



# INTERNATIONAL INSOLVENCY INSTITUTE

**Eighteenth Annual International Insolvency Conference**

**New York, NY**

*III NextGen Leadership Program and  
Class VII Induction*

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

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September 23 - 25, 2018

## **Court-to Court Communication: An Evolution**

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### ***The First Protocol***

In January 1992, the United States Bankruptcy Court for the Southern District of New York entered a *Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators* (the “Maxwell Protocol”) in the chapter 11 case of Maxwell Communication Corporation plc (“MCC”). *In re Maxwell Communication Corp.*, No. 91-15741 (TLB) (Bankr. S.D.N.Y. Jan. 15, 1992), *reprinted in* Mike Sigal et al., *The Law and Practice of International Insolvencies, Including a Draft Cross-Border Insolvency Concordat*, Annual Survey of Bankruptcy Law 1, 96-108 (William L. Norton, Jr., ed.). MCC comprised an English holding company with substantial assets – 80% of its total asset pool – in the United States. *See Maxwell Commun. Corp. v. Barclays Bank (In re Maxwell Commun. Corp.)*, 170 B.R. 800, 801-802 (Bankr. S.D.N.Y. 1994) (“Maxwell I”), *aff’d sub nom, Maxwell Commun. Corp. v. Societe Generale PLC (In re Maxwell Commun. Corp.)*, 186 B.R. 807 (S.D.N.Y. 1995), *aff’d*, 93 F.3d 1036 (2d Cir. 1996). Although most of the MCC company assets were located in the United States, substantially all of the company debt had been incurred in England. *See Maxwell I*, 170 B.R. at 802.

MCC filed its chapter 11 petition in New York in December 1991. *See id.* The next day, faced with the possibility that its directors could face personal liability under English law for trading while insolvent, MCC obtained an order from the High Court of Justice, Chancery Division, Companies Court in London, putting the company into administration under the U.K. Insolvency Act of 1985. *See id.* Soon after, the U.K. court appointed joint administrators in the English proceeding. *See id.* On the same day, the U.S. court appointed a chapter 11 examiner

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with a mandate to “harmonize the two proceedings so as to permit a reorganization under U.S. law which would maximize the return to creditors.” *Id.* Among other things, the January 1992 order of the U.S. court approving the Maxwell Protocol recognized the joint administrators as the corporate governance of MCC. *Id.* Similarly, the order of the U.K. approving the Maxwell Protocol granted standing to the examiner to be heard in the U.K. court. *Id.*

By all accounts, the Maxwell Protocol allowed for a successful reorganization. In February 1993, the joint administrators simultaneously filed a plan of reorganization in the U.S. court and a scheme of arrangement in the U.K. court. *Id.* Although they were filed as separate documents, “the plan and scheme [were] mutually dependent and, in their effect, constitute[d] a single mechanism, consistent with the laws of both [the United States and the United Kingdom], for reorganizing MCC through the sale of assets as going concerns and for distributing assets to creditors.” *Id.* Impaired creditors in the United States overwhelmingly (99.3% in number and 99.98% in amount) voted to accept the plan. *Id.* at 803. Similarly, 99.3% in number and 99.7% in amount of holders of scheme claims voted to accept the scheme.

The Maxwell Protocol represents a first in cross-border insolvency cases. While it did not explicitly contemplate court-to-court communication, practitioners recall that “Judge Brozman and Chancellor Hoffman very often were in communication directly and sometimes with the parties involved.” 01/14/09 Hr’g Tr. 78:14-16 (Miller, Harvey), *In re Lehman Brothers Holdings, Inc., et al.*, No. 08-13555 (SCC) (Bankr. S.D.N.Y. Jan. 14, 2009). Thus, the Maxwell Protocol fostered truly integrated reorganization proceedings, which, in turn, maximized efficiency and minimized disputes among all case constituents – the debtors, creditors, and the tribunals.

### *Statutory Schemes/Guidelines*

Since *Maxwell*, an increase in multinational corporation insolvencies has seen U.S. bankruptcy courts continually approving cross border protocols. Many such protocols have been based on various statutory schemes and guidelines that have been developed in the last twenty-plus years.

In 1995, the Council of the International Bar Association adopted the IBA Cross-Border Insolvency Concordat (the “Concordat”) as part of an effort to form principles to guide international insolvency cases. *See IBA Cross-Border Insolvency Concordat*, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=2d55e76f-cab1-493d-b0a9-4b4b967b3>. The Concordat was intended as “an interim step until treaties and/or statutes are adopted by commercial nations,” in recognition of the fact that an international treaty was necessary, but would be difficult to achieve in the short term. *Id.* The Concordat principles have formed the basis for a number of successful protocols. For example, in *Nakash v. Zur (In re Nakash)*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996), the United States Bankruptcy Court for the Southern District of New York resolved a motion by a U.S. chapter 11 debtor seeking a finding that the Israeli receiver of an insolvent Israeli bank that had obtained a substantial judgment in the Israeli courts against the debtor, a former director of the bank, had violated the automatic stay when it filed an involuntary petition against the debtor in Israel. *See id.* at 765. The court noted that, “upon being apprised of the facts and circumstances of the [d]ebtor's cross-border situation, [it] concluded that it would be in the best interests of the [d]ebtor and his creditors wherever situated to seek avenues for the promotion of international cooperation and coordination with respect to the various judicial actions in the United States and Israel involving the [d]ebtor and

his assets.” *Id.* at 766 n.2. The court therefore appointed an examiner in the chapter 11 case.

*See id.*

The court found in favor of the debtor in connection with the stay violation motion, but left “for another time the issue of sanctions, damages and other acts taken by the [r]eceiver.” *Id.* at 771. Notably, the court explained that following argument on the motion, the parties participated in a status conference during which they “unanimously agreed to be guided by three princip[al] goals going forward, namely 1) to preserve assets of the [d]ebtor; 2) honor the integrity of the courts of both countries and 3) reduce costs.” *Id.* at 766. Guided by those principles, the receiver and the examiner entered into a *Stipulation and Order Implementing Cross Border Protocol* (the “Nakash Protocol”). *In re Nakash*, No. 94-44840 (BRL) (Bankr. S.D.N.Y. May 23, 1996), reprinted in Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 *Tex. Int’l L.J.* 587, 601-612 (1998). Unlike the Maxwell Protocol, the Nakash Protocol specifically contemplated court-to-court communication, providing that

The US Bankruptcy Court and the Israeli NAB Liquidation Court are independent, sovereign Courts. The two Courts will seek to cooperate and coordinate with each other in good faith, but at all times each Court will be entitled to exercise its independent jurisdiction and authority with respect to matters before it and the conduct of the parties before it.

*Id.* at 605. The cross-border protocol in *In re Everfresh Beverages, Inc.* also was based on the guiding principles set forth in the Concordat. *See In re Everfresh Beverages, Inc.*, Case No. 95-B-45405-06 (Bankr. S.D.N.Y. Dec. 20, 1995). Significantly, the *Everfresh* matter involved the first U.S.-Canada cross-border joint hearing. *See* Bob Wessels et al., *International Cooperation in Bankruptcy and Insolvency Matters* 185 (2009).

Soon after the Concordat was adopted, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Cross-Border Insolvency. *See generally* UNCITRAL: U.N. Comm’n on Int’l Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014) (“UNCITRAL Model Law”), <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>. The Model Law was designed to assist sovereign governments in supplementing their insolvency laws by providing a modern framework for addressing cross-border insolvency proceedings. *Id.* The Model Law does not attempt to unify the substantive insolvency laws of different countries, but instead incorporates a modern modified universalist regime<sup>2</sup> that is focused on encouraging cooperation and coordination between jurisdictions. *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* ¶ 3, in *UNCITRAL Model Law, supra*, at 19-20. The UNCITRAL Model Law contemplates court-to-court communication in Article 25. It provides that

The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

UNCITRAL Model Law Art. 25(2).<sup>3</sup>

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<sup>2</sup> *See* Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 *Emory Bankr. Dev. J.* 387, 389-390 (2013) (explaining that universalism is a “diametrically opposed approach[] to cross border insolvencies” from territorialism; “[u]nder universalism, all proceedings would take place in a centralized court and proceedings would be subject to a single law”). “[Modified universalism] accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts the discretion to evaluate the fairness of the home country procedures and to protect the interest of local creditors.” Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 *Mich. L. Rev.* 2276, 2301 (2000) (alteration in original) (citation omitted).

<sup>3</sup> The United States adopted the UNCITRAL Model Law in 2005; it is incorporated as in the United States Bankruptcy Code (the “Code”) as chapter 15. *See* 11 U.S.C. § 1501 (providing, in relevant part, that the purpose of chapter 15 is “to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency”). Section 1525 of the Code differs slightly from Article 25 of the UNCITRAL Model Law, providing that

The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, *subject to the rights of a party in interest to notice and participation.*

11 U.S.C. § 1525(b)(emphasis added).

Additional guidelines regarding court-to-court communication soon followed. In 2000, the International Insolvency Institute (III), together with the American Law Institute (ALI), produced the ALI/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the “ALI/III Guidelines”).<sup>4</sup> Later, in 2009, UNCITRAL published its Practice Guide on Cross-Border Insolvency Cooperation.<sup>5</sup>

### ***The Lehman Protocol***

Commencing in September 2008, Lehman Brothers Holdings Inc. (“LBHI” and, together with its U.S. debtor affiliates, “Lehman”) and more than eighty of its direct and indirect foreign subsidiaries commenced (or, in some cases, had initiated against them) plenary insolvency proceedings in various jurisdictions around the world. In January 2009, the court overseeing the U.S. proceedings noted concern regarding the global administration of debtor assets. *See* 01/14/09 Hr’g Tr. 55:10-21 (Peck, J.), *In re Lehman Brothers Holdings, Inc., et al.*, No. 08-13555 (SCC) (Bankr. S.D.N.Y. Jan. 14, 2009) (“I have some concern as to the coordination, if any, that is going on globally between and among the various pending insolvency proceedings around the world. ... I simply want to know ... whether or not any cross-border protocols of [the] sort contemplated by the model law ... may be contemplated.”) Thereafter, counsel to the U.S. debtors prepared and proposed a *Cross Border Insolvency Protocol for the Lehman Brothers Group of Companies* (the “Lehman Protocol”). *See Notice of Debtors’ Motion Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of a Cross-Border*

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<sup>4</sup> Available at [https://www.iiiglobal.org/sites/default/files/7-\\_ali.pdf](https://www.iiiglobal.org/sites/default/files/7-_ali.pdf).

<sup>5</sup> Available at [http://www.uncitral.org/pdf/english/texts/insolven/Practice\\_Guide\\_Ebook\\_eng.pdf](http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf).

*Insolvency Protocol* [ECF no. 3647], *In re Lehman Brothers Holdings, Inc., et al.*, No. 08-13555 (SCC) (Bankr. S.D.N.Y. May 26, 2009).

Executed by 25 global affiliates of LBHI,<sup>6</sup> the Lehman Protocol provides for court-to-court communication through the adoption by each tribunal, in whole or in part, of the ALI/III Guidelines. *See id.* ¶ 22(c). By virtue of its reference to the ALI/III Guidelines, the Lehman Protocol recognized, with respect to the tribunals involved, the need for cooperation and coordination between courts in order to maximize distributions to all creditors. *ALI/III Guidelines* at Introduction. The U.S. bankruptcy court approved the Lehman Protocol in June 2009. *See Order Approving the Proposed Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies* [ECF No. 4020], *In re Lehman Brothers Holdings, Inc., et al.*, No. 08-13555 (SCC) (Bankr. S.D.N.Y. June 17, 2009). The cooperation fostered by the Lehman Protocol, including the court-to-court communication between the U.S. court and various other courts around the world, yielded myriad agreements that became the building blocks for the consensual plan of liquidation that the court confirmed in December 2011. *See Order Confirming Modified Third Amended Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and its Affiliated Debtors* [ECF No. 23023], *In re Lehman Brothers Holdings, Inc., et al.*, No. 08-13555 (SCC) (Bankr. S.D.N.Y. December 6, 2011).

### ***The JIN Guidelines***

In October 2016, a panel of judges from eight jurisdictions – Australia (Federal Court and New South Wales), the British Virgin Islands, Canada (Ontario), the Cayman Islands, England & Wales, Hong Kong (as an observer), Singapore and the United States (Delaware and Southern

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<sup>6</sup> In addition to the United States debtors, official representatives representing affiliates in Australia, the Netherlands, the Netherlands Antilles, Hong Kong, Germany, Luxembourg, Singapore, and Switzerland signed the Lehman Protocol. *See id.*

District of New York) – met in Singapore for the inaugural Judicial Insolvency Network (“JIN”) Conference. The purpose of the conference was to formulate guidelines for communication and cooperation between courts in cross-border insolvency matters (the “JIN Guidelines”). In February 2017, the Supreme Court of Singapore issued the JIN Guidelines.<sup>7</sup> In the months that followed, each of the Supreme Court of Bermuda, the Eastern Caribbean Supreme Court in the British Virgin Islands, the Chancery Division of the High Court of England and Wales, the United States Bankruptcy Court for the District of Delaware, and the United States Bankruptcy Court for the Southern District of New York adopted the JIN Guidelines. The JIN Guidelines specifically address “Communications Between Courts,” providing, among other things, that a “court may receive communications from a foreign court and may respond directly to them.” JIN Guidelines a Guideline 7. Importantly, the JIN Guidelines provide for parties to be present “[i]n the normal case” where courts are communicating with each other and that “[t]he communications between the courts shall be recorded and may be transcribed.” JIN Guidelines at Guideline 8 (i), (iii).

The JIN Guidelines are in their infancy, and so anecdotal evidence as to their effectiveness is scarce. As cross-border cases become more prevalent, court-to-court communications pursuant to the JIN Guidelines will become more valuable and may facilitate more consistent decisions in global insolvency cases.

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<sup>7</sup> Available at <https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-1-2017---issuance-of-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters-.pdf>.