COMMENTARY ON BOSHKOFF, *SOME GLOOMY THOUGHTS CONCERNING CROSS-BORDER INSOLVENCIES*

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Although Professor Boshkoff himself strives to characterize his paper[1] as an essay in pessimism, it may be remarked that in this instance (as in so many others) the fruits of long experience suggest that caution and skepticism are essential qualities of mind with which to approach the phenomenon of cross-border insolvency and the multiple problems generated thereby. Pessimism may thus be acknowledged as closely akin to realism for the current purpose. Indeed, it would if anything be a gross understatement to claim that the age-old problems of international bankruptcy are among the most intractable to have presented themselves to scholars and practitioners searching for workable and just solutions to the legal complexities of our increasingly interdependent global community.

Nevertheless, it behooves us not to be defeatists even in the face of such daunting challenges to our collective intellectual skills. And in § 304 of the U.S. Bankruptcy Code,[2] we certainly encounter much that is positive and potentially liberating in the quest for improved interjurisdictional cooperation in bankruptcy matters. The section has undoubtedly set a new benchmark in terms of judicial empowerment, through its authorization of the U.S. court to respond directly to applications lodged by foreign *representatives* (as opposed to foreign courts alone), and without any specific precondition that there should be international agreements in force, to which the United States and the foreign state are parties, pursuant to which such cooperation may take place. Neither of these qualities is to be found, for example, in the latest statutory provision enacted in the United Kingdom, namely section 426 of the Insolvency Act 1986. The latter provision operates exclusively on the basis of judicially formulated requests for the rendering of assistance, submitted by courts of countries scheduled

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1. Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931 (1994).

2. *See* 11 U.S.C. § 304 (1988).

nominatim for this purpose on the basis of established arrangements between the United Kingdom and the other state or territory. The historic absence of such arrangements between the United States and the United Kingdom necessarily entails that, for the time being, the otherwise flexible statutory powers of the U.K. courts to grant judicial assistance in bankruptcy matters are precluded from being exercised for the benefit of any trustee or other representative appointed in U.S. bankruptcy proceedings.

Nevertheless, the foregoing does not mean that the incumbent representative in a U.S.-based proceeding cannot look to the courts of the United Kingdom for appropriate and essential assistance. The foundations for such assistance, established by case precedents, are well developed historically, and there is no basis for supposing that those common law precedents have been disturbed or supplanted by the modern statutory provision in the Act of 1986, referred to above.[3] Therefore, to the extent that, as suggested by Boshkoff, the U.S. courts, when responding to requests for assistance brought under § 304, will wish to verify the substance and reality of the foreign system in terms of its readiness and capability to accommodate the interests of parties in the United States on the instant (and on some hypothetical future) occasion, the credentials of the United Kingdom seem perfectly sound, at least in theory. In practice, however, much odium and suspicion as to the true character of the English bankruptcy law in its relationship with that of the United States has been generated by the courteous, but firm, refusal by Justice Hirst, in his judgment in *Felixstowe Dock and Railway Co., Ltd. v. U.S. Lines, Inc.*,[4] to lift an injunction preventing turnover of the English assets of a U.S. corporation undergoing Chapter 11 reorganization. Although this decision was widely interpreted as signalling a policy of noncooperation towards this form of U.S. proceeding, if not towards others, the reality is arguably less sinister and less generalized. Justice Hirst was careful to point out the detrimental implications of the reorganization plan, viewed from the perspective of the English creditors, when compared with the prospective, longer-term implications for the U.S. creditors of the debtor company. Since a comparable solicitude for protection of the interests of U.S. creditors is

3. For the English case law concerning cross-border insolvencies and the various forms of assistance available to foreign trustees, liquidators, etc., see ALBERT V. DICEY & J.H.L. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS ch. 30-31 (12th ed. 1993); IAN F. FLETCHER, THE LAW OF INSOLVENCY ch. 27-29 (1st ed. 1990).

4. [1987] 2 Lloyd's Rep. 76; [1989] QB 360. This case is referred to by Boshkoff in his paper at footnote 38. Boshkoff, *supra* note 1, at 939 n.38.

manifested in the terms of § 304(c) itself when foreign proceedings are in progress and the request for turnover is made in the opposite direction, it is perhaps not too unreasonable for a foreign judge to reserve the discretion to review the substance of the prospective consequences of turnover from the standpoint of local parties in interest, and to afford them a degree of protection against prejudice or inconvenience or unjust treatment, so far as it lies within his power to do so.

Since the decision in *Felixstowe Dock*, there have been indications of a discreet, but determined, judicial initiative aimed at correcting the negative transatlantic conclusions derived from that case. The ghost may have been finally buried, in well-publicized circumstances, by the series of complementary decisions reached during various episodes of the Maxwell insolvency saga, which commenced shortly after the death at sea of Robert Maxwell in November 1991, and is still in progress. One early harbinger of a fresh spirit of internationalism in judicial collaboration was the innovative fusion of U.K. Administration proceedings with U.S. Chapter 11 proceedings, sanctioned by orders emanating from the U.S. Bankruptcy Court for the Southern District of New York and the U.K. Chancery Division, to facilitate the transatlantic coordination of the insolvency of Maxwell Communications Corporation PLC (MCC), the English-formed parent company of the publicly owned companies within the Maxwell "empire." By this means, the English administrators of MCC were able to acquire the status of the corporate governors of the company in the eyes of U.S. law, and consequently to function as the "debtor in possession" for the purposes of Chapter 11.

Taking advantage of their dual status under the insolvency laws of both jurisdictions, the administrators later resolved to embark upon preference avoidance proceedings in New York with respect to a transaction utilizing funds derived from the disposal of a U.S. asset of MCC, which allegedly amounted to a wrongful preference of a creditor in England. There are significant differences between the U.S. and U.K. laws on preference attack indicating that the administrators would have more favorable prospects of recovery using U.S. law in a U.S. court. Not surprisingly, the creditor sought to deny them this advantage by seeking an anti-suit injunction from the English court. Both the First Instance judge (Justice Hoffman) and the Court of Appeal refused to grant an injunction, and seemingly went out of their way to emphasize that it would be an arrogant and offensive exercise of judicial power for the English courts to preempt the prerogative of the U.S. Bankruptcy Court to rule upon the preliminary issues of its own jurisdictional competence, and of the appropriateness of bringing proceedings there.[5]

There were simultaneous proceedings, this time anchored purely in English law, involving the administration of the private-side companies belonging to the Maxwell empire. The administrator in one of these sets of proceedings wished to procure the stay of a New York court action against the company—Headington Investments Ltd.—of which he was the administrator. Accordingly, he sought relief by requesting, pursuant to § 304, that the Bankruptcy Court enjoin the continuation of that action. Whether by accident or by design, the judgment of Judge Brozman in *In re Brierley*[6] was delivered within seven days after the First Instance decision of Justice Hoffmann not to grant an anti-suit injunction in the *MCC* proceedings.[7] Although the two sets of proceedings were not directly linked, a common spirit seems to infuse both judgments, and in her opinion Judge Brozman places on the record the positive benefits that have resulted therefrom. At the same time, a more general appraisal of the nature and quality of English insolvency law is offered, including its Administration procedure, from the standpoint of U.S. standards of evaluation utilized under § 304. In her conclusion that the Insolvency Act 1986 is "manifestly not" repugnant to American laws, which followed closely upon an intensively reasoned judicial plea in favor of the principle of comity as a resource with which to counter the "potential for chaos" that is "lurking in all international bankruptcies,"[8] the learned judge eloquently demonstrated that, for the present at least, peace has broken out along the transatlantic corridor. Long may it endure!

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5. Barclays Bank PLC v. Homan (*Re* Maxwell Communications Corp. PLC), [1993] BCC 757 (Hoffmann, J.); BCC 767 (Court of Appeal). It is intriguing to note that in her subsequent decision, dated August 5, 1994, Judge Brozman concluded that it was inappropriate for the Bankruptcy Court for the Southern District of New York to accept jurisdiction to hear the preference avoidance suit, having concluded that English law should govern the matter and that the English court was the appropriate forum.

6. 145 B.R. 151 (Bankr. S.D.N.Y. 1992).

7. The judgments were delivered on July 28, 1993 and August 4, 1992, respectively.

8. 145 B.R. at 164.