Appointed Official

Today, most insolvency laws in the world provide two models of business organisation in insolvency cases: management by a court appointed insolvency official or the debtor in possession model. German legislation learnt this from the US Chapter Eleven.[28] Its concept, adopted only in 1994, was regarded as promising. However, it did not keep its promise. In Germany most insolvency proceedings are still exclusively managed by a court appointed receiver. The debtor in possession concept has been a long time in coming and is not yet really accepted in business insolvency cases. The recent Arcandor proceedings e.g. – collapse of a huge corporate group of department stores and a mail-order business – appeared to be an encouraging example, but ended in insolvent liquidation proceedings managed by a court appointed receiver. I will later come back to the presumable reason for this characteristic failure of the debtor in possession concept in Germany.

28 See the explanatory memorandum to the German Insolvency Code 1994, Bundestagsdrucksache 12/2443, 105.

There are, however a lot of open questions even with regard to ordinary cases of insolvency receivership. Concerning corporate governance in an insolvent company, there is an ongoing debate on the separation of powers between the receiver and the continuously existing company's organs.[29] Courts and commentaries, for example, are restrictive in imposing the duties of a company's organs upon the receiver, such as the information of shareholders. Even environmental agencies hold that environmental liabilities stemming from the period prior to the opening of insolvency procedures do not have any binding effect on the receiver and the insolvency estate, a result which in my eyes is hardly acceptable.[30] Another point of discussion is the business judgment rule.[31] Does a receiver, running the company's business, benefit from this common sense driven privilege regarding corporate governance liability? As for myself, I am in favour of the so called insolvency judgment rule, although many academics do not agree.

On the other hand, in the debtor in possession scenario, where the directors themselves act as liquidators or continue running the business, a specific insolvency law question is at stake. Does – and to what extent does – the opening of insolvency proceedings affect the organisation even though the management is still in the directors' hands? The answer of most insolvency laws is that, beyond the change of directors' duties, the company's organisation is altogether subject to fundamental change. The shareholders for example or a supervisory board must no longer monitor the directors, who have to abide by the creditors' resolutions and the decisions of the insolvency court. The majority of colleagues in my country accepts this concept. Yet, in a recent publication, I raised the question if this understanding is in line with the debtor in possession idea.[32] In my view, the debtor in possession concept should not interfere with the organisation of the business and just stick to the directors' duty to act in accordance with insolvency law, but nothing more.

Company Group Aspects

The worldwide phenomenon of corporate groups – "groupe de sociétés", "gropo de sociedades" or whatsoever – makes things even more complicated. The "Legislative Guide on Insolvency Law" of the United Nations Commission on International Trade Law (UNCITRAL) extensively deals with the "Treatment of corporate groups" (2005), "enterprise groups" (2009), discussing, *inter alia*,

29 See – with further references – K. Schmidt, AG 2011, 1 et seq.
30 K. Schmidt, NJW 2010, 1489 et seq.; K. Schmidt, ZIP 2000, 2013 et seq.
31 C. Berger/M. Frege, ZIP 2008, 204 et seq.; C. Jungmann, NZI 2009, 80 et seq.
32 K. Schmidt, BB 2011, 1603 et seq.

the question if corporate groups shall be subject to "substantive consolidation" or at least "joint administration". At first glance, many of us may be in favour of "substantive consolidation" regarding the corporate group as a unit. However, even the UNCITRAL documents reveal that substantive consolidation will only be workable under "very limited circumstances". This statement seems convincing to me. Groups of companies are based both on the separation of the group members and the non-uniform links between them. For this reason, even the famous German "Konzernrecht"-rules do not deal with the group as such but only with control, financial relations and linked responsibilities between group members, such as parents, daughters or siblings.[33] Substantive consolidation would go far beyond this concept, leading to multiple and permanent piercing of the corporate veil. In my eyes, this simple observation sufficiently proves that the consolidation concept is not helpful as a general principle.

For the same reason, a uniform group forum for the corporate group will never work as a mandatory rule. Nevertheless, the forum concern must be considered both national and transnational. The moment the crisis of a business in a corporate group affects other group members, we should ask for a group-oriented center of main interest. This is a crucial concern. In some German cases, we witnessed that group members moved from one seat to another for the only reason to open insolvency proceedings at the forum of their parent company.[34] In order to render this manœuvre unnecessary, I made some suggestions to German legislation, published in a German law journal, concluding that we should work on these details instead of expecting too much from a mandatory corporate group forum.[35]

Insolvency Plans

Conceptual Basis

Today, most countries in the world are familiar with the concept of insolvency plans. This makes me confine myself to some very short remarks, before switching to legal policy. The first one is that, beyond the powerful model of Chapter Eleven, there had been precursors in many countries. The legitimacy of insolvency plans – contrary to unanimous arrangements – derives from the combination of private workout and court approval. The question, whether the stakeholders' resolution is a private law instrument in spite of the last-mentioned requirement is merely

33 K. Schmidt, in U. Schneider et al. (eds), *Festschrift Lutter* (2000, Otto Schmidt Verlag, Köln), at 1167 et seq.

34 See Eidenmüller/Frobenius/Prusko, above note 1; H. Eidenmüller, KTS 2009, 137 et seq.; M-P. Weller, ZGR 2008, 835 et seq.

35 K. Schmidt, KTS 2011, 161 et seq.

academic. The apparently more practical issue of rights to file a plan is extensively dealt with in the German code. The creditor or the insolvency administrator is entitled to submit an insolvency plan to the insolvency court (section 218(1) of the Insolvency Code). Reality, however, tells a different story. Regardless of the formal competence to file, a plan needs to be prepacked under the assistance of major stakeholders. The legal policy issues lie elsewhere.

Reorganisation Plans affecting the Shareholders

As mentioned before, the performance of insolvency plan proceedings and the debtor in possession model is still disappointing in my country. One of the reasons for this, again is, beyond economic reality, the persistent division of corporate law and insolvency law. Due to this concept, insolvency plans only deal with creditors and disregard the shareholders. This is detrimental to business reorganisation.[36] If, e.g., the restructuring of an enterprise shall consist of four elements:

- waiver of debts;
- deferment of payments;
- reduction of (old) share capital; and
- increase of capital providing fresh funds;

the resolution referring to debts is part of the insolvency plan produced by the creditors,[37] whereas the resolution referring to the share capital is passed by the shareholders.[38] Up to now, German insolvency law does not provide any particular reduction or increase of capital instruments. The indispensable link between these coherent measures can only be established by a "conditional insolvency plan" ("bedingter Insolvenzplan") (section 249 of the Insolvency Code). This insolvency plan will not be acknowledged by the insolvency court, unless a capital increase resolution has been registered. The basic idea behind this concept was that company law and insolvency law have different tasks and different legitimating rationales. Yet this approach is a rather academic one and has never been accepted in business practice.

Major problems arise in debt-to-equity swap scenarios, consisting of:

- debt cancellation;

36 See H. Eidenmüller, in Kirchhof *et al.* (eds), above note 18, at 66 et seq. (§ 217, paragraph 2); H. Eidenmüller/A. Engert, ZIP 2009, 541 et seq.

37 Section 235 et seq., Insolvency Code (InsO).

38 Sections 55, 58, Limited Liabilities Code (GmbHG); sections 182, 222 Corporation Code (AktG).

- reduction of share capital (regarding the old shares);
- increase of capital (promising a raise of the assets);
- using remaining claims of insolvency creditors as contributions in kind.

Obviously this package of restructuring measures is not workable as long as the relevant decisions have to be made by different bodies in separate procedures.

In December 2011, however, the German Bundestag passed an amendment to the Insolvency Code called the Act for Enhancing Business Restructurings.[39] This act is meant to smooth the path between insolvency law and corporate law. One of its achievements will be the insertion of corporate restructuring measures into the insolvency plan rules (which means another step to bring it into line with the US model). The shareholders will constitute a special group of stakeholders affected by the insolvency plan (section 220 of the Insolvency Code). Besides, there will be a new section among the rules regarding insolvency plans (section 217 et seq.), which reads as follows:

> "§ 225a RegE InsO – Rechte der Anteilsinhaber
>
> (1) Die Anteils- oder Mitgliedschaftsrechte der am Schuldner beteiligten Personen bleiben vom Insolvenzplan unberührt, es sei denn, dass der Plan etwas anderes bestimmt.
>
> (2) Im gestaltenden Teil des Plans kann vorgesehen werden, dass Forderungen von Gläubigern in Anteils- oder Mitgliedschaftsrechte am Schuldner umgewandelt werden. Eine Umwandlung gegen den Willen der betroffenen Gläubiger ist ausgeschlossen. Insbesondere kann der Plan eine Kapitalherabsetzung oder -erhöhung, die Leistung von Sacheinlagen, den Ausschluss von Bezugsrechten oder die Zahlung von Abfindungen an ausscheidende Anteils inhaber vorsehen.
>
> (3) Im Plan kann jede Regelung getroffen werden, die gesellschaftsrechtlich zulässig ist, insbesondere die Fortsetzung einer aufgelösten Gesellschaft oder die Übertragung von Anteils- oder Mitgliedschaftsrechten.
>
> (Section 225a RegE-InsO Rights of Shareholders

39 Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG) of 7 December 2011, BGBl. I, 2582.

(1) The share- or membership-rights of persons holding a share in the debtor remain unaffected by the insolvency plan, unless the plan provides otherwise.

(2) The constructive part of the plan may provide that claims of creditors are converted in share or membership rights in the debtor. No conversion can be made against the will of the affected creditor. In particular, the plan can provide for a capital reduction or increase, the performance of contributions in kind, the exclusion of subscription rights or severance payments to departing shareholders.

(3) In the plan, any arrangement permitted by law, in particular the continuation of a dissolved company or the transfer of shares or membership rights can be made.)"

Paragraph 3 of this new section plainly reveals the goal of this new legislation. The competence to amend the articles of association for restructuring purposes will shift from the shareholder meeting to the insolvency plan procedure.[40]

The basic idea of this concept is convincing. It had already been launched by the Expert Group which prepared the German Insolvency Code more than 25 years ago (First Report of the Insolvency Law Commission, 1985), but has not been taken up by legislation. The reason for this reluctance was not merely an academic one. It was due to the awareness of the involvement of complex corporate law issues. Particularly in a debt-to-equity swap scenario, difficulties will arise on different fields:

- firstly, the comparative valuation of claims and shares as different kinds of stakeholdership (affecting voting rights and conditions of the debt-equity-swap scenario);
- secondly, and necessarily, the fair treatment of creditors and shareholders; and
- thirdly, a procedure, meeting the requirements for legitimacy under insolvency law and corporate law.

A simple example: Let us think that the share capital is EUR 1 million. The cram-down may lead to EUR 100,000 only. We will have to rely on experts' opinions in order to know that this figure is correct.

40 See also the explanatory memorandum to the ESUG, Bundestagsdrucksache 17/5712, 47.

Let us further assume that an increase of capital will be financed partly by fresh money and partly by a debt-to-equity-swap. Who tells us that the valuation of the claims, which will be converted into share capital is correct?

Let us finally assume that the turnaround fails. In this case, the insolvency receiver (liquidator) might sue the debt-to-equity investors for payments, alleging that the valuation of the claims was incorrect and the value did not cover the increase of capital. This threat would be a disincentive regarding the debt-to-equity-model. In order to prevent this effect the reform bill will preclude those claims by declaring valuation in the insolvency plan proceedings binding. The relevant provision in the amended Insolvency Code will read as follows (section 254 (4)):

> "(4) Werden Forderungen von Gläubigern in Anteils- oder Mitgliedschaftsrechte am Schuldner umgewandelt, kann der Schuldner nach der gerichtlichen Bestätigung keine Ansprüche wegen einer Überbewertung der Forderungen im Plan gegen die bisherigen Gläubiger geltend machen.
>
> (In the event that claims of creditors are converted into shares of the debtor company, the debtor, after confirmation by the court, may not bring a claim based on the overvaluation of those contributions against the former creditors.)"

In the eyes of German corporate law and regarding its major concern, the capital protection concept, this insolvency law privilege means biting the bullet. The general rule of creditor protection is that a shareholder, whose contribution in kind does not equal the par value of his share, has to render a cash contribution in the amount of the deficiency.[41] The new legislation releases the creditors from this pending risk in insolvency plan scenarios. A mandatory creditor protection rule will be replaced by the control of the insolvency court. This concept will mean new challenges for insolvency proceedings, insolvency courts, and insolvency judges. It is their task to approve the insolvency plan including creditors and shareholders. This will require much more business expertise and responsibility.

41 Section 9, Limited Liability Companies Code (GmbHG).

Pre-Insolvency Procedures

General Preconditions

What does "Pre-Insolvency Procedure" mean?

The last part of my presentation attempts to explain that the legal policy debate about pre-insolvency procedures, too, is a discussion about the interaction of insolvency law and corporate law. Shall we rely on the tools of corporate law for turnaround strategies prior to *de facto* insolvency, or should insolvency law provide special procedures in order to enhance corporate reorganisation in business distress?

My first question in this respect is: What does "pre-insolvency procedure" mean? The diversity of models provided in European countries will make us uncertain. I leave the Italian "piano de risanamento" and the Austrian Reorganisation model out, for these are more or less mere safe harbour arrangements.

France offers no fewer than four pre-insolvency procedures. The "procédure de sauvegarde", which comes rather close to insolvency plan proceedings, gained a remarkable attention in the Eurotunnel case. The Italian "concordato preventive" virtually resembles an insolvency plan. In England, the "company voluntary arrangement" seems to be close to these reorganisation models, too. However, presently the scheme of arrangement seems to be at the center of attention, and this institution is regulated by the Companies Act 2006, not the Insolvency Act 1986. The variety of informal reorganisation models is overwhelming.

Pre-Insolvency Scenarios in the Absence of Formal Procedures

The legal policy question regarding pre-insolvency procedures depends on the usefulness of national civil and corporate law rules for turnaround purposes. And these national rules differ significantly. In Germany, the courts tend to implement pre-insolvency ideas in corporate law rules addressing the shareholders, not the company's creditors.

According to the Federal Court, creditors are not bound to approve an arrangement between the company and the majority of creditors, even if the existence of the company is at stake.[42] The shareholders, however, are exposed to German case law rules regarding their duties in restructuring scenarios. In a landmark decision of 2009, the Federal Court held that members of a partnership or close corporation

42 BGH, 5 November 1991 - VI ZR 20/91, BGHZ 116, 31 ("*Akkordstörer*").

in particular situations can be forced by a majority resolution to choose between paying in fresh money or leaving the company.[43]

This decision is of extreme importance for turnaround strategies in the investment branch. For tax reasons, many private investors in Germany do not buy shares at the stock market, but rather form small partnerships. Many of these partnerships have been severely hit by the financial crisis. And many of them cannot survive without fresh funds. The obligation of partners or shareholders to contribute to the business is limited by the sum they promised in the articles of association. This holds true even in a crisis of the business. However, if the majority is ready to rescue the company by contributing fresh money, the minority can be forced to choose between doing the same or leaving the company, provided:

- firstly: a turnaround proves to be impossible without fresh money;
- secondly: the turnaround prospects are positive;
- thirdly: the contributions of the majority will definitely be paid; and
- fourthly: the squeeze-out-position of the minority is not worse than their position in a liquidation scenario.

Comparative Observations

The interim conclusion after these observations is that German law is:

- ready to include the creditors, but not yet the shareholders, in insolvency proceedings; and, to the contrary
- ready to include the shareholders, but not the creditors, outside insolvency proceedings.

As long as the courts follow this approach, it is up to legislation to decide whether this ought to be changed in the wake of English, French or Italian examples. This, however, requires diligent comparison not only of insolvency law, but also of the general preconditions in the respective national laws and jurisdictions.

43 BGH, 19 October 2009 - II ZR 240/08, BGHZ 183, 1.

Recognition

In this context, I would like to draw your attention to the debate on the recognition of English schemes of arrangement in German courts.[44] In the "Rodenstock" Case – Rodenstock is a German optical lens manufacturer – the High Court of Justice (Chancery Division)[45] recently held that a scheme of arrangement negotiated between English banks and the German company can be sanctioned under English jurisdiction. The court relies on two distinguished German experts' opinions that this decision would be recognised by the Federal Court in spite of a contrasting decision of a German higher court of appeal.[46] I presume that these experts are right and I will leave out the complicated details with the exception of one. The German higher court of appeal had argued, inter alia, that a scheme of arrangement is regulated by the Companies Act 2006 and not the Insolvency Act 1986.[47] Even if a German company may be subject to an English insolvency procedure, its seat-oriented company law regime is German, not English, and there is no scheme of arrangement in German company law. In my eyes, this conclusion is wrong, illustrating once again that the affiliation of a legal concept to corporate law or insolvency law has to be determined in accordance with the nature of the subject matter, not blindly in accordance with the relevant code.

Legal Debates in Germany

If, as I presume, German companies will be affected by English schemes of arrangement, the question is, whether a similar instrument should be created in my country. As already mentioned there is an ongoing discussion about pre-insolvency proceedings in Germany.[48] The different national approaches are conscientiously observed, especially in research and legal policy. However, the forthcoming reform-bill will not integrate formal pre-insolvency proceedings in the Insolvency Code. For the time being, legislation will be satisfied with enhancing business reorganisations in insolvency proceedings.

44 See O. Gebler, NZI 2010, 665, 668 et seq.; P. Mankowski, EWiR 2010, 711 et seq.; C. Paulus, ZIP 2011, 1077 et seq.; R. Petrovic, ZInsO 2010, 265 et seq.; A. Riewe, NZI 2011, 483 et seq.

45 *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).

46 OLG Celle, 8 June 2009 - 8 U 46/09, ZIP 2009, 1968.

47 Ibid., at 1970 et seq.

48 V. Beissenhirtz, ZInsO 2011, 57 et seq.; H. Eidenmüller, ZIP 2010, 649 et seq.; M. Jaffé, ZGR 2010, 248 et seq.; C. Paulus et al., WM 2010, 1337 et seq.; L. Westpfahl, ZGR 2010, 385 et seq.

Objections to the Introduction of Pre-Insolvency Regimes in Germany

My personal view on this issue is that it is company law rather than insolvency law which provides legal rules for turning around a business. Directors' sense of responsibility will inspire them to act:

- in good time;
- confidentially; and
- without any interference of courts and state authorities.

This is a kind of a confession. Although I am fully convinced by the concept of Chapter 11 pertaining to corporate restructuring in insolvency proceedings, I am even more convinced of the importance of business law for the same purpose, prior to *de facto* insolvency. Business law provides:

- informal tools;
- lean management structures; and
- permanent awareness and responsibility.

Although this cannot be proved statistically, I firstly rely on the invisible hand of business law. A formal insolvency proceeding is a dramatic step: a step into state regulation and interference. As long as German insolvency law is not even able to convince the business world of the usefulness of insolvency proceedings in the state of imminent illiquidity, legislation is bound to enhance insolvency proceedings and to make it more attractive to companies, directors, and stakeholders. This is what the 2011 reform is striving for. And I agree with this attempt.

Again, I am in favour of:

- modernisation of insolvency law following the American model; and even
- pre-insolvency rules which may, e.g., provide alternative dispute regulations close to insolvency.

But I am opposed to statutory formal pre-insolvency proceedings in Germany.

Postscript (2014)

The Legal Basis

On 1 March 2012, seven months after the 2011 Edwin Coe Lecture, the Act for Enhancing Business Restructurings (ESUG) came into force and had a huge practical impact from the outset, especially with regard to the newly introduced section 225a of the Insolvency Code: “Any measure permissible under company law” can now – in formal insolvency proceedings – be realized by insolvency plans rather than by shareholder resolutions. This means strengthening the influence of creditors in distressed companies’ restructuring proceedings.

To compensate the shareholders for that intrusion into their rights, they now have a say in the voting process on insolvency plans (sections 222, 243 of the Insolvency Code). Formally, passing an insolvency plan requires majority approval of the group of (all) shareholders. Yet this right of the shareholders is significantly diluted by the cram-down-powers of the insolvency court, which can approve an insolvency plan against the shareholders’ vote if the following criteria are met:

> “Section 245 – Prohibition to Obstruct
>
> (1) Even if the necessary majorities have not been achieved, a voting group shall be deemed to have consented if
>
> 1. the members of such a group are likely not to be placed at a disadvantage by the insolvency plan compared with their situation without such plan,
> 2. the members of such a group participate to a reasonable extent in the economic value devolving on the parties under the plan, and
> 3. the majority of the voting groups have backed the plan with the necessary majorities.
>
> (2) A reasonable participation of a group of creditors for the purpose of subsection (1) No. 2 shall exist if under the plan
>
> 1. no other creditor will receive economic values exceeding the full amount of his claim;
> 2. neither a creditor with a lower-ranking claim to satisfaction without a plan, compared with the creditors forming his group, nor the debtor nor a person holding the debtor’s shares receives an economic value; and
> 3. no creditor to be satisfied on an equal footing with the creditors forming his group without a plan receives an advantage with respect to such creditors.

(3) A reasonable participation of a group of shareholders for the purpose of subsection (1) no. 2 shall exist if under the plan

1. no creditor receives economic benefits exceeding the full amount of his claim and

2. no shareholder who would be equal in rank to the shareholders in the group if no plan were drawn up is better placed than they are."

To sum this up, shareholders' approval is not necessary if under the plan they are:

(i) not worse off than in the absence of a plan;

(ii) if specific shareholders are not favored over all the other shareholders; and

(iii) the shareholders participate to a reasonable extent in the economic value of the restructured firm. According to subsection 3, the shareholders participate to a reasonable extent if the creditors receive no value exceeding the nominal value of their claims.

Shareholders Sidelined

If insolvency proceedings are opened because of overindebtedness, a company by definition is unable to pay the full nominal amount of its creditors' claims. Section 225a(3) of the Insolvency Code in combination with section 245 of the Insolvency Code therefore appears to be an instrument for the creditors(!) to take comprehensive measures regarding the company itself.[49]

The new concept behind section 225a of the Insolvency Code in combination with section 245 of the Insolvency Code – the inclusion of shareholders rights' in insolvency plan proceedings – is not only law in the books but already affected widely-debated (not only amongst lawyers) real cases.

Takeover Effects?

One example is the so called *Pfleiderer* case, in which the shareholders of a distressed stock company were approached by its creditors with the request to give up nearly all of their shares in a rights issue-procedure to the benefit of the creditors. The shareholders claimed that sacrifice the creditors demanded from them was too great and ended up with nothing, as their shares were eventually

49 This reflects the prevailing view amongst German lawyers at this point of time; for a summary on the new insolvency/corporate law regime, see H. Eidenmüller, "Der Insolvenzplan als gesellschaftsrechtliches Universalwerkzeug" (The Insolvency Plan as a Corporate All-Purpose Tool), NJW 2014, 17 et seq.

completely eliminated in an insolvency plan procedure in which the creditors successfully invoked sections 225a and 245 of the Insolvency Code.[50]

Squeeze-out Effects?

Another example is the so called *Suhrkamp* case. Suhrkamp is a distinguished book publishing company in which the majority partner initiated – pursuing a common strategy with the company's creditor – a transformation of the partnership into a stock corporation in insolvency plan proceedings with the help of sections 225a and 245 of the Insolvency Code, as a result of which the other partner lost several minority rights. This experience has given race to an ongoing discussion on the legitimate goals of insolvency proceedings.[51]

Questions to be answered

There is now need for a discussion on whether the Act for Enhancing Business Restructurings (ESUG) did strike the right balance between insolvency and corporate law. The author especially doubts whether a mere balance-sheet-test (section 245 of the Insolvency Code) is sufficient to cram down a plan on the shareholders that expropriates them completely.[52]

50 E. Decher/T. Voland, ZIP 2013, 103 et seq.

51 F. Schäfer, ZIP 2013, 2237 et seq.

52 K. Schmidt, ZGR 2012, 566, 579 et seq.

Chapter 5

On The Future of European Insolvency Law

Professor Bob Wessels

Introduction

I would like to begin this afternoon by thanking the board of the Academic Forum of INSOL Europe for the invitation to speak to you today.[1]

Early this year, the European Commission issued a "Consultation on the Future of European Insolvency Law".[2] It is an open, internet-based consultation inviting reactions to a questionnaire which will assist the Commission to determine whether and how the existing legal framework should be improved and modernised. My first thought was: what is European Insolvency Law (capitals supplied)? Fortunately, the Commission provides for an answer: the European Insolvency Law is laid down in Regulation (EC) No 1346/2000 on insolvency proceedings (the "EIR"), which has applied since 31 May 2002.

I am challenging this phrasing. I would like to depart from the description that European Insolvency Law is a body of rules and practices, formed both by national law and the law of the European Union relating to matters of financial distress. In earlier publications, I indicated that the core content of insolvency law concerns the prevention, regulation and administering of discontinuity in legal relationships of persons who have legal rights (companies or natural persons) and find themselves in financial difficulty. The essence of the legal domain of European Insolvency Law then is the avoidance or streamlining of (the consequences of) the possible inability to fulfil payment obligations. Consequently, in a European context, European Insolvency Law is also concerned with certain contractual arrangements (e.g. cross-border private arrangements or "work outs") and the recording of "best practices", which, in practice, play an important role.[3]

* This is a re-edited version of a piece first published under the same title in Chapter 11 in R. Parry (ed), *European Insolvency Law: Current Issues and Prospects for Reform* (2014, INSOL Europe, Nottingham) (133-158).

1 During the lecture, only selected topics of the text were addressed.

2 See http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=Insolvency.

3 See e.g. B. Wessels, *International Insolvency Law* (3rd ed) (2012, Kluwer, Deventer), at paragraph 10001.

Presently, this body of rules and practices has certain recognisable principles in the cross-border area, such as the principle of applying the *lex concursus*, automatic recognition of certain judgments and cross-border cooperation between insolvency office holders. The totality of this body, however, largely is a crystal ball, as European Insolvency Law is still searching for patterns of interactions between the two systems of national laws and European Union law, and the coherence within the law of the European Union itself. Among the many topics that are presently debated, evaluated, regulated or litigated in this area, in the light of European Insolvency Law, the following three themes specifically stand out as the most important to discuss today.

1. The present state of European Insolvency Law, for which I make a distinction between:
   1.1. The early period;
   1.2. The cross-border period;
   1.3. The harmonisation period.
2. Insolvency law and its role in establishing a better Europe:
   2.1. Better functioning of the internal market;
   2.2. Initiatives regarding natural persons?
3. Actors in the field of European Insolvency Law, being:
   3.1. Legislature;
   3.2. Courts;
   3.3. Insolvency office holders;
   3.4. Academia.

I will then end with some concluding remarks regarding the "Future of European Insolvency Law", which is also the title of my lecture.

The Present State of European Insolvency Law

The Early Period

European Insolvency Law, until 2002, has shown its presence in different shapes and forms, although I add that its visibility has been limited. One of the first and very important signs has been in the area of the transfer of undertakings with

Directive 77/187/EC with regard to Safeguarding of Employees' Rights in the event of Transfer of Undertakings. The Directive, quite remarkably, is silent on the question whether it applies in cases of insolvency. In a Dutch case of 1985, the European Court of Justice concluded that Article 1(1) of Council Directive No 77/187/EEC of 14 February 1977 did not apply:

> "…. to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor."

The Court added that the Member States are at liberty to apply the principles of the Directive to such a transfer on their own initiative. The Directive, however, does apply – so the Court determines – where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a "*surséance van betaling*" (judicial leave to suspend payment of debts).[4] Although in this Directive, "insolvency" as a term was not covered in the text, it is obvious that there is a direct effect of the European rule into the national legal system of a Member State.

It then took thirteen years before "insolvency" again asked for attention, now as an event which was expressly taken into account in the Directive 90/314/EC regarding the insolvency of a Tour Operator. Article 7 provides:

> "The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency."[5]

Here again, insolvency led to a set of national rules in the legislation of the Member States. In several other European Union instruments too, "insolvency" as a legal phenomenon was made a part of its provisions, e.g. in the Directive 97/9/EC on Investor Compensation Schemes, Directive 2000/35 with regard to Late Payments in Commercial Transactions, Directive 2000/74 on the Protection of Employees

4 *Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* (Case 135/83) [1984] ECR 469. The Court observed: "In addition, the rules on liquidation proceedings and analogous proceedings are very different in the various Member States. For that reason, and in view of the fact that insolvency law is the subject of specific rules both in the legal systems of the Member States and in the Community legal order, it may be concluded that if the directive had been intended to apply also to transfers of undertakings in the context of such proceedings, an express provision would have been included for that purpose." The Court's observation "that insolvency law is the subject of specific rules… in the Community legal order" is interesting but rather mysterious.

5 *Jürgen Blödel-Pawlik v HanseMerkur Reiseversicherung AG* (Case C-134/11) [2012] EUECJ C-134/11 decided that Article 7 of Council Directive 90/314/EEC is to be interpreted as covering a situation in which the insolvency of the travel organiser is attributable to its fraudulent use of the funds transferred by consumers.

in the Event of Insolvency of their Employer (updating Directives 77/187 and 80/987), Regulation 2001/2157 with regard to the Statute for a European company (SE), in which Article 63 provides:

> "As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, an SE shall be governed by the legal provisions which would apply to a public limited-liability company formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general meeting…",

or – a recent example – the Proposal for a Regulation on the Statute for a European Foundation (FE), within which Article 36 ("Transfer of registered office"), paragraph 3 provides:

> "The FE shall not transfer its registered office… if proceedings for winding-up, insolvency or similar proceedings have been brought against it..."[6]

Here, insolvency as a term seems rather narrow. The drafters certainly have not looked into the definition in the EIR.

The given examples are important for those direct involved (employees, travellers, certain legal persons etc.), but in this first pan-European period there is no sign that "insolvency" as such has been an object of specific policies of study on a European Community (since 2009: European Union) level, nor that "insolvency", as far as it has been included in European Union legal instruments, is drafted in a coherent way in these instruments that in their core deal with other matters. There is a level of interaction between European Union law and the national law of Member States, but the interplay is limited to certain national islands of civil law. There is, as far as I can see, no evidence that these islands are interconnected, meaning that the specific national rules have been discussed or aligned between Member States themselves.

The Cross-Border Period

A second phase in the development of European Insolvency Law began with the entry into force of the EIR in May 2002. Unlike the early phase, this one is clearly introducing a system in a body of rules. It has given an enormous boost to insolvency practice, education and research. The EIR has a private international

6 Proposal for a Council Regulation on the Statute for a European Foundation (FE), Brussels, 8 February 2012, COM(2012) 35 final, 2012/0022 (APP).

law angle, which has as its basis (now) Article 81 of the Treaty on the Functioning of the European Union ("TFEU"). The EIR is a legal instrument that forms a part of a more comprehensive framework of the private international (insolvency) law system of the European Union. This wider framework consists of a variety of components, such as the Brussels I Regulation on International Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, to which the Insolvency Regulation fills the gap.[7] Presently (mid-October 2012), the EIR is the subject of a large review process. I will make some remarks regarding this process later.

It is in this period too that reorganisation and winding-up of financial institutions is on the European Union drawing table. Insurance Undertakings and Credit Institutions are excluded from the EIR since they are subject to special arrangements and, to some degree, national supervisory authorities have wide-ranging powers of intervention. Since 2011, some of these intervention powers are in the hands of one of the three European Supervisory Agencies in the financial sector. The respective Directives 2001/17 and 2001/24 have resulted in an abundance of implemented national provisions, rather detailed and spread over different national sources, such as Acts or Codes on civil law, Insolvency Acts and/or Banking Acts. Since a few years, in the midst and hopefully the aftermath of the financial crisis, debates are ongoing on the most desirable European structure for the resolution of banks and investment firms. In the June 2012 proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms,[8] "resolution"[9] constitutes – according to the proposal – an alternative to normal insolvency procedures[10] and provides a means to restructure or wind down a bank or investment firm that is failing and whose failure would create concerns as regards the general public interest, such as threaten financial stability, the

7 Article 1(1), Brussels I Regulation excludes from its scope insolvency proceedings relating to: "...bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."

8 Proposal for a Directive of the European Parliament and of the Council establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, Brussels, 6 June 2012, COM(2012) 280 final, 2012/0150 (COD). Article 1(3) defines "investment firm" as an investment firm as defined in Article 3(1)(b) of Directive 2006/49/EC that is subject to the initial capital requirement specified in Article 9 of that Directive.

9 Ibid., Article 2(1): "resolution" means the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability and restore the viability of all or part of that institution.

10 Ibid., Article 2(40): "normal insolvency proceedings" mean the collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator, normally applicable to institutions under national law and either specific for those institutions or generally applicable to any natural or legal person. The description generally follows the one in Article 1(1), EIR with regard to collective insolvency proceedings.

continuity of a bank's critical functions and/or the safety of deposits, client assets and public funds.[11]

In the period of their creation, some ten years ago, both Directives have been the subject of a debate on the nature of these rules. The Italian author Galanti, for instance, is of the opinion that the rules concerning private international law which are included in the Directive 2001/24 (Credit Institutions) are placed in the more important and overall framework of exchange of information and cooperation among authorities:

> "The circumstance that banks and insurance undertakings are subject to prudential supervision accounts for the allocation of the crisis directives in the EU-derived law in these sectors, thus giving to the rules on private international law a secondary role."[12]

The Belgian Professor Torremans, however, puts it in a different perspective, as follows:

> "The final aim is therefore not so much to exclude these entities from the scope of the Regulation, as to put in place a tailor made special regime for them." [13]

Whereas the legislative instruments originating from the cross-border period continue to evolve concerns may be expressed regarding certain topics. There certainly is a level of interaction between European Union law and national law of Member States, but the way this interaction plays out lead to rather different results. To give one example of the interaction of European Union law and national law, the EIR led to some gaps with existing national (insolvency) procedural laws. In the Netherlands, for instance, in 2003 an attempt was made to realise the EIR's full potential by making "national" and "European" law compatible. A set of some 15 legislative provisions has been included in the Netherlands Bankruptcy Act. Germany did the same in the German Insolvency Act, while France at the national level, however, has used a "*circulaire*" for these purposes. Mutual comparison of these rules demonstrate that the three countries have introduced many different consequences in their aim of striving for the compatibility of the EIR on the one hand and national procedural legislation on the other, leading to

11 See http://ec.europa.eu/internal_market/finances/docs/committees/reform/20120912-com-2012-510_en.pdf.

12 E. Galanti, "The New EC Law on Bank Crises" (2002) 11 *International Insolvency Review* 49, at 52.

13 P. Torremans, *Cross Border Insolvencies in EU, English and Belgian Law* (European Monographs No. 39) (2002, Kluwer, The Hague), at 145.

e.g. different rules for publication, registration, use of language or the degree of a court's involvement.[14]

I have not seen attempts either that the implementation of those Directives in specific national rules has been discussed or aligned between Member States themselves. If you and I have an assignment and we are working from the same template, doesn't it make sense that we share some thoughts and discuss some approaches? It seems to me a quite common way especially as we are "buddies", given the existence of "mutual trust" between Member States.

Another area to pay attention to is the coherence within the system of European Union law itself. Coherence, I think, has two components. The first one is "synchronization" or "fine-tuning", the second is what I now call "adjusting".

Synchronisation is at hand for instance with the Brussels I Regulation and the EIR. In the proposals of December 2010 to amend the Brussels I Regulation,[15] the cited exclusion in Article 1(1) of the Brussels I Regulation, excluding from its scope insolvency proceedings relating to:

> "…bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings…"

leaves doubts as to its scope, which could have been avoided by sychronising, therefore by clarifying that Article 1(1) excludes those matters that fall within the scope of the EIR.

Another example of synchronisation relates to the EIR and the two Directives mentioned, both on the definitions of the proceedings (collective insolvency, winding-up, reorganisation) as well as the scope of these instruments ((collective) investment firms are excluded from the Regulation; does the recent draft-definition of June 2012 for investment firm fully close the gap of Article 1(2) of the EIR?; definitions of set-off and netting?). Another synchronisation item relates to the law applicable. Article 4(1) of the EIR applies the so called *lex concursus* (or lex fori concursus), the law of the Member State within the territory of which insolvency proceedings are opened governs all the conditions for the opening, conduct and closure of the insolvency proceedings, the admissibility of claims and the rules on distribution, etc. There is one difference, though. Article 10(1)

14 Further on such realisation or adoption measures in Austria, England, Germany, France, Czech Republic and Poland, see Wessels, above note 3, at paragraph 10492.

15 Proposal for a Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 14 December 2010, COM(2010) 748 final, 2010/0383 (COD).

of Directive 2001/24 concerning banks does not determine that the "law" of the home Member State are universally applicable; it provides that "the laws" (plural) and "… regulations and procedures" of the home Member State are applicable. To symbolise (at least in its wording) this broader regime, I have referred to the "laws, regulations and practices" as the "*lex domus*", in contrast to the *lex concursus* as meant in Article 4(1) of the EIR.[16]

The other component of coherence relates to adjustment, e.g. in case certain provisions of the EIR will be amended, adjustment involves the necessity to amend the mirror-image provisions in the Directives (e.g. those relating to applicable law) accordingly. According to the Spanish professors Virgós and Garcimartín, the instruments concerning cross-border insolvency (the EIR and the two Directives) are part of a single common system on cross-border insolvency, all forming what they call a "hermeneutic circle", within which the rules should be interpreted and construed.[17] Although I have criticised this unconvincing "hermeneutic circle" interpretation-theory,[18] I agree with the authors that the European Union legislator is the main guarantor of the unity and coherence of the European Union law system, and therefore should synchronise and adjust as just mentioned.

A final note regarding this cross-border phase is that it is not only related to cross-border insolvency matters. Although concerns regarding the principles of subsidiarity and proportionality could be made, often preventing unification of matters of civil law, including insolvency law, as being impossible or exceptional, it should be mentioned that several provisions of the Insolvency Regulation are to be characterized as substantive rules and are therefore now accepted throughout Europe as unified rules concerning the topics to which they relate, see for example Articles 7(2), 20, 29-35, 39 and 40 of the EIR.

16 See G. Moss and B. Wessels, "General Introduction to the EU Insolvency Law Framework and Principles with regard to Financial Institutions", in G. Moss and B. Wessels (eds), *EU Banking and Insurance Insolvency* (2006, Oxford University Press, Oxford), at 3ff.

17 See M. Virgós and F. Garcimartín, *The European Insolvency Regulation: Law and Practice* (2004, Kluwer Law International, The Hague), at 9ff; F. Garcimartín, "The Review of the European Insolvency Regulation: Some General Considerations and Two Selected Issues (Hybrid Procedures and Netting Arrangements)" (Report of the Netherlands Association for Comparative and International Insolvency Law 2011, ius, 2012), at 19, a copy of which is available at: www.naciil.org.

18 See B. Wessels, "The Hermeneutic Circle of European Insolvency Law", in E.H. Hondius *et al.* (eds), *Contracteren Internationaal (Opstellenbundel aangeboden aan prof. mr. F. Willem Grosheide)* (2006, Boom Juridische Uitgevers, Den Haag), at 351ff.

I give only one example, Article 7(2) of the EIR.[19] Article 7(2) regulates the legal consequences in the event of the seller's insolvency following the transfer of an asset (from seller to purchaser). Article 7(2) says that the opening of main insolvency proceedings against the seller of an asset, after delivery of the asset:

(i) shall not constitute grounds for rescinding or terminating the sale; and

(ii) shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of the main proceedings.

As a result of the application of Article 7(2), the contract (sale of assets) is not vitiated and the legal consequences of the contract (acquiring ownership by the purchaser) in principle become operative. Provided the purchaser continues paying his instalments, he will be the owner as soon as the last term expires. The scope of the provision gives it priority over the rules of national law which deviate from Article 7(2) or contract provisions with a different content.[20] Remarkably, this is a uniform substantive rule of (at least in the Netherlands) general private law or of insolvency law, created at the European level, but hardly debated in national legal circles.

The Harmonisation Period

Over thirty years after the first confrontation between European Union law and national law of a Member State in a matter of insolvency, the book of rules for European Insolvency Law turns to the next page: harmonisation. On 15 November 2011, the European Parliament approved a "Motion for a European Parliament Resolution with Recommendations to the Commission on Insolvency Proceedings in the Context of EU Company Law". In its motion, the European Parliament requests the Commission to submit to Parliament, on the basis of Articles 50, 81(2) or 114 of the TFEU, one or more legislative proposals:

19 Article 7(2), EIR: "The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings." In the Dutch text, Article 7 refers to "*goed*" (a legal term used to describe all property: tangible, intangible, rights ownership, entitlements and claims). However, this should be interpreted for the purposes of Article 7 as the Dutch term "*zaak*" (which refers to all moveable and immoveable assets). A similar observation can be made in relation to the French text (referring to "*bien*" rather than "*chose*").

20 For a further treatment, see Wessels, above note 3, at paragraph 10670ff. The wider European Union context for retention of title problems include Article 4(1), Directive 2000/35 (on Late Payments), Articles 3, 4 and 14, Rome I Regulation.

> "…relating to an EU corporate insolvency framework, following the detailed recommendations set out in the Annex hereto, in order to ensure a level playing field, based on a profound analysis of all viable alternatives."[21]

One of the categories on the European Parliament's wish-list concerns matters related to harmonisation of national insolvency law. As topics ready for research on the suitability of harmonization, the European Parliament suggests (amongst others), certain aspects of the opening of insolvency proceedings, certain aspects of the filing of claims, aspects of avoidance actions and general aspects of the requirements for the qualification and work of liquidators, which is the European Union term for a variety of insolvency office holders working in the European Union Member States. Is this in any way feasible or is it "all hell breaks loose"? As these harmonisation-proposals are the object of a different study, soon to be published, I will not dwell on them now.[22]

Insolvency Law and its Role in establishing a Better Europe

I now turn to the second theme, the question whether insolvency law can serve in establishing a better Europe. Most remarkably, the European Parliament is indicating, as a possible legal basis for its recommendations for harmonization, Article 114 of the TFEU. By this suggestion, "insolvency" is directly placed within the goals of the establishment of the internal market.[23]

21 See Motion for a European Parliament Resolution with Recommendations to the Commission on Insolvency Proceedings in the Context of European Union Company Law (2011/2006(INI). In the motion, the European Parliament confirms "that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens." For all related documents, see http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&format=XML&language=EN. According to Wikipedia (last seen on 3 October 2012) a "level playing field" is: "…a concept about fairness, not that each player has an equal chance to succeed, but that they all play by the same set of rules. A metaphorical playing-field is said to be level if no external interference affects the ability of the players to compete fairly. Government regulations tend to provide such fairness, since all participants must abide by the same rules. Examples of such regulation: building codes, material specifications and zoning restrictions, which create a starting point/a minimum standard - a 'level playing field'".

22 See I. Fletcher and B. Wessels, "Harmonisation of Insolvency Law in Europe" (Reports presented to the *Nederlandse Vereniging voor Burgerlijk Recht* (Netherlands Association of Civil Law)), to be discussed at its Annual Meeting, 14 December 2012, The Hague, The Netherlands ("Harmonisation Report 2012").

23 In general on harmonisation and the internal market, see T. Wiedmann and M. Gebauer, "Zivilrecht und europäische Integration", in M. Gebauer and T. Wiedmann (eds), *Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Kommentierung der wichtigsten EU-Verordnungen* (2nd ed) (2010, Richard Boorberg Verlag, München), at Kap. 1, nr. 37.

Better Functioning of the Internal Market

Title VII ("Common Rules of Competition, Taxation and Approximation of Laws") of the TFEU contains a Chapter 3 ("Approximation of Laws"), which includes Article 114 (ex-Article 95 of the EC Treaty). Its first paragraph provides:

> "1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[24]

In the literature, the term "internal market" (sometimes referred to as: single market) has been described as a territorial (geographic) space within which there is full mobility of production factors, such as labour, capital, goods and services, as an efficient allocation of these factors results in a higher level of welfare in the Union.[25] According to the German scholars Wiedmann and Gebauer, this internal market (*Binnenmarkt; marché intérieur*) has developed from a step-by-step developing project to a permanent duty of the Union (*Binnenmarktaftrag als Daueraufgabe der Union* or Internal market as an endurance assignment).[26] The term "internal market", therefore, has a dual meaning. Next to the indication of a certain space, it also relates to a goal, to strive for two complementary avenues:

(i) measures for the approximation of the provisions laid down by law;[27] and

(ii) provisions which do not allow (private) obstacles in inter-Member State traffic, such as hindrances to the freedom of movement of workers within the

24 Article 26 TFEU (ex-Article 14 of the EC Treaty): "1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. 3…."

25 See R. van Leuken, "Internemarktbeginsel en Privaatrecht" (2011) *Weekblad voor Privaatrecht, Notariaat en Registratie* 6901 (Themed issue on "Algemene beginselen van Unierecht en het privaatrecht").

26 See Wiedmann and Gebauer, above note 23, at Kap. 1, nr. 32.

27 See Articles 114 and 115, TFEU. For an overview of these measures related to civil law in the Dutch literature, see A. Hartkamp, *Europees Recht en Nederlands Vermogensrecht (Asser/Hartkamp 3-I*)* (2011, Wolters Kluwer, Alphen aan den Rijn), at no. 235ff.

Union,[28] to the freedom of establishment (for corporations) (Article 49 of the TFEU)[29] and the prohibitions regarding free competition (e.g. Articles 101 and 107 of the TFEU on State Aid).

My point of view is that in this concept of "internal market", the creation of a European community and the further establishment of the European Union, including its four freedoms, strongly fostering and enhancing trade, business and investments across national boundaries, cannot be regarded as complete without a transparent and solid insolvency system. This submission is not new. It has already been made over a decade ago by Manfred Balz, one of the architects of what now is the EIR, in that:

> "…a functioning bankruptcy system is essential to any economy that aspires to achieve the freedoms of establishment of business and the free flow of goods, services and capital, and to integrate national markets into a unitary internal market."[30]

Of course, certain stigma still exists, such as a debtor's insolvency indicates his overall failure in business or reflects presumptions of fraud to the detriment of its creditors, but generally in business life, insolvency has grown to become a calculable and acceptable enterprise risk.[31] In most of the more developed legal systems, insolvency law has grown in importance, although most countries continue to discuss and struggle with the desirable approach and therefore the goals of insolvency law.

As I see it, companies and businesses operate best in a challenging environment, which is beneficial for all parties concerned, such as suppliers, the companies' management, employees, creditors, customers, shareholders and the tax collecting government. This logically means that uninterrupted continuity of any business is a desideratum in itself, as it means:

28 In a recent Opinion delivered on 13 September 2012, Advocate General Sharpston has concluded that Article 45, TFEU (Freedom of Movement for Workers within the Union) must be interpreted as meaning that a residence requirement such as that included in the Swedish *skuldsaneringslagen* (an insolvency measure, not listed in Annex A of the EIR) as a condition for obtaining debt relief constitutes a restriction on the freedom of movement of workers, because it is liable to prevent or deter a worker from leaving Sweden to take up employment in another Member State (in the case at hand: France).

29 For a discussion, see: A. Van Hoe and M. Vanmeenen, "Insolvency Law and the Freedom of Establishment: Friend or Foe?", Chapter 17 in R. Parry (ed), *The Reform of International Insolvency Rules at European and National Level* (2011, INSOL Europe, Nottingham), at 179ff.

30 M. Balz, "The European Convention on Insolvency Proceedings" (1996) 70 *American Bankruptcy Law Journal* 485, at 490.

31 See J. Westbrook *et al.*, *A Global View of Business Insolvency Systems* (2010, World Bank, Washington DC), at 143, submitting that insolvency is an enterprise risk.

(i) the possibilities of continuing employment; including

(ii) job security for management;

(iii) the possibility (guided by good management) of efficiently employing all the available means to run a good business (e.g. natural resources, technical equipment);

(iv) a share in the profits (dividend) for shareholders;

(v) the possibility to continue all other relations, with small suppliers of goods and services and buyers/customers of the business' products and services; and

(vi) the continuous stream of tax-money to the State, to finance its chosen policies.

In this respect, insolvency law is the vital core and provider of strength and resilience of any economic system. If the financial difficulties go from bad to worse, insolvency laws should have available rules to timely prevent these difficulties or respond to them, to formulate a optimal approach to a solution, within which all rules of company law, contract law, the law on securities, employment law, and of course insolvency procedural law itself, are taken into account. If indeed "insolvency" is a true part of the legal skeleton for an internal market in the meaning of Article 114 of the TFEU, a design for an insolvency law that will meet the key objectives within the focus of European Union policies on the longer term must in its substantial and procedural forms be brought into alignment with norms and principles which are predominant in the non-insolvency law area.[32]

Today, I miss a coherent vision of the structural place of insolvency in relation to the realisation of the internal market. With a focus on corporate insolvency law, the participants in the market themselves could take responsibility by discussing and drafting certain principles on how, for instance, a restructuring market would look like and, thus, assist the European Commission in further developing its ideas. Here a call is made to the European equivalent of associations of industry, trade, employees, banks, unions and insolvency specialists to further the debate on this important topic.

Initiatives regarding Natural Persons?

Although the European Parliament's motion of November 2011 is certainly challenging, it is just as imperfect, as the great majority of recommendations it covers do not relate whatsoever to natural persons. In fact it refers only once

32 In our Harmonisation Report 2012, above note 22, Fletcher and I present an Agenda for future work.

(possibility of harmonisation of opening of insolvency proceedings) to "natural persons". Is there a role for the European Union in this regard?

In the last two decades Member States have adopted specific insolvency regimes regarding natural persons (sometimes also "consumers", "non-merchants" or "non-traders"), whilst such rules still are lacking in many countries, including – in Europe – e.g. in Bulgaria, Greece, Italy, Hungary, Lithuania, Luxembourg and Croatia, the last one being the 28th European Union Member State as of 1 July 2013.[33] Generally, the reason for a national treatment of the phenomenon seems to be that, in the area of natural persons, many times some other purposes in legislation may have a primary attention, such as the protection of a certain minimum of assets and income, available for an individual natural person (and his household) or the specific goal of:

> "…financial rehabilitation of over-indebted individuals and families and their reintegration into society."[34]

Such a rehabilitation may include specific support on debt counselling, participating in social welfare programs or certain obligations to be fulfilled during participation in an collective insolvency proceeding or debt rescheduling scheme (such as the duty to inform a court or an insolvency supervisor on new received income, the duty to apply for a job, and so on). Not the European Union, but the much larger geographically spread Council of Europe, has formulated as a goal for insolvent natural persons their "reintegrating in society", which is the active component of the more passive view of the European Union, being the:

> "…. view to guaranteeing a decent life to the poorest debtors (as a principle of social justice)."[35]

33 Lithuania will introduce legislation regarding debt rescheduling for natural persons as of 1 March 2013, see Law No. XI-2000, VŽ, 19 May 2012, No. 57-2823. In Hungary and Luxembourg, drafts for laws on discharge regimes are pending, whilst in Italy, Law 3/2012 generally deals with debts of natural persons but does not provide a discharge.

34 See Recommendation 4(f) of the Council of Ministers of the Council of Europe (20 June 2007) to its (over 40) member states: "[to] introduce mechanisms necessary to facilitate rehabilitation of over-indebted individuals and families and their reintegration into society in particular by:… f. encouraging effective financial and social inclusion of over-indebted individuals and families, in particular by promoting their access to the labour market" (Recommendation CM/Rec(2007)8, with a follow up Resolution 294 (2009)), copies available at: https://wcd.coe.int. See J. Kilborn, "Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010", for which see: http://ssrn.com/abstract=1663108.

35 Terms of Reference for the European Union Group of Experts on Cross-border Insolvency, at 2, copy available at: http://ec.europa.eu/justice/newsroom/contracts/files/2012_expert-group-insolvency/terms_of_reference_group_insolvency_en.pdf. From another angle, it has been submitted that "…consumer insolvency poses a systemic risk to global financial stability", for which reason, the World Bank presently is conducting a critical comparative study of existing legal regimes to help nations design, modernise or revise insolvency law systems applicable to natural persons. See: http://siteresources.worldbank.org/EXTGILD/Resources/WB_TF_2011_Consumer_Insolvency.pdf.

Another reason for leaving out natural persons by the European Parliament certainly will be the largely different views on the fair and equitable allocation of consumer credits risks and the society's view on providing rehabilitation or a fresh start to a natural person/debtor who has (unfortunately) fallen into a situation that he reasonably cannot repay all its pre-insolvency debts. Furthermore, Member States' have largely different rules regarding the question what belongs to the insolvency estate[36] or – to the contrary – what is exempted from such an insolvency estate,[37] the contributions to be made to the estate, the extend and the nature of the discharge ("fresh start"), restrictions imposed on the debtor during the proceedings or as a condition for such a discharge, the events in which such proceedings may be terminated, the avoiding powers of creditors, the duration of the proceedings, just to name a few.[38] In July of this year, the German scholar Hoffmann (with his COMI in Estonia) concluded that in Europe:

> "…a minimum degree of comparability can hardly be determined".[39]

At present, at the European level, insolvency of natural persons mainly is known from the phenomenon of "bankruptcy tourism", where a natural person is shifting its COMI to another Member State, to be in the position to have the court of that Member State open collective insolvency proceedings, to which the respective debtor will be a subject. It is rather likely that such a choice is sparked by the lighter nature or the specific legal effects of these proceedings as similar proceedings would otherwise have had were the debtor to have its COMI in the Member State from which he travelled, including the durations of the proceedings.[40]

36 H. Rajak, "Determining the Insolvent Estate – A Comparative Analysis" (2011) 20 *International Insolvency Review* 1.

37 D. McKenzie Skene, "The Composition of the Debtor's Estate on Insolvency: A Comparative Study of Exemptions" (2011) 20 *International Insolvency Review* 28; R. de Weijs, "Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons" (2012) 21 *International Insolvency Review* 67.

38 See *The Consumer Debt Report II, Reports of Findings and Recommendations* (2011, INSOL International, London) and S. Viimsalu, "The Over-Indebtedness Regulatory System in the light of the Changing Economic Landscape" (2012) XVII *Juridica International* 217, also available at: www.juridicainternational.eu/public/pdf/ji_2010_1_217.pdf.

39 T. Hoffmann, "The Phenomenon of "Consumer Insolvency Tourism" and its Challenges to European Legislation" (2012) 35 *Journal of Consumer Policy* 461. For an earlier study on the same topic, see T. Hoffmann, "Consumer Insolvency Tourism and the EIR – Stuck between Convergence Needs and the Stockholm Action Plan?", Chapter 18 in Parry (ed.), above note 29, 191ff.

40 See A. Walters and A. Smith, "'Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A View from England and Wales" (2010) 19 *International Insolvency Review* 181; Marc D'Avoine, "Internationale Zuständigkeit des deutschen Insolvenzgerichts bei offenkundiger "Rückkehroption" des ehemals selbständig wirtschaftlich tätigen Schuldners mit dem Ziel der Restschuldbefreiung" (2011) *Neue Zeitschrift für Insolvenzrecht* 310.

This topic creates at least two problems. The first one is the challenge that it puts on the application of the EIR for instance with French courts (especially in the Alsace) stretching the requirements for the determination of the COMI of (German) debtors,[41] an English court annulling a previous order opening bankruptcy proceedings of a debtor (a German notary, presenting himself as sports photographer in the United Kingdom), which was made on false information regarding his COMI[42] and a German court applying – beyond its deliberate narrow interpretation – the public policy defence against recognition of such proceedings, opened for instance in England.[43] There may certainly be a degree of sympathy for these cautious judges, but the problem perceived should be solved, not by judges deciding in *ad hoc* cases, but by the legislator, based on a well-balanced set of legal rules.

Secondly, such forum shopping may be beneficial for an individual debtor, but even if it is resulting in a genuine COMI move, it may appear as an unfair circumvention of national rules and in the case of insolvency can result in creditors losing out. A rather recent example relates to Ireland, where at least thirteen Irish property developers, who owe the State's National Asset Management Agency (NAMA) at least EUR 2 billion, have been declared bankrupt in the United Kingdom. By so doing, they escaped the draconic Irish 12 year period to be discharged from debts, and enjoyed the period from adjudication to automatic discharge, which under current United Kingdom insolvency law is one year. The Minister for Justice of Ireland, Alan Shatter, is cited as stating:

> "The very essence of having a common market is that you need to have common rules with regard to access to bankruptcy legislation and not rules which appear to be in conflict with each other and can provide incentives for people to engage in bankruptcy tourism."[44]

In the European Union, however, there are no such common rules. It has been observed that in Europe no harmonisation of legislation is on the agenda either, given the huge differences in domestic proceedings.[45] Referring to the research of Kilborn and of Hoffmann, certain topics are (slowly) converging. A recent examples of this tendency is to limit the length of such proceedings, e.g. in

41 See e.g. Court of Appeal Colmar 16 September 2008, discussed in Wessels, above note 3, at paragraph 10561a.

42 *Sparkasse Hilden Ratingen Velbert v Horst Konrad Benk and the Official Receiver* [2012] EWHC 2432 (Ch).

43 Landesgericht Cologne 14 October 2011 (2011) *Neue Zeitschrift für Insolvenzrecht* 957, correctly criticised by H. Vallender, "Zur Anerkennung einer englischen Restschuldbefreiung bei missbräuchlicher Wohnsitzverlegung" (2011) *Entscheidungen zum Wirtschaftsrecht* 775.

44 The Financial Times, 6 July 2012.

45 See also J. Israël, "Shopping voor een schone lei" (2012) *Nederlands Tijdschrift voor Burgerlijk Recht* 19.

Ireland, Germany and Greece. This tendency flows from changing views on how to respond to debt-overburdened natural persons in a modern credit-based society.[46] The first signs of another development point at a tendency to limit rights of secured creditors. In the ongoing financial crisis, in nearly all Member States, many over-indebted families will have to cope with settling their debts, especially struggling mortgage holders. At present, in Ireland,[47] a draft of a Personal Insolvency Bill 2012 is being discussed, introducing (amongst others) three non-judicial based processes, one of which is the Personal Insolvency Arrangement (PIA), which applies to both unsecured debt (of any amount) and secured debt of up to EUR 3 million. In an Opinion of 14 September 2012, the European Central Bank (ECB) stated that it generally supported the Irish reforms, but observes that the PIA reforms are "unprecedented" both in scope (including secured debt) as in amount, and recommends that the limit for these PIAs, the category dealing with the biggest debtors, be reduced to EUR 1 million. The Opinion even asserts:

> "In particular certain features of the proposed PIA regime may have negative implications for credit institutions in their capacity as creditors and even for the wider functioning of the financial system."[48]

On 12 September 2012, the President of the European Commission, Mr Barroso, delivered his State of the Union 2012 Address. He said:

> "….. Our agenda of structural reform requires a major adjustment effort. It will only work if it is fair and equitable. Because inequality is not sustainable. In some parts of Europe we are seeing a real social emergency. Rising poverty and massive levels of unemployment, especially among our young people. That is why we must strengthen social cohesion. It is a feature that distinguishes European society from alternative models. Some say that, because of the crisis, the European Social model is dead. I do not agree. Yes, we need to reform our economies and modernise our social protection systems. But an effective social protection system that helps those in need is

46 See also J. Spooner, "Long Overdue: What The Belated Reform of Irish Personal Insolvency Law Tells Us About Comparative Consumer Bankruptcy" (2012) 86 *American Bankruptcy Law Journal* 243, at 298, on the rapid convergence in many European jurisdictions to introduce fast-track insolvency proceedings for natural persons in cases of "no income, no assets".

47 I understand that similar ideas are being discussed in Greece and Norway.

48 "If made use of by large numbers of debtors, the PIAs could significantly increase default rates and thus impact on both the capital adequacy and liquidity position of credit institutions at a time when they are still undergoing restructuring", see Opinion of 14 September 2012 on measures relating to personal insolvency (CON/2012/70), published on the ECB's website. I am leaving aside the question whether Ireland, after adopting the Bill, will propose to include these "non-judicial" proceedings in Annex A of the EIR.

> not an obstacle to prosperity. It is indeed an indispensable element of it. Indeed, it is precisely those European countries with the most effective social protection systems and with the most developed social partnerships, that are among the most successful and competitive economies in the world. Fairness and equity means giving a chance to our young people. We are already doing a lot. And before the end of the year, the Commission will launch a Youth Package that will establish a youth guarantee scheme and a quality framework to facilitate vocational training."

Let's keep these words in mind.

In the Opinion mentioned above, the ECB also invites the Irish authorities:

> "…to make it easier for secured creditors to repossess mortgaged properties upon default by the debtor."

It is difficult to see how such a statement can be justified. I seriously query whether, in the recent circumstances, with hundreds of thousands of family's overburdened with debt, the unconditional execution by banks is the right answer. Isn't it time, given the statement of Commission's President Barroso and in the light of desirabilities expressed in the Treaty on European Union: "to deepen the solidarity between their peoples, while respecting their history, their culture and their traditions", "to promote economic and social progress for their peoples", as well as e.g. Article 3(1) of the TEU, stating that "The Union's aim is to promote peace, its values and the well-being of its peoples", to tackle this very sad and wide spread problem on a European Union level and introduce certain limitations on the realisation of secured rights, such as a postponement of execution under certain circumstances, with a discretionary position for a court. Spooner's recent statement regarding draconian personal bankruptcy laws in Ireland:

> "Thus the novel nature of the problem of consumer over-indebtedness has called for novel political responses…"[49]

is certainly ready to be addressed to the European Union legislator.[50]

49 Spooner, above note 46, at 298.

50 J-L. Vallens, "The Future of the European Regulation on Insolvency Proceedings", Chapter 12 in Parry (ed), above note 29, at 121ff., goes much further by submitting that harmonisation seems possible in the area of "relief for individual debtors after bankruptcy, and discharge and new start." On 10 October 2012, the World Bank published its Draft Report on the Treatment of the Insolvency of Natural Persons (inviting feedback by 9 November 2012), for a copy of which see: http://siteresources.worldbank.org/INTGILD/Resources/WBPersonalInsolvency ReportOct2012DRAFT.pdf.

Actors in the Field of European Insolvency Law

Ladies and gentlemen, I would like to finalise this lecture with some remarks on the actors in the field of European Insolvency Law. I fully agree with Paul Omar's recent observation that creating insolvency law and rules in practice is a collaborative effort by judges, practitioners and academic scholars.[51] I am not hesitant to address these others, but the first actor which comes to mind is the legislator itself, either the European Union legislator or national legislators. In this lecture, I limit myself to the earlier one.

Legislature

The European Union legislator acts as the fundamental safeguard of the unity and coherence of the European Union law system. As such, one of its main tasks is to guarantee the completeness and internal consistency of all the parts forming the European Union legal system on cross-border insolvency, and, in future the inclusion of "insolvency" in the further development of the internal market. Leaving aside the awkward, burdensome and politically sensitive history of the coming into effect of the EIR, the legislative system itself has in inherent conceptual failure. In the present system individual Member States may propose to list insolvency proceedings in Annex A. There is no evidence that there is any check by a European Union body, which leads to the sheer unilateral promotion of a national definition to an Annex with as a result a "European effect" to this national proceeding. As I have analysed elsewhere the present framework opens the door for opportunistic behaviour by a Member State placing "sort of" insolvency proceedings in the Annex, which is detrimental for the trust to put in the core base of the system of automatic recognition of insolvency judgments in the context of the EIR.[52]

I regret to inform you that also concerning the legislative process of evaluating the EIR the Commission is having problems – to put it mildly – to receive a sufficient mark. Article 46 of the EIR provides that the Commission will submit at the latest on 1 June 2012 a report concerning the application of the Regulation accompanied, if necessary, by a proposal for adaptation of the Regulation. This term has been exceeded. How come? Well, anyone with only a bit of knowhow and experience in these types of evaluations would calculate some 18 months for research, assessment, discussion and preparation for such a report and its accompanying

51 P. Omar, "The Building Blocks of Insolvency Reform: Is Law Enough?" (2012) *Eurofenix* (Summer Issue) 32.
52 See B. Wessels, "What is an Insolvency Proceeding anyway?" (2011) 4 *International Insolvency Law Review* 491.

proposal for adaptations. In April 2010, in an address to the European Parliament Mrs Vivian Reding on behalf of the European Commission, announced:

> "Pursuant to Article 46 of the regulation, not later than 1 June 2012, the Commission shall present an application report and amendment proposal if needed. ….. Ten years after its entry into force, it is expected that the regulation will need a new facelift. Therefore, the Commission will launch a large study on this issue at the beginning of 2011."

At that time, on 10 January 2011, another Commissioner, Mr Barnier, in the context of the work for a new framework for crisis management in the financial sector, said:

> "By June 2012 the Commission shall present an application report and amendment proposal if needed."[53]

Unlike the legislative commandment and the promises given, we now know that the Commission (note that Mrs Reding is in charge, not Mr Barnier) clearly failed to meet this legislative deadline. The first step to action by the Commission however was not taken in the beginning of 2011, but 14 months later, in March 2012, by setting out the public consultation I mentioned earlier.[54] Since April 2012, an Evaluation Study is being conducted (performed by a consortium of the Universities of Heidelberg and Vienna) as well as a Study for an impact assessment of a revision of the Regulation, in which identified policy options in terms of their economic, social and fundamental rights impacts as well as the impacts on Member States' judicial systems are assessed. This has been done by a multi-disciplinary consultancy, based in Brussels.[55] As far as I am informed, the latter impact study was available for the Commission early September 2012, whilst the Heidelberg/Vienna report is due second week October 2012. A "Group of Experts on Cross-border Insolvency" has been assisting the Commission in the preparation of a legislative proposal for a revision of the EIR and the adoption of this proposal is foreseen (as indicated in the Commission Work Programme 2012) for December 2012.[56] It is uncertain whether both reports of a few hundred pages together will sincerely influence the nearly finalised work in the process of drafting

53 Mrs Reding, Vice-President of the European Commission, responsible for Justice, Fundamental Rights and Citizenship. Mr Barnier is the Commission's member for Internal Market and Services. See: www.europarl.europa.eu. For sources, see B. Wessels, "European Insolvency Regulation: Where to go from here?" (2011) 3 *International Insolvency Law Review* 298.

54 Ibid., at footnote 1. See also: http://ec.europa.eu/justice/newsroom/civil/opinion/120326_en.htm.

55 I have participated in the Panel of Senior Advisors of this Study.

56 I am a member of this Group of Experts.

of the legislative proposal. For various reasons this state of affairs is – to say the least – unfortunate. In my opinion, the whole process could have gained from the acknowledgement of the basic imperative to start early which such a process and with strong leadership by (someone appointed by) the Commission in managing and coordinating this whole process.

A second flaw in the Commission's approach is – at least in the area of corporate insolvency – to recognise and acknowledge that for the necessity to include insolvency law within the achievements to develop such an internal market, parties in this market seems to play only a limited role. However, a piece of light entered the room two weeks ago. On 3 October 2012, the European Commission expressed its wish for a strong, deep and integrated Single Market which creates growth, generates jobs and offers opportunities for its European citizens which were not there 20 years ago. I quote:

> "The completion of the Single Market is a continuous exercise and is a central element of the European growth agenda to address the current economic crisis. This is why the European Commission has today adopted Single Market Act II, putting forward twelve key actions for rapid adoption by the EU institutions."

These actions are concentrated on what is called "four main drivers for growth, employment and confidence", being, I am quoting again:

> "(a) integrated networks;
>
> (b) cross border mobility of citizens and businesses;
>
> (c) the digital economy; and
>
> (d) actions that reinforce cohesion and consumer benefits."

Interestingly, section (b) has as a third action point:

> "(iii) modernise insolvency proceedings, starting with cross-border cases, and contribute to an environment that offers second chances to failing entrepreneurs."[57]

Doesn't it reflect the European Union legislatures' belief in the power of the full manufacturability of this internal market? It seems that the European Union is taking the lead in responding to problems which increasingly transcend national boundaries, either because the problems do not lend themselves to solely national regulation or because they involve the interests of the international community as a whole. In this new environment, the traditional areas of European Union law or national law (such as private law, criminal law, administrative law or insolvency law) acquire an increasingly internationalised character, in which its content is formed on different levels, with different legal measures (including soft law mechanisms), established either "top-down" the legislation-ladder or "bottom-up", initiated by private actors or a mix of such modes of operation.[58] Here, in matters of insolvency, the ears of the Commission should be much closer to the European ground. The backbone of the legal framework for insolvency as an integral part of the internal market is a balanced development of decision making, with time for

57 See: http://ec.europa.eu/internal_market/smact/index_en.htm. For ease of reference, I quote the specific abstract dealing with insolvency, see the Communication related to the "Single Market Act II. Together for new growth, at 7, "Key action 7: Modernise EU insolvency rules to facilitate the survival of businesses and present a second chance for entrepreneurs", with the following text: "Businesses operating in Europe benefit from an overall positive business environment, which the European Union is further improving through its better regulation agenda. But more can be done. Europe needs modern insolvency laws that help basically sound companies to survive, encourage entrepreneurs to take reasonable risks and permit creditors to lend on more favourable terms. A modern insolvency law allows entrepreneurs to get a second chance and ensures speedy procedures of high quality in the interest of both debtors and creditors. We thus need to establish conditions for the European Union wide recognition of national insolvency and debt-discharge schemes, which enable financially distressed enterprises to become again competitive participants in the economy. We need to ensure simple and efficient insolvency proceedings, whenever there are assets or debts in several Member States. Rules are needed for the insolvency of groups of companies that maximise their chances of survival. To this end, the Commission will table a legislative proposal modernising the European Insolvency Regulation. However, we need to go further. At present, there is in many Member States little tolerance for failure and current rules do not allow honest innovators to fail 'quickly and cheaply'. We need to set up the route towards measures and incentives for Member States to take away the stigma of failure associated with insolvency and to reduce overly long debt discharge periods. We also need to consider how the efficiency of national insolvency laws can be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market. To this end, the Commission will table a Communication together with the revision of the European Insolvency Regulation." See: http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf. The Communication mentioned is set for the Fourth Quarter 2012. No doubt, there will be further discussion on this key action.

58 See e.g. P. Buck-Heeb and Andeas Dieckmann, *Selbstreguliering im Privatrecht* (2010, Mohr Siebeck, Tübingen); M. Knauf, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (2010, Mohr Siebeck, Tübingen); J. Smits, "The Complexity of Transnational Law: Coherence and Fragmentation of Private Law" in K. Brown and D. Snyder (eds), *General Reports of the Eighteenth International Academy of Comparative Law (Washington 2010)* (2012, Springer, Berlin), at 113ff.; J. Smits, *Private Law 2.0. On the Role of Private Actors in a Post-National Society* (2011, Eleven International Publishing, The Hague); S. Muller *et al.* (eds), *The Law of the Future and the Future of Law* (2011, Torkel Opsahl Academic Epublisher, Oslo).

consultation, study, constructive criticism and debate, with strong involvement of all players in the market.[59]

Courts

So far, for making rules.

> "In the field of insolvency there are two actors whose integrity and experience are central to the functioning of the insolvency system: judges and administrators".[60]

This submission is made by Professor Jay Westbrook from Austin, Texas, who delivered the Edwin Coe lecture in 2008. Of importance for the judicial area in Europe is the so-called Stockholm-programme. In 2012, within the European Union supportive measures have been taken for the benefit of:

> "…delivering an area of freedom, security and justice for Europe's citizens…"

with the object of guaranteeing:

> "…. respect for the human person and human dignity, freedom, equality, and solidarity are our everlasting values at a time of unrelenting societal and technological change."[61]

This seems easier said than done. However, after the entry into force of the Lisbon Treaty in December 2009, an Action Plan Implementing the Stockholm Programme was published aimed actively at strengthening confidence in the European judicial

59 In our Harmonisation Report 2012, above note 22, Fletcher and I have developed seven criteria – not necessarily in this order and overlaps could occur – which may point at a direction to take in the process of developing a legislative skeleton for harmonisation of insolvency: (i) consistency with international norms, (ii) goals for the European Union, (iii) take stock, (iv) formulate overriding objectives, (v) draft flexible legislation, (vi) examine whether these is need for action, (vii) strive for a fair balance between the (often competing) interests of creditors and other parties concerned. For a framework that could guide public policy-makers in assessing whether, and in what form, private regulation can prove the most appropriate form of policy intervention, se the interesting six-step process of F. Cafaggi and A. Renda, "Public and Private Regulation. Mapping the Labyrinth" (2012) 1 *The Dovenschmidt Quarterly International Review on Transitions in Corporate Life, Law and Governance* 16ff.

60 Westbrook *et al.*, above note 31, at 203.

61 European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01), copy available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF.

area.[62] It is clear that it focuses on the area of freedom, security and justice, and therefore stays within the (perceived) restrictions of Article 81 of the TFEU.[63]

The Action Plan says:

> "The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods."

In the area of cross-border judicial co-operation, the corner-stone principle is that of mutual recognition, founded on a high level of confidence in the legal systems of the other Member States. What the system of mutual recognition requires, however, is more: it requires well-founded mutual confidence, thus Pauliine Koskelo, President of the Supreme Court of Finland, adding:

> "We cannot, however, expect our systems of criminal or civil justice to work well for the citizens of other Member States unless and until they work well in general. If the justice systems don't function up to standard in the domestic context, they will hardly function up to standard in cross-border situations either. Therefore, we simply cannot escape the fact that adhering to the principle of mutual recognition necessarily entails that the justice systems in each and every Member State must be brought up to standard. This is an urgent and serious common concern in the interest of citizens throughout the Union."[64]

In the insolvency arena, an area of concern is the uncertainty of the existence of common (minimum) standard for an insolvency judges. A first look at the general tableau of "courts" is not encouraging. In many civil law countries insolvency cases are not dealt with by specialised courts (like the bankruptcy courts in the United States), but by a court that has general competence in civil matters and disputes. These countries include Belgium, Czech Republic, Estonia, Germany, France and the Netherlands. In some countries (supervisory) judges could be non-professional

62 Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, 20 April 2010, copy available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF.

63 Ibid., at 4. See C. Timmermans, "Voorrang van het Unierecht door 'multilevel' rechterlijke samenwerking" (2012 February) *SEW Tijdschrift voor Europees en Economisch Recht* 50, observing that judicial cooperation takes place on three levels: pre-judicial reference procedures to the Court of Justice of the European Union, on an informal level and via court cases.

64 See her address to the IBA Northern Europe Conference, Helsinki, 3-4 September 2009, available at: www.kko.fi/47788.htm.

lay judges, such as in Belgium, France and the Netherlands. In England, the High Court Bankruptcy Registrars, and throughout the country the county court judges with designated jurisdiction in insolvency matters, oversee individual insolvency proceedings, as the bankruptcy order must be made judicially.[65]

I am not aware of any research results related to such questions as whether the judges in these courts are specialised enough (in applying rather complicated insolvency law matters, many times in a rather short time frame) and possess sufficient commercial experience. Only in the last decade useful, but limited data have become available to sketch the general European procedural landscape, resulting in such conclusions as that there is no common European definition for "court", that there are "radically different" court budgets and that the professional status of judges is not harmonised.[66]

The fundamental principle in cross-border insolvency matters within the European Union is that recognition of judgments delivered by the courts of the Member States is automatic (Article 16 of the EIR) as it "should be based on the principle of mutual trust" (see recital 22 to the EIR and, since 2009, Article 81(4) of the TFEU). This principle serves as the cornerstone for confidence in the Member State's judicial capacity. For the very near future, systematic examination in this specific field is recommended in an aim to obtain accurate and comparative data on aspects of the functioning of courts in insolvency matters[67] and – if need be – work on a programme to bring the judiciary indeed up to standard. I can therefore fully support the reasons to monitor justice sector performance, as recently expressed in The Hague Institute for the Internationalisation of Law (HiiL)'s Programme on "Justice Monitoring and Guardians of Justice", one of which is:

65 Other types of procedure – such as Individual Voluntary Arrangements (IVA) and Debt Relief Orders (DRO) – are commenced out of court, but the court always has "oversight" in the sense that there can be a reference or an appeal to the court if contested issues arise.

66 See A. Uzelac, "Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations" in X. Kramer and C. van Rhee, *Civil Litigation in a Globalising World* (2012, TMC Asser Press, The Hague), at 175ff. See also the Council of Europe's Commission for the Efficiency of Justice (CEPEJ) report of September 2012, establishing a reference at European level to evaluate European judicial systems recognised and providing – so the website says – the opportunity to compare, identify, analyse and plan possible improvements on the basis of a detailed picture of the daily functioning of judicial systems in 46 European States and to measure the main trends, see: http://www.coe.int/t/dghl/cooperation/cepej/.

67 Article 2(d), EIR states: "'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings."

"(iii) economic growth depends on effective protection of property rights, contractual rights, labor rights, consumer rights, effective debt collection and insolvency."[68]

The Insolvency Office Holder

For matters of insolvency, the most important actors in nearly any insolvency proceeding in Europe is the insolvency office holder, who will derive its authority from the provisions of domestic law.[69] In an individual case, the allocation of functions between a court and an insolvency office holder liquidators, including the legal and operational relationships between them, will be based on law and additional regulations, as well as a country's institutional system, merely related to the requirements to fulfil these actors' functions, including professional and ethical rules that apply to them. As Westbrook indicated, a successful insolvency proceeding is heavily dependent on a skilled and experienced insolvency office holder and court. He also noted a short overview of a few different jurisdictions demonstrated that selection of insolvency office holders, their supervision and their remuneration can be arranged in "quite a number of ways".[70]

In a report of 2007, published by the European Bank for Reconstruction and Development (EBRD), a comparative survey has reviewed the manner in which the laws of eight south-eastern European countries make provision for issues such as qualifications, licensing, appointment, removal/retirement/replacement, standards of work and conduct, discipline and remuneration of office holders in insolvency cases.[71] The principal purpose of the survey was to determine whether and the extent to which the respective laws of the countries mentioned make such provision. Aware of the relatively young and rather untested legal regimes related to insolvency in these countries the drafters' main conclusions are:

(i) that in all the topics mentioned a variety of approaches have been chosen in a country's laws and regulations;

68 The other reasons are: (i) mutual trust in justice institutions, in cooperation between the police and the courts, and in fair, effective migration procedures, performance/productivity of justice sector organizations, (ii) human rights, protection of victims, prevention of crime, rule of law and fundamental freedoms, see: http://www.hiil.org/project/Justice-monitoring-guardians.

69 I am now leaving aside these roles as they are determined by the EIR.

70 Westbrook *et al.*, above note 31, at 208ff.

71 J. Allen *et al.*, *A Regional Report on Insolvency Office Holders in South-East Europe* (June 2007). See: www.ebrd.com/downloads/legal/insolvency/insolserv.pdf. The eight countries are Albania, Bosnia and Herzegovina, Bulgaria, FYR Macedonia, Montenegro, Romania, Serbia, and Slovenia.

(ii) that there is a clear need for appropriate detailed standards to guide office holders in their work and to improve the basis on which their work can be measured and assessed; and

(iii) that in general there is an inadequate disciplinary system for insolvency office holders (either related to the vague ground for disciplinary action or the limited type of available sanctions).

This has the look of a provincial patchwork where confidence and trust in the impartial work of an insolvency office holder is concerned. As rightly positioned by Kenneth Cork in the United Kingdom:

> "The success of any insolvency system… is very largely dependent upon those who administer it. If they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse."[72]

I therefore welcome the European Parliament's proposal to harmonise general aspects of the requirements for the qualification and work of "liquidators". The recommendation includes the liquidator's approval by a competent authority of a Member State or being appointed by a court of competent jurisdiction of a Member State, with proven reputation, educational background, skills to manage the affairs of the insolvent company, being independent and resigning his office in the event of a conflict of interest. At this juncture I may welcome the initiative taken by INSOL Europe for a thoroughgoing research in the national systems of this area and to draft best practices for insolvency office holders.

Academia

Ladies and gentlemen, dear colleagues, looking into our own mirror, we see that true European comparative research is still in its infants' shoes. The organisation of academic research is rather national, with a majority of PhD-research done by individual researchers, hardly cooperating with others, let alone other colleagues from law schools in other jurisdictions. Although I agree with Rebecca Parry that significant progress has been made in the development of insolvency law scholarship in recent years,[73] the European Parliament's call for harmonisation

72 Cork Report, Insolvency Law and Practice – Report of the Review Committee (Chairman, Sir Kenneth Cork) (Cmnd 8558) (1982, HMSO, London), at paragraph 732. The report formed the basis for the reform of insolvency law in the United Kingdom, resulting in the Insolvency Act 1986.

73 See the Editorial Preface in Parry (ed), above note 29, at ix.

evidently will trigger more focused comparative studies.[74] The basic structure of for instance the Academic Forum of INSOL Europe now in place and substantially active since 2007, should consider to organise itself in such a way that it is well placed to undertake such research, preferably in collaboration with the European Law Institute, established last year, when it should decide to do research in certain areas I mentioned before. Undoubtedly, other areas of research could contribute to the delivery of unity and coherence of the European Union law system. For instance, the coherence of the procedural rules, laid down in some fifteen directives and regulations of European procedural law has as far as I know never been a subject of serious research involving researchers from several disciplines of law, whilst for instance a rather new concept in insolvency such as cross-border cooperation and communication between courts and liquidators never has been compared with or tested against similar coordination frameworks in Europe which are in place regarding criminal law or tax law.

Another area of interest should be the next generation and their introduction into European Insolvency Law. There is an enormous task of a system of arranging and ordering, so that all relevant European Union law documents related to insolvency are available via an online directory, the legislative history of the EIR should be publically available and the CJEU cases should be systematically listed. Improving the accessibility of primary and secondary sources in a readily and easy way will certainly assist to accelerate capacity building for courts, practitioners and students.

Conclusion

Ladies and gentlemen, to conclude:

I have argued that "insolvency" is a true part of the legal skeleton for an internal market in the meaning of Article 114 of the TFEU. The Commission has put the revision of the EIR in its Work Programme for 2012. The revision is one of the measures in the field of "Justice for Growth" set out in the Commission's Action Plan implementing the Stockholm Programme. The revision links in with the European Union's current political priorities to promote economic recovery and sustainable growth, as set out in the Europe 2020 strategy, and its very recent initiative to modernise insolvency proceedings and to contribute to an environment that offers second chances to failing entrepreneurs, in the Single Market II Act. I

74 See R. de Weijs, "Towards an Objective European Rule on Transaction Avoidance in Insolvencies" (2011) 20 *International Insolvency Review* 219, at 242, presenting "a blue print for future European harmonisation". See related to this topic also the INSOL Europe Revision Report 2012, in the Appendix on "Harmonised Rules on Detrimental Acts".

have given some examples of interaction between European Union law and national law, the lack of cooperation between Member State to align their implementation efforts and the necessity for a unified and coherent European Union law. With insolvency being one of the essential pillars upon which the internal market rests, we presently lack clear concepts, terms and norms as well as guiding principles. This results in the present rather fragmented and inconsistent nature of European Insolvency Law.

The challenge is to understand and articulate the paradigm shift in insolvency, from the sacrosanct "pay what you owe" to the balanced promotion of the continuity of companies in distress and reintegration of over-indebted consumers into society. Further research and debate should lead to the creation of a design for an insolvency law that continuously will meet the key objectives within the focus of European Union policies on the longer term. Overarching and guiding principles then must fit in the overall legal structure for an internal market. More specifically, European Insolvency Law's substantial and procedural forms should be brought into alignment with norms and principles which are predominant in non-insolvency law area. European Insolvency Law, in future, will further challenge the tension which exists between underdeveloped legal policies concerning insolvency in the European Union and the traditional sometimes out-moded national concepts of insolvency law.

There is much to be done, interaction, synchronisation, adjustment, unity, coherence. In my opinion this calls for a coordinating unit, which will operate at European Union institutional level. Such an organisation (I now call it a European Insolvency Service) would have as an overall aim to develop and maintain a world-class European Insolvency Law and regulatory framework, to deliver services to insolvency practice (creating forms and maintaining relevant insolvency databases), to assist in the development of a regulation of the insolvency profession, to coordinate basic information to be of assistance to courts, to ensure and facilitate coordination in cross-border cases, to advise government departments and agencies on insolvency and related issues, to provide information to the public via its website, and to continuously monitor the efficiency and effectiveness of all matters of European Insolvency Law.

There is a lot to be done. The Academic Forum can be a forerunner here, by creating awareness on these matters, undertake research and maintain its platform for regular dialogue and outreach. Thank you for your attention.

Chapter 6

Spreading the Gospel: The Mission of Insolvency Law, and the Insolvency Practitioner, in the early Twenty-First Century

Professor Ian Fletcher QC

Introduction* **

In this lecture, I will present a personal assessment of the state of insolvency law, and insolvency practitioners, at this still early point in the 21st century. After more than 40 years spent mainly writing and thinking about insolvency matters, this seemed an appropriate moment to review past experience and to venture some thoughts about the future direction and destiny for the subject and for those who profess it. In embarking on this task it may be appropriate to invoke the words inscribed on a celebrated painting by the French artist, Paul Gauguin:

> "D'où venons nous? Que sommes nous? Où allons nous?"[1]

I start with some reflections on "Where do we come from?"

The Historic Background – Myth and Reality

When I began to make a serious study of insolvency law – in the early 1970s – the picture, both in terms of English domestic law and at the international level, was one in which time appeared to be frozen, and the inhabitants of the landscape (rather like Gauguin's subjects caught in their dream-like Netherworld) seemed to dwell in a curious limbo in which the law's archaic substance wholly failed to address contemporary conditions and actual social needs. English insolvency law, both individual and corporate, had remained essentially unchanged throughout the

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** This is a re-edited and updated version of a piece first published under the same title in Chapter 17 in S. Bariatti and P. Omar (eds), *The Grand Project: Reform of the European Insolvency Regulation* (2014, INSOL Europe, Nottingham) (179-195).

1 "Where do we come from? What are we? Where are we going?" The painting, dating from 1897/8, hangs in the Museum of Fine Arts, Boston, Massachusetts. Intriguingly, there are no question marks on the inscription painted onto the canvas by the artist.

first seven decades of the 20th century, and the legislative frameworks established by nineteenth century statutes were essentially still operative, although contained in legislation of somewhat more recent vintage.[2] At the international/cross-border level there was a similar lack of any serious progress towards overcoming the traditionally fragmented approach to the special problems encountered when an insolvency case contains multi-jurisdictional features.

Notably, by 1970, the original 6 Member States of what was then known as the European Economic Community were encountering the first of a series of intractable setbacks in the attempt to negotiate a convention aimed at regulating the conduct of insolvency cases within the frontiers of the self-styled "internal market". The first draft of a proposed "EEC Bankruptcy Convention", when first made available for external scrutiny in 1970, proved to be an unworkable blend of high-minded, academic proclamations of allegiance to the twin principles of unity and universality, instantly undermined within the same text due to the complete inability of the national negotiators to accept the logical consequences of applying those principles in circumstances where the national insolvency laws, together with the related national regimes of property and security law, remained unharmonised.[3]

So began a 30-year saga marked by repeated failures and recriminations until, at long last, sanity managed to prevail with the adoption in May 2000 of the European Insolvency Regulation ("EIR"),[4] which succeeded in squaring the circle by embracing the pragmatic principle of *modified* universalism. This compromise solution affords a limited accommodation to those who might otherwise experience a less favourable outcome through the application to their claim of the law of the debtor's centre of main interests ("COMI"). Although it is always possible to point to technical or practical shortcomings in the final text of the EIR as currently in force, it is notable for its commercial realism and for delivering tangible benefits in terms of value preservation and greater efficiency in the conduct of cross-border insolvencies. It is also capable (in the right professional hands) of facilitating the restructuring of businesses and preservation of employment.

2 In the 1970s, the principal legislative provisions relating to individual and corporate insolvency respectively were contained in the Bankruptcy Act 1914 and the Companies Act 1948.

3 For a critical account of the Preliminary Draft Convention as published in 1970, see I. Fletcher in K. Lipstein (ed), *Harmonisation of Private International Law by the EEC* (1978, Chameleon/IALS, London), at 119; also published in (1977) 2 *European Law Review* 15. The subsequent, revised Draft, published in 1980, is the subject of further critical analysis in I. Fletcher, *Conflict of Laws and European Community Law* (1982, North-Holland Publishing Company, Amsterdam), in Chapter 6 (187-249).

4 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L160/1 (30 June 2000), which entered into force on 31 May 2002 (Article 47).

My early investigations into the world of insolvency convinced me of the need to break out of the academic ivory tower and to become acquainted with the real workings of the law "on the ground", and then to be prepared to identify and denounce whatever shortcomings were uncovered. In the English experience, the grave deficiencies in the law had been publicly exposed in the 1957 Report of the Blagden Committee, who concluded:

> "Practical experience has shown that the present law fails and, it is suggested, fails badly in all these primary objects."[5]

Significantly, but alas all too typically of the fate of constructive proposals for the reform and improvement of insolvency law, no legislative initiative was pursued by the government of the day to translate the Blagden Committee's numerous recommendations into law.

So the scandalous inadequacies of English insolvency law were perpetuated for two more decades until, in 1976, the Cork Committee was established by the Labour government of the day, largely in response to two documents which made an especially cogent case for such reform. These were, in 1975, the report by Justice entitled "Bankruptcy",[6] and in 1976 the *Report of the Advisory Committee on the EEC Preliminary Draft Convention on Bankruptcy*.[7] The chairman of the Advisory Committee, Kenneth Cork, was immediately re-engaged to chair a Review Committee on Insolvency Law and Practice, with a remit to review the entire law of insolvency, individual and corporate, in England and Wales, and to propose whatever reforms might be necessary or desirable. Despite the serious intentions with which the Review was launched, the committee was not given the full resources necessary to undertake a thorough, scientific study of the law and its working as a prelude to formulating its proposals.

This was in marked contrast to the approach being taken contemporaneously in the United States in the well-resourced process which culminated in the Bankruptcy Reform Act of 1978. Nevertheless by 1982 the Cork Committee did succeed in producing a convincingly argued Report advocating wholesale reform of the English law of insolvency.[8] But with a different political party by then in government the Cork Report was initially ignored until 1984, when the

5 *Report of the Committee on Bankruptcy Law and Deeds of Arrangement Law Amendment* (Chairman, His Honour Judge Blagden) (Cmnd 221) (1957, HMSO, London).

6 *Bankruptcy – A Report by Justice* (1975). The report was produced by a committee chaired by Allan Heyman QC.

7 Cmnd. 6602 (1976, HMSO, London). This report is usually known as the "Cork I" report to distinguish it from the subsequent report of the Review Committee, also chaired by Sir Kenneth Cork.

8 *Insolvency Law and Practice. Report of the Review Committee* (Chairman, Sir Kenneth Cork) (Cmnd 8558) (1982, HMSO, London).

groundswell of public opinion, fuelled by repeated financial scandals, led to the hasty resurrection of the Cork proposals in a Bill which ultimately became the Insolvency Act 1986.

A "Mission to Explain"

The unedifying spectacle of the process of domestic insolvency law reform between 1976 and 1986 convinced me of the need for those who possess a technical understanding of the law and its actual working to establish effective channels of communication with legislators and with policy-makers in government, in order to ensure that there is a proper appreciation of the vital impact that this complex and much-misunderstood area of law has upon the totality of social well-being in a modern, credit-based society. Therefore it is an important aspect of the "mission" of insolvency practitioners to improve awareness, both on the part of the wider public and within the corridors of government, of the realities of insolvency law and practice, and to do so in a way that earns public confidence and respect rather than functioning merely as special pleading on behalf of the vested interests of those "in the business". The "mission to explain", as I call it, needs to be based on authentic and verifiable demonstrations of how the shortcomings of the current law have contributed to loss of value and the needless destruction of viable businesses, complemented by constructive proposals for the progressive improvement of law and practice. I shall return to this theme in a later part of this lecture.

Professional Regulation – A *Sine Qua Non*

When the Cork Committee's proposals were belatedly made the basis of legislative reforms, a number of elements were omitted from the Act as finally passed by Parliament, notably in relation to corporate rescue and the predicament of what we nowadays term "consumer debtors". These omissions have had to be re-visited in subsequent years, and it must be acknowledged that in a number of respects we in the United Kingdom have still not managed to achieve a satisfactory balance – the genesis of a "rescue culture" is still a work in progress. However, one keystone proposition in the Cork Report happily bore fruit, namely that all office holders in insolvency proceedings must be suitably qualified, professionally organised and properly regulated, so as to be fully accountable for their stewardship and conduct of the cases in which they act. A robust, statutory framework to ensure the competence and integrity of those acting as insolvency practitioners ("IPs") was seen by Cork as a *sine qua non* of a soundly-run insolvency law, a conviction with which I respectfully concur.

The emergence in the United Kingdom, post-1986, of a regulated sub-profession of insolvency practitioners has in my view been the single most important advance in the operation of insolvency law in my country since the 19th century, and I believe it can furnish a model and example for other systems in and beyond Europe. For let us be in no doubt: however well-crafted the enacted, black-letter provisions of an Insolvency Act or Code may be, they are relatively impotent and devoid of value unless they are administered and applied by office holders, judges and regulators whose competence and integrity are systemically assured. Without a proper institutional infrastructure based on firm ethical standards – which cannot be simply wished into existence overnight – public trust and confidence in the system will be progressively destroyed. One has only to look back on the notorious state of disarray and corrupt practices that characterised the pre-Cork era to realise how far we in the United Kingdom needed to come, and to appreciate the need to avoid ever lapsing into a complacent belief that "all is now perfect". Instructive accounts of the scandalous goings-on in former times, have been chronicled by Stephen Aris in his book "*Going Bust*",[9] and by Sir Kenneth Cork himself in his memoire "*Cork on Cork*".[10]

In the United Kingdom since 1986, there has existed a statutory regime for the regulation of every person who "acts as an insolvency practitioner" by taking appointment in relation to any of the formal types of insolvency proceeding (including administrative receivership under a floating charge). The regulatory regime established by Part XIII of the Insolvency Act 1986 (sections 388-398), together with several pieces of secondary legislation,[11] is designed to control access to the provision of IP services by imposing an exacting series of "entry criteria" involving education, training and experience, combined with the somewhat intangible quality of being a "fit and proper person" to undertake the functions of an IP. The entry criteria go well beyond the "mere" possession of a professional qualification as a lawyer or accountant, although membership of a "recognised" professional body is in most cases the initial platform for acquiring eligibility to practice as an IP. Each of the recognised professional bodies has obtained specific ministerial recognition granting it authority to confer a license to practice as an IP upon those of its members who satisfy the requisite criteria. To become a "recognised professional body" ("RPB") – there are currently seven of

9 See S. Aris, *Going Bust* (1985, HarperCollins, London), especially in Chapters 6, 7 and 9.

10 See K. Cork, *Cork on Cork* (1988, Macmillan, London), especially in Chapters 2-6 and 10.

11 See especially: Insolvency Regulations 1994 (SI 1994/2507); Insolvency Practitioners Regulations 2005 (SI 2005/524); Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986/1764); Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986 (SI 1986/952); Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003 (SI 2003/3363) (all as amended by subsequent SIs).

them,[12] purpose-designed internal structures, acceptable to the minister, must be in place both for conferring a licence in the first instance, and for the regulation of those IPs who are licensed by the RPB in question. These rules and structures must be reinforced by suitably rigorous disciplinary procedures.

As though it were not already sufficiently complicated, the United Kingdom system superimposes an additional layer of regulatory oversight by making the RPBs themselves subject to the scrutiny and oversight of the Insolvency Service, effectively acting on behalf of the government. As the annual reports of the Insolvency Service make clear, these regulatory functions are an important aspect of the role of the Service in ensuring that public confidence can be maintained.[13] But the complexity does not end there. Particular aspects of practice are the subject of "statements of insolvency practice" ("SIPs") issued by one of the RPBs, the Insolvency Practitioners Association ("IPA") in conjunction with the other six, giving their members detailed guidance on matters of practice which are seen to be of particular concern (e.g. SIP 16, concerning pre-packaged administrations).[14] As if all this were not enough, there is one further element in the United Kingdom edifice of professional oversight, namely the *Insolvency Code of Ethics*, agreed between all the RPBs, drawn up by the Joint Insolvency Committee which serves as a vehicle for coordination and discussion between the seven RPBs and the Insolvency Service.[15]

The United Kingdom system may appear over-elaborate, complex and somewhat unwieldy. Bearing in mind that it was virtually created from scratch after 1986 its somewhat prolix structure can be said to have come about by accident rather than

12 Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986/1764). The seven RPBs are: The Chartered Association of Certified Accountants; The Institute of Chartered Accountants in England and Wales; The Institute of Chartered Accountants in Scotland; The Institute of Chartered Accountants in Ireland; The Insolvency Practitioners' Association; The Law Society of Scotland; The Law Society.

13 "(*IP regulation): The service is the oversight regulator of IP's and ensures that the 7 RPBs permitted by the Secretary of State to authorise their members as IP's regulate them effectively*.": Annual Report of the Insolvency Service 2011-12, at 12, which can be viewed (together with reports for some other years) on the Insolvency Service website at: https://www.gov.uk/government/publications/the-insolvency-service-annual-report-and-accounts-2011-to-2012 (last viewed 31 December 2014). Further information about the regulatory functions of the Insolvency Service can be found at: https://www.gov.uk/government/organisations/insolvency-service and also at: https://www.gov.uk/government/publications/insolvency-practitioner-regulation-oversight-and-monitoring-of-authorising-bodies (last viewed 31 December 2014).

14 The collected texts of the SIPs (currently 17 in number) can be viewed at the website of R3 (the Association of Business Recovery Professionals) at: http://www.r3.org.uk/index.cfm?page=1380 (last viewed 31 December 2014) and at the individual websites of the Recognised Professional Bodies.

15 The Joint Insolvency Committee (JIC) is made up of eight representatives from each of the Recognised Professional Bodies and from the Insolvency Service. More information can be viewed at: http://webarchive.nationalarchives.gov.uk/+/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/iparea/jic.htm (last viewed 31 December 2014). The most recent version of the Code of Ethics can be viewed at: https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics (last viewed 31 December 2014).

design, and to reflect the historic subdivisions between and within the respective professions of accountants and lawyers in England and Wales, in Scotland and in Northern Ireland. One would not therefore advocate the adoption of the actual United Kingdom structure as an international model for exportation. But what can be said in its favour is that it amounts to a very serious attempt at ensuring that, in substance, the regulatory mechanism is a robust and dynamic one, and that there is even a layer of oversight of the regulators themselves, thus responding to the familiar rhetorical query "*Quis custodiet ipsos custodes?*".[16]

But it remains essential at all times to avoid lapsing into a sense of complacency. For example, a reputational challenge for the profession has emerged in the wake of the development, particularly since 2002, of pre-packaged administrations. I do not intend here to discuss the actual mechanics of pre-packs, nor to assess their merits or demerits. Rather, I wish to call attention to the evident fact that certain features of their development bear an uneasy resemblance to such malpractices as "phoenixism" and "Centrebinding", which many assumed had been consigned to history by the combination of reforms enacted in 1986. But when it becomes something of a routine practice to utilise administration as a vehicle for concluding a rapid sale of assets and businesses to internal buyers without any open marketing, and without the necessity of obtaining prior endorsement of the creditors, many of whom are destined to go uncompensated, questions are bound to be asked regarding the professional judgment and probity of the IP selected to serve as administrator. Particularly when, as is so often the case, the administrator is selected and appointed by the very persons who are destined to acquire the assets at a price previously agreed with the selfsame IP prior to being clothed with the powers of office.

Quite understandably, the unsecured creditors who are left behind by the process – and likewise any holders of equity in the Oldco who are not destined to become involved in the new venture – can be left with the impression that something disreputable has taken place. That is a problem with which we in the United Kingdom are still cautiously trying to come to grips, for there is the very real risk that in trying to devise some mechanism to allay popular concern about the integrity of the prepack process, particularly where insiders are involved, over-engineered solutions may be introduced which will simply kill off the rescue

16 The Latin maxim is translatable as "Who will guard the guards themselves?".

culture and deprive potentially viable businesses – and those employed in them – of any chance of escaping the inevitable alternative of liquidation.[17]

I therefore reaffirm my conviction that the United Kingdom experience bears out the proposition that effective and proportionate regulation is a *sine qua non* of a healthy and socially beneficial insolvency law. Proportionality is crucial, because over-regulation can produce negative consequences which can also be detrimental to the public interest. I would add that I am not persuaded that there is one single, ideal model of regulation which can be applicable to all societies in a uniform manner. The model for regulation has to be tailored to match the needs and circumstances of the community and system in which it is to function. And it needs to be kept under review, and be adaptable to match changing conditions. Notably, the United Kingdom Insolvency Service has recently conducted a study of our own regulatory machinery.[18] One welcome consequence of that review, implemented from 5 June 2013, is the introduction of a single gateway for complaints against insolvency practitioners in place of the labyrinthine structure that was previously in operation. The would-be complainant now merely has to access a single avenue for making a complaint, in place of having to ascertain which of 8 possible avenues was the correct one to use in relation to the IP in question.

At the European Level

When we move to the European level and ask the questions "where have we come from?", and "what are we?" the initial impression is somewhat encouraging, as we reflect on (currently) 11 years during which the EIR has occupied a central place in the practice of insolvency in 27 of the (currently) 28 Member States of the European Union. But our enthusiasm must be qualified as we recognise that there are many practical issues which are, or can be, a source of dissatisfaction and mistrust. One must acknowledge the potential for such negative experiences which

17 Following a period of consultation commenced in March 2010 seeking proposals for improving the transparency of, and confidence in, pre-packs, the Insolvency Service initially announced in March 2011 that additional legislative measures would be forthcoming. Subsequently, on 26 January 2012, a Ministerial statement was issued indicating that no such measures were in contemplation for the immediate future. But in July 2013, a fresh initiative was launched, involving further consultations to assess the working of pre-packs. The subsequent Report ("The Graham Report") which was published in April 2014, contains proposals for further reform and oversight of the operation of pre-pack administrations. Its recommendations form the basis for provisions included in the Small Business, Enterprise and Employment Bill, introduced into Parliament on 25 June 2014. The Graham Report can be viewed at: https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration (last viewed 31 December 2014).

18 See the consultation document, "Strengthening the regulatory regime and fee structure for insolvency practitioners" (February 2014), which can be viewed on the Insolvency service website at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/280880/Strengthening_the_regulatory_regime_and_fee_structure_for_insolvency_practitioners.pdf (last viewed 31 December 2014).

can result from the lack of harmonisation and standardisation, both in the substance of the national insolvency laws as well as in the procedures and processes available state by state. Further obstacles are caused by disparities between the nature and standards of national organisation, training and regulation of the professionals and courts engaged in the insolvency process in their respective ways. The prospective emergence of an atmosphere of mistrust is especially unfortunate, and potentially fatal, in relation to the functioning of the EIR itself, whose very operation is ultimately (and explicitly) dependent on there being "mutual trust" between the Member States, and between the respective national courts and nationally-established professionals. As last year's Edwin Coe lecturer, Professor Bob Wessels, so forcefully reminded us by means of a quotation from the European Commission Action Plan Implementing the Stockholm Programme:

> "The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods."[19]

In the current text of the EIR, the "principle of mutual trust" is invoked in Recital (22), which concerns the immediate and automatic recognition of judgments concerning the opening, conduct and closure of insolvency proceedings. It supplies the main rationale for the proposition that:

> "…grounds for non-recognition should be reduced to the minimum necessary."

So a great deal is staked on there being general acceptance of this "principle of mutual trust" across the European Union. A central aspect of the scheme of the EIR is that national insolvency laws and practices remain essentially untouched and intact, while at the same time the EIR has the effect of superimposing the law of the state of opening of main proceedings upon all assets, and all claims, which are otherwise grounded in the laws of other states (except where secondary proceedings can be and actually are opened). This state of affairs has the very real capability of creating perverse incentives for interested parties to engage in forum-shopping tactics in the quest for some personal advantage obtainable under

19 European Commission, COM (2010) 171 Final, 20 April 2010, in Section 4, "Strengthening confidence in the European judicial area", opening paragraph. The Action Plan can be viewed at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF (last viewed 31 December 2014).

the insolvency laws of another state (a tendency which has become known as "bankruptcy tourism").

With their growing experience of the operation of the EIR, United Kingdom courts have become increasingly vigilant to identify instances where the debtor's claim to have accomplished a transfer of COMI to the United Kingdom is not borne out by the discoverable facts.[20] There are also commendable examples of principled conduct by insolvency practitioners themselves, such as in the *Hans Brochier* case.[21] There, English IPs had been induced to accept out-of-court appointment as administrators of a German company upon the assurance that its COMI had been transferred to the United Kingdom. Upon discovering that the true facts were otherwise they promptly took steps to notify the English court, and they sought (and were granted) immediate release from office. In calling attention to these documented examples of the efforts made by English courts and IPs to adhere to the spirit as well as the letter of the European Insolvency Regulation's ambitious scheme for applying the principle of universalism despite the significant disparities between the domestic laws of the Member States, I wish to emphasise once again the heavy reliance which is placed on the integrity of the individual practitioner, and also upon the discernment of the national judge. If the principle of "mutual trust" is ultimately found to be based upon a false premise in relation to the behaviour of certain constituent members, this experiment in applied universalism risks falling into disrepute.

Where are we now? Where *should* we go?

My personal assessment of the current state of affairs ("*Que sommes nous?*"), both at the national and at the European Union level, is that while much has been accomplished since the "Wild West" era prior to the 1980s, much still remains to be done. Let me offer some thoughts on where we need to go (rather than try to prophesy where we are going to go).

First, the disparity between national insolvency laws needs to be addressed. This cannot be resolved overnight, but we need to start to tackle the more egregious anomalies, and identify areas where convergence can be realistically, and beneficially, attempted. Of course, proposals for a "European insolvency law" have been made in recent years, both by INSOL Europe and by the European

20 For examples in the area of personal bankruptcy see, e.g. the cases of *Mitterfellner* [2009] BPIR 1075; *Eichler (No.2)* [2011] BPIR 1293; *Quinn* [2012] BCC 608; *O'Donnell* [2012] EWHC 3749 (Ch); [2013] ILPr 16.

21 *Hans Brochier Holdings Ltd v. Exner* [2006] EWHC 2594 (Ch); [2007] BCC 127.

Parliament.[22] On 5 July 2013, the Commission launched a *Consultation on a new European approach to business failure and insolvency*, conducted by means of an on-line questionnaire which includes a section inviting responses on areas to be selected for resolving the divergence between national insolvency laws.[23] The indications are that a gradualist approach is being prepared whereby selected aspects of the law will be explored and targeted for harmonisation. This is a far more realistic course of action than any grandiose attempt to devise a single, comprehensive insolvency code for the whole of the European Union.

Aspects which seem to be suitable for early exploration include the test or tests of insolvency which are to be employed in determining whether proceedings can be opened; other criteria, such as time periods, which may be employed in relation to the opening of proceedings, and also the relevant time periods utilised in the operation of typical remedies for transaction avoidance. The subject of directors' liability for their conduct of company affairs would be another obvious candidate for attention, and likewise the basis for imposing disqualification on delinquent directors (with the important additional need to ensure that the effects of disqualification under the law of one Member State will be recognised and enforced in all other European Union States). But the above are, of course, merely the first steps in what is likely to prove the equivalent of the proverbial thousand-mile journey – the "Long March" towards eventual harmonisation of insolvency laws and procedures within Europe. What are the prospects for such a project being accomplished, and how best should the task be approached?

Harmonisation – *Festina Lente*

Some comments on the theme of harmonisation can be included here based on recent personal experience. In 2012, Professor Wessels and I produced a Report, "*Harmonisation of Insolvency Law in Europe*", commissioned by the Netherlands Association for Civil Law.[24] In drawing up our conclusions, we were struck by

22 See the European Parliament, Committee on Legal Affairs, Report with Recommendations to the Commission on Insolvency Proceedings in the Context of EU Company Law (the "Lehne Report"), (6 June 2011, 2011/2006 (INI), PE467.008v02-00). See also the European Parliament, Directorate General for Internal Policies, "*Harmonisation of Insolvency Laws at EU Level*", PE 419.633 (April 2010) (the report was prepared for the European Parliament by a committee of INSOL Europe). Further proposals for harmonisation of selected rules of insolvency law were included in the Proposals by INSOL Europe, "*Revision of the European Insolvency Regulation*" (May 2012), Drafting Committee Chairman, Robert van Galen. Both the INSOL reports can be viewed on the INSOL Europe website at: http://www.insol-europe.org/publications (last viewed 31 December 2014).

23 The European Commission consultation was formerly available on the Europa website at: http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=InsolvencyTwo. The consultation period has expired.

24 See I. Fletcher and B. Wessels, *Harmonisation of Insolvency Law in Europe* (Preadviezen Nederlandse Vereniging voor Burgerlijk Recht 2012/Reports of the Netherlands Association for Civil Law 2012) (2012, Kluwer, Deventer).

the enormous sensitivity surrounding the use of the very term "harmonisation", and indeed in our researches into the literature we detected an aversion to the very use of the "H" word. Reviewing the prospects for "harmonisation of insolvency law" with as much academic objectivity and dispassion as we could muster, we discerned several meritorious arguments in favour of the adoption of a cautious, incremental approach towards the task of harmonisation.

One quite fundamental – and also very practical – proposition which commended itself was that in order to formulate a single set of principles and procedures for uniform application European Union-wide one must first establish community-wide agreement as to the policy goals and objectives which the insolvency laws are intended to promote. Such unity of vision is yet to be achieved across the 28 Member States, and it may take some time, and much patient effort, before consensus can emerge. Therefore we must be prepared to commit ourselves to the long-term view that by regular and sustained discussion we may arrive at agreement on the fundamentals on which European insolvency law is ultimately to rest.

In the meantime, we can take encouragement from the fact that a dynamic process of evaluation and reform is operating in many of the Member States, as they observe the fruits of alternative solutions which have been adopted in sister states. Although there is always the danger that inter-state competition will degenerate into a "race to the bottom" (sometimes castigated as the "Delaware syndrome"), as has been experienced at times within the federal system of the United States,[25] Bob Wessels and I considered that there was force in the argument that in the present age, when new solutions are still being devised in response to rapidly-changing social and commercial challenges, it would be premature to attempt to formulate one single model of insolvency law, and to seek to impose it in a top-down manner by means of an European Union Regulation, as this could well stifle the innovation and creativity being exhibited by law makers and practitioners in individual states. Preferably, piecemeal harmonisation could be carried out by means of European Union Directives, which have the additional feature that each Member State is able to adopt the most suitable means of transposing the measure into its domestic law, respecting the particular characteristics of the national system.[26]

I am therefore of the opinion that, at the European Union level, the mission for insolvency law, and for those who formulate and enact it, is to seek common

25 For a vivid account of such experiences, see L. LoPucki, *Courting Failure* (2005, University of Michigan Press, Ann Arbor MI).

26 See Fletcher and Wessels, above note 24, in Chapter 7.

ground wherever possible and not to lose sight of the fact that complex factors within the social history of the separate Member States have contributed to the current pattern of diversity. The watchword must therefore be "*Festina lente*" (make haste slowly). A reasoned case should be put, building on the proposition that up to date insolvency laws, embodying current best practices, can be a means of ensuring the preservation of value and the maintenance of employment to an extent that cannot be achieved through the retention of antiquated laws and unreconstructed professional practices. As always, prudent regulatory oversight is crucial. I revert to my previous assertion: an insolvency law, however modern and finely crafted its provisions, is only as effective as the quality and competence of those administering it enable it to be.

Promoting Cooperation in Cross-Border Insolvency Cases

In the concluding part of this lecture I wish to offer some further thoughts on how the quality of insolvency law, and also the professional ethos and commitment of those who administer and apply it in practice, can be steadily enhanced. First, I will address the question of cross-border cooperation, which has been of particular concern for some time and which is now especially topical in view of the European Commission's proposals, published in December 2012, for reform of the EIR.[27]

If the EIR amendments proposed by the European Commission are enacted in more or less their current form there will undoubtedly be an increase in the flow of communications between courts, and between liquidators, and also in the incidence of applications and requests between liquidators and courts, during the course of proceedings within the European Union. In tomorrow's world, there will be a growing need to ensure that these cross-border communications, and appearances and applications before foreign courts by liquidators appointed in other states, can be conducted in an environment where the essential factor of "mutual trust" can be nurtured and respected. The need to take active steps to promote cross-border cooperation at a global level was also one of the key objectives in the

27 European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings*, Strasbourg 12 December 2012, COM(2012)744 final, 2012/0360 (COD). The final report of the European Parliament Committee on Legal Affairs on the Commission's proposal for a regulation amending Regulation 1346/2000, was published as Document A7-0481/20123, reference PE.519.449v02-00; RR\1014200EN.doc, dated Strasbourg 20 December 2013. Subsequently, the EU Council published a proposed text of a "compromise document", issued as EU Council DOC.10284/14.ADD 1, dated Brussels 3 June 2014, with an Addendum dated 4 June 2014, 10284/14, ADD 1, COR 1. Following negotiations with the Parliament, the Council produced an amended text embodying a recast of the Regulation as originally adopted in May 2000, referenced as DOC.15414/14.ADD 1, dated 20 November 2014. This text was adopted by the Council on 4 December 2014. The enactment process, involving a vote by the Parliament, is scheduled to be completed by the middle of 2015.

project conducted between 2005 and 2012 on behalf of the American Law Institute and the International Insolvency Institute, for which Bob Wessels and I served as Joint Reporters.

Although our Report, which contains Principles and Guidelines for Cooperation in International Insolvency Cases,[28] is an example of what is generally known as "soft law", we venture to hope that the dissemination programme currently being developed by a steering committee established by the III will bring the Report to the notice of judges, legislators and practitioners across the world, and there are already indications that its contents are beginning to make an impression on judicial thinking.[29] Producing an appropriate response to the challenge of nurturing a culture of international cooperation among judges and practitioners forms an important part of the "Mission", which I shall now proceed to delineate.

The Mission

Insolvency Office Holders

Starting with the challenge indicated above, of securing appropriate conditions for "mutual trust" to operate within the European Union, we can note that presently the EIR allows the title of "liquidator" to be claimed by the person who has been appointed to an office listed in Annex C in relation to the Member State in which an insolvency proceeding (as listed in Annex A) has been opened. The criteria for eligibility to be appointed to such a listed office remain entirely a matter for the national laws of the state in question, and there is clearly a great difficulty in evaluating the equivalence of entry qualifications applicable to all the relevant professions established under the laws of the 28 Member States. Although the formal policy of the European Union is to promote the mutual recognition of professional qualifications obtained in other Member States, in reality a judge in any of the European Union states experiences a genuine predicament when faced with a request to release assets possibly worth millions of Euros into the custody and control of a foreign liquidator claiming to be in sole command of the

28 The American Law Institute and the International Insolvency Institute, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (2012), Reporters: I. Fletcher and B. Wessels. The text of the Global Principles Report can be viewed on the website of the International Insolvency Institute at: http://www.iiiglobal.org/component/jdownloads/viewdownload/36/5897.html (last viewed 31 December 2014). Hard or soft copies of the Report can be ordered from the American Law Institute at: http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=85 (last viewed 31 December 2014).

29 As examples: the text and commentary of Global Principle 13, on international jurisdiction, was cited with approval by Lord Collins delivering the leading judgment of the United Kingdom Supreme Court in *Rubin v. Eurofinance SA* [2012] UKSC 46; [2012] 3 WLR 1019, at paragraph 13 of the judgment. Global Principle 1.1, and the Comment to Global Principle 24, were cited with approval by the U.S. Court of Appeals for the 3rd Circuit in its judgment in *Re ABC Learning Centres Ltd* (27 August 2013, not yet reported) (Scirica, Circ.J), at 8-9.

insolvency process according to the regime of the EIR. How far can it be safely assumed that this foreign-qualified liquidator possesses the same order of skills and competence, and is subject to equivalent ethical and regulatory standards, as an IP whose license to practise has been conferred under domestic law?

It seems rather obvious (to this commentator at least) that the level of trust could be considerably enhanced if a standardised, internationally recognised and accredited qualification to provide the services of an IP at international level could be developed and administered. The INSOL Global Insolvency Practice Course offers a possible foundation for such a qualification. Though presently designed (as its title indicates) for participants who aim to practice at a global, rather than purely European, level, the GIP course could be adapted and extended to provide purpose-designed training to equip its graduates with competence and standing to practice in an international mode under the regime of the EIR. This could be a project for INSOL Europe to explore in collaboration with the main INSOL organisation, and might pave the way for eventual harmonisation of IP qualifications across Europe.

Judges and Other Participants in the Insolvency Process

I should also like to acknowledge here the important role played by organisations such as INSOL Europe, and also INSOL International, in facilitating the development of international relationships of a personal nature, between IPs, judges, regulators, academics and others. Such relationships can provide a further basis for the building up of the levels of trust and understanding which are so vital to the smooth functioning of international insolvency business. This can be seen in the steady expansion, from tentative beginnings a little more than two decades ago, of the practice of judge-to-judge communication for the purpose of exploring the optimum ways in which to manage a case in which the respective courts are actively engaged.

When the first initiatives in the convening of international colloquia for judges took place in the mid-nineteen nineties under the auspices of INSOL International and UNCITRAL, the first-hand testimonies of Justices Brozman and Hoffmann of their experience in the Maxwell case, and of their sense of frustration at the lack of any mechanism or precedent for a direct transatlantic contact to be made between judges, made a powerful impression on those present.[30] At that stage, a number of judges from other jurisdictions around the world expressed various degrees of misgivings about such inter- judicial communication, up to and including downright opposition to the very notion of such activity taking place. Yet within a few short years, many of the doubters had been won round and were actively championing the practice, and the UNCITRAL Model Law was well on its way to being concluded in record time.

Attitudes had been transformed, in considerable part, by the very experience of those judges in meeting their counterparts from other jurisdictions, and in coming to realise that they shared similar ideals and common objectives, and hence cooperation could be based on trust. But of course, the forging of such personal contacts is largely a matter of chance encounter through attendance at international conferences and colloquia. A more systematic programme of judicial training and confidence building is therefore required if the requisite "critical mass" of mutual trust and understanding is to be attained.

Within the European Union, just such a programme is currently being developed with the financial and moral support and of the European Commission together with the III. Once again, the central figure and moving force behind this venture is Professor Bob Wessels, who has conceived an innovative project aimed at promoting judicial cooperation in cross-border insolvency cases in the European Union. This project, whose abbreviated name is "the JudgeCo Project", was conceived as a natural extension of the Global Principles and Guidelines Report previously mentioned,[31] with the more targeted purpose of producing a purpose-designed set of principles for judicial cooperation in cases falling within the scope of the soon-to-be revised EIR. The initial task of formulating the JudgeCo principles is being performed as a comparative exercise involving expert consultants from across the European Union and some outside states. When finalised, the principles themselves will become the subject of a training programme for insolvency judges drawn from all European Union states, expected to take place in 2014. If this venture is judged to be a success, it is hoped that the programme of training can be

30 See the edited transcript of the proceedings of the Colloquium on Cross-Border Insolvency convened in Vienna on 17-19 April 1994, jointly organised by INSOL International and UNCITRAL. The transcript is published in the Special Conference Issue of the *International Insolvency Review* (Volume 4, 1995). The comments of Judge Brozman are reproduced at 16-29, and those of Hoffmann LJ at 97-102. Reports (including edited transcripts and supporting documentation) of two subsequent INSOL/UNCITRAL Judicial Colloquia, held in Toronto (22-23 March 1995) and in New Orleans (23-24 March 1997) are respectively published in (1996) 5 *International Insolvency Review*, at 140-169 and in (1997) 6 *International Insolvency Review*, at 139-144 and 236-251.

31 See above. The coordinators for the JudgeCo Project, together with Professor Wessels, are Professor Jan Adriaanse, Leiden Law School and Professor Paul Omar, Nottingham Law School.

placed on a permanent footing with financial support from the Member States as well as from the European Union centrally.

It may seem a distant prospect, but perhaps one day the European insolvency network will spawn an organisation comparable to the National Conference of Bankruptcy Judges which has flourished since 1926 in the United States.32 In the meantime, it is appropriate to acknowledge the achievements of both INSOL Europe and its international counterparts (INSOL International and III) in nurturing contacts and engagement with and between judges as an integral aspect of their activities.

Europe – Where do we go Next?

My concluding thoughts, formed in the light of the developments I have just outlined, are about the future: where should European insolvency law, and its insolvency practitioners, go next? The existing organisations, and their various programmes, will certainly continue to play a constructive part in the progressive improvement of the law in substance and in practice. But in my personal vision, the European level would also be the context in which a more transcendent venture could be undertaken. Once again, it must be conceded, the example and the precedent are taken from the United States. Very recently, in June 2011, we saw the foundation of the European Law Institute ("ELI"), modelled upon that distinguished American institution the ALI, and with a mission:

> "…as an entirely independent organisation … to improve the quality of European law, understood in the broadest sense."[33]

The ELI will undoubtedly involve itself from time to time in matters pertaining to insolvency, but that will be but one aspect of a far more extensive programme of activity. By no means all of the ELI's membership at any given time will have a close interest in insolvency law. I believe that there is a need for a stand-alone organisation dedicated to the development of insolvency matters within Europe.

A European Insolvency Academy?

I therefore propose that serious consideration should be given to the formation of a separate, specialist organisation devoted exclusively to insolvency and insolvency-related issues, constituted as an independent, self-sustaining organisation capable

32 See the website of the NCBJ at: http://www.ncbj.org/ (last viewed 31 December 2014).

33 See the website of the European Law Institute at: http://www.europeanlawinstitute.eu/ (last viewed 31 December 2014). The website of the American Law Institute can be viewed at: http://www.ali.org/ (last viewed 31 December 2014).

of formulating authoritative opinions and advice concerning the improvement of the insolvency laws of the European states, including their progressive convergence over time. The organisation should be independent of governmental or European Union official patronage, and should also be separately constituted from any professional organisations to which its members would, almost inevitably, simultaneously belong in their individual capacity.

Membership should be by elective process, and should be limited in number, so that election would be seen as a badge of distinction carrying corresponding duties to serve the general public good, rather than purely sectional, or partisan, interests. Its collective authority should be such as to make it the obvious point of reference for national legislators and policymakers, as well as being a source of expert advice for the European Union institutions. In the United States, such an organisation has existed since the 1930s in the form of the National Bankruptcy Conference, whose website describes it as:

> "…a voluntary organisation composed of persons interested in the improvement of the bankruptcy laws of the United States and their administration."[34]

For several years during the 1990s, I was privileged to observe the proceedings of the NBC at first hand, in the capacity of an invited international correspondent. I was particularly impressed by the exceptional level of expertise of those participating (some 60 or so in number), and by the diversity of their backgrounds – attorneys; academics; judges from all corners of the United States – all aspiring to the higher ideal of making a contribution to the improvement of the law for the benefit of their fellow citizens, based on objective, rational and non-partisan discussion concerning the topical issues of the moment. A maxim that was several times invoked in my hearing neatly sums up the philosophy of the organisation:

> "When we enter the meeting, we check our clients at the door."

Having originally come into existence as an *ad hoc* group invited to advise Congress and the Administration during the Depression years of the 1930s, the NBC evolved into an established, self-funding institution whose expertise was and is still regularly drawn upon in the process of law reform. It has had a distinguished consultative role in every major piece of bankruptcy legislation since the 1940s, including the 1978 Bankruptcy Reform Act and subsequent revisions and reforms. My closing question – challenge even – is therefore: can Europe create a similar

34 The website of the National Bankruptcy Conference can be viewed at: http://www.nationalbankruptcyconference.org (last viewed 31 December 2014).

institution, drawing its membership primarily from across the current 28 European Union states? I believe that the benefits could be significant, and the existence of such a body need not cut across the excellent work being done by existing organisations such as INSOL Europe.[35] Let it be our mission, then, as practitioners of insolvency here in Europe, to consider how best to develop a suitable vehicle to harness the skills and experience of the leading members of our community, and to enable them to work together for the general good.

35 Possible names for such a body might be: the "European Academy of Insolvency Law" or (somewhat more modestly) the "European Insolvency Forum".

Chapter 7

Insolvency Specialists and Government Enquiries: A Unique Opportunity to Contribute to the Public Good

Professor Rosalind Mason

Introduction*

This lecture addresses the contribution of research by insolvency specialists to the development of insolvency law and practice, in particular to the (re-)design of insolvency systems. It draws on examples from Australia of government enquiries to reform insolvency law as well as other areas of law with which it intersects. It comments on the role that insolvency specialists can play in such policy debates – not only insolvency academics[1] but also scholarly practitioners – for the public good.

Where governments seek to improve the laws affecting personal and corporate economic failure, insolvency academics can bring original insights they gain through their teaching. The process of regularly lecturing on insolvency law provides a valuable and deep understanding of its internal and external connections. This is a good foundation from which to analyse an area. Teaching also requires academics to maintain currency through identifying issues arising in practice. Such insights provide a perspective which places insolvency academics in a unique position, as "disinterested" observers, to contribute to the public good by way of commentary and submissions to improve the law.

This lecture will draw upon material that is publicly available on the internet for the benefit of an audience on the other side of the globe but who may be interested in comparative research on insolvency with an Australian dimension.[2] In so doing,

* This piece will be reprinted under the same title in Chapter 00 in R. Parry (ed), *Designing Insolvency Systems* (2015, INSOL Europe, Nottingham) (000-000) (forthcoming).

1 My focus has been on insolvency law academics, although in my review of government enquiries, it is encouraging to see that academics from a range of law sub-disciplines, as well as other disciplines, such as economics and social work, have contributed their expertise.

2 For that reason, the names of insolvency researchers (and where their names first appear, their university affiliations) are included in the text or footnotes. This is based on information on the web sites for the various enquiries – although it is possible that some submissions have been inadvertently missed.

I am confident that there will be issues in common with the range of jurisdictions represented in this INSOL Europe audience, as well as points of difference that may be interesting and informative for future research.

My lecture will first provide some background on the Australian context for insolvency law and policy. Secondly, it will describe three broad categories of government enquiries to which insolvency specialists have contributed over the past few decades. They are:

(i) referrals to independent law reform commissions by the Attorney-General;

(ii) a range of departmental consultations by working parties or through discussion or options papers; and

(iii) enquiries undertaken by committees of parliamentarians.

Next I mention briefly some independent statutory bodies that have enquired into laws affecting insolvency. Finally, I draw together some themes about the contributions that insolvency specialists can make to government to improve insolvency systems and I encourage you to contribute your own unique expertise should similar opportunities arise.

The Australian Context

To begin, I provide some constitutional context for Australian law-making regarding insolvency. In 1901, the six Australian colonies federated to become the Commonwealth of Australia, comprising six States.[3] Under the Australian Constitution, the new Federal Parliament was granted a specific power, to be exercised concurrently with the States, to make laws with respect to "bankruptcy and insolvency".[4] The colonies' personal bankruptcy and insolvency laws continued in existence until comprehensive federal bankruptcy legislation came into effect in 1928. The main statute that currently applies to the insolvency of natural persons is the Bankruptcy Act 1966 (Cth).

Although the grant of power to the Commonwealth to legislate on "insolvency" was wide enough to extend to the liquidation of companies,5 the then English approach of including the regulation of corporate insolvency in the general

3 Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia. There are also two internal Territories: the Australian Capital Territory, the seat of the national capital Canberra, and the Northern Territory.

4 Section 51(xvii), Australian Constitution. Australian statutes are available at: www.austlii.edu.au.

5 Justice R. French, "Federal Jurisdiction — An Insolvency Practitioner's Guide to the Labyrinth" (2000) 8 *Insolvency Law Journal* 128, at 129.

corporations legislation was followed in Australia. Thus, the colonies - and later, the States - continued to legislate on the winding-up of trading companies and other associations in various Companies Acts.[6]

The Australian Constitution granted the Commonwealth concurrent law-making power with the States over corporations, in respect of:

> "…foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."[7]

Despite the constitutional limitations imposed by the words "trading", "financial" and "formed", a move towards uniform corporate regulation in Australia began in the early 1960s and continued for a number of decades. However ongoing constitutional difficulties required the referral of state powers to the Commonwealth[8] combined with the Commonwealth's pre-existing constitutional powers to finally achieve a sound basis for comprehensive federal legislation in the form of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth).[9] Thus the parliament with responsibility for legislating on both personal and corporate insolvency is the Commonwealth or federal Parliament based in Canberra.

However, the bifurcation of insolvency law between individual (or natural person) debtors and corporate debtors has resulted in separate regulatory bodies for personal and corporate insolvency administrations and practitioners. Individual debtor administrations are regulated by the Australian Financial Security Authority ("AFSA") established as an executive agency within the Attorney-General's portfolio.[10] Corporate insolvency administrations are regulated by the Australian Securities and Investments Commission ("ASIC").[11] ASIC and AFSA have signed a Memorandum of Understanding to provide a framework for cooperation in the

6 M. Gronow, *McPherson's The Law of Company Liquidation* (2008, Lawbook Co, Sydney), at [1.400].

7 Section 51(xx), Australian Constitution.

8 Ibid., section 51(xxxvii).

9 The states agreed to refer the relevant powers for a period of five years that may be terminated earlier or may be extended by proclamation. The referral of powers has since been extended, most recently until 2016.

10 Until August 2013, it was known as the Insolvency and Trustee Service Australia ("ITSA"). For more information, refer to the Annual Report available at: www.afsa.gov.au.

11 See: www.asic.gov.au/.

performance of their regulatory functions12 and both bodies are members of the International Association of Insolvency Regulators ("IAIR").[13]

More significantly for present purposes, different government departments are responsible for policy and law reform for personal and corporate debtors.[14] The Commonwealth Attorney-General has responsibility for bankruptcy policy, the Bankruptcy Act 1966 (Cth) and AFSA. Within the Attorney-General's Department, The Civil Law Division (within the Civil Justice and Legal Services Group) advises the Attorney-General on policy relating to bankruptcy and insolvency. As AFSA's Portfolio Department, it also communicates with industry through the Bankruptcy Reform Consultative Forum.

Corporate insolvency law reform is the responsibility of The Treasury, which provides advice to government on company law and corporate governance issues, corporate insolvency, corporate financial reporting and oversight of portfolio agencies connected to corporate regulation and related financial issues. Corporate insolvency falls within the Financial Services and System Division which sits within the department's Markets Group.

Using three categories, and beginning with law reform commission referrals, I now provide an overview of Australian government enquiries and the contribution of insolvency specialists to these to improve the design of the insolvency system over recent decades.

Law Reform Commission Enquiries

There have been few formal Australian law reform commission referrals that comprehensively enquire into insolvency. The most recent reports have their origins in 1976 when the Commonwealth Attorney-General issued terms of reference to the Australian Law Reform Commission ("ALRC") to report upon whether the Bankruptcy Act 1966 (Cth) adequately provided for small or consumer debtors to discharge or compromise their debts from their present or future assets

12 In September 2014, ASIC and AFSA signed a new Memorandum of Understanding (replacing a 2002 agreement) to facilitate liaison, cooperation, assistance and the exchange of information between the agencies in performing their regulatory functions, for which see: http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AFSA-MOU-published-1-October-2014.pdf/$file/AFSA-MOU-published-1-October-2014.pdf.

13 See: http://www.insolvencyreg.org/.

14 Until 1996, they were in different sections (ITSA and Companies and Business Law Section) within the Attorney General's Department. However, the Companies and Business Law Section was moved to Treasury following the 1996 election and a change of government.

or earnings and what legislative measures could be adopted to provide financial counselling facilities to small or consumer debtors.[15]

The reference resulted in ALRC Report 6 "*Insolvency: The Regular Payment of Debts*" (1977).[16] The Commissioner in Charge, David Kelly,[17] was assisted by consultants who included industry experts as well as three Australian academics.[18] It is noteworthy that the ALRC also consulted internationally – appointing an expert on bankruptcy law, Harvard Law Professor Vern Countryman.[19] The Commission received written submissions from four Australian academics[20] as well as a Canadian Professor.[21]

The final Report concluded that the existing systems were inadequate, as they did not meet the needs of a modern consumer credit based society and recommended a review of the entire law of bankruptcy.[22] A substantial review of the Bankruptcy Act 1966 (Cth) was undertaken by the Department of Business and Consumer Affairs and the Act amended in 1980.[23] An example of a recommendation which was taken up, albeit in an amended form was to introduce automatic discharge from bankruptcy.[24] Some other recommendations were not implemented for many years.[25]

During its work on ALRC Report 6, the ALRC identified that judgment debt recovery procedures in the States and Territories could contribute to worsening insolvency. As a second stage of its response to the 1976 terms of reference, the ALRC investigated these procedures more fully in ALRC Report 36 "*Debt*

15 In making its report, the ALRC was to have regard to "the community's interest in the financial rehabilitation of small but honest debtors, and the need to ensure that creditors have an effective means of enforcing the payment of debts due to them." (*Insolvency: The Regular Payment of Debts* [1977] ALRC 6, at v).

16 See: http://www.alrc.gov.au/report-6.

17 David Kelly was a foundation full time member of the Australian Law Reform Commission 1976-1980 and a Professor of Law at University of Adelaide 1980-1983.

18 Professor Colin Howard (University of Melbourne); Anthony Moore (University of Adelaide); John Willis (La Trobe University).

19 On Professor Countryman's support for the rights of the debtor, see: http://www.law.harvard.edu/news/bulletin/backissues/fall99/article6.html.

20 Professor Bob Baxt (Monash University); Bruce Kercher (Macquarie University); C.W. O'Hare (Monash University); J. Neville Turner (Monash University).

21 Professor William Neilson (University of Victoria, British Columbia).

22 ALRC Report 6 concluded that the procedures provided under the Bankruptcy Act 1966 (Cth) for rearranging of debts were costly, cumbersome and inappropriate for the needs of non-business debtors. See: http://www.alrc.gov.au/inquiries/insolvency-and-debt-recovery.

23 ALRC Report 36, Chapter 1 Introduction, at [2].

24 ALRC Report 6 recommended an automatic six-month discharge for non-business debtors unless creditors object. The 1980 amendments provided that a bankrupt should be automatically discharged from bankruptcy after three years although it also introduced procedures for objecting to the discharge.

25 For example, a system for the regular payment of debts for non-business debtors: "Part IX Debt Agreements", was introduced in 1997.

Recovery and Insolvency" (1987).[26] Professor David Kelly continued as the Commissioner in Charge (1976–1985).[27] Consultants were appointed once again and comprised industry experts and academics, from Australian and overseas law schools[28] as well as from a department of social work.[29] Submissions were received from two academics[30] and an academic consultant, who also consulted on ALRC Report 6, made oral submissions during the public hearings.[31]

The ALRC acknowledged additional assistance was received from a large number of persons and organisations, including local[32] and international[33] academics. One of these was Professor Alan Fels, an Australian economist and lawyer,[34] who had criticised the ALRC Report 6:

> "…for its failure to analyse the costs and benefits of the reforms it proposed."

It was said that:

> "…the discussion of insolvency took place in an economic vacuum; overlooking considerations of demand and supply; with no attempt to assess whether the proposed reforms might have significant and adverse effects on the supply of credit."[35]

The 1977 Report's recommendation of a general insolvency inquiry was taken up in 1983 when the Attorney-General referred the law and practice relating to the insolvency of both individuals and bodies corporate to the ALRC. The consequent ALRC Report 45 "*General Insolvency Inquiry*" (1988)[36] is commonly known as the "*Harmer Report*" after the Commissioner-in-Charge Ron Harmer, then a legal

26 See: http://www.alrc.gov.au/report-36.

27 Ron Harmer was also appointed a Law Reform Commissioner during this period.

28 From Australia, A.J. Duggan (University of Melbourne, now of University of Toronto); Bruce Kercher; A.P. Moore (University of Melbourne) and J.E. Willis (La Trobe University). From overseas, Dr. C.G. Veljanovski (Centre for Socio-Legal Studies, Oxford University).

29 Dr. T.C. Puckett (La Trobe University).

30 A.J. Duggan and Bruce Kercher.

31 J. Willis in Melbourne. Ron Harmer also made oral submissions at the public hearings in Perth.

32 These included Professor Maureen Brunt and Alan Fels, competition lawyers (Monash University); Martin Ryan (Department of Social Work, La Trobe University).

33 Professor C.R.B. Dunlop (a Canadian specialist in creditor and debtor law) and Professor R.M. Goode OBE LLD (an English specialist in corporate and insolvency law).

34 Professor Fels became chairman of the Australian Competition and Consumer Commission (1995–2003).

35 ALRC Report 36, above note 23, at [115].

36 See: http://www.alrc.gov.au/report-45.

practitioner and subsequently a Professor at University College London.[37] The part time Commissioners on this reference included another scholarly practitioner, Richard Fisher.[38] Consultants included three Professors of Law[39] as well as a Professor of Banking and Finance.[40] The list of written submissions discloses significant Australian and international academic input.[41] The public hearings did not appear to include academics.

ALRC Report 45 examined the developments of overseas jurisdictions in relation to insolvency, in particular in relation to voluntary arrangements with creditors. There were nine submissions from the United States including from Professors Thomas Jackson and Kenneth Klee. The ALRC also received submissions from Europe on cross-border insolvency - from Professor Ulrich Drobnig, Max Planck Institut, Hamburg and Professor Dr. Hans Hanisch, Switzerland.

The Corporate Law Reform Act 1992 (Cth) implemented many of the 1988 Report's recommendations on corporate insolvency, including the introduction of the new Part 5.3A on voluntary administration, which was a significant development in Australian corporate rescue regulation. In 1993, legislative changes also implemented the Harmer Report's recommendation to abolish the statutory priority of the Tax Commissioner over other creditors in bankruptcy and insolvency in relation to unremitted tax.[42] This was well-received by insolvency specialists, although other legislative provisions have ensured taxation laws continue to have a significant impact on insolvency.[43]

So far I have referred to formal Law Reform Commission enquiries concerning insolvency that were referred to it by the government of the day. Now I will

37 Ron Harmer was an internationally recognised insolvency expert who worked with many multilateral organisations, including INSOL International, the Asian Development Bank, the World Bank, the European Bank for Reconstruction and Development and UNCITRAL on improving the design of insolvency systems.

38 Richard Fisher AM was then a partner at Dawson Waldron and is now General Counsel and an Adjunct Professor, University of Sydney.

39 Professor Robert Baxt, who at the time was Chairman, Trade Practices Commission; Professor Harold Ford (University of Melbourne), Chairman of the Companies and Securities Law Review Committee, which was established by the Ministerial Council for Companies and Securities pursuant to the inter-governmental agreement between the Commonwealth and the States to assist the Ministerial Council by carrying out research into, and advising on, law reform relating to companies and the regulation of the securities industry; and Professor James O'Donovan (University of Western Australia).

40 Professor Tom Valentine (Macquarie University).

41 These included submissions by Professor Ford; A.P. Moore; Dr. O'Donovan.

42 The Insolvency (Tax Priorities) Legislation Amendment Act 1993 (Cth) amended the Income Tax Assessment Act 1936 (Cth), the Bankruptcy Act 1966 (Cth) and the Corporations Law.

43 For example, see C. Brown *et al.*, "The Certainty of Tax in Insolvency: Where does the ATO fit?" (2011) 19(2) *Insolvency Law Journal* 108.

provide a snapshot of some less formal ways in which the government gathers input on policy and law reform.

Governmental Working Parties, Options Papers and Discussion Papers

A recurrent theme of Australian enquiries has been government interest in the regulation of insolvency practitioners.[44] In 1993, the government established the "*Working Party on the Review of the Regulation of Corporate Insolvency Practitioners*".[45] This was a result of recommendations for changes to the regulation of insolvency practitioners made by the *Harmer Report* (1988) and the Trade Practices Commission in its "*Study of the Professions*" (1992).[46] The only submission by an academic (the present author) was in respect of the importance of local regulation of corporate insolvency practitioners for cross-border insolvency practice. The Working Party Report was delivered in June 1997 and some ten years later it was referred to when the Corporations Amendment (Insolvency) Bill proposals were introduced in 2007.

In recent years, the federal government has issued Discussion Papers and Options Papers, seeking input on specific law reform proposals. In June 2011, the Attorney-General and the Parliamentary Secretary to the Treasurer released an Options Paper titled "*A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*" (2011).[47] It examined reforms to address concerns about misconduct in the insolvency profession and to improve the value for money for recipients of insolvency services.[48] Of the 33 submissions

44 That is, the specialist accounting professionals who are appointed as company liquidators, bankruptcy trustees etc.

45 It comprised departmental officers; a senior corporate regulator; accounting and legal practitioners specialising in insolvency as well as the President of the insolvency practitioners' professional body.

46 Its mandate was to consider and make recommendations as to whether any changes should be made to the current system for the registration, appointment and remuneration of insolvency practitioners, as well as to the procedures for responding to complaints about the conduct of corporate insolvency administrations.

47 Both Ministers were involved as it covered practitioners appointed in both personal and corporate insolvency. See: http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2011/A%20Modernisation%20and%20Harmonisation%20of%20the%20Regulatory%20Framework/Key%20Documents/PDF/Options_Paper20110602.ashx.

48 Key reform areas in the paper include promoting a high level of professionalism and competence by practitioners, enhancing transparency and communication and promoting increased efficiency in insolvency administration. See: https://www.afsa.gov.au/practitioner/pir-newsletter/june-2011-pir-newsletter.

received,[49] one was from insolvency academics Associate Professors Chris Symes[50] and David Brown.[51]

Then, in December 2011, the government issued a Proposals Paper[52] to which there were some 29 submissions,[53] including from Associate Professors Colin Anderson[54] and David Morrison[55] as well as Associate Professors Christopher Symes and David Brown. Subsequently, draft laws on the regulation of insolvency professionals were released for public comment by March 2013.[56] Of the 16 submissions, none were by academics. At the time of writing, there is no further information on the progress of the Bill.[57]

A current wide-ranging enquiry, the "*Financial System Inquiry*" ("FSI"), has amongst other things requested input on insolvency laws in Australia.[58] In 2013, the government initiated this inquiry following the 2012 release of a government Consultation Paper on strengthening the banking regulator's crisis management powers.[59] During the height of the global financial crisis which began in 2008, a few Australian banks did experience funding pressure to a limited extent, however there were no failures.[60] Subsequently there has been some commentary about the possible need to review Australia's crisis management tools because of the concentrated structure of its banking sector.[61]

49 See: http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/A-Modernisation-and-Harmonisation-of-the-Regulatory-Framework/Submissions.

50 University of Adelaide.

51 University of Adelaide.

52 See: http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2011/Reforms%20to%20Modernise%20and%20Harmonise%20Insolvency/Key%20Documents/PDF/Proposals_Paper_insolvency.ashx. It acknowledged the work of the Senate Economics Reference Committee, *Inquiry into Liquidators and Administrators* (2010), discussed below.

53 See: http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/Reforms-to-Modernise-and-Harmonise-Insolvency/Submissions.

54 Queensland University of Technology.

55 University of Queensland.

56 See: http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/Insolvency-Law-Reform-Bill.

57 On 7 November 2014, Treasury released a draft Insolvency Law Reform Bill 2014 which addresses some of same issues as the 2013 draft legislation although it differs in a number of respects. Significantly, it proposes new delegated legislation under the Insolvency Law Reform Bill, the Insolvency Practice Rules. If adopted, these will amongst other things align the registration and disciplinary frameworks that apply to registered liquidators (for companies) and registered trustees (in bankruptcy). Submissions on the exposure draft closed on 19 December 2014.

58 See: http://fsi.gov.au/. This FSI material draws on joint research by the present author with Michael Murray, Legal Director ARITA and Visiting Fellow, QUT Faculty of Law, on the Australian approach to crisis management in the banking sector.

59 The Treasury, *Strengthening APRA's Crisis Management Powers* (Consultation Paper, 2012), a copy of which is available at: http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/APRA.

60 See: http://www.rba.gov.au/publications/bulletin/2011/dec/pdf/bu-1211-5.pdf.

61 International Monetary Fund, *Australia: Financial System Stability Assessment* (IMF Country Report No 12/308, 2012), at [51], a copy of which is available at: http://www.apra.gov.au.

In July 2014, the FSI released an Interim Report in which it sought submissions on a wide range of issues, including whether there is evidence that Australia's external administration regime causes otherwise viable businesses to fail and, if so, what could be done to address this. The FSI has received over 6,500 submissions in response to its Interim Report, some of which are by insolvency specialists and address the external administration issue.[62] The final report is due in December 2014.[63]

Federal Statutory Authorities

Government has been assisted with respect to corporate insolvency laws through the Corporations and Markets Advisory Committee ("CAMAC"),[64] a statutory body established in 1989 to provide independent advice to the responsible Minister on the administration of corporate and financial services laws or changes to them. However the federal government announced in its 2014-15 Budget that it would be abolishing CAMAC as a "smaller government" measure.[65] While this announcement prompted academics and professional bodies[66] to query the decision and to support an ongoing role for CAMAC, the government has released an exposure draft Bill and associated explanatory material to give effect to the decision and called for submissions.[67]

While CAMAC has undertaken work on its own initiative,[68] most issues it has examined were referred by government Ministers. For example, in May 2007, the Parliamentary Secretary to the Treasurer referred a number of issues on insolvency law to CAMAC arising from its consultation on proposed changes to

62 Submissions were made by academics on a broad range of the issues, for example by Professor Justin O'Brien; Dr. George Gilligan; Professor Ross Buckley; Ken Ooi; Professor Kingsford-Smith (University of New South Wales); Associate Professor Paul Latimer (Monash University) and Phillip Maume (Technische Universität München, Germany). The submission by Dr. Colin Anderson, Cath Brown and the present author (Commercial & Property Law Research Centre, Queensland University of Technology) addressed insolvency issues.

63 The *Financial System Inquiry Final Report*, at 265 recommended to government to "Consult on possible amendments to the external administration regime to provide additional flexibility for businesses in financial difficulty." See: http://fsi.gov.au/publications/final-report/.

64 See: http://www.camac.gov.au/CAMAC/camac.nsf. Its most recent report was on report on crowd sourced equity funding in May 2014.

65 See: http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-07.htm. The committee's advisory function is to be merged into Treasury.

66 The Law Council of Australia's letter in June 2014 to the relevant Minister expressing concern at the proposal can be found at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2857_-_Commonwealth_budget_proposal_to_abolish_corporations_and_markets_law_reform_body.pdf.

67 See: http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/CAMAC.

68 Such as the "*Members' Schemes of Arrangement Report*" (2009).

the law through the Insolvency Bill (2007) referred to below. CAMAC issued a consultation paper to which it received submissions, including from academics.[69]

CAMAC's role was only to make recommendations and there was no requirement for the Minister or government to act on its reports. Just one example of its impact has been the reference to its reports on "*Corporate Voluntary Administration*" (1998) and the "*Rehabilitation of Large and Complex Enterprises*" (2004) in the Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007.[70]

Another federal statutory body is the Productivity Commission,[71] the government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. In 2010, it undertook a "*Regulatory Burdens on Business Review*" (2010) and Associate Professors David Morrison and Colin Anderson made a submission regarding the duplication of laws around insolvency and the regulation of that profession.[72]

A further Productivity Commission enquiry that intersected with insolvency law was the "*Inquiry into The Market for Retail Tenancy Leases in Australia*" (2007). Associate Professor Jenny Buchan,[73] an expert in franchising law, made a submission on the implications for franchisees occupying retail premises not being protected under some State legislation and as a result potentially being detrimentally affected if the franchisor becomes insolvent.[74]

Parliamentary Enquiries

Thus far, I have been addressing enquiries by the executive arm of government, Ministers and their Departments. I will now turn to the legislative arm of government, the Parliament. The Commonwealth Parliament itself also undertakes enquiries through its Parliamentary Committees and on occasions has done so in respect of insolvency law reform.

69 The submission by Professor Michael Adams (University of Western Sydney) and Dr. Marina Nehme was cited at 18 and that by Anil Hargovan (University of New South Wales) at 74. All are available under the rubric "Submissions" at: www.camac.gov.au.

70 Additional CAMAC publications include the "*Report on External Administrations*" (2008); "*Shareholder Claims against Insolvent Companies: Implications of Sons of Gwalia Decision*" (2008).

71 It is established under the Productivity Commission Act 1998 (Cth): http://www.pc.gov.au/.

72 See: http://www.pc.gov.au/__data/assets/pdf_file/0013/100606/subdr053.pdf.

73 University of New South Wales.

74 "For example, if the franchisor becomes insolvent, the head lease may be disclaimed by the franchisor's liquidator... This leaves the franchisee who is a sub lessee, licensee, or casual tenant without a contract based right to remain in the premises unless a side agreement has been reached between the franchisee and the landlord." Jenny Buchan's Submission at 5, a copy of which is available at: http://www.pc.gov.au/__data/assets/pdf_file/0014/70223/sub139.pdf.

The Australian Parliament comprises a lower house (the House of Representatives) and an upper house (the Senate). Bills have to be passed by both houses and assented to by the Governor-General before they become Acts of Parliament.[75] More enquiries in the area of insolvency have been initiated either by the Senate, which is understandable as it is a house of review and seen as a "watchdog" of the executive branch of government, or by joint parliamentary committees comprising members of both houses of Parliament than by the House of Representatives.[76]

Senate Committees

The Senate has developed a comprehensive range of committees[77] to investigate matters of public policy; examine government administration; and scrutinise proposed legislation. The Senate Committee that is most relevant for policy and regulation in the area of insolvency is the Senate Economics Committee, however other committees can be involved depending upon the department responsible for proposed legislation. I will now discuss three types of enquiries by Senate committees.

First, a Senate Committee may be asked to examine proposed legislation. A recent example relevant to insolvency is an inquiry by the Senate Education and Employment Legislation Committee into employee issues in insolvency. On 4 September 2014, the Fair Entitlements Guarantee Amendment Bill 2014 was introduced into Parliament.[78] This Bill proposes to amend the Fair Entitlements Guarantee Act 2012 (Cth) to cap the maximum amount of redundancy pay entitlement available under the Fair Entitlements Guarantee ("FEG") scheme at 16 weeks; and make technical amendments to clarify the operation of the scheme.[79] When the Bill came before the Senate later that day, it referred the Bill to the Senate Education and Employment Legislation Committee for inquiry and report. It called for submissions with a closing date of 12 September 2014 and reporting date of

75 Bills can be introduced in either House, except for laws relating to revenue and taxation, which must be introduced in the House of Representatives: www.aph.gov.au.

76 The House of Representatives has a Standing Committee on Economics, which can inquire into and report on any annual reports referred to it by the House. In March 2014, it agreed to undertake an inquiry into the 2013 Annual Report of the Australian Prudential Regulation Authority, an independent statutory authority which regulates banks, superannuation and insurance companies. This inquiry is relevant to insolvency because it concerns the regulatory settings for resolution of financial distress for banks. See: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/2013_APR_Annual_Report.

77 Senate Committees are either Select Committees, appointed by the Senate to inquire into some specific matter and to report back to the Senate within a set time, or Standing Committees, a permanent committee of the Senate for the life of the whole of any one Parliament.

78 See: http://www.comlaw.gov.au/Details/C2014B00186.

79 Hansard is available at: www.aph.gov.au.

24 September 2014.[80] Eleven submissions were received from industry bodies, trade unions and the Department of Employment, the responsible government department, as well as from a law firm that acts for employees seeking payment of entitlements where their employer is under administration in insolvency. A public hearing was held in Melbourne on 17 September.[81] No submissions or appearances at the public hearing were made by academics, although the law firm's submission referred to research on the FEG scheme published by practitioners and industry[82] and academics.[83] Even though this was a relatively brief amendment bill, this was a remarkably short time for submissions. The Report handed down on 24 September 2014 fell along party lines - with a majority of members, drawn from the government, supporting the legislation, and two dissenting reports delivered by the federal opposition party and one of the minor parties.[84]

Secondly, a Senate committee may undertake an enquiry in response to a current issue of public concern. An example from the Senate Economics Committee concerns a former liquidator, Mr Stuart Ariff, who was arrested on 19 criminal charges following an investigation by ASIC. The offences related to his conduct whilst he was the liquidator a company and in 2011, he was convicted and jailed for six years. Following the publicity surrounding this matter in 2010, the Senate Economics Committee undertook an "*Inquiry into Liquidators and Administrators*".[85] Among the 95 submissions, many of which were marked confidential (likely debtors and creditors affected by insolvency), there were submissions by academics from four universities.[86] The Report referred extensively to academics' written submissions as well as oral submissions at the public hearings in Adelaide, Newcastle and Canberra.[87]

80 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Entitlements.

81 Nine witnesses appeared representing the Australian Industry Group and Australian Chamber of Commerce and Industry (2) (employers); the Australian Council of Trade Unions and Textile Clothing & Footwear Union of Australia (4) (employees); and the Department of Employment (3) (government).

82 S. Whelan, L. Zwier and R. Campo.

83 Submission 11 by Slater & Gordon dated 15 September 2014 referred to research by Mark Wellard (Queensland University of Technology); David Morrison (University of Queensland); and Helen Anderson (University of Melbourne): http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Entitlements/Submissions.

84 At the time of writing, the Bill was still before the Senate.

85 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2008-10/liquidators_09/index.

86 Written submissions by Jeffrey Fitzpatrick and Vivienne Brand (Flinders University); Christopher Symes (University of Adelaide); Colin Anderson (Queensland University of Technology); and David Morrison (University of Queensland).

87 Public hearings at Adelaide (Dr. Vivienne Brand, Associate Professors David Brown and Chris Symes); Newcastle (Professor Scott Holmes); and Canberra (Associate Professors Colin Anderson and David Morrison).

The Senate Committee referred to the lack of adequate, publicly available data on the state of the corporate insolvency industry in Australia. (This has been a recurring theme in submissions to several inquiries.88) When the Senate Committee's report discussed the need for better data on insolvencies, a whole subsection was devoted to the "Academics' perspectives". The Senate Committee noted it had received evidence from several legal academics based in Brisbane and Adelaide who were critical of the lack of public data on insolvency[89] and who made international comparisons.[90]

The Report referred under "Academic Research" to academics' frustration at the lack of adequate insolvency statistics. Dr. David Morrison was quoted as follows:

> "…if you want data from ASIC, if you are an academic and you would like to look at something independently, unless it is a priority area that is presumably flagged between the government and ASIC, ASIC cannot provide it to you. If you want to pay to get data at ASIC, even if you can afford to pay for it—and most of us cannot, of course, because we are employees of the government and therefore paid small amounts of money— the records they have are based on paper and microfiche, so you have to pay a search fee every time you want something and you have to go into quite an archaic set of files. So, even if ASIC wanted to help people with independent information, they actually do not have the technology to do it, and that is a very stark contrast to ITSA, the bankruptcy regulator."[91]

The Report also explored options proposed by academics on gathering statistics on insolvency matters.[92] The Senate Committee concluded that it strongly agreed with the view that there needed to be a better system for collating and analysing corporate insolvency data in Australia. It specifically agreed with Associate Professors Colin Anderson and David Morrison that the lack of data is an issue that

88 See the discussion below on the Parliamentary Joint Committee on Corporations and Financial Services "*Corporate Insolvency Laws: a Stocktake Report*" (2004).

89 "*Inquiry into Liquidators and Administrators*" (2010), at [9.17] referring to Associate Professors Colin Anderson, David Morrison and David Brown.

90 Associate Professor David Brown referred to the more developed data gathering mechanisms of the United Kingdom and New Zealand governments and Associate Professor Colin Anderson to a large United States study on liquidators' fees and returns to creditors.

91 "*Inquiry into Liquidators and Administrators*" (2010), at [9.24]. Mr Warren Day of ASIC responded to these comments and explained to the Committee the limitations placed upon ASIC, for example, that payments are required by law.

92 Ibid., at [9.26].

needs to be addressed in a comprehensive way to ensure confidence in information about the perceived problems and the resulting policy.[93]

Thirdly, Senate committees also have a specific mandate to monitor the performance of departments and agencies. In 2013-2014, the Senate Economics Committee undertook an inquiry into the "*Performance of the Australian Securities and Investments Commission (ASIC)*".[94] The committee examined many aspects of ASIC's work, concentrating on two case studies in particular: consumer credit and misconduct by financial advisers. During its enquiry, the Committee called for submissions[95] (including writing to academics and others with an interest in ASIC's performance and inviting submissions) and also conducted public hearings.[96] The Committee's list of references included articles by academics.[97]

Once again, a Senate Report referred to the lack of access to information collected by ASIC. A number of witnesses were critical of ASIC's failure to publish much of the information which it collects as a result of its regulatory activities.[98] The Report referred to a submission from several Adelaide academics which expressed concern about:

> "…the relative lack of statistics and data for researchers, stakeholders and the wider public."[99]

Mr Jason Harris, University of Technology Sydney, submitted that the lack of data, particularly relating to enforcement and insolvencies, stifles debate as:

93 Ibid., at [9.31].

94 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC.

95 Many academics made written submissions including Jason Harris (University of Technology Sydney); Professors Dimity Kingsford Smith, Justin O'Brien, Dr. George Gilligan, Associate Professor Michael Legg, Dr. Marina Nehme (University of New South Wales); Dr. Suzanne Le Mire, Associate Professors David Brown, Christopher Symes and Ms Karen Gross (University of Adelaide); Dr. Vivienne Brand and Dr. Sulette Lombard, (Flinders University); Professor Robert Baxt AO; Professor AJ Brown (Griffith University).

96 Oral submissions were made by Associate Professor David Brown and Dr. Suzanne Le Mire (University of Adelaide); Professors Dimity Kingsford-Smith; Justin O'Brien (Sydney hearings); Professor Bob Baxt; Jason Harris; Dr. Vivienne Brand and, Dr. Sulette Lombard; Professor AJ Brown (Canberra hearings). President David Lombe, CEO Mr John Winter and Legal Director Mr Michael Murray, represented the insolvency professional body ARITA.

97 "*Performance of the Australian Securities and Investments Commission*" (2014), Appendix 6. These included articles by Helen Anderson; Vicky Comino (University of Queensland); Aakash Desai and Ian Ramsay (University of Melbourne); Jason Harris and Michael Legg; Dimity Kingsford-Smith; and Roman Tomasic (University of South Australia).

98 "*Performance of the Australian Securities and Investments Commission*" (2014), at [22.13].

99 Ibid., at [22.14].

> "…we are unable to determine exactly what it is that ASIC does aside from what it tells us; but, more importantly, we are unable to work out what it is ASIC is failing to do."[100]

The insolvency practitioners' professional body, the Australian Restructuring, Insolvency and Turnaround Association ("ARITA")[101] also drew attention to the amount of prescribed information that ASIC receives and stores under legislation and how little is published. While acknowledging ASIC had improved its collection and publication of data it indicated that it needed to do more. When appearing before the Committee, Michael Murray, ARITA's Legal Director, compared ASIC's statistics with those of AFSA who:

> "…produce good statistics which inform the law reform process in bankruptcy. We do not have that sort of information in corporate insolvency."[102]

ARITA's President, David Lombe, gave an example of the limitations imposed on researchers, when he referred to work undertaken by an academic, Mark Wellard:[103]

> "ARITA gives a research prize so that someone can do research. One of our prize-winners was looking at deeds of company arrangement. When you go into voluntary administration, there is a decision about whether you go into liquidation or a deed of company arrangement. He was trying to work out how many companies go into deeds of company arrangement and how successful those deeds of company arrangements are. He wanted to get access to information from ASIC to be able to do that very important research. It would have cost thousands of dollars and ASIC just said, "We can't give that information to you."[104]

The Senate Committee formally recommended that:

> "ASIC promote 'informed participation' in the market by making information more accessible and presented in an informative way."[105]

100 Ibid., at [22.15].

101 See: www.arita.org.au.

102 "*Performance of the Australian Securities and Investments Commission*" (2014), at [22.19].

103 Visiting Fellow, Queensland University of Technology. See M. Wellard, "A Review of Deeds of Company Arrangement" (2014) 26(2) *Australian Insolvency Law* 12.

104 "*Performance of the Australian Securities and Investments Commission*" (2014), at [22.20], referring to research undertaken by Mark Wellard, Visiting Fellow, QUT, and his research for the Terry Taylor Scholarship ARITA: http://www.arita.com.au/about-us/arita-terry-taylor-scholarship/past-recipients.

105 Ibid., at [22.28]. (Recommendation 39).

Parliamentary Joint Committees

Finally, Parliamentary Joint Committees (with members from the House of Representatives and Senate) are also established by resolution or legislation agreed to by both houses.[106] In the area of insolvency, the most significant Joint Committee is the Parliamentary Joint Committee ("PJC") on Corporations and Financial Services.

Its most recent and extensive enquiry in relation to insolvency was initiated in 2002, when it agreed to consider and report on the operation of Australia's insolvency and voluntary administration laws – resulting in the Report, "*Corporate Insolvency Laws: a Stocktake*" (2004) ("*Stocktake Report*"). It invited submissions addressing the terms of reference and notified various academics, organisations and professionals of its inquiry.[107] It then released an Insolvency Issues Paper providing background material and information on aspects of insolvency law that had been highlighted in submissions or in media and professional commentary on corporate insolvency law and practice. The Issues Paper also posed questions for consideration by both the Committee and witnesses in preparing for the series of public hearings. During 2003, the Joint Committee conducted public hearings in Toowoomba, Canberra, Melbourne and Sydney, including by teleconference to international academics, Professors Andrew Keay and Ron Harmer. Its report referred to submissions and research published by academics.[108]

Following publication of the "*Stocktake Report*", the government announced in 2005 that it intended to reform Australia's insolvency laws. Because of the specialised nature of insolvency, it appointed an Insolvency Law Advisory Group to provide technical advice on the draft legislation. It comprised senior accounting and legal practitioners, an academic (the present author) and representatives of the leading accounting, banking, insolvency practitioner and legal professional bodies.[109] During 2006, tranches of draft legislation were discussed by the Advisory Group. In November 2006, the Parliamentary Secretary to the Treasurer released a

106 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint.

107 See: http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2002_04/ail/report/ail_pdf.ashx.

108 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2002-04/ail/submissions/sublist. A list of the submissions is set out in Appendix 1. Submissions were made by the following academics: Mr Colin Anderson (then University of Southern Queensland) and Dr. David Morrison; as well as the present author.

109 Parliamentary Secretary to the Treasurer, *Establishment of Insolvency Law Advisory Group* (Media Release 6 of 2006): http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2006/006.asp. It included representatives from the Institute of Chartered Accountants in Australia, CPA Australia, the National Institute of Accountants, the Australian Banking Association and the Insolvency Practitioners Association of Australia.

draft Corporations Amendment (Insolvency) Bill 2007 and Corporations and ASIC Amendment Regulations 2007 for public comment.[110]

During the progress of the Bill through Parliament, the PJC on Corporations and Financial Services commenced a new inquiry - an "*Inquiry into the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007*".[111] It narrowed this inquiry's focus to those elements of the 2004 "*Stocktake Report*" which the Government had rejected, agreed with in principle or argued were matters falling under the jurisdiction of ASIC. It therefore sought the views of stakeholders on specific issues of continuing relevance.[112] The 2007 Report referred to written[113] and oral submissions[114] by insolvency academics and once again the PJC commented on empirical research and review processes.

Conclusion

In conclusion, what are some of the themes indicated by this broad review of the contributions by insolvency specialists to some significant Australian government enquiries over recent decades? I would like to suggest some six or seven themes have emerged which apply to Australia and which are likely to resonate with many other jurisdictions as well.

First, it is apparent that the executive arm of government uses a wide range of approaches to gathering input from specialists on law reform and that there are many opportunities to contribute. While formal referrals to Law Reform Commissions on insolvency are relatively rare, academic researchers have many opportunities to contribute in response to government papers and inquiries as well as to independent statutory agency enquiries.

Second, the ways in which academics can contribute are by written (and, upon invitation, oral) submissions. In addition, even if they are not in a position to

110 The Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007 referred to suggestions for reform in the "*Harmer Report*" (1988) and the Trade Practices Commission's "*Study of the Professions*" (1992); the Government Working Party Report on the "*Review of Insolvency Practitioners*" (1997); the Parliamentary Joint Committee on Corporations and Financial Services Report on "*Corporate Insolvency Laws: a Stocktake*" (2004); and the CAMAC reports on "*Corporate Voluntary Administration*" (1998) and the "*Rehabilitation of Large and Complex Enterprises*" (2004).

111 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/insolvency/index.

112 They were under four broad categories: the regulation of the insolvency process; the role of administrators and directors; the treatment of employee entitlements; and the need for empirical research and review processes.

113 Appendix 1 refers to Submissions by David Morrison, Colin Anderson and Jenny Dickfos (Griffith University).

114 Professor Keay (University of Leeds) was interviewed and cited.

make a formal submission, academics can usefully contribute by forwarding their published research on the topic under consideration to the enquiry.[115]

Third, because of the way in which insolvency law intersects with so many other areas of law that regulate business or society, insolvency specialists can make a unique contribution to the public good by highlighting intersections that would otherwise go unnoticed.[116]

Fourth, despite submissions and appearances by numerous academics as well as other stakeholders, no outcome or even a response may be forthcoming from government. Even where recommendations are accepted by government, it may still take many years before references to a Report appear in proposed law reforms.[117]

Fifth, and associated with the previous comment about lack of a government response, some issues keep recurring – even where there are many submissions and recommendations supporting a change. One particular example has been highlighted – the lack of data available to assist with empirical research into corporate insolvency. Most recently, the 2014 Senate Economics Committee report on the inquiry into the "*Performance of the Australian Securities and Investments Commission*" endorsed previous recommendations that ASIC should provide and disseminate information it receives from a range of sources in order to keep the business and academic worlds better informed about developments and trends in corporate Australia.

Sixth, international dimensions are relevant to government enquiries into insolvency. Since the earliest law reform commission report to which I referred, overseas academics have made submissions and also acted as consultants and, in more recent times, been invited to participate in public hearings by teleconference.

My final theme is not necessarily drawn from the information collated for this paper. Rather it based on a story which I heard while investigating this topic – and which I have subsequently verified through Hansard. When Australia's Personal Property Securities legislation was introduced into Parliament in 2009, Phillip Ruddock, a former Attorney-General who at that time was a member of the opposition party, was speaking in favour of the bill, which had bipartisan support:

115 For example, Jeffrey Fitzpatrick and Vivienne Brand (Flinders University) with Christopher Symes (University of Adelaide) submitted their conference paper "Fit and Proper: An Integrity Requirement for Liquidators in the Australian Corporate Legal Framework" to the Senate Economics Committee "*Inquiry into Liquidators and Administrators*" (2010).

116 A good example is Jenny Buchan's submission regarding the impact on franchisees of franchisor insolvency.

117 The Working Party Report on the *"Review of the Regulation of Corporate Insolvency Practitioners*" (1997) was finally mentioned when the bill to amend corporate insolvency laws was introduced in 2007.

> "What I can say is that this issue became an issue largely by accident. I was attending a regional bar association and law society conference on the Sunshine Coast at Coolum. My wife said to me: 'Look, there is this session on personal property security. If you can't see anything else in the program that you want to do, you might as well go along.' I went along and I heard a presentation from the late Professor David Allan from Bond University on measures that had been taken in some states of the United States and Canada to simplify personal property securities and, equally, the measures to codify arrangements that had been put in place by New Zealand. I heard from a very distinguished legal practitioner at that time about the very considerable business that he as a legal practitioner had in advising on variations in personal property security in different jurisdictions. The point that he was making was that if you are a legal practitioner you can spend a lot of time and you can generate very considerable costs, which clients have to pay, offering advice on differences that are in fact totally unnecessary.
>
> I have also spent a bit of time with people in business, people who you might think would not be interested in these matters. … It reinforced my view that this was an absolutely essential reform. We did take it to SCAG [Standing Committee of Attorneys-General for the Commonwealth, States and Territories] and we got the states to agree there. We did take it to COAG [Council of Australian Governments] and, I might say, it was not an easy path to get the department of finance and the Treasury to agree to meet some of the costs of getting the states up to the barrier in relation to this. I might also say that if you did not drive it, it was not going to happen."[118]

Professor David Allan who gave the speech which the government Minister heard had spent a professional life time, commencing in New Zealand in 1964, pursuing law reform to acknowledge the value of personal property and bring it into line with the contemporary needs of society, especially in light of globalisation and the problem of "fugitive assets". If you wish to read an account of a dedicated academic

118 See: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-09-16%2F0220%22.

being proactive and making submissions, even when there was no enquiry in place, then I refer you to two articles written by the late Professor Allan.[119]

This proactive, rather than reactive, stance is to be applauded. It puts me in mind of an insight by Professor Ian Fletcher shared in last year's Edwin Coe Lecture about:

> "…the vital need for those who possess a technical understanding of the law and its actual working to establish effective channels of communication with legislators and with policy-makers in government, to ensure that there is a proper appreciation of the vital impact that this complex and much-misunderstood area of law has upon the totality of social well-being in a modern, credit-based, mercantile society. Therefore it is an important aspect of the "mission" of insolvency practitioners to improve awareness, both on the part of the wider public and within the corridors of government, of the realities of insolvency law and practice, and to do so in a way that earns public confidence and respect rather than functioning merely as special pleading on behalf of the vested interests of those "in the business"."

Such a quote seems an appropriate place to conclude this brief examination of the contribution by insolvency specialists seeking to improve the design of the Australian insolvency system. Insolvency specialists can play an important, even unique, role in such policy debates – and in so doing, promote the public good.

119 D. Allan, "Personal Property Security - A Long Long Trail A-Winding" [1999] *Bond Law Review* 12, available at: http://www.austlii.edu.au/au/journals/BondLawRw/1999/12.html; D. Allan, "Uniform Personal Property Security Legislation for Australia: Introduction to the Workshop on Personal Property Security Law Reform" [2002] *Bond Law Review* 1, available at: http://www.austlii.edu.au/au/journals/BondLawRw/2002/1.html.