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Cross-Border Insolvency

The 1996 Denning Lecture

by

Rt Hon The Lord Hoffmann

Middle Temple Hall

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Cross-border insolvency is not perhaps a topic which seems likely to stir the passions. As a subject for a Denning Lecture, it cannot really compete with the questions of whether we should have a Bill of Rights or the role of the Take-Over Panel in late capitalist society. I chose it as a subject for two personal reasons which might seem inadequate; almost frivolous. The first was that as a result of the accident of having been the Companies Judge on a morning in December 1990 when an application was made to appoint administrators to some of the Maxwell companies, I obtained some personal experience of insolvency proceedings which had to straddle different jurisdictions. The second is that the European Communities Select Committee of the House of Lords has recently produced a report on the draft European Insolvency Convention and I had the honour to be chairman of the sub-committee which drafted the report. These are my rather slight qualifications for speaking on a topic which is actually of very considerable practical importance.

Insolvency laws play an important part in the economic life of the community in a number of different ways. First, people who provide credit to a business, whether as long or short-term lenders or as traders, want to know what will happen if the worst comes to the worst and the business fails. They want to know, for example, whether their fixed or floating charges will be effective. They want to know whether the Government or some other creditor will be given a preference which enables it to scoop the remaining pool. They want to know whether they can set off what they owe the debtor against what the debtor owes them and prove for the balance or whether they will have to pay up in full and receive only a dividend for their claim. From the point of view of the lenders, it often does not particularly matter what the answer is. If their security is more vulnerable, they will simply extend less credit or charge more for their loans. If they cannot net liabilities against each other, they insist on more frequent settlements; and so on. But from the lender's point of view, the important thing is that the rules, whatever they are, should be certain and predictable. On the other hand, from the point of view of the community as a whole, the rules do matter. If greater security can be offered, more will be lent and at lower rates of interest. That is why one of the greatest inventions of Victorian equity lawyers was the floating charge. It enabled a company to offer its entire assets and undertaking as security for fixed debt or banking facilities and at the same time to trade freely with those assets in the ordinary course of its business. No other legal system allowed borrowers to have their cake and eat it in this way. And the consequence for the development of the Victorian economy was that businesses could borrow more and at lower rates than they would otherwise have done.

Secondly, insolvency rules are important in providing a way in which individuals can release themselves from the burden of failure and debt and make a fresh start. In the United Kingdom, this function of the insolvency law has only in recent years come to be regarded as important. Before then, the law was concerned almost entirely with the division of the bankrupt's estate among his creditors and very little with what happened to the bankrupt himself. Indeed, bankruptcy was regarded as a symptom of moral weakness if not downright dishonesty and the policy of the law was that the bankrupt should be made to feel his degraded status. The attitude in some other countries, such as the United States, was quite different. Insolvency law in the United States has always been much more sympathetic to the debtor. It reflected a different culture, in which everyone was entitled to a fresh start. But this aspect of insolvency law concerns individuals rather than companies and nowadays the bankruptcy of an individual seldom has international implications in the way in which the insolvency of a company has. So I pass on to a third reason for the importance of insolvency laws, which has in recent years become of much greater importance.

The historic function of insolvency law in this country has been the realisation and equitable distribution of the debtor's estate for the benefit of creditors. When the debtor was carrying on a business, this generally meant winding it up, dismissing the employees and disposing of the assets. Although a liquidator had power to carry on the business with a view to selling as a going concern, it would be unusual for this power to be exercised. It was more common in the case of a receiver appointed under a floating charge. But even in such cases, it did not happen very often. Today it is much more common for insolvency practitioners to start by considering whether anything can be done to save the business as an organisational unit. It is now far more common to find that although a company is insolvent in the sense of being unable to pay its debts, its business may be perfectly healthy and profitable. The company's problem may be one of timing; perhaps it was insufficiently capitalised, so that even though the business is profitable, it is unable to finance a period of negative cash flow. Or it may be part of a conglomerate group in which it is profitable but other companies are not, so that through cross-guarantees it becomes insolvent on account of the failure of others. These are standard cases in which everyone stands to gain from the business being sold as a going concern: the creditors gain, because higher value is realised than if the business is broken up; employees gain because their jobs may be preserved and the community gains because a unit of profitable economic enterprise is not destroyed.

Insolvency laws can help to save viable businesses by providing an efficient and speedy procedure for holding the assets, employees and goodwill together until a buyer can be found. I emphasise the necessity of speed because once a business is known to be insolvent, its value drains away at an alarming rate with every moment of uncertainty and delay. Customers who do not know whether the company will be carrying on business will shift their orders to competitors; key employees will look for other jobs; suppliers will withhold deliveries and banks will be cautious about advancing interim finance. A cloud of doom will hover over the company until the moment at which the deal is done and its future survival is assured. In English law, receivership has traditionally provided the mechanism for swift action by an insolvency practitioner. The debenture enables him to exercise the widest possible powers to take charge of the whole business, protected from claims by other creditors. He can act as swiftly as the circumstances of the case require. The administrator, who was invented by the Insolvency Act 1986, is in essence a court-appointed receiver, with very similar powers; the only difference is that he is responsible to the whole body of creditors rather than to a single debenture-holder. But the value of administration in facilitating the preservation of a business was shown by the recent Barings Bank collapse, in which administrators were appointed on a Sunday night and had sold the bank, lock stock and barrel, by nine days later.

In summary, therefore, the main purposes of insolvency laws are to provide a predictable and equitable distribution of assets in the event of a liquidation and to facilitate the preservation of insolvent but viable businesses. I want to consider next how these objects can be achieved in a case in which the insolvency has an international element: for example, when the debtor is in one country and there are assets or creditors in another. It can be seen at once that the injection of an international element into insolvency is potentially threatening to both the objects which I have described. English law cannot require that assets outside the jurisdiction be distributed according to the English rules of priority. Nor can English law confer upon a liquidator, receiver or administrator the power to take charge of assets of a business which are situated in another country. With the internationalisation of business, these national boundaries to insolvency law have become more and more important. Assets, especially in the form of money, can easily be moved from one country to another. The attempts of the administrators of Polly Peck plc to recover money transferred by the company to Northern Cyprus are eloquent testimony to the obstacles which national boundaries can place in the way of co-ordinated insolvency proceedings. Even in countries in which the courts are less partisan than Northern Cyprus, differences in substantive bankruptcy laws can create unpredictability. English law, for example, regards the rule of set-off on bankruptcy, that is, the rule which requires that cross-claims be netted off against each other, as elementary justice. Not so everyone else. The right to set off is a form of security and some countries insist that the insolvent's debtors should pay in full and then prove in the bankruptcy for whatever dividend they can get. The possibility that netting may depend upon where the company has decided to bank its money creates uncertainty and risk which has to be compensated by higher returns to the lender. The preservation of a business with assets in different countries also requires co-operation between the courts or responsible officers in those countries. A recent example of what happens when such co-operation is not forthcoming was the insolvency of the English fork-lift truck manufacturer, Lancer Boss. The company had a subsidiary in Germany which traded with its parent company so that the two companies were in practice a single business. Greater value could be obtained from selling both companies together than from selling both separately. But the German liquidator, acting in the interests of the German banks who were the principal local creditors, refused to co-operate in an attempt to sell the business as a whole. The amount which could be realised by selling the German company separately was sufficient to pay off the German creditors and it was therefore sold at once to a German competitor. The English creditors were left with a shortfall.

Examples like this might suggest that the solution lay in some form of international convention by which insolvency proceedings in one country would be given recognition in another, so that everything could proceed in sweetness and harmony. Judges faced with cross-border problems have often said that such a convention was the only answer to the chaos and uncertainty with which they seemed to be faced. In the *Paramount Airways* case [1992] 3 All E.R. 1, 11, where the question was whether the provisions of the Insolvency Act 1986 for setting aside transactions at an undervalue could be invoked against a non-resident, Sir Donald Nicholls V.-C. said that there was "a crying need for an international insolvency convention." Lord Browne-Wilkinson had said the same in the *BCCI* case. But the cry has not yet been answered. Why not ?

One might have expected that at least within the European Union, such a convention could be agreed. Article 220 of the Treaty of Rome requires Member States to enter into negotiations with each other to secure for the benefit of their nationals "the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals." The Brussels Convention of 1968 was negotiated pursuant to this Article. It deals comprehensively with jurisdiction and recognition in civil and commercial matters and seems to have worked with relatively few problems. But bankruptcy was excluded from the Brussels Convention. I shall return later to the tortuous history which has led after more than 30 years of negotiation to the modest draft Insolvency Convention which is now open for signature. But why has it been so difficult ?

The first point to be made is that there is a great difference between a convention on jurisdiction and recognition of judgments in ordinary litigation on the one hand and in bankruptcy cases on the other. The Brussels Convention is concerned, first, with deciding in which court the case is going to be tried and secondly, with the enforcement of the judgment which that court has given. It is not at all concerned with the substantive law to be applied to the dispute: that is a matter for the conflicts rules of the country in which the action is heard. So jurisdiction should not affect the outcome of the case. If the parties have made a contract governed by English law, that law should be applied whether the case is tried in London or in Paris. And once the issue in dispute between the parties has been decided, there are strong incentives to limit the circumstances in which it can be tried again in another jurisdiction. Bankruptcy, on the other hand, is very different. First, an English court has no jurisdiction to apply any insolvency law other than the Insolvency Act 1986. Jurisdiction therefore also determines the choice of law. There are no separate choice of law rules. For example, if an English liquidator applies to set aside a payment by an insolvent company as a voidable preference, the court cannot decide that because the transaction had a more substantial connection with New York than with England, it will instead apply the equivalent provisions of the US Bankruptcy Code. There are no conflict of law rules by which US law can be applied in an English court. So recognition of an order made in another country necessarily involves acceptance of the law of that country. Secondly, administration in bankruptcy does not primarily involve deciding disputes and issues between parties, so that one can say that once that issue has\been decided in one court, it should not be tried again in another. There are occasionally such disputes to be decided, but insolvency proceedings are for the most part administrative in nature, involving the collection of assets, their disposal and the distribution of the proceeds. One of the principal forms of English insolvency proceedings, receivership, does not necessarily involve any participation by the court at all. The receiver is appointed entirely out of court and his statutory obligations consist of making returns to the Companies Registry. The extra-judicial nature of the receiver has made it difficult to get receivership recognised as insolvency proceedings for the purposes of the European or any other insolvency convention. But the similarity in the functions of the receiver and the court-appointed administrator also shows how different court-based insolvency proceedings are from ordinary litigation.

I can sum up the difference between recognition of ordinary judgment and the recognition of insolvency proceedings in very general terms by saying that whereas in the former case one is concerned largely with the procedural competence of a foreign court, in the latter one is concerned with the substantive effect of its laws. The court asked to recognise insolvency proceedings in another jurisdiction is being asked to give extra-territorial effect to the laws of that country. The question of extra-territoriality is invariably one which arouses strong feelings. Why, for example, should an English court which controls the debtor's English assets, sacrifice the rights of English creditors by allowing those assets to be taken by a foreign bankruptcy trustee and administered according to a foreign system of law ?

One possible answer is that reciprocal recognition may sacrifice the interests of English creditors in one case but allow them to be protected in another, so that, looking at the question overall, what is lost on the swings is gained on the roundabouts. But this argument depends very much upon having the right sort of economy. A trading nation like England has always had more to gain than to lose from mutual recognition of insolvency proceedings. On the other hand, an underdeveloped country with few enterprises trading overseas will have very little to gain. It is better off keeping the assets of the bankrupt English merchant in the local warehouse and distribute their proceeds among the local creditors. Reciprocal recognition of the rights of its own trustee to assets in England is of little use because it will have few if any merchants with assets in England anyway. In the nineteenth century therefore, England adopted what was called a universalist theory of bankruptcy. This meant that it regarded the title of the trustee of an English domiciled bankrupt to moveable assets as entitled to recognition anywhere in the world and gave reciprocal recognition to the trustees of foreign domiciled bankrupts. This clearly suited English creditors of an English merchant who had goods in Bombay or Rio de Janeiro. It may have been less advantageous to the Indian or Argentinean creditors who would have to prove in the English bankruptcy. For this reason, although England was able to impose its universalism upon the territories of the

Empire, other countries like the nineteenth century United States, South America and Japan took an obstinately territorial view of bankruptcy. They refused to allow that a foreign bankruptcy had any effect upon assets in their jurisdictions and gave no recognition to a foreign trustee.

Even between countries where the economic interests in mutual recognition may appear to be more equally balanced, there are wide differences in what might be called the insolvency culture; differences over the social and economic purposes of the insolvency law. England, as I mentioned, tends to look at the matter from a creditor's point of view. It shows great respect to the rights of secured creditors, pioneered the invention of a novel form of security in the floating charge and does not pay much regard to the interests of the holders of the equity in the business and the employees. Somewhere in the middle of the spectrum on which England is near the creditor-oriented end is the United States. It has a procedure under Chapter 11 of the Federal Bankruptcy Code which encourages the management of insolvent businesses to negotiate a compromise with their creditors, including secured creditors. It allows them to remain in control of the business during the period of negotiation, which can be very protracted and at the same time protects them against any execution or any other kind of proceedings by creditors. It gives the equity holders a negotiating position from which they can usually hope to emerge with something from the negotiation of a scheme which is conducted by lawyers under the active supervision of a Bankruptcy Judge. At the other end of the spectrum from England is France, which, true to its political traditions, concentrates heavily upon the preservation of the business in the interests of the employees and the French economy. Creditors take second place to these macro-economic considerations.

Co-operation between jurisdictions in bankruptcy matters is made difficult not only by differences in bankruptcy culture but also by the fact that judges are naturally cautious about recognising the effects of a foreign bankruptcy in a way which may prejudice local creditors. This is hardly surprising, because judges are not in a position to take a global view of the consequences of their decisions: they have to do justice to the litigants before them. It is only at the level of a governmentally negotiated convention that a swings and roundabouts approach can be taken. I can illustrate these difficulties by two fairly recent cases. In *Felixstowe Dock and Railway Co.* v. *U.S. Lines Inc.*[1] U.S. Lines Inc was a shipping company carrying on business all over the world. It owed money to the Felixstowe dock company and similar bodies in France and Holland. It had money in

[1] [1989] Q.B. 360.

a bank account in England and some assets in France. It filed a petition in New York under Chapter 11 in the United States Bankruptcy Code. Under U.S. law the effect was automatically to stay all proceedings against the company's assets all over the world. Commencement of such proceedings was punishable as a contempt by the U.S. court. Meanwhile, and until the negotiation of a compromise with creditors, the old management remained in charge occupying a fiduciary position as if they were administrators of their own company. This is the normal position in the United States. It strikes foreigners as rather odd because we are used to the idea that the persons responsible for the company's insolvency should be removed and make way for an independent trustee. In the United States, however, a trustee is appointed only when the management have been dishonest or grossly incompetent, on the ground that it is less expensive and disruptive to leave them in control. There is obviously much to be said on both sides. But the response of the Felixstowe Dock company was to obtain a *Mareva* injunction to restrain the company from moving its money out of England back to the United States. U.S. Lines applied to Hirst J. to discharge the injunction on the grounds that it was a violation of the world-wide automatic stay and that all the company's assets should be administered in accordance with the Chapter 11 re-organisation.

The judge refused to discharge the injunction and kept the assets in England. There has been a lot of criticism of this case, particularly in the United States. Hirst J. has been accused of insularity, not showing due comity to a foreign court and not understanding Chapter 11, in spite of being sent a long essay by the U.S. judge explaining in simple language how it worked. I do not think that these criticisms are fair. As a matter of U.S. law, the automatic stay operated world wide. But that was no reason why an English court should give it extra-territorial effect. Of course it is often perfectly sensible that the whole of a corporation's assets world wide should be dealt with under a single system of law. Not long after *Felixstowe* I heard a case myself in which a U.S. creditor of a U.S. corporation in Chapter 11 in Texas wanted a *Mareva* injunction against assets of the corporation in England. I refused the injunction, saying that fairness to all creditors required that he should participate in the reorganisation in Texas. But this was not the case in *Felixstowe*. The proposed scheme of reorganisation was that the assets removed from England would be used to keep U.S. Lines going in the United States but that it would withdraw from the European market. This meant that the Felixstowe Dock company would gain nothing from the reorganisation. Furthermore, it was clear that the French, who have a highly developed sense of their own national interest, were for similar reasons not going to allow any of the assets in France to be sent to the United States. The question of whether to discharge the injunction was a matter of discretion for the judge and in those particular circumstances, I am not surprised that he thought it would be unfair to the English creditors if they had to take their chance in the Chapter 11 reorganisation.

The *Felixstowe* case was thought at the time to represent a low-water mark in co-operation between the bankruptcy courts of the United Kingdom and the United States. A year or so later came the *Maxwell Communications Corporation* bankruptcy, which is often regarded as showing a welcome reversal in the attitudes of the British courts. I happened to be the judge in that case and I can only say that I did not regard myself as doing anything unusual or anything which Hirst J. would not have done. M.C.C. was a British company and most of its creditors were British banks. But most of its assets were in the United States in the form of subsidiary publishing companies. After a period of unsuccessful negotiation with its banks after the death of Mr Robert Maxwell, the company petitioned for an administration order in England. I made the order, but there was a dispute between the company and the banks over who should be appointed administrator. Both candidates were highly respectable accountants from huge international firms and I decided in favour of the banks' nominees simply on the ground that they had a running start because they had already put in thousands of person/hours investigating the company's affairs during the negotiations over the previous weeks. The company management did not like this and went off to New York to petition under Chapter 11. They invited the New York judge to appoint an Examiner, who is an officer of the court acting in effect as *amicus curiae*. They hoped that this would block the attempts of the English administrators to gain control of the U.S. assets. The judge appointed an Examiner for the different and perfectly proper reason that she wanted someone independent to advise her in how to run the Chapter 11 proceedings.

The English administrators, who hoped to be able to dispose of the U.S. subsidiaries as quickly as possible as going concerns, now found that they had to deal with the U.S. Examiner. This was something of a culture shock for them. The administrator, as I have said, is modelled on a receiver appointed to take complete control of the whole of the company's assets and business. He is used to going round to the offices or factory within an hour of his appointment and taking charge. He has full powers to do whatever he likes and although he is in theory the agent of the company, his duty even to provide information to the old management before the termination of the receivership is practically non-existent. He can employ the old management if he likes, but if he decides not to, he simply collects the keys of their cars and leaves them to go home on the bus. In *Maxwell* the administrators found that they had to deal with an Examiner who was responsible to a judge who in turn had to have regard to the various interest groups - secured creditors, unsecured creditors, stockholders - who jockey for position in any Chapter 11 proceedings. Even the old management, who would simply have been shown the door in England, had their leverage which enabled them to keep a place at the negotiating table.

The administrators therefore found that to get anything done - for example, to raise interim finance to keep the subsidiary companies going - required a great deal of expensive and time-consuming negotiation. So they negotiated an overarching agreement with the Examiner, which was rather grandly called the Protocol, which laid down general lines of demarcation for running the proceedings on both sides of the Atlantic with a view to avoiding delay and duplication of effort. The New York judge had encouraged both the negotiation of the Protocol and co-operation between the Examiner and the English administrators.

The Protocol was brought before me for approval. I think it took me about 20 minutes to read and approve it. I checked to see whether it contained anything which looked like an obvious mistake. Otherwise the chances are that I would have approved of whatever it said. I had appointed administrators and it was their duty to take charge of the business and collect the assets according to their professional judgment. They were eminent insolvency accountants who had an experience in the management of insolvent businesses which I certainly did not share. I would ordinarily therefore accept their judgment of the best way to go forward. So in this case, the administrators told me that they were having a difficult time in New York. Naturally they would have preferred simply to take charge of everything as they were used to doing. That would have been quicker and cheaper. But they had been advised that an attempt to terminate the Chapter 11 proceedings in New York would be expensive and delay matters without necessarily being successful. So they felt that the interests of creditors were best served by agreeing to the Protocol. In those circumstances, it is hardly surprising that I approved. It involved no conflict between the interests of English creditors and any principles of comity or internationalism.

There is an important difference between the *Felixstowe* case and the *Maxwell* case. In the former, no insolvency proceedings had been started in England. The court was being asked simply to hand over the assets to the debtor in possession, which may be regarded as the equivalent of an administrator under US law, although in fact it was the old company management, and leave the English creditors to take their chance in the Chapter 11 reorganisation. In *Maxwell,* the English creditors were represented by the administrators, who advised that co-operation with the US court and examiner was in the best interests of English creditors. English courts have always felt more comfortable about co-operation with foreign insolvency proceedings when there were already proceedings on foot in this country. As a general principle, the existence of insolvency proceedings in another country, even the country of the bankrupt's domicile or a company's principal place of business, has never precluded an English court from making a bankruptcy or winding-up order if that appeared to be in the interests of English creditors. The jurisdiction to make such orders is at present extremely wide: in the case of a winding-up order, there need not even be assets in this country. All that is necessary is that the order should be to someone's advantage: for example, because it will enable creditors to use the investigatory powers of the English court to discover what has happened to missing assets. The making of an order is a matter of discretion and a judge will refuse if he thinks that the interests of creditors are adequately protected in the foreign proceedings. But there is no doubt that his primarily concern will be with the interests of English creditors.

The attitudes of the courts in the United States are not very different. They have power under article 304 of the Bankruptcy Code to give assistance to foreign trustees and foreign courts. But the power is discretionary and requires them to take into account a number of factors, including the question of whether adequate protection will be given to creditors in the United States. The United States is unusual in having procedures for giving any assistance to foreign liquidators or bankruptcy trustees at all. I think that it is fair to say that in most countries they are simply not recognised. I asked an insolvency practitioner in Hong Kong recently what he did about trying to recover assets of an insolvent company in the People's Republic and he said that he did not bother. Quite recently, the United Nations Commission on International Trade Law (UNCITRAL) has taken up the question of recognition of foreign insolvency proceedings. It is trying to draft model legislative provisions for adoption by member States which will allow foreign liquidators or administrators to have *locus standi* in the courts and the ability to obtain at least a temporary stay on local proceedings which would hamper a rescue of the business or an orderly disposal of its assets as a whole. A draft proposal has been under consideration at a session in New York over the past two weeks.

This brings me to the draft European Convention; the current answer to the crying need identified by Sir Donald Nicholls V-C. in the *Paramount* case. The present status of the Convention is that it has been initialled on behalf of all member States of the European Union and opened for signature. It requires unanimity and has so far been signed by 13 member States. The two which have not yet signed are the United Kingdom and Ireland. That looks very promising, although it must be said that the Convention requires unanimity to come into effect. But before I describe how the Convention will work, I must say something about the 30 years or so of negotiations which preceded it. A draft was produced in the late 70's. It was a very ambitious scheme, which provided that the country in which the debtor's "centre of administration" was situated should have exclusive jurisdiction to declare the debtor bankrupt. The liquidator or trustee appointed by the court in that State would be entitled to administer all the assets throughout the European Community and all creditors would have to prove in a single bankruptcy, which would for the most part be regulated by the law of that State. So the scheme was that if, say, a French company with a factory in England became bankrupt, the bankruptcy would be in France, the French liquidator would be entitled to the assets and the English creditors would have to prove in France. This scheme was given a lukewarm recommendation by the House of Lords Select Committee on the European Communities, mostly on the grounds that it would seldom have any practical effect. The reason for this is something to which I shall return in connection with the new draft Convention, but it is briefly as follows. Individual bankrupts seldom have assets and creditors distributed over more than one Member State and corporations which have businesses in different States generally do so through subsidiary or associated companies. The Convention as originally drafted or as it stands today has no application to groups of companies, even if they amount in economic terms to a single business. So the scope of the original draft was thought to be very limited. Nevertheless, it proved completely unacceptable to most of the Member States. They were quite unwilling to allow assets of a bankrupt individual or corporation to be administered according to the law of some other country when there were domestic creditors, particularly when there were creditors such as the Government which under domestic law would have preferential claims. So the first draft as declared overambitious and rejected. The draughtsman were discouraged and for some years abandoned their efforts. A few years ago they resumed and the present Convention is a much more modest affair. No longer does it attempt to confer exclusive jurisdiction upon a single State. The proceedings in the State where the insolvent company has the "centre of its main interests" are designated the main proceedings. All other Member States are in the first instance obliged to recognise the orders of the court in which the main proceedings are taking place. The liquidator, administrator or other officer appointed by that court must be recognised and he may exercise in any Member State all the powers he has under the law of the State which appointed him. Most of the questions which arise in a bankruptcy will be determined by the law of the State in which the main proceedings take place. But this time there is nothing to prevent the commencement of insolvency proceedings in the courts of any other Member State in which corporation has what the Convention calls an "establishment". An establishment will most obviously mean a place of business, but the draft explanatory memorandum suggests that it will be very widely interpreted. Such secondary proceedings can be started by a creditor or by the liquidator or administrator in the main proceedings. If secondary proceedings are started in another State, they will apply only to assets situated within that State. In respect of those assets, however, the local law will apply to most of the issues which arise; the local creditors, including the State, will be entitled to preferences out of the local assets according to domestic law..

I can best explain how it is supposed to work by giving an example. Take an insolvent French company which is the subject of main proceedings in France. It has a factory in England and a bank account in Frankfurt. Employees at the English factory can, if they wish, start secondary proceedings in England. So can the Crown if it wants to claim arrears of PAYE. If they do, the English assets will be subject to the English law of insolvency and the Crown and the employees will get the preferential rights in those assets to which they are entitled in English law. If no one starts any secondary proceedings in Germany (and the mere presence of a bank account in Frankfurt would not seem to amount to an establishment sufficient to give jurisdiction to start such proceedings) then the German courts are obliged to give effect to the French bankruptcy and hand over the money to the French liquidator. If there are any German creditors, they must go and prove in France. English creditors, on the other hand, can all prove in the English proceedings and if the English assets are not sufficient, the English liquidator will hand over their claims to his French colleague.

The view of insolvency practitioners in Britain, as given in evidence to the House of Lords Committee, was that the Convention is likely to be helpful. It does mean that an insolvency practitioner who is appointed liquidator or administrator of a British company can obtain quick and cheap recognition of his position in all other Member States in which secondary proceedings have not been commenced and a minimum of co-operation from the court-appointed officers in those in which they have. On the other hand, as I have said, companies of any size which operate in more than one

Member State usually do so, not through branches but through locally incorporated subsidiaries or associated companies. The Convention has nothing to say about such a case except, for what its worth, the right of the liquidator of a parent company to be entitled to control its shareholding in a foreign subsidiary. So this immediately reduces the practical value of the Convention. If one goes back to the example of Lancer Boss plc, a British company with a German subsidiary, the Convention does nothing to help the administrator or liquidator of either company in trying to rescue them both as a going concern rather than breaking them up. As now, it will depend upon *ad hoc* negotiation between the insolvency practitioners in the two countries.

The general principles of the Convention are however to be welcomed. On the one hand, within the limits of its operation, it provides certainty. Recognition and co-operation follow as of right and do not have to be litigated or negotiated. On the other hand, it does not achieve certainty at the expense of sacrificing the interests of creditors in any country in which there are sufficient assets to count as an establishment. Such creditors are entitled to their own secondary proceedings and the operation of their own law. There are certain technical problems about the Convention which still need to be cleared up: for example, it has some rather ambiguous language about such matters as the effect of bankruptcy on contractual netting agreements, on floating charges and on market settlement systems. But this is not the place in which to discuss these rather dry matters. The overall conclusion is that the Convention will be an improvement upon what we have now.

And yet, what a modest improvement it is. When I asked one insolvency practitioner with great experience in the insolvency of multinational businesses what difference he thought it would make to his life, he said he had had many difficulties in trying to reorganise bankrupt enterprises but he could not say that high on the list was the absence of an international convention. The reason, I think, is the obstinately national character of bankruptcy proceedings which I see no way of eliminating. In this respect, bankruptcy has resemblances to competition laws, such as the anti-trust laws of the United States. In both cases one has laws which are, at least in part, designed to protect national economic interests but which in cross-border cases cannot be effectively applied unless they are also given some extra-territorial effect. These two features are a recipe for international conflict. And in cases in which there is a business to be saved, such conflicts can only cause loss to everyone.

What then is the answer ? In my view it is necessary to make a clear distinction between the power to deal with the assets and undertaking of a business and the rights and priorities of creditors in respect of the proceeds of that business. In the early stages of an insolvency, what matters is preserving the value of the assets without regard to which creditors may eventually receive the benefit of the proceeds of those assets. If the business can be saved and the assets preserved by swift action, that must be to the advantage of everyone. There will be time later to sort out the priorities in the proceeds. So, for example, in the case of an English company with a subsidiary in Germany carrying on a wholly integrated part of the business, what should matter is to decide at once how best to realise the business as a whole. The apportionment of the proceeds between the German and English creditors for distribution in accordance with their respective domestic systems can come later.

But the distinction between realisation and distribution is in practice not so clear cut. The attitude of the German banks in Lancer Boss was that it might well be advantageous to creditors as a whole to wait and see whether a buyer could be found for the group as a whole. On the other hand, why should they take the risk of waiting at all ? They would be fully covered by selling the German business at once. It therefore seems to me unlikely that we are going to achieve any general rule whereby one person will be able to take charge of a business operating in several countries even for the purposes of rescue or realisation. The only other solution is the *ad hoc* negotiation upon a case-by-case basis of arrangements to deal with the business of an insolvent company to maximum advantage. The only contribution which the law can make to this process is to confer the greatest possible discretion upon the representatives of the domestic creditors, such as the administrators, receivers or liquidators, to enable them to negotiate such arrangements. Fortunately, English law is already well equipped for this purpose. A receiver appointed under a floating charge has the widest possible powers which enable him to negotiate with foreign insolvency representatives and, if he can establish any *locus standi*, with foreign courts. The administrator, whose position has been deliberately modelled upon that of the receiver, has similar powers, subject to control by a creditors' meeting and the court. But, as the *Maxwell* case showed, the court will ordinarily be guided by the administrator in deciding how to deal with any cross-border problems. Not all foreign legal systems contain this degree of flexibility. Continental systems tend to be based upon Codes which are fairly rigid; the idea of conferring wide discretions upon an insolvency practitioner or even the court is contrary to their traditions. It is this inflexibility which sometimes creates difficulties for English receivers or administrators trying to deal with an insolvent multinational business, even in cases in which the foreign creditors do not, as in Lancer Boss, have an economic interest in non-co-operation.

How best can one provide a framework which will enable such a negotiated rescue or realisation to take place ? I think that it requires international agreement by which each system of domestic law will contain two basic features. First, that it will recognise the *locus standi* of a foreign insolvency representative to apply to its courts in connection with the assets of a business in which, by virtue of his appointment under the foreign law, he has an interest. Secondly, that it will have power, at the request of the foreign representative, to grant a temporary stay of proceedings against the assets in question, so as to give the opportunity for the negotiation of arrangements for dealing with them. In essence, it is these basic features which are contained in the model law which UNCITRAL is proposing to publish. If implemented, they will at least open the door to an English liquidator or administrator who is trying to co-ordinate the rescue or disposal of a business with assets in another country. But opening the door is in my view the most which the law can do. Thereafter it is a question of negotiation and persuasion. It may seem a messy solution. But I hope that I have provided some of the reasons why the problem is inherently a messy one and why attempts to solve it by international conventions have yielded such modest results.