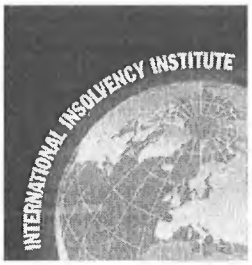

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The Elements of Coordination in International Corporate Insolvencies: What Cross-Border Bank Insolvency can Learn from Corporate Insolvency

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CROSS-BORDER BANK INSOLVENCY

Edited by

ROSA M LASTRA

OXFORD
UNIVERSITY PRESS

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THE ELEMENTS OF COORDINATION IN INTERNATIONAL CORPORATE INSOLVENCIES: WHAT CROSS-BORDER BANK INSOLVENCY CAN LEARN FROM CORPORATE INSOLVENCY

*Jay Lawrence Westbrook**

8.01 I offer here a summary of the evolution of international cooperation in the management of multinational corporations in financial distress.[1] The notion is that an understanding of the emerging experience in the corporate insolvency field may help to reveal useful approaches in dealing with distressed financial institutions once they have reached the point of requiring the aid of procedures akin to liquidation or reorganization. (I will use the term 'resolution' procedures to distinguish

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The author is grateful for the research assistance of Jamie France, Texas '11, in preparing this chapter.

[1] 'Bankruptcy' is the term most often used in North America for the legal response to a general default by either a natural person or a legal entity. 'Insolvency' is the English-language term generally used outside North America to refer to business bankruptcy. This chapter will generally use the term 'insolvency' to refer to a legal proceeding or process intended to resolve the financial distress of a business whether by liquidation or reorganization. The term 'financial distress' refers to a circumstance in which the company is or may soon be either insolvent in a balance sheet sense or seriously illiquid.

liquidation or reorganization of financial institutions from ordinary insolvency processes.) What follows reflects a clear understanding that resolutions must differ importantly from ordinary corporate cases, but it also reveals that reformers active in the insolvencies of multinational corporations have had to overcome much the same sort of scepticism and parochialism that impede current efforts to achieve international cooperation in resolving the crises of financial institutions.

8.02 In summary, the following are the key elements of international corporate insolvency[2] that are especially relevant to a multinational resolution procedure:[3]

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

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

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

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[2] For more detailed discussions of national systems, see eg Jay Westbrook, Charles M Booth, Christoph G Paulus, and Harry Rajak, *A Global View of Business Insolvency Systems* (Washington, DC: World Bank, 2010) (hereinafter 'Global'); *Legislative Guide on Insolvency Law* (New York: UNCITRAL, 2005); *Principles for Effective Insolvency Creditor Rights Systems* (Washington, DC: World Bank, 2005), available at <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf>; American Law Institute, *International Statement of Canadian Bankruptcy Law* (Huntington, NY: Juris Publishing, 2003); American Law Institute, *International Statement of Mexican Bankruptcy Law* (Huntington, NY: Juris Publishing, 2003); American Law Institute, *International Statement of United States Bankruptcy Law* (Huntington, NY: Juris Publishing, 2003).

[3] I ignore in this brief report the question of avoidance or 'claw-back' procedures that permit reversal of transactions and asset transfers, especially to insiders, although such provisions might be important, inter alia, to public support for the resolution process and for the possible expenditure of public funds.

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

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

- The case involves protected creditor classes in one or more of the jurisdictions (eg in the Federal Mogul case: tort victims versus pensioners).[4]
- The debtor's corporate organization and operations lend themselves to breaking the case into national pieces, sometimes because of regulatory effects (eg the Lehman case).[5]
- The case includes local professionals who desire to have more authority and to receive more fees, although many professionals are deeply committed to international cooperation.

Background

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

[4] Mark Andrews, 'The Federal-Mogul Restructuring: Coordination in International Bankruptcy', in Eight-First Annual Meeting, National Conference of Bankruptcy Judges 14–15 (Orlando, Fla, 2007).

[5] 'Lehman Protocol Divides Administrators' *The Banker*, 27 May 2009, <http://www.thebanker.com/news/fullstory.php/aid/6625/Lehman_protocol_divides_administrators.html>.

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

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

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

8.08 Historically, international cooperation in insolvency matters—often under the rubric of 'comity' (common law) or 'enforcement of judgments' (civil law)—reaches well back into the nineteenth century.[6] However, cooperation was hit or miss and often frustrated by the requirement of reciprocity, which is easier to dispute than to prove. Only a handful of treaties were achieved and cooperation under those treaties was often spotty.

8.09 Some important transnational cases in the 1970s stimulated reform efforts in the USA and elsewhere. Reform and a growing number of insolvencies of multinational corporations began to produce a fair number of cases of successful cooperation, which were celebrated, and cases in which courts did not cooperate, which were criticized. These developments culminated with the promulgation by UNCITRAL (United Nations Commission on International Trade Law) in 1997 of the Model Law on Cross-Border Insolvency (the 'Model Law'),[7] which has now been adopted in one form or another by eighteen countries, including jurisdictions of considerable commercial importance.[8]

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[6] The earliest important case in the USA was *Canada SRR Co v Gebhard*, 109 US 527, 537–8 (1883), in which the US Supreme Court forced New York bondholders to accept the results of the reorganization of a Canadian railroad. For a partial history of the development of cooperation in the US courts, see *Cunard SS Co v Salen Reefer Servs* 773 F 2d 452, 457–9 (2d Cir 1985). See also Jay L Westbrook, 'Transnational Bankruptcy', in *The Development of Bankruptcy Law in the Second Circuit Court of Appeals*, Second Circuit Committee on History and Commemorative Events, United States Courts (New York: Matthew Bender and Co, 1995). For a more general history, see Bob Wessels, Bruce A Markell, and Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford: Oxford University Press, 2009).

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

[8] Australia (2008), British Virgin Islands (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002),

Despite the substantial history of cooperation leading up to the UNCITRAL negotiations, there was widespread scepticism that any agreement could be reached. When agreement in the form of the Model Law was achieved in record time and the law promulgated, many argued that it would fail due to lack of significant adoption. After a number of countries had adopted it, critics claimed courts would evade granting recognition under provisions the critics deemed too vague to enforce. Now that decisions are emerging from courts in a number of countries enforcing the local versions of the Model Law, no doubt the next prediction of scepticism is searching for a purchase. But so far, the claims that parties and courts will invariably be parochial and nationalistic, failing to see the long-term benefits of cooperation, have proven importantly wrong. **8.10**

The Model Law

The Model Law is not a treaty and does not contain any requirement of reciprocity.[9] It provides for recognition of foreign insolvency proceedings as either 'main' or 'non-main' proceedings. A foreign main proceeding is one that is pending in the debtor's centre of main interests (COMI). A non-main proceeding is one brought in a jurisdiction in which the debtor has been engaged in active commerce, but does not have the centre of its interests. A proceeding must be main or non-main to be recognized. (Haven jurisdictions need not apply, because ordinarily they have no economic connection with the debtor's activities and therefore are neither main nor non-main jurisdictions.) There is a very simple, fast procedure for recognition without any consideration of the substance of the foreign proceeding's insolvency law. Speed is aided by rebuttable presumptions, including the presumption that the debtor's place of incorporation is also its COMI. **8.11**

Ignoring many important points of detail, there are three key elements of the Model Law. The first is that it provides for expedited control of the debtor's local assets and their protection from unilateral actions by creditors. It then gives the local court considerable discretion to grant all sorts of relief to an administrator from a foreign main proceeding. (Non-main administrators are eligible for considerably more limited relief.) In addition, that discretion is accompanied by a statutory mandate for cooperation. The local court is directed to use its broad powers to cooperate with foreign proceedings, subject to ensuring that the debtor and its creditors are adequately protected. (Note the statute does not require protection of **8.12**

New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and the USA (2005). UNCITRAL, Status, 1997: Model Law on Cross-Border Insolvency (2010), <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>.

[9] Some adopting countries have added such a requirement, although most have not.

local creditors or even of all creditors claiming locally, but mandates concern for creditors generally.[10])

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

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

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

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[10] Model Law, Article 22. The statute states a general rule forbidding discrimination against foreign creditors. Model Law, Article 13.

[11] The Model Law also provides for provisional remedies while the recognition request is pending. Model Law, Article 19.

[12] Model Law, Article 28.

[13] Council Regulation 1346/2000 European Union Regulation on Insolvency Proceedings, 2000 OJ L160 (hereinafter the 'EU Regulation'). See generally Gabriel Moss, Ian F Fletcher, and Stuart Isaacs (eds), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (Oxford: Oxford University Press, 2009); Look Chan Ho (gen ed), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law on Insolvency* (London: Globe Business Publishing, 2006) (hereinafter 'Look Chan Ho, *Cross-Border Insolvency*'); Bob Wessels, *Judicial Cooperation in Cross-Border Insolvency Cases* (Culemborg: Centraal Boekhuis, 2008).

[14] One example is Germany. See Judgment of 13 October 2009—X ZR 79/06 German Federal High Court of Justice (Bundesgerichtshof—BGH) (automatic recognition of United States Chapter 11 proceeding). Eberhard Braun (ed), *Commentary on the German Insolvency Code* (Düsseldorf: IDW-Verlag, 2006).

Just a Bit of Theory and Policy

8.16 Underlying the history of international cooperation in insolvency matters and the adoption of the Model Law is a long-standing debate between territorialism and universalism. Territorialism is the traditional view that each country should seize whatever assets it can (hence the name 'grab rule'), sell them, and pay out the realized value under local law. Universalists reject this piecemeal approach, hoping ideally for a unified, worldwide proceeding for both maximization of value and a single distribution. The ideal view has been tempered by the realities of a world of nation states, leading to a version often called 'modified universalism', which takes the universalist ideal as its pole star, but adapts flexibly to achieve results as close to a single worldwide process as is pragmatically possible.[15]

8.17 Most academics and those active in insolvency practice have embraced modified universalism. At least one territorialist has reacted to the virtues of modified universalism by proposing 'cooperative territorialism' in which courts seek to maximize value by cooperation but then distribute the realized value according to local priorities.[16] Another attempted compromise is 'universal proceduralism', which would concentrate procedural power (eg the moratorium) in the main court, while leaving substantive insolvency law questions (eg distribution priorities) to local rules.[17] Nonetheless, and notwithstanding all of the scepticism about the willingness of nations to cooperate, the leading American territorialist concedes that the Model Law represents a step toward universalism[18] and recent decisions suggest that most national judges are leaning toward a universalist future.[19]

Corporate Groups

8.18 The Model Law did not address the problem of corporate groups, which is now the subject of a new project at UNCITRAL.[20] It is one of the most difficult aspects of

[15] American Law Institute, *Principles of Cooperation among the Nafta Countries* (Huntington, NY: Juris Publishing, 2003).

[16] Lynn M LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98 *Michigan Law Review* 2216.

[17] Cf Edward J Janger, 'Virtual Territoriality' (2010) 48 *Columbia Journal of Transnational Law* 401 and Jay L Westbrook, 'A Comment on Universal Proceduralism' (2010) 48 *Columbia Journal of Transnational Law* 401.

[18] See LoPucki above n 16–17.

[19] eg *In re Condor Ins Ltd* 2010 WL 961613 (5th Cir 2010); *In re Maxwell Comm Corp* 93 F 3d 1036 (2d Cir 1996); *In re HIH Casualty and General Insurance Ltd* EWHC 2125 (Ch) (2005); Judgment of 13 October 2009—X ZR 79/06 German Federal High Court of Justice (Bundesgerichtshof—BGH) (automatic recognition of United States Chapter 11 proceeding). Of course, the progress is inevitably marked by two steps forward and one back.

[20] <http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html>.

international insolvency and offers no easy solutions. However, it strikes me as likely that it may be more manageable in some respects in the banking context, because of the availability of regulatory tools to require structures and corporate relationships that will lend themselves to coordinated, cooperative treatment.

8.19 The central difficulty with corporate groups is the tension between the reality that many groups are managed as if they were one company and, on the other hand, the need to vindicate creditor expectations by maintaining the legal distinction among corporate entities as pools of value for creditors of those entities.[21] The balance between these elements varies from group to group. In one group, holding companies may be passive investors, but another group may deal with creditors as a single business with a global brand and creditors may even be unclear concerning which subsidiary is their legal counterparty. Furthermore, particular subsidiaries within one group may fall at different points on this centralized–decentralized spectrum, ranging from mere legal fictions to separately branded and funded businesses.

8.20 The group problem has proven much more intractable than the issues that were addressed by the Model Law. The main reason is that the Model Law issues involve problems largely solved at the national level, so the only difficulties that had to be addressed were those arising from their rotation into the fourth dimension of multinational law. By contrast, the issues regarding the financial distress of groups are largely unresolved in domestic systems.[22] Transporting unsolved problems into the multinational space just makes them harder.

8.21 International coordination is more difficult because each corporate entity may be subject to different rules of domestic and international jurisdiction. For example, a Polish holding company may file in Poland while its five European subsidiaries as stand-alone companies would normally file in five different European countries.[23] Even though the EU Regulation would require those countries to recognize an opening of proceedings for the subsidiaries in Poland, would the Polish courts accept that they have international jurisdiction over these foreign corporations? Certainly a number of jurisdictions would not. Aside from nationality, will Poland accept a filing by a subsidiary that is not itself insolvent? If the answer is negative in either instance, how will the courts cooperate, given that neither the regulation nor the Model Law solves these problems?

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[21] *Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency*, §§ 4–8, UN Doc A/CN.9/WG.V/WP.90, UNCITRAL, Working Group V (Insolvency Law), thirty-seventh session, 9–13 November 2009, Vienna (distr 31 August 2009).

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

[23] On the corporate side, the term 'ring fencing' is not so often used as in banking. However, subsidiaries in corporate groups often present the same sort of problem.

Another important problem arises from intra-group claims and the consolidation of subsidiaries in a reorganization plan. Where creditors do not have strong reasons to claim special rights in a given subsidiary, it is common in domestic cases to consolidate the entities. Indeed, in such cases it might be prohibitively expensive—or at least intolerably wasteful—to try to isolate the separate obligations of each subsidiary to affiliate companies or to third parties. Yet problems of jurisdiction and coordination make consolidation challenging in some cases. **8.22**

The Key Elements in the Growth of Cooperation

Notwithstanding the problem of corporate groups, management of the insolvency of corporate debtors has made considerable progress. Each positive step in increasing cooperation has served to build confidence and momentum, because each one tends to disprove the assumption that nations will usually react to a shared difficulty in a short-sighted and parochial way. The early cases in various countries were both positive and negative, but the negative cases were merely instances of judges applying the same old ideas, whereas each positive (cooperative) decision attracted attention as a judicial innovation in the internationalist direction. Some academic writing of a similar import may have made a modest contribution as well. **8.23**

Exemplary is the *Maxwell* case.[24] It was highly publicized because of the great size of the company and the spectacular death of its colourful leader. It began with the US and UK courts at daggers drawn, but was resolved with a wise and steady cooperation among excellent judges and lawyers, resulting in the most universal and successful global insolvency plan in history. Among other things, it dealt with an entire, massive corporate group despite the existence of subsidiaries and assets in a number of countries. It ended with management of the insolvency in the United Kingdom even though the USA had the greatest concentration of assets. The result was admired and celebrated throughout the professional and financial world. It thus had a greater impact than some other rulings where a court may have denied cooperation while insisting on a niggling concern with relatively minor legal differences based on a distrust of foreign notions. **8.24**

These cases helped build the base that encouraged UNCITRAL to take up what became the Model Law project. The UNCITRAL process made an independent contribution to the evolution of pro-universalist attitudes in a number of countries by bringing together expert and non-expert diplomats to negotiate. The delegates taught each other that the basic principles of insolvency law are found nearly everywhere, while educating each other about the elements in various **8.25**

[24] *In re Maxwell Comm Corp* 93 F 3d 1036 (2d Cir 1996).

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

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

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

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

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

The Corporate Experience as it Relates to Banking

Based on what I have learned from my distinguished fellow authors, including experts in banking law and supervision, I may have some sense of what elements of the corporate experience might be most helpful in improving international cooperation with regard to distressed financial institutions. In particular, I want to discuss initiation, expedition, leadership, distribution and priorities, communication, formal agreements of two kinds, and special relationships. **8.29**

Initiation

One of the great difficulties in corporate insolvency both domestically and internationally is the problem of initiation (commencement of proceedings). The debtor's managers know all about its financial problems, but often have too many disincentives to initiate a proceeding that may cost them their jobs. The creditors have more appropriate incentives, but too little information, so they may act rashly or belatedly. These problems should be avoidable with regulated entities. Regulators should be able to obtain ample financial information and should be given the authority to initiate resolution proceedings when appropriate. Lobbyists brandishing fantasies of governmental conspiracy have muddied that authority in the recent US legislation, but the power should be clear and should be discretionary, subject to the normal protections against arbitrary governmental action (including compensation) found in most well-developed legal systems. **8.30**

Expedition

In cases of financial distress, speed is everything. The standard trope in insolvency practice is the debtor whose principal asset is a shipload of fish, but the principle is applicable in nearly all cases. In advanced domestic insolvency systems, judges are available '24/7' to provide immediate relief where it is required to preserve value and maintain the status quo. The Model Law has at its heart the expedited system of recognition—an expedition buttressed by presumptions and an explicit disclaimer of formal requirements—followed by an automatic invocation of the local form of moratorium on all asset transfers and creditor enforcement. By providing 'status quo' relief quickly, while reserving more complete relief (eg turnover of assets to be distributed under main-proceeding rules) for later court consideration in light of the interests of creditors, the Model Law provides an acceptable balance. **8.31**

Leadership

The element of leadership refers to the need to have a main proceeding to which others defer to one degree or another. The court or administrative authority in the main jurisdiction need not be a dictator, but should be something more than *primus* **8.32**

inter pares. The experience in jurisdictions with successful reorganization systems demonstrates that where negotiation is required, the law should structure a centre around which the negotiations can be conducted. Domestically, the administrator, trustee, or debtor-in-possession may provide that centre. The centre can be seen as the logical proposer of possible solutions and the convener of negotiations.

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

Financing

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

Distribution and priorities

8.35 One of the most difficult problems in multinational corporate insolvency arises from differences in distribution priorities among national systems.[26] Although *pari passu* distribution is the mantra almost everywhere, priorities are the reality.[27] Britain has reduced priorities in recent reforms and Germany has abolished most of them, but they remain important everywhere. They also vary greatly. It is true that the three Great Priorities—for employees, tax authorities, and secured creditors—are found in nearly all systems, but the type and extent of these priorities vary and

[26] See Jay L Westbrook, 'Universal Priorities' (1998) 33 *Texas International Law Journal* 27; Ulrik Rammeskow Bang-Pedersen, 'Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests' (1999) 73 *American Bankruptcy Law Journal* 385, 386–7.

[27] See Riz Mokal, 'Priority as Pathology: The Pari Passu Myth' (2001) 60 *Cambridge Law Journal* 581.