Cross-Border Insolvencies
Challenges of Litigation in a Global Economy

James M. FARLEY*

Insolvency is a condition which is inherently chaotic. With the effluxion of time and no stabilization of distracting factors, value evaporates. Resources are not fully utilized—indeed in some instances, the scarce resources are completely discarded. Often these resources are intangibles—namely the goodwill which is built up in a business organization and its workforce. This is not the goodwill that enhances the value of a business by its location, say a newsstand in a subway station. Rather it is the goodwill which a business has arising out of a trained workforce, with established ties to suppliers and to customers and with an organized distribution system. Time, experience and capital have been spent in building up such an organization. While this organization has become insolvent, and therefore there will have been a combination of internal and external factors contributing to this condition, it would be a waste to have the business shut down and its tangible assets liquidated on a piecemeal basis. That result would not maximize value for the creditors of the company (nor for its shareholders); it would throw its employees out of work requiring them to seek jobs for which they may not be readily qualified; it would require anyone purchasing piecemeal assets to rebuild the goodwill discussed.

There is now general recognition that the sale (or other reorganization disposition) of an insolvent but viable business is the option which should be first explored so as to conserve the scarce resources. That may take the form of compromise of debt (restructuring the balance sheet) with creditors exchanging part of the money owed to them into equity, possibly with existing management continuing and possibly with the original shareholders maintaining a (reduced) equity participation. At the other end

* Justice, Superior Court of Justice, Toronto, Ontario.

of the spectrum, the company may be taken over by a new equity investor who will require new management and the original creditors may have sold their debt position to entrepreneurial "vulture funds", the managers of which may be counting on a reorganization plan leaving them with a return of more pennies on the dollar than they paid the original creditors, with or without an equity kicker. Existing management may survive if it is perceived that the troubles which beset the enterprise were unexpected by the industry generally; if, however, existing management were not alert, then their chances of survival are minimized.

If productivity is a fundamental problem, then a balance sheet restructuring will only be a temporary band-aid doomed to failure. Productivity issues require a complete rethinking of the business organization/operation so that the restructured enterprise may be competitive. There must also be a recognition that the "successful restructuring" of an enterprise may only increase the pressure on its domestic competitors which may then find themselves next in line for insolvency proceedings. That is, there may be overcapacity in an industry sector which cries out for reduction rationalization. The equation may be more difficult to handle with foreign competition.

Can every insolvent enterprise be successfully reorganized/ rehabilitated? No. In some instances, technological innovation will have overcome some industries. Amalgamated Buggywhip Inc. may have been a darling of the stock markets in the 1880's but with the advent of the automobile its role as a survivor would be as a small niche player catering to horse fanciers. Some businesses transition themselves—for example, as did Studebaker in shifting manufacturing from wagons to automobiles—only to succumb to competition from other vehicle manufacturers a half a century later.

Today, with the tariff barriers eliminated or virtually non-existent, foreign imports create increasing pressure on domestic industries. Witness the traditional Big Three vehicle manufacturer: worldwide capacity in the vehicle manufacturing business of some twenty percent virtually assures that at some stage, one or more of the Big Three will disappear.

The economic doctrine of comparative advantage in the long run means that everyone in the world, no matter what country they live in, will be better off if there is specialization in particular businesses in which a nation or a region has a comparative advantage (taking into account transportation costs). Simply put, if China is more efficient than Canada

both in the production of clothing and of automobiles, but relatively more efficient at making clothing than automobiles, then both countries would benefit if China produced all the clothing for both countries and Canada all the autos. However, we do not live in a perfect world and governments decide for public policy reasons that they wish to support a variety of businesses. But in doing so, these governments subsidize relatively inefficient industries and the worldwide consumer is penalized. We do, however, live in the short run, not in the long run. It is not easy, nor indeed possible, to readily change a textile mill into an operation which produces carburetors. Industries which prospered under a cheap Canadian dollar may have difficulty adjusting to its newfound strength (or conversely, the newfound weakness of the US dollar), especially when the change was generally unanticipated and so rapid. Many businesses are capital intensive and require many years to emerge from the planning stage to that of full-scale production; a commitment to such an enterprise requires assumptions about exchange rates, government policy (including taxation), inflation and interest rates.

Developing nations may not find it desirable to rely upon one or two primary industries where they have a comparative advantage. For instance, sisal may be cyclical as to production/harvest and as to price competition on a worldwide basis—and it may be under functional competition with, say, plastic rope. Further these developing nations may feel that they need to protect local inefficient industry for a period of time to allow these industries to achieve a critical mass with which to withstand international competition. Short-term subsidies for this purpose may be acceptable, but if they go beyond a legitimate short-term boost, then they become a hidden tax upon the consumer and a direct burden on the taxpayer, meanwhile they signal hope and expectation to other industries that they, too, should benefit from a hand-up which is in truth a handout.

Business on a worldwide basis is increasingly becoming more and more competitive. At the same time the world economy is becoming increasingly more interdependent. To enjoy the higher standard of living which goes with that interdependence, we have to be flexible and adaptable to keep up with that competition. We really do not have a choice of standing still; for if we did, we would be opting out and so becoming poorer.

Canada is a good example of how foreign trade (which is 80% of our Gross National Product on a gross value) benefits a country's economy. NAFTA substantially integrated our economy with that of the United States. Foreign trade with the US represents approximately two thirds of our Gross National Product. Canada and the US are each other's largest trading partner. Each has substantial investments in the other.

This has been a short and simplistic economic analysis to set the stage for the legal concerns involved in cross-border insolvencies. In essence, when things go wrong in a business enterprise, there are much more likely to be implications in various countries, including Canada (and likely at least the US). As Bruce Leonard and I observed about the globalization of business and reorganizations and restructurings in a paper to the Turnaround Management Association Conference in 2001 entitled *Co-ordinating Cross-Border Insolvency Cases*:[1]

> "The tremendous advances in information technology within the last fifteen years have made it possible for businesses to operate in a variety of different countries at the same time and to link all of these operations as if they were right next door. A multinational business operating profitably and internationally can make decisions quickly that affect its global operations; it can allocate resources internationally in a manner which best suits its objectives and it can utilize its going-concern values to augment the value of its underlying operating assets on the basis that the whole is greater than the sum of its parts.
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> The onset of an insolvency case, however, stops all that and turns the business into a series of disconnected segments in several different countries. In a typical international insolvency, different sets of creditors assert different kinds of claims to different assets under different rules in different countries. The international business that was once carried on comes to an end and separate, unconnected remnants of the organization attempt to continue until they either starve or implode. It is almost as if a cross-border insolvency system had been set up deliberately to *promote* failures and liquidations.

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[1] (West Palm Beach, Florida, October 15, 2001) [unpublished, paper on file with the author].

> The structural framework for dealing with multinational and cross-border businesses that encounter financial difficulties has hardly evolved from the state it was in several decades ago although our recent experience and developments that are on the horizon hold the promise of significant improvements and the prospect of the domestic adoption of the UNCITRAL Model Law is becoming more and more encouraging. There have been initial and limited domestic legislative initiatives into the area of co-operation in international insolvencies and restructurings but until the UNCITRAL Model Law is widely enacted, however, the legal structure internationally for enterprises in financial difficulty can best be described as compartmentalized. When insolvency or financial failure affects a multinational business, it is still most commonly dealt with through a variety of independent, separate and often-unconnected administrations, most often for different, if not conflicting, purposes."

For reason of simplicity, I will only refer to a two country model, specifically Canada and the United States; however, in many instances there will have to be more than two countries involved—for example, ranging from three, Canada, US and England, in the Olympia & York insolvency to scores in BCCI (Bank of Commerce and Credit International) to over 150 in Singer.

What happens when things go awry in a business that operates and/or has investments on both sides of the border? Usually there will be filings under both Chapter 11 of the *US Bankruptcy Code* and usually the *Companies' Creditors Arrangement Act* (CCAA) in Canada. If the activity in the US is primarily derivative of what might be described as a main centre of activities in Canada, then likely, a section 304 *US Code* ancillary proceeding will be brought in the US to stay proceedings there and coordinate them with the main Canadian proceedings. In the reverse situation, the section 18.6 1997 amendments to the CCAA (or indeed Part XIII of the *Bankruptcy and Insolvency Act* (BIA)) may be utilized to the same effect. As a side note, historically and now, the US is used to having a Chapter 11 stay respected essentially on a worldwide basis because so many foreign enterprises have US investments or their principals travel to the US. In contrast many foreign enterprises may be willing to run the risk of ignoring a stay order emanating from a Canadian or other non-US court on the basis of having no tangible connection with the country whose court has issued the stay. An example of this would be the seizure of Canada 3000 planes in Europe by creditors notwithstanding Ground J.'s

CCAA order. In those circumstances, Canadian CCAA applicants would have to obtain foreign recognition of the Canadian order usually on a comity basis to allow for practical enforcement. That process may take some time and the horse will have been taken from the barn before the Canadian order is recognized, as illustrated by Canada 3000. However, at present, it is not unusual for foreign-retained counsel to be waiting by the fax machine for a copy of the CCAA order so that they may obtain a recognition order within a few hours from the US or other major trading partner court, with that recognition order having effect for the whole of the day of issue. The Courts of Canada and the US are very cognizant of the doctrine of comity and the increased volume of proceedings traffic across the 49th parallel has resulted in a familiarity allowing for significant streamlining of applications.

Given that the insolvency condition is inherently chaotic, most of the proceedings are manifestly "real time litigation". However, part of a case may evolve into what might be termed "autopsy litigation". An example of autopsy litigation would be where none of the parties is arguing that a particular segment of the enterprise not be disposed of; as a result, the business may be transferred to the new owner without dispute in exchange for value; however, autopsy litigation may take place, say, a year later to determine how that consideration is to be divided up. The important thing with real time litigation is not to get bogged down in procedural issues, but rather that coordination between the jurisdictions be promoted to the maximum degree. The fundamental cornerstone of that coordination is to have effective and timely communication between the courts of the two (or more) jurisdictions. How is that to be accomplished?

Communication between courts—is that not a radical step? Are there no fundamental issues of procedural fairness involved? The answer is "no" to the first question and "yes" to the second, but that procedural fairness questions have been well addressed over the past decade. There has always been communication between courts—in the past this has usually been through one court issuing an order accompanied by reasons and the other court responding in kind with communications being through counsel in either jurisdiction. However, this is rather time consuming and it does not lend itself to brainstorming problems/solutions in real time.

The need for better, that is more efficient, communications was well illustrated by the Maxwell Communications case of the early 90s. The US and English judges, Brozman and Hoffmann respectively, sensed that the information they were receiving in their respective courts was askew. They independently raised with their respective counsel that a protocol between the two courts would be helpful, not only to resolve an impasse, but also to facilitate better and more timely exchange of information. Interestingly enough with the protocol in place which provided for an intermediary, these two distinguished judges never spoke directly to each other until they met for the first time at an international insolvency conference shortly after the successful conclusion of the Maxwell case. Needless to say that they have become fast personal friends.

About the same time in the Olympia & York proceedings, there was a problem involving governance of the O&Y US subsidiaries. Again a protocol was worked out and accepted by Chief Judge Lifland of the New York Bankruptcy Court and Justice Blair of the Ontario Court. It involved the introduction of another intermediary, the distinguished US diplomat Cyrus Vance who was able to facilitate a *modus vivendi*.

The Maxwell and O&Y protocols were what might be described as single purpose limited in scope arrangements between the courts. With the appreciation that protocols could, if carefully thought out and responsive to each jurisdiction's needs, eliminate value evaporating wastage of time, practitioners in several countries including Canada thought that it would be helpful to provide an acceptable building block menu of principles to assist those involved in transborder insolvencies to finalize "general" protocols. The philosophy was that good fences/good bridges make good neighbours. Under the auspices of the International Bar Association, a working group of teams from more than a score of countries reviewed the commonalities of their insolvency regimes. This project involved major jurisdictions whose insolvency laws and procedures were based upon common law, civil code and mixed or other principles. While English was the working language, there was recognition that the principles had to be expressed in an absolutely neutral language readily translatable into other tongues and legal concepts, thereby avoiding any actual or perceived bias towards the common law. The threat of unintentional bias was quite real since the judiciary in common law jurisdictions, especially the US, England and Canada, had considerably more experience in international judicial cooperation and in this respect had generally utilized the common law philosophy that if something was not forbidden and it made sense to do it, then it was judicially permitted. Key also to the working group

success was the participation of judges along with practitioners from the outset of the project. The IBA project culminated with that body's adoption in September 1995 of the principles under the title of "Concordat". The international insolvency community benefitted not only from the availability of the Concordat principles, but also from the working sessions which allowed the various persons involved to discuss the underlying concerns and commonalities, engage in give-and-take discussions based upon the experience gained in previous cases and to "get to know the other fellows".

Two months after the adoption of the Concordat, a new proceeding, Everfresh, came along. Bruce Leonard, a Toronto lawyer and part of the Canadian team, was involved in this case wherein Everfresh operated legally and functionally intertwined in both Canada and the US by "coincidence", the case came before Judge Lifland and myself and both of us had also been involved in developing the Concordat. It should then be no surprise that the judges on either side of the border enthusiastically supported the concept of developing a more general protocol based on the Concordat principles. While other functional work was progressing, a protocol was developed in a few weeks by the practitioners. Based upon a general consensus of those involved, each court approved the protocol. Matters were proceeding more quickly in Canada than in the US. The protocol was therefore utilized to hold what was the first cross-border joint hearing to co-ordinate the pace of proceedings on each side of the border. The hearing was by way of conference telephone with counsel participating. Given the rather limited scope of the problem, the telephone facility did not constitute any particular problem. However, I would strongly recommend that joint hearings be conducted through a video-conference facility to take advantage of what should be better two-way communication (speakerphones are generally one way) and the ability to "see" and react to the other side of the proceedings. Justice Forsyth of the Alberta Court and Judge McFeeley of the New Mexico Bankruptcy Court in the Solv-X case in 1996 persevered against significant technological difficulties in their telephone conference hearings. But beware—make certain the videoconference connection is workable a day or two in advance on a wet run (not dry run) basis.

After the Everfresh case finished (in about a half year), counsel on all sides were canvassed as to their satisfaction with the process. They estimated that as a result of the more timely and efficient dealing with matters, value was enhanced/preserved by a factor of some 40%. This was

particularly significant when one appreciates that Everfresh was a fairly small insolvency involving some $50 million of value.

Other protocols followed in short order. These included ones outside the US—Canadian ambit, including *Re Commodore Business Machines* (US–Bahamas), *Re AIOC Corp.* (US—Switzerland), and *Re Nakash* (US—Israel), the latter two being of specific interest because they involved common law and civil code jurisdictions and Nakash had its protocol approved by the courts notwithstanding the objection of the most major party. An extensive list of protocols and their actual texts are available on the website of the International Insolvency Institute (III): www.iiiglobal.org. The protocols have become more and more comprehensive and procedures have become streamlined, improved and standardized. Counsel should have no difficulty in any future case in developing a readily acceptable protocol tailored to the specific needs of their case based upon these templates. Judges will be able to appreciate that the judiciary in other cases has been satisfied with the form, content and workability of these protocols. Indeed in many instances the very presence of a protocol has eliminated direct court involvement as the parties merely proceed smoothly according to the principles involved in the protocol. As discussed in the earlier mentioned Turnaround Management Association paper:

> "Protocols are intended to reflect the harmonization of procedural rather than substantive issues between jurisdictions. Protocols typically deal with such items as co-ordination of court hearings in the two or more jurisdictions, co-ordination of procedures dealing with the financing or sale of assets, co-ordination in pursuing recoveries for the benefit of creditors generally, equality of treatment among the general body of unsecured creditors, co-ordination of claims filing processes and, ultimately, co-ordination and harmonization of plans in different jurisdictions. Procedurally, recent cases have tended to use Cross-Border Insolvency Protocols from the early stages of a case. Indeed in 2000, *Re Loewen Group Inc.* (Canada—US), there was a protocol actually entered into as a "first day" order. Protocols, however, are invariably expressed to be effective only upon their adoption and approval by each of the Courts involved in accordance with the local law and practice of each local jurisdiction."

There seem to be many threads which have been developing over the past decade, all with a view to making a suit to fit the requirements of international insolvency. Another example of this would be the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. The Turnaround paper observed:

> "UNCITRAL began a study of the feasibility of achieving higher levels of co-operation in the international insolvency area in April 1994, as a result of an international insolvency colloquium in Vienna sponsored with Insol International. The objective in developing the Model Law was to establish a set of uniform principles that would deal with the requirements which a foreign insolvency representative would need to meet in order to have access to the courts of other countries in cross-border cases. The Model Law Project, however, evolved into a much broader work and ultimately became an agreed-upon international model for domestic legislation dealing with cross-border insolvencies that could be adopted anywhere in the world with or without variations that would reflect the local domestic practices and procedures. The Official Text of the Model Law has now been published and widely disseminated and is available on UNCITRAL's web site at http://www.UNCITRAL.org and on the International Insolvency Institute web site at www.iiiglobal.org (at 'Organizations—UNCITRAL').
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> The primary goal of the Model Law is to facilitate domestic recognition of foreign insolvency proceedings and to increase international co-operation in multinational cases. Foreign insolvency proceedings are divided into two categories in the Model Law, *i.e.*, 'main' proceedings and 'non-main' proceedings. A main proceeding is one which takes place in the country where the debtor has its main operations. If the foreign proceeding is recognized as a *main* proceeding, the Model Law provides for an automatic stay of proceedings by creditors against the debtor's assets and the suspension of the right to transfer, encumber or otherwise dispose of the debtor's assets. The scope and terms of the stay of proceedings are subject to the normal requirements of domestic law."

The Model Law contemplates a high level of co-operation between courts in cross-border cases. Domestic courts are directed to co-operate "to the maximum extent possible" with foreign courts and foreign insolvency representatives in the Model Law: article 26. The courts may communicate directly with each other and may request information or assistance directly from the foreign court or from the foreign insolvency representative: article 25. Co-operation can, for example, consist of appointing someone to act on the direction of the court, communicating information by any means considered appropriate by the court and co-ordinating the administration of the debtor's assets and affairs in both jurisdictions: article 27. The courts may also approve or implement agreements concerning the co-ordination of concurrent proceedings involving the same debtor: article 30.

The UNCITRAL Model Law was being formulated at the time of Canada's 1997 amendments to the CCAA and BIA. Many of the significant concepts of the Model Law are therefore present in our present legislation, although not expressed in the language of the Model Law. The current review of our insolvency legislation will determine whether to keep the present form and incorporate the additional concepts by supplementary language or to delete the present form of section 18.6 of the CCAA and Part XIII of the BIA, replacing that with the specific language of the Model Law, possibly with some amendment. While Canadian courts prior to 1997 relied on their inherent jurisdiction and the principles of comity, specific authorization to engage in court to court communication is now found in section 18.6(2) of the CCAA and section 268(3) of the BIA.

Mexico, Eritrea, South Africa and Japan have passed legislation to enact the Model Law. Unfortunately its adoption in the US has stalled as a result of lobby pressure directed at another portion of the US Code overhaul; as part of that overhaul, the proposed Chapter 15 of the Code would be added to the Code to enact the Model Law which has been variously approved by both the Senate and the House of Representatives over the past several years, but not within the same bill. As a result, it remains in limbo.

The UNCITRAL Model Law is a procedural initiative. There is another UNCITRAL initiative to develop a menu of substantive law presently underway. It is anticipated that the working group will be able to finalize its work on this project (a menu of alternatives, with a review of considerations to be taken into account with each possible selection and

observations on the harmonization of the constituent parts) either at this September's Vienna session or at the next session to take place within a half year. Developing countries will be able to tailor their insolvency regimes to fit their own requirements—an improvement over past initiatives where consultants from a developed jurisdiction would essentially recommend the adoption of the insolvency regime from the consultant's home jurisdiction—for example, US financial consultants invariably recommended that the post-Communist countries adopt what in essence was the *US Bankruptcy Code*. In many of these instances, these countries have gone back to the drawing board after appreciating that such a wholesale incorporation of foreign law did not address their business, social and cultural requirements. (I have previously cautioned against wholesale adoption of provisions of the US Code concepts into Canadian jurisprudence given that the US Code has evolved to meet specific US conditions which may not be present in Canada.) In the remainder of those countries, problems continue since their recently enacted legislation based on the US Code is not suitable for their particular legal, business and social cultures and infrastructures. This is completely unsatisfactory, given that a workable insolvency law and regime is essential to a viable economy and especially necessary in order to attract foreign capital (loan and equity) on any reasonable basis, if at all! This Model Menu will allow developed countries to conduct a checkup on the efficiency and effectiveness of their present insolvency regimes and will therefore assist in recognizing the need for any change. The World Bank is also engaged in a complementary program to upgrade the insolvency regimes in countries around the world.

There is a further initiative by INSOL International, an international organization comprised of insolvency practitioners with an emphasis on practitioners from the accounting and lending sectors. Aside from the biennial Judicial Colloquium sponsored jointly by INSOL and UNCITRAL (1994, 1995, 1997, 1999, 2001 and 2003), INSOL has developed an INSOL Lenders Group. This Group has developed a statement of principles for cooperation among financial institutions during multinational reorganizations. Maximization of value, preservation of viable enterprises and jobs and the avoidance of inefficient cratering have been the guidelines for the S*tatement Principles for a Global Approach to Multi-Creditor Workouts*. Key to the underlying foundation is that the parties involved can negotiate "within the shadow of the law; that is, that the insolvency regimes in the various countries be predictable with certainty and fairness so that negotiations can take place with a minimum

of guesswork as to what would be the outcome if the courts were resorted to on any minor or major point along the way.

Additionally, there has been an American Law Institute (ALI) project on NAFTA Insolvency Law. The Restatement Paper of substantive laws of the US, Mexico and Canada was the first international program undertaken under the supervision of this prestigious US body with major international connections. Once that paper had been completed and accepted, it was thought helpful to see if there could be agreement on procedural matters so that there could be harmonization and coordination of the insolvency proceedings in cases which involved more than one of the NAFTA jurisdictions. This aspect was completed by the tripartite country teams and accepted by the ALI in 2000. One of the most important elements of this was the preparation of the *Guidelines Applicable to Court Communications in Cross-Border Cases*. These guidelines were largely based upon examples of actual cross-border cases involving protocols. The Guidelines may also be accessed through the III website. As indicated in the Turnaround paper:

> "The *Guidelines* recognize that one of the most essential elements of co-operation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganizational proceedings, it is essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises. (This summary is largely derived from Prof. L. Westbrook's very eloquent Introduction to the topic in the ALI's Transnational Insolvency Project *Statement*.)
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> It is reasonable to expect that many jurisdictions, including most common law jurisdictions, have prohibitions against *ex parte* communications with a Court by one party to a proceeding in the absence of the party to the proceeding. In some jurisdictions, by contrast, the prohibition may be milder and may not even exist at all. Arrangements for court-to-court communications in cross-border cases must not promote or condone any contravention of domestic rules, procedures or ethics. The *Guidelines* in fact specifically mandate that local domestic rules, practices and ethics must be fully observed at all times.

> The *Guidelines* are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications among courts in cross-border cases, however, is both more important and more sensitive than in domestic cases. The *Guidelines* are intended to encourage such communications and to permit rapid co-operation in a developing insolvency case while ensuring due process to all concerned. The concept of court-to-court communications is better seen as a linking of two concurrent court hearings, all conducted in accordance with proper systems and procedures. The only change form a purely domestic hearing is the technological link to the other Court.
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> The *Guidelines* are intended to be adopted following the appropriate notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations would be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the *Guidelines* at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the *Guidelines*."

One of the issues that a communication linkage may raise however, is the issue of whether the participation by a party in one country in arguments or submissions being made in the hearing in the other country constitutes a form of attornment to the jurisdiction of the other Court. The *Guidelines* attempt to anticipate that difficulty by indicating that such participation will not constitute an attornment to the jurisdiction of the other Court unless the party who participates in the hearing in the other Court is actually seeking relief from that Court. This is consistent with article 10 of the UNCITRAL Model Law which indicates that an application by a foreign representative does not subject the foreign representative or the foreign assets or the affairs of the debtor to the

jurisdiction of the domestic Court for any purpose other than the actual application.

These guidelines have been incorporated into protocols—for example, *Re Matlack Inc.*; *Re PSINet Limited*; and *Re Systech Retail Systems Inc.*[2]

The United States Third Circuit Court of Appeals in a 2002 decision *Re Lernout & Hauspie* had a number of very direct and pointed observations on the need for international cooperation between courts in cross-border cases.[3] It indicated:

> "We strongly recommend, in a situation such as this, that an actual dialogue occur or be attempted between the Courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws…
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> While we do not know whether the cooperation [in *Maxwell*] was initiated by the court or the parties, there is no reason that a court cannot do so, especially if the parties (whose incentives for doing so may not necessarily be as great) have not been able to make progress on their own.
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> … [W]e urge that, in a situation such as this, communication from one court to the other regarding cooperation or the drafting of a protocol could be advantageous to the orderly administration of justice."

I believe that the watchword for any of the protocols and procedures to be tested is as follows: would the informed objective observer say that what was adopted by the Courts after receiving all submissions was fair and reasonable in the circumstances—and indeed, why has this not been adopted before as it is truly common sense.

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[2] *Re Matlack Inc.* (2001), 26 C.B.R. (4th) 45 (Ont. Sup. Ct.) (containing the text of the Guidelines); 01 CL 4109 April 19, 2001 (Toronto Commercial List) & US Bankruptcy Court Delaware 01-01114 (May 24, 2001). *Re PSINet* and *Re Systech* are unreported endorsements adopting the Guidelines: *Re PSINet* 01 CL 4155 July 10, 2001 (Tor ComList) and US Bankruptcy Court (SDNY) 01-13213 (July 10, 2001); *Re Systech* 03 CL 4836 January 30, 2003 (Tor ComList) and US Bankruptcy Court (EDNC, Raleigh Div.) 03-00142-5 January 30, 2003.

[3] *Stoningham Parnters, Inc.* v. *Lernout & Hauspie Speech Prods. N.V.* 310 F.3d 118 (3rd Cir. Del. 2002).

When one looks back ten or twelve years, it is truly amazing what strides have been made in improving how to deal with cross-border insolvency cases. Waiting for the negotiation and adoption of international treaties was simply not feasible; by the time that would have happened, likely another century would have passed. I gave the following report on behalf of the 1997 UNCITRAL/INSOL Judicial Colloquium:

> "Under the auspices of INSOL and UNCITRAL 50 judges from 30 different countries were involved in the Second Judicial Colloquium over the previous two days. The judicial regimes represented were common law, civil law, a combination thereof, and from other traditions besides these. It is not surprising that judges may vary in their approach to matters to reflect different concerns in different parts of the world. However, given that the judicial perspective is to ensure that justice is done in the cases before the court, it is also not surprising that, despite these differences, there is a general consensus of thoughts on international judicial co-operation and communication. The Colloquium has allowed the judges to explore these matters and to appreciate that we have a common interest over a wide variety of subjects.
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> Of course, law cannot operate in isolation and insulation from the society and economy in which it is to function and regulate conduct and activities. The economy is not merely a domestic one, as it will be influenced by foreign trade and investment going both ways. Therefore, no country's legal system can operate without having regard for the activity of neighbouring states. Given the high degree of internationalism in trade and investment, the world has, in this respect, become a very small place; I believe we must regard each and every state as being neighbours.
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> Judges at the Colloquium were of the consensus that it was important to avoid these problems. This could be achieved not only through agreement to co-operate, but they were also of the view that, in essence, where there are concurrent proceedings it should be determined whether deferment to the other court on material issues more directly affecting that jurisdiction may be possible and with reciprocal treatment. We must, of course, recognize the sensitivity of the situation—countries will have concerns about the integrity of their jurisdiction, including substantive and procedural concerns. These must be accommodated and on a two or multiple

> way basis. In addition, there is the aspect that, through improved communication, there could be a timely exchange of valid information amongst the concerned courts. …
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> … INSOL and UNCITRAL will continue to hold a Judicial Colloquium, and INSOL will initiate a separate section for the judiciary to deal with these matters on a continuing basis between Colloquia."

How do the bar and insolvency practitioners fit into this equation?

1. The judiciary rely upon you as professionals—skilled practitioners in the field—to implement these proposals and generally to assist in these matters.

2. As a result of this initiative you will know what is expected of you and how to implement it through building on the Concordat and the UNCITRAL model law and other valuable initiatives from time to time. There will be the desirability of your taking the opportunity during the immediate stabilization period provided by stays to see whether by using the Concordat and the draft UNCITRAL model there can be harmonization between the various concurrent proceedings—both as to procedures and timing. This hopefully will lead to the timely and cost-effective development of a protocol to be entered into amongst affected parties and thereafter submitted for consideration and approval by the respective courts. Once you review the Concordat and the UNCITRAL draft you will see that there is a fertile field of possible steps to consider and adopt with suitable changes into a protocol. It is expected that you will be significantly advanced on the learning curve through the use of Concordat and UNCITRAL so that you will be able to "shortcut" the negotiating time required to table a protocol. It will be helpful to the parties concerned and the legal system generally to make every effort to effect this protocol harmonization.

The courts will rely on you to carry their message of co-operation and communication as expressed in formal orders and accompanying reasons to the other courts—reliably and faithfully.

3. In this regard we in the judiciary may need your assistance to ensure that where transcripts are not a regular feature of the domestic court a transcript to the extent desired by the judge can be made available forthwith. We will also need your assistance with respect to excellence of

translation (not mere words but concepts—the opposite to legal research by computer which is based upon word identification and not concept analysis).

4. You will be expected to advise the local court of what procedures are taking place in other jurisdictions, and to maintain an update of that situation.

5. The courts will recognize the need for you to return to them to obtain appropriate relief from time to time, including adjustment of any initial order or orders which may have been deployed in the immediate emergency circumstances.

We, as judges, will rely upon counsel and insolvency practitioners to take the lead in providing the conduit for judicial co-operation and communication. We are confident that we can rely upon you as professionals to ensure that justice is done.

> "The key in this Colloquium is that the participating judges have reached consensus about being outward-looking—rather than inward-looking. International insolvencies are truly international; they are not local, with merely local solutions. We have progressed beyond national interests; we are now clearly looking at international concerns. As we approach the next millennium, we must not be looking backwards toward the nineteenth and early twentieth centuries; rather, we must be forward looking to solve our problems."

Allow me to conclude by observing that what I have been describing is the way by which courts and the practitioners have dealt with cross-border insolvency matters. However, the general principles and approaches involved here are not restricted to the insolvency arena. Indeed, colleagues who have been engaged in class actions and other general litigation cross-border matters have begun to ask "Why not our sector?", appreciating that there is a need for harmonization and coordination in their fields across provincial and national boundaries. Why not indeed!