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INTERNATIONAL SOLUTIONS TO INTERNATIONAL INSOLVENCY: AN INSOLUBLE PROBLEM?

Donna McKenzie*

I. INTRODUCTION

The problems posed by international insolvencies, that is, insolvencies in which the laws of more than one jurisdiction come into play in the course of the insolvency, and the search for an acceptable international solution to those problems, are not new or even recent phenomena. In his address to the Colloquium on Cross-Border Insolvency¹ held in Vienna in April 1994 (first Vienna Colloquium), Ron Harmer² commented on the staggering number of articles written on the subject, going back decades, even centuries.³ However, despite the existence of a limited number of unilateral, bi-lateral, or localized multi-lateral measures, a widely acceptable international solution remains what has been aptly described as a "Holy Grail," desirable but elusive, notwithstanding continuing efforts at many levels to attain it.

This may not be surprising when one considers that the search for solutions to the problems of international insolvency is complicated by a number of factors. First, whereas parties may, if they so wish, choose the governing law of their contract, the method of dispute resolution and so on, they cannot choose the law which will govern in the event of the insolvency of one or other (or both) of them.

Second, and connected to this point, if insolvency does occur, the law which ultimately governs that insolvency may not be predictable. The parties will have considered what arrangements they wish

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1. Jointly sponsored by the International Association of Insolvency Practitioners (INSOL) and the United Nations Commission on International Trade Law (UNCITRAL).

2. Senior insolvency law partner in the Australian law firm of Blake, Dawson & Waldron; Council member of INSOL International.

3. The edited proceedings of the first Vienna Colloquium are contained in the special Conference issue of the *International Insolvency Review*. See generally 4 INT'L INSOLVENCY REV. 1995.

to make to protect themselves in the event of insolvency, for example the taking of security. They will test the validity and effectiveness of those measures against the laws which they think are likely to apply in the event of supervening insolvency. But it may happen that an entirely different law will apply. For example, the insolvent party may have a creditor residing in a jurisdiction otherwise completely unconnected with the parties, but which allows that creditor to open insolvency proceedings in that jurisdiction. The applicable law in that jurisdiction may not recognize the measures taken or may ascribe to them a different effect to that which the parties had intended. Even if the parties wished to do so, it would be virtually impossible to establish every possible connection with other jurisdictions and assess whether their insolvency laws might conceivably apply if the worst came to pass.⁴

Third, although insolvency law is often treated as a discrete area of law, the rules on insolvency in most jurisdictions are in fact inextricably interwoven with the rules in many other areas of law, particularly property law, but also status, employment, remedies, and so on. Any major changes to insolvency law, including the rules on the treatment of insolvencies with an international element, may have repercussions for other such areas of the law, which may or may not be regarded as acceptable and at the very least would necessitate review of those other areas also.

This article will, therefore, briefly review the existing measures adopted to address the problems of cross-border insolvency and examine the current initiatives to promote other such measures, and assess whether a widely acceptable solution to the problems of international insolvencies is ever likely to become a reality.

II: LEVELS OF ACTION

Before embarking on the examination of the existing and proposed measures to deal with the problems of international insolvency, it is important to be clear about the different levels at which action can be taken to improve cooperation in international insolvencies. This is so for two reasons. First, the very fact that action can be taken at different levels is important in itself — action at one level may be more attractive to any given jurisdiction than action at another. Second, the level at which action is taken may have

4. And even if this could be done, it is doubtful if the parties would be able to take measures which would simultaneously protect them in all such jurisdictions.

a bearing on the likely success of the measure, and also has implications for whether that measure is likely to prove to be widely acceptable.

At the first Vienna Colloquium, Bruce Leonard⁵ suggested four such levels:

- (i) multi-lateral treaties
- (ii) bi-lateral treaties
- (iii) facilitative provisions in domestic legislation
- (iv) use of protocols at an individual level

Although one might suggest refinements to that list, on the whole it does give a good perspective of the differing levels at which action can be taken.

It is significant that harmonization of the insolvency laws of nations is not featured on this list. Harmonization of insolvency laws, effectively the ideal solution to the problems of cross-border insolvency and the guiding light of some earlier efforts in this field, has now been accepted by many as an unrealistic goal for the foreseeable future. It has largely been abandoned in favor of an "art of the possible" approach seeking to achieve solutions which, although perhaps more modest, are also more attainable in a shorter period of time. At the first Vienna Colloquium, Ron Harmer described it as an impossible ideal, "nice to write about, nice to contemplate," but one which could not be achieved. In his view, future efforts required to concentrate on achieving things of a very basic nature, even if these were more limited. His perception was that aiming too high, as he put it, would only result in ten more years without any progress at all.

This is, of course, a very pragmatic approach. Indeed, it might be said to echo the equally pragmatic attitude often adopted by creditors in individual insolvency situations: half a loaf is better than no bread, particularly if it is half a loaf right now, or at least sooner rather than later. However, in my view, the concept of harmonization cannot be written off as irrelevant to continuing efforts *if* a widely acceptable international solution is the ultimate goal. The terms of the UNCITRAL resolution, which gave rise to the first Vienna Colloquium and, following on from it, the joint project with INSOL, were to investigate "the desirability and feasibility of harmonized rules of cross-border insolvencies" and to consider "what aspects of cross-border insolvency lend themselves to harmonization"

5. Partner in the Toronto law firm of Cassells, Brock & Blackwell; co-chairman of the International Bar Association's Committee J.

as well as what might be "the most suitable vehicle for harmonization." Many of the participants in the Colloquium appeared to conclude that harmonization was not feasible, but the concept cannot be completely ignored. This is discussed further below.

III. EXISTING CROSS-BORDER PROVISIONS IN OPERATION

A. *Treaties (Levels 1 and 2)*

At levels 1 and 2 of the scale, there are relatively few multi-lateral and bi-lateral treaties in operation.

The only multi-lateral treaties currently operational are the Nordic Convention of 1933 between Sweden, Denmark, Norway and Finland; the Montevideo treaties of 1889 and 1940 between Argentina and Peru, Colombia, Bolivia, Uruguay and Paraguay; and the Havana Convention of 1928.

Two other multi-lateral treaties have been drawn up, namely the Council of Europe Convention on Certain Aspects of International Insolvency (Council of Europe Convention) and the European Union Convention on Insolvency Proceedings (E.U. Convention), but neither of these is yet in operation. The Council of Europe Convention has been open for signature since June 5, 1990, but few member countries have signed it, and none have ratified it. A minimum of three ratifications would be necessary to bring it into force between ratifying states. Most of the members of the European Union have not signed it, perhaps on the basis that their own Convention, that is the E.U. Convention, which provides for the Council of Europe Convention to be superseded as between European Union member states, would soon be concluded. The E.U. Convention has not yet, however, come into force either. It was opened for signature on November 23, 1995 and stipulated that it remained open for signature until May 23, 1996. It was signed within that time period by all the member states except the United Kingdom (U.K.), who refused to sign it as part of its policy of non-cooperation resulting from the B.S.E. crisis. Since the legal basis for the Convention is Article 220 of the Treaty of Rome, all member states must sign it before it can come into force. The U.K.'s failure to sign it before the stipulated date therefore effectively means that the Convention cannot progress any further. It is unlikely, however, that the Convention will be abandoned altogether and it is anticipated that it will be revived in due course.

There is a greater, though still relatively small, number of bi-lateral treaties, most of them between countries which are now

members of the European Union. Existing bi-lateral treaties between members of the European Union will be superseded by the E.U. Convention when, if ever, the latter comes into force. Similarly, the Nordic Convention will also be partially superseded by the E.U. Convention: cross-border insolvency matters between those states which are party to the Nordic Convention and also members of the European Union will be regulated by the E.U. Convention in preference to the Nordic Convention insofar as they fall within the scope of the E.U. Convention.

B. Domestic Law Provisions (Level 3)

At level 3 of the scale described above, a number of countries now have domestic legislation regulating recognition and assistance in cross-border insolvencies. Longest standing of these is the United States with Section 304 of the Bankruptcy Code, which came into force in 1978. Section 304 allows foreign insolvency office-holders to apply for the commencement of an ancillary case in the United States providing certain conditions are fulfilled, and thereby obtain various forms of assistance from the United States court. Despite the volume of literature on this provision, there are few reported cases. However, practitioners seem to be of view that this does not mean the provision is not used or useful. Indeed, quite the contrary.

In 1986, the U.K. introduced legislation in the form of Section 426 of the Insolvency Act of 1986. This provides for mandatory assistance between the insolvency courts of the separate jurisdictions of the U.K. and certain other prescribed countries, mostly former Commonwealth countries.⁶ Although section 426 requires that a request for assistance comes through the court of the territory where the insolvency proceedings are taking place, rather than allowing direct access to the court by the office-holder, the section has been used with success. For example, in *Dallhold Estates (U.K.) Pty. Ltd.*,⁷ an administration order under the Insolvency Act of 1986 was made in the U.K. in relation to an Australian company already in liquidation in Queensland, thereby allowing the preservation of assets

6. Section 426(4) of the Insolvency Act of 1986 itself mandates assistance between the courts of the UK and those of the Channel Islands and the Isle of Man. The other countries to which § 426 applies are Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St. Helena, Turks and Caicos Islands, Tuvalu and Virgin Islands.

7. [1992] BCC 394.

which would otherwise have been lost. However, although the wording of the section is mandatory, in the case of *In Re Focus Ins. Co.*,⁸ the English court refused an application for assistance on behalf of the liquidator of a Bermudan company under the section on the basis that the relief sought was in relation to a person subject to a bankruptcy order in England and was inconsistent with the scheme imposed by the English insolvency legislation for the recovery of assets of a bankrupt. The court took the view that it was entitled to do so notwithstanding the mandatory wording of the statute if there were sufficiently strong reasons for doing so. Regrettably, this decision undermines the section.

In Australia, the domestic provisions are not dissimilar to those of the U.K. in that they provide for mandatory assistance in relation to certain designated countries with such assistance being sought through the medium of a request from the foreign court. They go further than the U.K. legislation, however, in providing for discretionary assistance in relation to any other country, without specifying any preconditions for such assistance or indeed any guidelines as to when it should or should not be given. Of course, although there is no statutory provision in the U.K. regarding assistance in relation to countries which do not fall under section 426, there are common law rules of private international law which allow discretionary assistance to foreign insolvency office-holders. Arguably, however, it would be better if these were also put on a statutory footing.

It is probably not coincidence that those countries which have led the way in introducing domestic legislation in this field are those which have separate systems of law operating within their own borders. Such countries will have experienced cross-border insolvency problems arising "internally" as well as in truly international situations and recognized the need for effective rules to regulate such matters. But of course the rising incidence of truly international insolvency means that more and more countries now come across the problems of cross-border insolvency, and hence the demands for suitable solutions.

C. *Protocols in Individual Cases (Level 4)*

Such protocols, which have been described as "mini-treaties,"⁹ have been used in a number of cases to regulate the conduct of

8. The Times, May 6, 1996.

9. Judge Tina Brozman in her address to the first Vienna Colloquium.

particular insolvencies. The most famous example of the use of such a protocol is probably the *Maxwell* case, where Chapter 11 proceedings in the United States (U.S.) and administration proceedings in the U.K. were coordinated by means of a protocol drawn up by the examiner appointed by the U.S. court and approved by both the U.S. and the U.K. courts. Another example of the successful use of such a protocol is the case of *Everfresh Beverages Inc.*, which involved coordination of proceedings in the U.S. and Canada.

IV. CURRENT INITIATIVES

A. *The International Bar Association's (I.B.A.) Cross-Border Insolvency Concordat (Level 4)*

Operating at level 4 of the scale described above, the I.B.A.'s Cross-Border Insolvency Concordat provides a statement of principles to be followed in drawing up protocols for use in individual cases. Although not officially published at the time of writing, the principles contained in the Cross-Border Insolvency Concordat were used in drawing up the protocol in the *Everfresh Beverages* case.

B. *The International Bar Association's Model International Insolvency Cooperation Act*

The I.B.A.'s Model International Insolvency Cooperation Act (MIICA) provides model legislation which can be adopted by countries into their own domestic legislation, thereby allowing them to operate at level 3 on the above scale. The provisions of the model legislation provide for recognition of the foreign representative in insolvency proceedings and mandatory assistance to the foreign proceedings if either the foreign jurisdiction has substantially similar legislation or the foreign forum is a proper and convenient one and it is in the overall interest of the creditors to administer the estate there. They provide further that the foreign representative may commence ancillary proceedings for the purposes of obtaining prescribed reliefs or, if such ancillary proceedings are unavailable or denied, a full insolvency proceeding in accordance with the provisions of the local law. In the former case, foreign substantive law will normally apply; in the latter case, local law will apply. They also provide for supercession of the provisions where any treaty is applicable. The model legislation has not, however, been adopted by any country as yet, perhaps because it relies on or contains concepts which may be unacceptable to some countries.

C. *INSOL/UNCITRAL Project on Cross-Border Insolvency*

The first Vienna Colloquium was followed by further sessions in Toronto in 1995 and Vienna in 1996, and sessions in New York and New Orleans have taken place this year. A model law is now at an advanced stage. The model law will now be submitted to the UNCITRAL full Commission meeting scheduled to take place in May of this year for approval and adoption. Assuming such adoption, the model law would be put forward for confirmation of the meeting of the General Assembly of the United Nations scheduled to take place in July of this year.

Like MIICA before it, the model law will provide model legislation which can be adopted into each country's domestic law, thus allowing them to operate at level 3 of the scale. It is longer and more detailed than MIICA, but nonetheless essentially restricts itself to dealing with the issues surrounding the recognition of foreign proceedings, access to the courts of the country in which recognition is sought, either through the foreign court or directly by the foreign representative, and the kinds of relief necessary to protect businesses and assets. However, some provisions are more far-reaching. For example, a distinction is drawn between foreign "main" proceedings and others, with certain consequences following on the recognition of such "main" proceedings. This and some other provisions have been adopted from the E.U. Convention. An important provision is that which allows and encourages direct cooperation between courts and provides a non-exhaustive list of means by which this might be achieved, a major facilitating provision where courts do not currently have inherent power to achieve this.

D. *The Council of Europe Convention*

As its name suggests, this Convention attempts to deal only with some aspects of international insolvency. It applies only to proceedings involving disinvestment of the debtor. Initially intended only to make provision for the exercise of certain powers of office holders outside their own jurisdiction, ultimately its scope was expanded to cover three areas: exercise of the liquidator's powers outside his home jurisdiction, the opening of secondary proceedings in other jurisdictions, and matters relating to creditors' claims. It allows for a plurality of proceedings in different jurisdictions, but provides for only one of these to have universal effect, the others being limited in effect. Signatories may choose to disapply the provisions relating

to the exercise of the liquidator's powers outside his own jurisdiction and the provisions relating to the opening of secondary proceedings. However, as stated, the Convention has not yet come into force and may indeed never do so.

E. The E.U. Convention

The E.U. Convention is also restricted in scope to proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator, although the proceedings which are specified in Annex A to the E.U. Convention as meeting that definition for the U.K. include the rescue-oriented procedures of administration and voluntary arrangements. However, some of the important provisions of the E.U. Convention are restricted to winding up proceedings, which exclude these rescue-oriented procedures. Like the Council of Europe Convention, which was used as a working draft for the E.U. Convention, it also allows for a plurality of proceedings. It is a direct convention imposing mandatory rules of jurisdiction which override national rules, and it is according to the jurisdictional basis on which proceedings are opened that the E.U. Convention determines their effect. All proceedings opened in accordance with the grounds of jurisdiction specified in the E.U. Convention are accorded automatic recognition throughout the Union, but proceedings opened in the debtor's "centre of main interests" are given universal effect throughout the Union, the liquidator being able to exercise his powers in any other member state with few restrictions, while any other proceedings opened on the alternative basis of the presence of an "establishment" of the debtor have only territorial effect. The E.U. Convention provides a number of choice-of-law rules by which questions arising in the insolvency will be determined, some of which are qualified or may be disapplied in certain circumstances. The E.U. Convention does not, however, attempt to deal with the difficulties caused by the situation where there are some proceedings within the Union and some outwith it, a situation which is potentially fraught with disaster.

F. International Bar Association's Model Insolvency Code

This project aims to develop a set of model provisions relating to each of the major concepts of insolvency law, for example, grounds of challenge of prior transactions, priority claims, tests for insolvency and, importantly, recognition of foreign proceedings and assistance to foreign insolvency office-holders, which could be considered by countries reforming (or indeed forming) their insolvency

laws and adopted by them into their new domestic law. Its goal is to promote harmonization of insolvency laws worldwide and, thereby, facilitate the proper and fair treatment of creditors' claims in international insolvencies. In other words, it will work at the higher level of harmonizing the insolvency regimes of countries rather than at any of the levels on the scale discussed above.

G. Other Initiatives

There are a number of other initiatives currently being considered by various bodies in the United States, particularly. For example, the American Bankruptcy Institute (A.B.I.) has recently approved proposals for amendments to U.S. domestic law which would alleviate the problems currently encountered by foreign insolvency office-holders having to apply for relief in different states wherever action is required in more than one state. The amendments would clarify that the various bases for venue in section 1410 may be regarded as alternatives, provide a catch-all venue choice related to convenience and the interests of justice for foreign proceedings, and allow consolidation of all proceedings filed by a foreign representative seeking the assistance of the U.S. courts. This is a useful initiative for improvement of existing domestic provisions. The American Law Institute has embarked on a project to explore the possibility of harmonization of the insolvency laws of the NAFTA states, but this remains at a relatively early stage of study and, therefore, concrete results may be some time away.

V. THE ELUSIVENESS OF A UNIVERSAL SOLUTION

Why, then, have none of the existing provisions proved to be a universal, or at least widely acceptable, solution? Will any of the current initiatives prove to be so? If not, why not?

It is trite to say that the legal systems of the world are different, sometimes dramatically different, from each other. Nonetheless that is both the root of the problem in international insolvencies and the main reason why it is so difficult to find a universally acceptable solution to international insolvency problems. This, too, is the reason why harmonization of insolvency laws is the ideal answer to the problems of international insolvency, even if, realistically, it seems an unattainable dream.

The question, therefore, remains whether action at any of the other levels discussed can realistically provide a widely acceptable solution.

At the level of treaties, the answer is probably no. We have seen that there are some multi-lateral treaties which appear to work well, but they are what might be described as purely regional. That is, indeed, the essence of their success. They work well in their own particular context because the countries involved have close links and similar legal systems and insolvency laws. They would not necessarily work outside their own particular context. At the first Vienna Colloquium, Professor Michael Bogdan¹⁰ said of the Nordic Convention that

[it] functions very well. However, *I would not recommend it for universal use.* One has to keep in mind that the Nordic countries are very close, although not perhaps as close as the United Kingdom, the United States and Canada. Danes, Norwegians and Swedes understand each other, they are geographically close, their legal systems are similar and they have a high level of confidence in each other's legal systems. Under such conditions, the Convention works well and is generally accepted. A Swedish creditor may in another country get less, or more, than he would receive in a Swedish bankruptcy, but that is accepted.

Even on a regional basis, if one contemplates a wider region than that which has worked successfully in the case of the Nordic Convention, it may not be possible to successfully conclude a worthwhile treaty. Even if there are close trade and other links between nations, the greater the number of countries involved, the more differences in their legal systems and laws there are likely to be. The more difficult, therefore, will be the process of reaching a solution which is acceptable to all. This has been amply illustrated in the difficulties which were encountered in concluding the Council of Europe Convention and, particularly, the E.U. Convention. Even within the European Union, where the advent of the single market and increasing cross-border trade within the Union made the finding of solutions to the cross-border insolvency problems which would inevitably result imperative, it took more than ten years, and that at the second attempt, to reach an acceptable compromise. Even nearing completion, the success of the project remained doubtful, because of differences between member states, not just on minor issues, but on the absolutely fundamental question of universality versus territoriality. That being so, however, the fact that the

10. Professor of Law at the University of Lund.

treaty *was* concluded shows that agreements may be reached even in the face of very great differences. But it is suggested that the E.U. Convention is operating at the limits of what is possible for this medium, and where no imperative, such as those that existed in the case of the European Union, exists, agreements involving large numbers of countries are unlikely. And the E.U. Convention is still only a regional Convention, albeit encompassing a slightly wider region than previous treaties, and is likely to be no more "exportable" to other regions than previous treaties have been. It is unlikely, for instance, that the E.U. Convention would be acceptable to the U.S. As already discussed, the Convention is not particularly oriented towards rescue/reorganization procedures, and indeed has been strongly criticized on that ground.¹¹ At the same time, it has been observed that the U.S. would be very reluctant to submit to any concordat or series of treaties where reorganization procedures, and in particular the concept of "debtor in possession," are not accorded full recognition.¹² The concept of "debtor in possession," and the reluctance in many countries to recognize proceedings where the debtor is in possession, would appear to be another fundamental issue which may become a serious obstacle to reaching agreement on a wider basis.

Bi-lateral treaties may be easier to achieve, but the problems are the same. They only allow cooperation between the two signatories and they may not be "exportable" to other contexts.

Further, in the case of both multi-lateral and bi-lateral treaties, there is the additional difficulty of providing adequately for the situation where there are insolvency proceedings in both a treaty country and a non-treaty country. When an international insolvency situation arises, it will often be the case that even if some of the countries involved have treaty arrangements, there will be other jurisdictions involved which do not have such arrangements with any or all of the other relevant jurisdictions. The situation where some of the proceedings fall within the scope of a treaty and some do not

11. See, e.g., Johnson, *The European Union Convention on Insolvency Proceedings: A Critique of the Convention's Corporate Rescue Paradigm*, 5 INT'L INSOLVENCY REV. 80 (1996).

12. This view was expressed by Louis Levit, a U.S. member of INSOL, at the first Vienna Colloquium, and more recently echoed by Harold Burman at the Symposium on Developments in International Commercial Law held at the University of Baltimore on March 26-28, 1997, where he suggested that the E.U. Convention would be unacceptable in its current form because of its concentration on liquidation type procedures.

is fraught with difficulty. This is a problem which the E.U. Convention certainly fails to address, and such failure may cause complications to rival those which may currently exist in the absence of any agreement at all.

At the level of domestic law, although so few countries have promulgated legislation specifically in relation to cross-border insolvencies, there may be routes of access for an insolvency office-holder into a foreign system other than, or regardless of the existence of, specific provisions anent cross-border insolvency. In the United States, for example, there are provisions other than section 304 on which a foreign insolvency office-holder may rely. Indeed, these may be preferable to invoking section 304 in certain circumstances. For example, if all that is sought is discovery, this may be obtained under section 1782 of the United States Code. Or the office-holder may prefer to commence a full bankruptcy. In the U.K., commencement of full or ancillary insolvency proceedings may also be an option available to a foreign office-holder. Assistance may be available at common law even where section 426 does not apply. The same would be true in many other countries. It is acknowledged, however, that the recognized difficulty in relying on such general provisions for access into a foreign system is that they may not be particularly suitable for obtaining the kinds of assistance that are likely to be required in cross-border insolvency cases, and in civil law jurisdictions, there may be little or no inherent jurisdiction in the court to manufacture suitable assistance.

Even where domestic law specifically relating to cross-border insolvency has been enacted, however, it never gives unconditional recognition and unrestricted access to the foreign system. The U.K. and Australia have adopted the system of mandatory assistance to prescribed countries and discretionary assistance to others.¹³ The countries which have been prescribed as suitable to receive mandatory assistance have been selected because they have similar legal systems and laws so that the country granting assistance can have confidence in the proceedings to which it is granting assistance. As discussed above, however, in the U.K. at least even the

13. As indicated above, in the case of Australia, both mandatory and discretionary assistance are specifically provided for by statute, whereas in the U.K., only the mandatory assistance is statutory, but discretionary assistance is still available under the existing common law rules of private international law.

"mandatory" requirement is not truly mandatory: an overriding discretion remains. In the case of section 304, assistance is wholly discretionary. The court is directed to take into account prescribed factors including whether the distribution of proceeds is substantially in accordance with U.S. law. The issue is therefore the same as in the case of treaties: countries are generally prepared to give access and recognition to proceedings which come from a system similar to theirs, but not necessarily to others. Therefore, even if all countries were to adopt domestic legislation, it is unlikely that this would guarantee universal uniform treatment of insolvencies. Each country would still undoubtedly wish to give itself the option of refusing assistance in cases where, for whatever reasons it deemed valid, it considered the consequences of doing so to be unacceptable. The expressed aim of MIICA was that every country in the world would adopt it. Even had that aim been achieved, universal uniformity would not. For even MIICA is not completely mandatory in all respects. Nor is the prospective UNCITRAL model law. Further, it is unlikely that countries would be prepared to adopt them in that form if they were.

At the level of individual cases, the successful conclusion of protocols in particular cases will depend on whether the results of doing so are acceptable to the court required to approve it. A court is unlikely to be willing to approve a protocol in cases where the other proceedings emanate from a system which will have radically different outcomes to that envisaged in the other jurisdictions. It might be pointed out with justification that the fact that the U.S. proceedings in *Maxwell* were debtor in possession proceedings under Chapter 11, an issue earlier identified as one likely to cause difficulties, did not prevent the conclusion of a protocol in that case. However, the U.S. judge in that case commented that although the proceedings seemed to be very different, there were not in fact fundamental differences between the two systems. Again, therefore, the fundamental similarity of the systems involved is the key.

VI. CONCLUSION

What, then, may be concluded from this analysis? One must surely conclude that, standing continuing fundamental differences between the legal systems and laws of countries, countries will only be prepared to apply measures designed to facilitate cooperation in

international insolvencies at any level to other countries whose systems are basically similar to their own. Anything short of harmonization is, therefore, unlikely to produce a solution which is universally acceptable or even acceptable to a majority of countries.

The goal of harmonization must therefore continue to be pursued if a perfect solution is sought. This does not mean, however, that current or future initiatives at any level other than harmonization should not be pursued. If international commerce, as seems likely, continues to expand rather than contract, the sheer number of cases in which international insolvency problems will arise may in itself provide an imperative to make countries act. If the lack of a solution to such problems has a restricting effect on international trade, and this would appear to be the case, this will provide the necessary incentive for action. But if that action is of different kinds and at different levels in different countries, this need not be regarded as failure, even if it means, as it inevitably will, that there will still be cases where parties and insolvency office-holders achieve a less than perfect result. It would only be failure if the aim remains to promulgate a universal solution, and to continue to define success in this field in terms of the universality of the solution may be to miss the point. Parties wishing to protect their position in the event of insolvency, as the ultimate creditors in any such insolvency, are primarily concerned with being able to predict what will happen on insolvency, so that they may take the most appropriate measures to safeguard their position. In general, any action taken by countries at any level will facilitate this process and thereby make life easier, if still imperfect, for such parties and also for any insolvency office-holder subsequently appointed. It may therefore be that the better approach for the future is to accept that, short of harmonization, a universal or widely acceptable solution will not be found, and to concentrate on achieving as much as possible through current and future initiatives without measuring them against the yardstick of universality of application.

