CROSS-BORDER INSOLVENCY: A NEED FOR COMMONWEALTH ACTION?

A Paper prepared by the Commonwealth Secretariat

INTRODUCTION

Background

1. Insolvency law has been described as the foundation of commercial law. Certainly, a great number of business decisions are made and transactions structured with reference to what will happen if one or more of the parties enters an insolvency procedure. The insolvency law regime will often exert a decisive influence on the whole range of decisions relevant to the extension of credit, and in particular bank lending. Further, the legal regime in a particular state may be a key factor influencing foreign investment.

2. For these reasons, it would be unwise to ignore the deficiencies in the current legal framework in dealing with the problems created by cross-border insolvencies. Problems arise because of the dissimilarity in insolvency regimes throughout the world and the fact that harmonisation of these regimes would be a wholly unrealistic goal. Cross border problems are becoming more common as the number and complexity of transnational insolvencies rise and this trend is likely to continue due to the rapid and ongoing globalisation of economic activity which is currently taking place. The question therefore arises as to whether any action is required to address these problems. In seeking to answer this question it is necessary to establish the size of the problem.

Purposes and outline of paper

3. The purposes of this paper are therefore to ask Ministers:

- whether they have encountered significant problems in this area (and if so what they are and in how many cases they have arisen); and

- if problems have arisen, whether and how combined Commonwealth action might assist them to address those problems more effectively - in respect of cross-border insolvencies arising both between Commonwealth states and between Commonwealth and non-Commonwealth states.

4. To assist Ministers in their deliberations, this paper:

(a) outlines some of the key problems presented by cross-border insolvencies (paragraphs 7 - 10);

(b) assesses briefly the extent to which mechanisms available within the current legal framework enable cooperation in cross border insolvency cases (paragraphs 11 - 27)[1];

(c) notes current international initiatives in this area (paragraphs 28 - 29); and

(d) suggests a number of options for Commonwealth action (paragraph 30).

THE PROBLEMS PRESENTED BY CROSS-BORDER INSOLVENCIES: OVERVIEW

Terminology

5. Cross-border insolvency is a highly technical area, and it is necessary to define certain key terms at the outset.

6. A "cross border insolvency" case arises when an insolvency proceeding is commenced in State A in respect of a debtor who also holds assets and/or does business (and thus is likely to have

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1 Much of the discussion in this paper of the current legal framework and the problems presented by cross-border insolvency draws on the analysis and research of the International Association of Insolvency Practitioners and the United Nations Commission on International Trade Law, in particular *Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies: Expert Committee's Report on Cross-Border Insolvency and Recognition* (Reporters Evan Flaschen and Ron Harmer; draft 1 March 1995), and UNCITRAL *Cross-Border Insolvency: Possible Issues Relating to Judicial Cooperation and Access and Recognition in Cases of Cross-Border Insolvency* (A/CN.9/WG.V/WP.42, 26/9/95). Any errors remain, of course, those of the Commonwealth Secretariat.

creditors) in one or more other jurisdictions (States B, C etc). The insolvency proceeding commenced in State A will be referred to from now on as the "foreign insolvency proceeding" (FIP), and the person in charge of that proceeding the "foreign insolvency administrator" (FIA). The "other jurisdictions" in which recognition of the FIP is likely to be requested will be referred to collectively as "State B". Proceedings initiated in State B by the FIA will be referred to as "ancillary proceedings", and proceedings initiated in State B by local creditors as "secondary insolvency proceedings". "Local creditors" refers to those creditors who would be required to commence proceedings against the debtor in State B in order to recover their claim. In effect this means that these claims are likely to arise in respect to assets or business activities of the debtor situated in State B.

Overview of problems

7. By way of background, Appendix I outlines the steps which must typically be taken in the course of administering an insolvency proceeding, according to the law and practice of a variety of jurisdictions. Appendix I also indicates the points at which court involvement might be required, though this draws upon a narrower selection of insolvency regimes based upon the United Kingdom model.

8. These are the same steps which must be taken in a cross-border insolvency, and court assistance is also likely to be required in respect of certain activities in State B. The fact that the insolvency proceeding must be administered in more than one jurisdiction can give rise to some very complex practical and conflict of laws problems. These include the following:

- Separate and non-cooperative insolvency proceedings might be commenced in respect of the same debtor in more than one jurisdiction, with creditors and insolvency administrators competing for the assets. This may result in duplicated effort, increased cost, and a lower return to creditors as the opportunity is lost to realise the maximum value of the enterprise. Indeed, the best option might be to preserve the enterprise (along with its workforce and markets) as a going concern, and increasingly national laws are being changed to facilitate this approach in appropriate cases. However, the degree of required coordination and control may be very difficult to achieve in a cross-border insolvency for the reasons just mentioned.

- It can be quite unclear whether the FIP and/or the FIA will be recognised by State B, by what process and with what effects. States differ on these points due, among other things, to differences in insolvency laws, in the degree of discretion afforded to courts, and in the degree to which foreign law will be applied.

9. In terms of the effects of recognition, the following questions are among those likely to arise:

- will the FIA have power to manage and/or realise the debtor's assets held in State B?

- will the FIA be able to pursue voidable transaction and debtor liability claims, and if so according to the law of which forum?

- will the rights of local creditors be affected? In particular:

    - will local creditors be entitled to open separate insolvency proceedings?

    - what priority will their claims have in relation to the claims of creditors in the FIP?

    - will the security interests of local creditors be "trumped" by claims made in the FIP?

10. These and other issues are discussed further detail in Appendix II, which focuses in more detail on some of the problems and questions which an attempt to facilitate greater cross-border cooperation would have to address.

CURRENT LEGAL FRAMEWORK

Territoriality

11. According to this approach, recognition of foreign proceedings is refused, and domestic law is applied to the complete exclusion of cooperation and coordination in relation to a FIP.

Extraterritorial legislation

12. The insolvency laws of many countries purport to command control of, and confer rights in respect of, business activities, assets and creditors located outside of the jurisdiction. However, the effective operation of laws of this type depends wholly on the extent to which the foreign jurisdiction is able and willing to recognise and give effect to the FIP.

Comity

13. In the absence of any enabling legislation, access and recognition in common law jurisdictions depends on application of the doctrine of comity. This doctrine, exercised by a court pursuant to its inherent jurisdiction, guides courts in their consideration of whether to recognise the judicial, legislative and administrative acts of courts and other bodies in other countries. In exercising this jurisdiction, a court is likely to have regard to international duty and conscience, and to the rights of its own citizens and other persons under the protection of its laws (*Hilton v Guyot* 159 U.S. 113, 163-64 (1895)).

14. The doctrine of comity permits a court considerable flexibility, but this comes at the expense of predictability and certainty.

Exequatur

15. In civil jurisdictions, the doctrine of comity is in general not exercised. Instead, a FIA must petition the local court to recognise the FIP by issuing an "exequatur", ie an enabling order. The grounds on which this order can be granted are, typically, stated clearly in statute. Even then, it may still be necessary to have a local administrator appointed to realise local assets. However in most cases, if the local courts have jurisdiction over a debtor and there are grounds for commencing a local insolvency proceeding, principles of strict territoriality will apply.

16. The exequatur procedure provides certainty, but suffers some severe limitations. A key one is that exequatur statutes typically focus on the enforcement of foreign "judgements", a term which does not easily fit a collective FIP. This limitation is elaborated upon under the following heading, as an exequatur statute is a species of reciprocity of judgements legislation.

Reciprocity of Judgments Legislation

17. Legislation providing for the recognition of foreign judgements - commonly drafted pursuant to bilateral or multilateral treaty obligations - can assist the enforcement of money judgements, or of mandatory or injunctive orders. This may be of use in a FIP where the FIA seeks enforcement in State B of a judgement obtained in State A which has established the quantified liability of a particular person to the debtor's estate.

18. However, legislation of this type is likely to be of less use in relation to the general recognition and administration of an insolvency proceeding. A key reason for this is that an insolvency proceeding may not depend for its existence and effect on a judgment or order at all (and many do not); and if it does, the judgment or order is likely to be no more than a declaration of status and will not by itself command that something must be done or not done.

19. While it is not unknown for reciprocity of judgments legislation to enable recognition of a FIP as the functional equivalent of a judgement, legislation of this kind cannot realistically deal with the range of problems presented by cross-border insolvencies.

Conventions and Treaty Arrangements

20. Multilateral or regional conventions and treaties could in theory work very well to provide for access, recognition and judicial cooperation. Their main limitations are that they are difficult to conclude between countries with diverse insolvency law regimes and general commercial law, and of course do not address problems arising between a member and non-member country. Conventions and treaties which have attempted to address issues arising in this area include the Convention on Private International Law 1928 (the "Bustamante Code"), the two Treaties on Commercial International Law 1889 and 1940 (the "Montivideo Treaties"), the Nordic Bankruptcy Convention 1933, and the European Convention on Certain International Aspects of Bankruptcy 1990 (the "Istanbul Convention", not in force).

21. The European Community Convention on Insolvency Proceedings, which was opened for signature in November 1995 and is yet to come into force, is of particular interest because it comprises a significant attempt by countries with quite divergent legal systems to agree on a minimum level of cooperation. Also of interest is the Model International Insolvency Cooperation Act, recently drafted by the International Bar Association.

Unilateral Recognition/Assistance

22. A few nations have enacted legislation to provide for unilateral assistance and/or recognition in respect of a FIP ("unilateral" in the sense that reciprocity is not stated explicitly to be a prerequisite, though see paragraph 26 below). In some cases access (in a narrow procedural sense) is automatic or obtained through an administrative procedure, but these provisions invariably require court involvement to obtain substantive assistance and enforcement. However, they differ on essentials

such as the discretion if any allowed to the court; the grounds for making an order; the effect of an order; and the procedures to be followed in seeking an order.

23. It has been suggested that this general approach offers the greatest hope for improved cooperation in this area because:

- it seeks primarily a high degree of predictable recognition, assistance and cooperation rather than a uniform "international" insolvency law (which is perceived as unrealistic)

- the legislation is usually short and simple

- the procedure can be cheap and efficient and can achieve a high level of certainty

- the necessary legislation is equally possible as an addition to or expansion of the statutory regime in civil and common law systems

- it seems to operate well in practice

- there is no need for there to be a foreign "judgment" in the narrow sense noted at paragraphs 17 - 18.

24. Appendix III reproduces extracts of legislation from three countries which provide for unilateral assistance or recognition, namely sections 580-581 of the Corporations Law and section 29 of the Bankruptcy Act (Australia (Commonwealth)); section 426 of the Insolvency Act 1986 (UK); and clauses 101 and 304-306 of the Bankruptcy Code (United States). Other examples are section 156 of the Bankruptcy Law (Revised) (Cayman Islands), and section 135 of the Insolvency Act 1967 (New Zealand).

25. Several of these provisions enable assistance to the courts of "prescribed countries", for example those listed as follows:

- Section 581(2)(a) of the Corporations Law and section 29(5)(b) of the Bankruptcy Act (Australia): the Bailiwick of Jersey, Canada, the Independent State of Papua New Guinea, Malaysia, New Zealand, the Republic of Singapore, Switzerland, the United Kingdom, the United States of America.

- Section 426 of the Insolvency Act 1986 (UK): Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, the Republic of Ireland, Malaysia, Montserrat, New Zealand, St Helena, South Africa, Turks and Caicos Islands, Tuvalu, Virgin Islands.

26. It should be noted that while the description of these provisions as "unilateral" is technically correct, it is the administrative practice in, for example, the United Kingdom, to add countries to the prescribed list on the basis that their insolvency regime is broadly compatible with that of the prescribing country, and that reciprocal provisions are either in place or will be introduced.

Ad Hoc Protocols

27. A recent and successful development has been the development of the "ad hoc protocol". Under this approach, the courts of two states having primary jurisdiction over an insolvency (by reason of substantial business activities having been conducted in each jurisdiction) are requested to approve an ad hoc protocol, agreed to by the parties, which regulates various aspects of the administration of the cross-border insolvency. Limitations of this approach are that it must by its nature be individually tailored to the particular circumstances, and that its utility depends on the legal capacity and judicial willingness of each court system involved.

INTERNATIONAL INITIATIVES

28. The European Community Convention on Insolvency Proceedings, which was opened for signature by member states on 25 November 1995, comprises a primary source of inspiration in terms of possible approaches to cross-border insolvency problems. However, only members of the European Community can become parties to the Convention and it is therefore of limited practical use to the majority of Commonwealth States.

29. Of more immediate interest is the ongoing United Nations Commission on International Trade Law (UNCITRAL) project to develop a draft model legislative framework designed to facilitate improved international cooperation and coordination in dealing with cases of cross-border insolvency. The International Association of Insolvency Practitioners (INSOL) and the International Bar Association are both contributing substantially to this undertaking. The UNCITRAL Secretariat has contributed a paper ("International Cooperation on Cross-Border Insolvency Issues", LMM(96)26) which describes the project in detail. Attached to that paper is the latest draft of the proposed model legislation which has been prepared for consideration by an intergovernmental working group in New York in April 1996. The UNCITRAL Secretariat has

indicated that a Commonwealth Secretariat input to this process would be welcome, to the extent that this would add to the already substantial contribution of Commonwealth states: Australia, Botswana, Cameroon, India, Kenya, Singapore, the United Kingdom and the United Republic of Tanzania are all members of the working group. Nigeria is also a member of the working group, although its membership in the Commonwealth is currently suspended. The working group totals 36 states, and participation is open to and solicited from all member states of the United Nations.

OPTIONS FOR COMMONWEALTH ACTION

30. Options for Commonwealth action include the following:

(a) As a preliminary measure, a working group could be set up to ascertain the nature and extent of problems experienced by Commonwealth states in relation to cross-border insolvencies, and to assess the efficacy of national laws in addressing these problems. The information gathered in this exercise could be used in the process of developing an independent Commonwealth initiative, and/or fed into the work being undertaken by UNCITRAL. If the latter - as is recommended under option (c) - states would need to act promptly as the UNCITRAL project is well under way.

(b) Measures could be taken to improve the efficacy of existing Commonwealth recognition legislation, short of amendment. In particular, Commonwealth States could be advised of the criteria for being added to the list of "prescribed countries" for the purposes of assistance and recognition in those States which have the enabling legislation. However, as the existence of reciprocal provisions in the State seeking to be added to the prescribed list is likely to be one of these criteria, this may simply point to the necessity of option (c).

(c) Existing recognition provisions could be improved by amendment, and provisions introduced where they do not already exist (which appears to be the case in the majority of Commonwealth States), on the basis of an agreed model law.

This model law could be developed by way of an independent Commonwealth initiative. Alternatively the UNCITRAL draft provisions could be used as the preferred model for national legislation. An independent Commonwealth initiative probably makes little sense because it would:

- require considerable resources
- be likely to duplicate work done by UNCITRAL
- develop solutions which may only promote cooperation in respect of cross-border insolvencies between Commonwealth States. In contrast the UNCITRAL project, which has drawn on considerable international expertise and broad representation base of , addresses problems arising between jurisdictions with quite different legal systems and has an active membership which represents that diversity

It is therefore suggested that the most sensible course is for active Commonwealth participation in the UNCITRAL process, to the extent that this will add to the contribution already made by Commonwealth states. Those Commonwealth states which are not members of the working group may wish to have their views co-ordinated and expressed through representation by the Secretariat, following or in conjunction with the intra-Commonwealth projects suggested under options (a) and (b), above.

(d) States may wish to consider whether the specific topic of cross-border insolvency raises a wider issue: whether there is a need for Commonwealth assistance in revising and updating insolvency laws in general. This may be justified by the economic importance of insolvency law, noted above at paragraph 1.

March 1996

OVERVIEW OF INSOLVENCY PROCEEDINGS

A variety of tasks must typically be performed in the course of an insolvency proceeding. What these will actually be and who performs them will depend primarily on the nature of the particular proceeding - different types are noted in Appendix II. The following lists the types of tasks which commonly arise, selected from a variety of insolvency proceedings:

- initiation of the insolvency proceeding. This might be achieved by means of court order on application, or by operation of law following certain actions which, at least initially, do not require court involvement (though the court may have jurisdiction)
- identification and location of locate the debtor's assets
- calling in and liquidation of the assets
- reversal of voidable transactions which occurred prior to the insolvency proceeding
- defending claims against the debtor's estate and challenges to the administration of the insolvency
- reporting to the relevant authority certain criminal or tortious activities of the debtor, of the debtor's agents, and/or of those dealing with the debtor, or to initiate proceedings in respect of the same
- identification of creditors and the extent, validity and priority of their claims, and the making of distributions accordingly
- compromising with creditors or negotiating schemes of arrangement, perhaps in the course of restructuring and rescuing a business
- bringing the insolvency proceeding to an orderly conclusion.

The administrator is likely to posses a range of powers sufficient to perform most of the tasks listed above. Most of these powers can be exercised without court sanction. However, court involvement might be necessary to:

- determine that a transaction is voidable and that assets should be restored to the debtor's estate
- enable the administrator to proceed against certain persons in respect of civil or (more rarely) criminal liability
- determine ownership or possession of assets where this is disputed
- permit an administrator to deal with certain types of property, for example property subject to security (under those regimes which do not permit property subject to a security to be realised by the security holder independent of an insolvency proceeding)
- determine the administrator's remuneration
- enforce the administrator's powers in the absence of compliance
- formally end the insolvency proceeding and/or discharge the administrator's liability

IMPROVING COOPERATION IN CROSS-BORDER INSOLVENCIES: ISSUES TO BE ADDRESSED

A model law or convention (and thus national legislation prepared in accordance with it) which seeks to promote cooperation in cross-border insolvency would need to address the following issues, among others.

Recognition

The following section considers the issues relevant to:

- the recognition of the existence and/or legitimacy of a person (in most cases the FIA) or thing (the FIP itself or the foreign court which has jurisdiction over it); and

- the consequences which flow from recognition

(i) *Connecting factors*

What connecting factor must exist between the debtor and the requested State to justify recognition? Possibilities include domicile, habitual residence, place of registered office, principal place of business, centre of the debtor's main interests, location of assets. The "prescribed list" approach (see paragraph 25 of the main paper) goes some way to overcoming this problem, though connecting factors may continue to be relevant if the court is required to exercise its discretion in deciding whether, and to what extent, to assist requests from prescribed countries.

(ii) *Definition of "debtor"*

There are differing criteria under national laws concerning the status of persons who may be subject to insolvency proceedings. In some countries, a debtor could be a natural person, a corporation, a partnership, or some other form of business or not-for-profit enterprise. However, the insolvency laws of other countries are more restrictive, not applying for example to natural persons or to non-traders. Should a country be required to recognise insolvency proceedings which apply to categories of persons who cannot be the subject of insolvency proceedings under its own laws? If yes, what law would apply to the property of that person if there was no comparable insolvency law to apply?

(iii) *What forms of insolvency proceeding should be recognised?*

It is fundamental that recognition must only follow from the fact that insolvency proceedings have been lawfully commenced and conducted in the jurisdiction of State A. However, what forms of insolvency proceedings should be recognised? Any definition of "insolvency proceeding" formulated for the purposes of a model law or convention would have to take account of the following issues:

(a) Must the debtor be insolvent or approaching insolvency? This is not a prerequisite to the commencement of some rehabilitation proceedings, nor, of course, to commencement of a solvent liquidation. It has been suggested that the latter is an inappropriate subject of recognition, as problems concerned with the payment of debts to creditors rarely arise.

(b) Insolvency proceedings brought about by a formal court or judicial process; by executive action pursuant to statute; or by formal debtor-initiated action pursuant to statute and subject to court intervention, may in principle be considered uncontentious candidates for recognition.

However:

- some jurisdictions limit recognition to an FIP which qualifies as an insolvency proceeding according to the law of the forum.

- informal insolvency proceedings based purely on private contract and lacking statutory sanction or judicial supervision are unlikely to give a local court the comfort it needs to recognise a foreign proceeding. A receivership represents a more ambiguous case. It involves the enforcement of a contractual right for the benefit of one or a small number of creditors only, yet is commonly regulated to at least some extent by statute.

(iv) *Who should be recognised?*

It has been suggested that, if the principal purpose of obtaining recognition is to ensure that the FIA seeking recognition gains control of the business affairs and/or the assets of the debtor in State B, then that FIA must as a prerequisite to recognition possess those same powers in State A. Furthermore, these powers should derive from judicial order or statute.

Further issues are:

- should recognition be granted to those not coming within the category of "independent administrators" (such as are appointed under most insolvency procedures)? An example would be a "debtor in possession" who continues to manage the business, subject to court supervision.

- should a state which licenses insolvency practitioners be required to recognise a FIA from a regime which does not have a licensing regime, or at least not according to equivalent criteria?

(v) *What should be the effects of recognition?*

Mere recognition of the FIA and/or of the FIP itself, may not suffice without further measures. For example, there is likely to be an urgent need to prohibit creditors, automatically upon recognition or by court order, from disposing of the assets located in the state in which recognition has been sought and obtained. Further orders may be needed in relation, for example, to the disposal of assets.

There are several aspects to the general issue of the effects of recognition, including the following.

Powers of the court

It has been suggested that, as a general principle, the result of recognition should be that such cooperation, aid and assistance should be given as is not inconsistent with the law of the country in which recognition is sought. In particular, it would be necessary for a court in State B to have the following powers:

- to make a formal declaration of recognition

- to make interim or holding orders to preserve the status quo and to protect the business interests and assets of the debtor

- to grant varied types of relief and to join and summon parties as necessary

Effect on the debtor and creditors

Should the debtor be disinvested as a result of recognition? If so, in whom should the local assets vest? What rights should creditors with a claim to those local assets possess? This latter question is sufficiently important and complex to merit its own section below ((vi) "Rights of local creditors").

Powers of the FIA

What powers should the FIA have - all of those needed to perform the tasks listed in Appendix I? Should they be shared with (or conferred solely upon) the court of State B and/or a local administrator appointed in State B?

Sources of those powers might include one, both or all of the following:

- the law of State A;

- the law of State B in respect of the equivalent insolvency proceeding;

- orders of the court in State A or State B.

Mechanism for determining the effects of recognition

There are a number of alternative mechanisms for determining the effects of recognition:

- provision of an exhaustive list of all the consequences of recognition

- the effects of the FIP are imported in their entirety into the recognising State (subject perhaps to enumerated exceptions)

- the insolvency effects of the FIP are converted into the equivalent effects under the insolvency laws of State B

- the choice of law is left to the recognising court (perhaps in regard to the rules of private international law)

- the court is given the discretion to decide the effects (in accordance perhaps with prescribed guidelines)

(vi) *Rights of local creditors and secondary insolvency proceedings*

It is probably uncontentious to suggest that local creditors should at the very least be permitted standing in the ancillary FIP. However, what should their rights in this proceeding be? Should they even be permitted to open a secondary insolvency proceeding, and if so, in what circumstances and (again) with what rights? More specifically:

- Should local creditors be notified of, and given the right to oppose, an application for recognition? The answer may depend on whether the fact of recognition and consequences of recognition (for example an

automatic stay on creditors' rights) are determined at the same time. Appropriate rules would need to ensure that any permitted creditor challenge was dealt with expeditiously.

Following or pending recognition, should there be a complete stay on creditors' rights to proceed against the debtors' assets (immediately or at a later date); should their rights in this regard be left untouched; or should the rights of some creditors (eg those holding a security interest) to proceed be left untouched while others are barred from taking action? (This can be treated as a different issue from the ranking of local creditors' claims in an eventual distribution (discussed below), though in reality this may be determined by their right to bring separate proceedings and the relation of those separate proceedings to the FIP).

Should the fact of the FIP remove the need to prove insolvency as a prerequisite to the opening of a secondary insolvency proceeding? Should permission to open a secondary insolvency proceeding be limited to, for example, those cases where the debtor has an establishment in State B (not just assets)?

Should the opening of a secondary insolvency proceeding block entirely the recognition of a FIP, or freeze the FIP if it has already been recognised?

Which forum's law will govern the ranking of claims? Where will local creditors come in the "pecking order"? More specifically:

will local creditors have "first cut" at the proceeds of local assets or will these assets be added to the FIP pool for the benefit of all creditors?

will claims which are preferential under the law of State B, for example employee and revenue claims, be given priority?

can security interests over local assets which have been created in respect of business activity in State B be enforced in priority to security interests over local assets which have been created in respect business activities in another jurisdiction?

Should the answer to these various questions differ depending on whether these rights are pursued:

- in an ancillary or secondary insolvency proceeding?

- by creditors based in State B? (This was not made a component of the definition of "local creditor" in paragraph 6 of the main paper).

(vii) *Should recognition be mandatory (ie automatic on certain criteria being met) or discretionary?*

It has been argued that, once the elements contained in a definition of "insolvency proceeding" have been satisfied, recognition should follow with a minimum of discretion allowed to the decision maker (usually a judge). This would enhance predictability and certainty. The price would be inflexibility and possible resistance from a judiciary accustomed to the considerable discretion which is a feature of the common law tradition - a discretion which, typically, is exercised responsibly.

The approach in each jurisdiction is likely to depend on the compatibility of the respective insolvency laws of the countries involved. This is reflected in the unilateral recognition legislation of Australia (Corporations Law section 580) which requires mandatory recognition of an insolvency proceeding if it has originated in a prescribed country. Generally speaking, the insolvency law regimes of these "prescribed countries" are based on similar principles. For these countries, recognition is highly predictable. For non-prescribed countries, in contrast, the Australian legislation requires a discretionary approach and provides no guidelines for the exercise of this discretion. This appears to render the outcome much less predictable.

As a general point, the mandatory approach recognition may be preferable where the act of recognition is distinct from acts giving effect to recognition, for example the granting of enforcement orders or otherwise providing assistance with respect to the FIP.

Access

What procedures should be employed to obtain recognition? There are three principal methods:

(i) through formal diplomatic channels. This is seldom fast enough and is not considered further here.

(ii) through the judicial process. This requires a request to be made to the court of State B, in some states via a letter of request or similar instrument issued by a court of

State A. This latter requirement provides a useful filter and a measure of reassurance to the court of State B that the proceedings are properly founded and that the request is necessary. The judicial process is considered by some to offer greater protection, speed, efficiency and certainty. Direct contact of this type between courts would typically require an agreement between the States involved.

(iii) through the statutory reciprocity approach. This comprises filing a prescribed form with a relevant administrative agency, or filing a judgment or order with the relevant court. Recognition follows and may be used to base proceedings, though some judicial or quasi-judicial process will be needed for assistance. Existing legislation which provides for this approach (including exequatur statutes) could be improved by adding, where necessary, provisions which recognise the distinct nature of collective insolvency proceedings.

Judicial cooperation

(i) *Ad hoc protocol*

The International Bar Association is currently developing a model for ad hoc protocols of the kind noted at paragraph 27 of the main paper, in the form of a "Cross-Border Insolvency Concordat". The purpose of the Concordat is to suggest rules that the parties or courts could adopt to deal with issues such as designation of the administrative forum, application of that forum's priority rules, rules for cases in which there is more than one administrative forum, and designation of applicable rules for avoidance of transfers of assets which took place in the period preceding the insolvency.

(ii) *Judicial communication*

Communications between judges may be very helpful for the purpose of enabling them to obtain accurate information and to coordinate their actions, proceedings and orders. However, communications of this kind can be problematic in legal systems not accustomed to such initiatives, and may raise concerns in relation to procedural safeguards for the parties. It may help to give parties:

- notice of a forthcoming communication;
- the right to be present during the communication;
- a record of the communication;
- the right to agree to communication through a third party intermediary.

(iii) *Co-operation between administrators*

Cooperation would be enhanced if administrators appointed in a FIP and in a secondary insolvency proceeding had a duty to communicate any information which may be relevant to the other proceeding (subject to necessary limits imposed by eg confidentiality requirements and by the duties of the administrator).

RECOGNITION/ASSISTANCE PROVISIONS: SELECTED STATUTES

AUSTRALIA

DIVISION 9[1] - CO-OPERATION BETWEEN AUSTRALIAN AND FOREIGN COURTS IN EXTERNAL ADMINISTRATION MATTERS

Interpretation

580 In this Division:

"external administration matter" means a matter relating to:
- (a) winding up, under this Chapter, a company or a Part 5.7 body;
- (b) winding up, outside Australia, a body corporate or a Part 5.7 body; or
- (c) the insolvency of a body corporate or of a Part 5.7 body;

"prescribed country" means:
- (a) a country prescribed for the purposes of this definition; or
- (b) a colony, overseas territory or protectorate of a country so prescribed.

Courts to act in aid of each other

581 (1) **[Courts having jurisdiction under local Corporations Law]** All courts having jurisdiction in matters arising under the Corporations Law of this jurisdiction, the Judges of those courts and the officers of, or under the control of, those courts must severally act in aid of, and to be auxiliary to,
- (a) each other; and
- (b) all courts having jurisdiction in matters arising under corresponding laws, the Judges of those courts and the officers of, or under the control of, those courts; in all external administration matters.

581 (2) **[Where excluded Territories and prescribed and other countries]** In all external administration matters, the Court:
- (a) shall act in aid of, and be auxiliary to, the courts of the excluded Territories, and of prescribed countries, that have jurisdiction in external administration matters; and
- (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.

581 (3) **[Powers upon court's request for aid]** Where a letter of request from a court of an excluded Territory, or of a country other than Australia, requesting aid in an external administration matter is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

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[1]Corporations Law

581 (4) [Power to request a court's aid] The Court may request a court of an excluded Territory, or of a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter.

SECTION 29[2] COURTS TO ACT IN AID OF EACH OTHER

29(1) [All Courts with jurisdiction] All Courts having jurisdiction under this Act, the Judges of those Courts and the officers of or under the control of those Courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy.

29(2) [Aid to external Territories, other countries] In all matters of bankruptcy, the Court

(a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and
(b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

29(3) [Request for aid] Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

29(4) [Court may request aid] The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy.

29(5) ["Prescribed Country"] In this section, "prescribed country" means -
(a) the United Kingdom, Canada and New Zealand;
(b) a country prescribed for the purposes of this subsection; and
(c) a colony, overseas territory or protectorate of a country specified in paragraph (a) or of a country so prescribed.

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[2]Bankruptcy Act

UNITED KINGDOM

426.[1] Co-operation between courts exercising jurisdiction in relation to insolvency

(1) An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part.

(2) However, without prejudice to the following provisions of this section, nothing in subsection (1) requires a court in any part of the United Kingdom to enforce, in relation to property situated in that part, any order made by a court in any other part of the United Kingdom.

(3) The Secretary of State, with the concurrence in relation to property situated in England and Wales of the Lord Chancellor, may by order make provision for securing that a trustee or assignee under the insolvency law of any part of the United Kingdom has, with such modifications as may be specified in the order, the same rights in relation to any property situated in another part of the United Kingdom as he would have in the corresponding circumstances if he were a trustee or assignee under the insolvency law of that other part.

(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

(6) Where a person who is a trustee or assignee under the insolvency law of any part of the United Kingdom claims property situated in any other part of the United Kingdom (whether by virtue of an order under subsection (3) or otherwise), the submission of that claim to the court exercising jurisdiction in relation to insolvency law in that other part shall be treated in the same manner as a request made by a court for the purpose of subsection (4).

(7) Section 38 of the Criminal Law Act 1977 (execution of warrant of arrest throughout the United Kingdom) applies to a warrant which, in exercise of any jurisdiction in relation to insolvency law, is issued in any part of the United Kingdom for the arrest of a person as it applies to a warrant issued in that part of the United Kingdom for the arrest of a person charged with an offence.

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[1]Insolvency Act 1986

(8) Without prejudice to any power to make rules of court, any power to make provision by subordinate legislation for the purpose of giving effect in relation to companies or individuals to the insolvency law of any part of the United Kingdom includes power to make provision for the purpose of giving effect in that part to any provision made by or under the preceding provisions of this section.

(9) An order under subsection (3) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(10) In this section "insolvency law" means –

(a) in relation to England and Wales, provision made by or under this Act or sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company Directors Disqualification Act 1986 and extending to England and Wales.

(b) in relation to Scotland, provision extending to Scotland and made by or under this Act, sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company Directors Disqualification Act 1986, Part XVIII of the Companies Act or the Bankruptcy (Scotland) Act 1985;

(c) in relation to Northern Ireland, provision made by or under the Insolvency (Northern Ireland) Order 1989 or Pt. II of the Companies (Northern Ireland) Order 1989;

(d) in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of the foregoing paragraphs;

and references in this subsection to any enactment include, in relation to any time before the coming into force of that enactment the corresponding enactment in force at that time.

(11) In this section "relevant country or territory" means –

(a) any of the Channel Islands or the Isle of Man, or

(b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument.

(12) In the application of this section to Northern Ireland –

(a) for any reference to the Secretary of State there is substituted a reference to the Department of Economic Development in Northern Ireland;

(b) in subsection (3) for the words "another part of the United Kingdom" and the words "that other part" there is substituted the words "Northern Ireland";

(c) for subsection (9) there is substituted the following subsection –

"(9) An order made under subsection (3) by the Department of Economic Development in Northern Ireland shall be a statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 and shall be subject to negative resolution within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954".

UNITED STATES

§ 101.[1] Definitions

(23) "foreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

(24) "foreign representative" means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.

§ 304. Cases ancillary to foreign proceedings

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

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

(1) enjoin the commencement or continuation of -

(A) any action against -

(i) a debtor with respect to property involved in such foreign proceeding;

or

(ii) such property; or

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

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

(3) order other appropriate relief.

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

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[1]United States Bankruptcy Code (title 11 of the United States Code)

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

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

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

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

(5) comity;-and

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

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if -

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2) (A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

§ 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303, 304, or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303, 304, or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.