INSOLVENCY PRACTITIONERS AND BIG CORPORATE INSOLVENCIES

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RESEARCH REPORT

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Insolvency Practitioners and Big Corporate Insolvencies

by

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EXECUTIVE SUMMARY

The 1980s were a time of boom and many companies financed their expansion by taking on debt. For some of those companies, the 1990s have been a time of contraction. This has led to a spectacular rise in insolvency and corporate restructuring work and a growing interest in the work of a new breed of professional, established under the *Insolvency Act 1986*, the authorised insolvency practitioner.

This report explores the work of UK insolvency practitioners. In particular, it focuses on the work that arises out of *large-scale* business failures and investigates the role insolvency practitioners play in resolving big corporate collapses. The project sets insolvency work in its wider context, beyond formal legislative and regulatory provisions. Thus, it takes into account the inter-disciplinary nature of such work, involving lawyers and accountants, its status as a reserved activity for a relatively small group of professionals and, finally, the increasingly international domain in which it takes place.

The report seeks to throw light on:

- the UK insolvency regime as it operates in practice, and its consequences for corporate rescue and rehabilitation;
- patterns of change in insolvency practice, e.g. the move from *corporate undertakers* to facilitators of *corporate restructuring*;
- the issues that arise in insolvencies which involve more than one jurisdiction.

The study also aims to further understanding of wider inter-professional issues. In particular, it looks at the way professions come to develop specific fields of expertise in co-operation or conflict with one another, and the role of professionals as rule makers, where rules (in this case concerning international insolvencies) are absent.

Insolvency Practice in the UK

Overall, the club of authorised insolvency practitioners is very small (about 2,000), and has a mixed membership of accountants and lawyers. While both are authorised to take insolvency appointments, in practice, office holders are predominantly accountants, with lawyers acting largely as their advisers. This allocation of roles, which is peculiar to Britain, is observed in all big cases of corporate insolvency. Although there is no rule which demarcates their function along these lines, informal distinctions have prevailed. The insolvency club is also nearly

exclusively male; the demands of insolvency work on an individual's time, its dangerous, action-packed image (which featured very strongly in our interviews), and finally, the general resistance that still exists in the business world towards women in charge of financial affairs, make the insolvency world less than welcoming to women. The effect of this near absence of female insolvency practitioners on the style and ethos of the insolvency profession is difficult to calculate. Most interviewees acknowledged the human dimension of their work but felt that human issues had to be subjugated to the need to act fast and do the job that had to be done.

Big insolvencies are big scale operations and, as such, require resources which are only available to the very large firms of accountants and City lawyers. Appointments in large scale insolvencies are not based on professional knowledge *per se* (it could be argued that all competent insolvency practitioners would possess such knowledge), but on a variety of factors, including firm size, contacts and "favour-banks" with the banks and practitioners across the professional divide. An established reputation in the field is vital. Competition is found between accountant and accountant, lawyer and lawyer, but not between the two. In fact, neither profession could do their work without the help of the other. The collaborative nature of their relationship gives both groups the legitimacy to define mega-insolvencies as their own *problem*, amenable to their joint method of reasoning and intervention.

The International Arena

An important feature of large-scale insolvencies is their international dimension. The co-ordination and regulation of transnational insolvencies is hampered by a lack of international and domestic state norms. The European Union has for 30 years explored the idea of a directive on insolvency and major international organisations such as the International Bar Association have devised model rules which have not gained acceptance from national states. In short, no international treaty, European or global, has emerged to tackle the problems of cross-border insolvency. The two routes available when such problems arise are: negotiation between fellow insolvency experts based on ad-hoc rules; or litigation often involving conflicting state regulations and the risk of the company's assets disappearing in the process. Until institutions tackle the problem of cross-border insolvencies, the corporate world will continue to rely on local solutions crafted by the small global community of insolvency professionals.

The most significant large-scale insolvency case in recent history has been Maxwell Communications Corporation (MCC) because it required a degree of creative problem-solving which went beyond the norm, and highlighted the fundamental difference between the US Chapter 11 and UK administration procedures. As a headline news item, it has also brought to the attention of a wider audience the important role insolvency practitioners have come to play in corporate affairs in this and other countries.

Conclusions and Recommendations

The *Insolvency Act 1986* created a special role for UK insolvency practitioners; it brought into being new insolvency procedures aimed to foster a corporate rescue culture and established insolvency work as a reserved activity for authorised insolvency specialists.

Overall, the Act enables insolvency practitioners to play a more dynamic, creative role in insolvency matters, changing their image from corporate undertakers to problem solvers, while at the same time it limits the supply of insolvency services to those that have successfully undergone a process of authorisation. Furthermore, insolvency practitioners' role extends beyond the powers bestowed to them by legislation; developments, such as increased cross-border corporate activity, and subsequent collapses, have made it necessary to place greater reliance on insolvency practitioners as creative problem solvers, given the lack of international treaties in this area. Where there is a regulatory void, large corporations expect their elite professionals to construct their own rules and solutions to problems unforeseen and unresolved by legislature.

The private treaty worked out by insolvency specialists to resolve the Maxwell case, known as the *Protocol*, stands out as an example of the creative role insolvency practitioners have come to play as rule makers and problem solvers in the international arena. It is indicative that the advisers working on the Olympia & York international insolvency called the Maxwell team to ask for a copy of the document. The *Protocol* was acquiring the status of a blueprint for future cross-national bankruptcies. However, private treaties such as the *Protocol* are by definition expensive; they are a luxury item which cannot be transformed into a mass product. Again by definition, private treaties are powered by commercial considerations and interests and cannot compensate for the lack of a public, internationally agreed, regulatory system which should take into account the wider issues involved in cross-border insolvencies and the interests of all stakeholders.

It is therefore recommended that:

- The UK government and the accounting and legal professions should encourage and support initiatives for co-operation between different countries in matters of cross-border insolvencies, both at the national and international level. In particular, the current initiative by Insol International should be given full support, since it offers an opportunity to benefit from the imput of insolvency practitioners worldwide with experience in cross-border insolvency matters.

- Given the importance placed by legislation and the corporate world on the work of insolvency practitioners, there is a need for further research in this area of professional activity. In particular, there is a need for a thorough examination of issues, such as the role of investigating accountants prior to an insolvency appointment, professional fees, the participation of women in the insolvency profession, and the establishment of international insolvency treaties.

1. INTRODUCTION

What is Insolvency Work all About?

A company is insolvent when unable to pay debts owed and the term "corporate insolvency" is used to apply to a company which is in an insolvent state (Hanson 1985). Put rather simply, insolvency work means dealing with companies that cannot meet their debts.

In the UK, the law relating to corporate insolvency is found in the *Insolvency Act 1986*. The Act sets out four different insolvency procedures for companies which all require the involvement of an insolvency practitioner: company voluntary arrangements (CVAs), administration orders, administrative receiverships, and liquidations. A person who acts as a supervisor of a company voluntary arrangement, administrator, administrative receiver, or liquidator when "not qualified to do so" is liable to imprisonment or a fine or both (*Insolvency Act 1986*, s.389(1)). A brief explanation of UK insolvency procedures is given below.

CVAs, first introduced by the 1986 Act, are the most informal of the four main insolvency procedures. The legislators' intention behind this new vehicle for corporate rescue was to balance the needs of creditors and the interests of the company itself, by providing sufficient protection to the former without interfering too much with the normal operations of the latter. A CVA is essentially an agreement between the company, its shareholders and its creditors, for the satisfaction of company debts or for a scheme of arrangement of the company's affairs. It can involve any of the following possibilities: delay of payment to creditors, payment by instalments, payment of less than 100p in the pound, or the introduction of appropriate management and financial controls and personnel. Subject to certain protections for secured and preferential creditors, the parties to the agreement are free to agree almost any terms. The procedure was set up to be readily available to the company through its directors rather than its creditors. However, a proposal for a CVA will only come into force if approved by the necessary majority, that is (a qualified) 75 per cent of the company's creditors and over 50 per cent of its shareholders, both percentages calculated in terms of value. If approved, the CVA is binding on all those who had notice of the meeting, i.e. all known creditors, and the company may continue to trade.

Administration procedures, like CVAs, came into existence with the *Insolvency Act 1986*. However, unlike CVAs, such procedures are formal and require court involvement. An administration order is granted by the court on petition by a company, its directors or one or more of its creditors, and results in the appointment of an administrator. In order to grant an administration order, the court must be satisfied that the company is, or is likely to become, unable to pay its debts and that an administration, inter alia, would offer a better chance of

survival, or a better realisation of assets than a winding up. While the courts consider the petition, and after an administration order is granted, the company cannot be wound up, and there can be no appointment of an administrative receiver. (If an administrative receiver is already appointed, this will generally rule out an administration order.) The aim of an administration order is to hold a business together while plans are formulated for its future. Therefore, administrators' responsibilities include the day-to-day control and management of the company, as well as the formulation of proposals for rescuing the company. Such proposals must be presented to the creditors to vote on within a given period. Generally, while a company is under an administration order, it is protected from creditors' demands.The company can continue to trade under the management of the administrator.

While CVAs or administrations can be entered at the request of the company and its directors, administrative receivers are usually appointed on behalf of a debenture holder, usually a bank or other lending institution which holds security over the major part of the company's assets. The receiver's main function is to realise the company's assets in order to meet the claim of the debenture holder. Once appointed, administrative receivers can continue the business, and often do so, aiming to sell it as a going concern. If the business is sold, the buyer gets it free of debts, and the money paid goes to the receiver to distribute to the creditors in due order of priority. The primary responsibility of an administrative receiver is to the creditor who requested the appointment and not to the company or other creditors (although the receiver has some duties towards them).

A fourth possible route for an insolvent company is that of liquidation, which signifies the end of the company. The liquidator is appointed to collect in the company's assets, turn them into cash and then distribute the proceeds to the company's creditors. If all the company's liabilities are satisfied and there is a surplus, this can then be distributed to the company's shareholders. There are two main forms of liquidation: voluntary and compulsory. In compulsory liquidations, a winding up petition is made to the court and, if granted, the court orders that the company be liquidated. In voluntary liquidations, the members resolve to put the company into liquidation. This process will be a members' voluntary winding up if the company directors can make a statutory declaration that the company can pay its debts in full within a year or less, otherwise it will be a creditors' voluntary winding up. The appointed liquidator will almost never trade on, and except in highly unusual circumstances, the process of liquidation is irreversible (Cork Gully 1991).

While the above outline does not offer an in-depth analysis of the different insolvency procedures in the UK following the 1986 Act, it is possible to draw some general distinctions. Both CVAs and administrations aim to save the troubled company by offering some breathing space and an opportunity to improve its management. CVAs are informal in nature, while administrations are court driven and, as a result, expensive. In administrative receiverships, receivers are brought in by the debenture holder to realise the company's assets and repay the company's debts. To maximise asset realisation, it is important to sell the business as a going

concern. Therefore, in administrative receiverships the aim is to save the business, as opposed to the particular company. Liquidations on the other hand signify the end not only of the company but of the business itself.

The vast majority of company failures in the UK result in liquidation; in 1994, the number of liquidations (including compulsory liquidations and creditors' voluntary liquidations) was 16,728. By comparison, the combined total for CVAs and administrations in the eight years since their introduction by the 1986 Act was only 2,111 (see Charts 1 and 2). The CVA represents a different, and still relatively new, approach to corporate rescue in this country. As a result, it is neither fully accepted nor fully utilised by the insolvency profession (Flood et al forthcoming 1995). In fact, most CVAs are put together by a small number of insolvency practitioners specialising in this particular procedure. The small number of administration orders can be explained mainly in terms of the expense involved. The cost of an administration order (estimated at around £20,000) is often prohibitive for small companies who form the majority of companies in distress. Administrations are therefore suitable only for larger enterprises facing difficulties. Indeed, many of the high-profile, big corporate collapses discussed in this study were administrations.

Chart 1. Company liquidations and receiverships since 1987

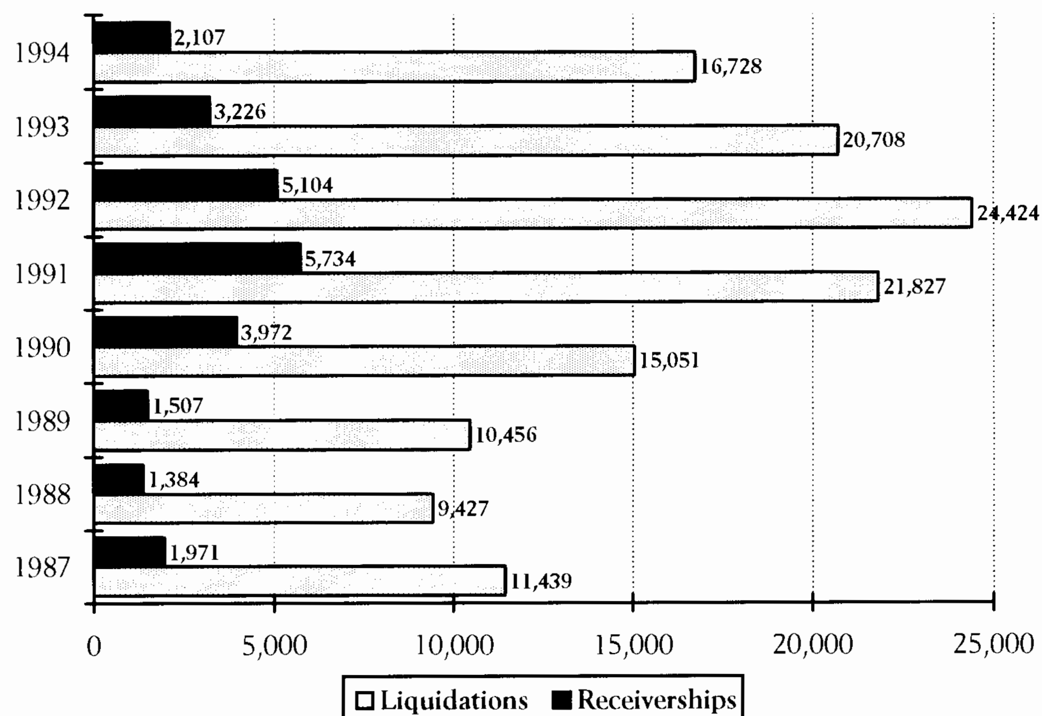
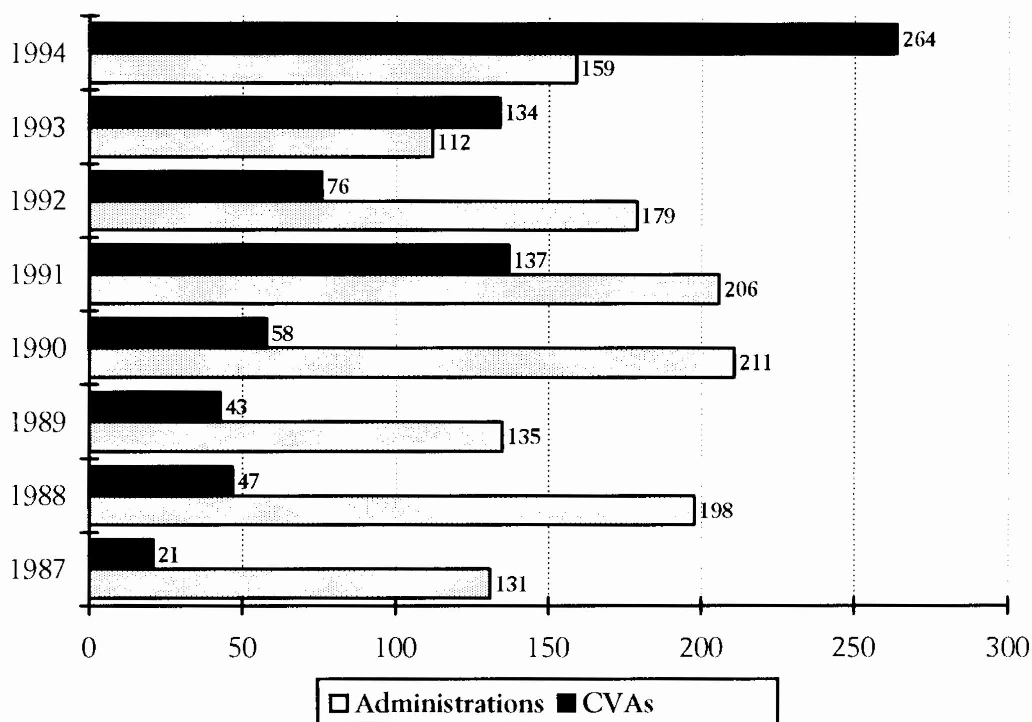


Chart 2. Administrations and company voluntary arrangements since 1987



The Insolvency Act 1986 and the Authorisation of Insolvency Work

Qualification implies authorisation; it is only granted to an individual and does not cover an entire firm. It can only be granted by a competent authority, i.e., the Secretary of State, or by virtue of membership of a recognised professional body (RPB).[1] In addition, the possession of technical knowledge and expertise in accountancy and law now needs to be demonstrated through professional examinations. The various recognised professional bodies have collaborated to ensure that one examination is sat by all applicants, whichever body or profession they belong to. The examination is organised by the Joint Insolvency Examining Board (JIEB).[2]

Despite the significance attached to technical expertise by the authorisation system outlined above, at the point of embarking on this research we did not expect practitioners' presentations of insolvency work to be in purely technical terms since, as Jones (1992:230) points out, "this would appear to be a claim to "technician" rather than "professional" status for the occupation" (cf. Jamous and Peloille 1970).

Scope and Theory

This paper focuses on insolvency practitioners, and more precisely on practitioners involved in big cases of corporate insolvency. Big-scale insolvency work means big names going or about to go under and big numbers of people being affected. Ultimately, it means big money — big money owed, and big fees charged by those trying to sort it out. For example, the collapse of the Bank of Credit and Commerce International (BCCI) and its subsequent UK liquidation had provided the Touche Ross insolvency team with fees of over $169.2 million (Accountancy Age 1994).[3] In 1993, fees of over £15 million were received by the joint administrators of Polly Peck International, in addition to £9.8 million paid in legal fees. The three accounting firms involved in the administration of the Maxwell empire reported fees running close to £35 million to the House of Commons Social Security Committee.[4] Advisers in the break-up of the US Maxwell assets shared fees totalling $60 million, with Price Waterhouse collecting $36 million (Robinson 1993).

Such figures are easy to explain if one takes into account the time-consuming nature of mega-insolvencies and the average hourly rates charged by the top players. According to the Social Security Committee's fourth report on the Maxwell insolvency practitioners (1993), the administrators of Maxwell Communications Corporation (MCC) charged on average £120 an hour, while their legal advisers charged the average hourly rate of £191 — the highest lawyers' rate encountered by the Committee.

Given the professional fees, and prestige, associated with large corporate insolvencies, it is not surprising that this type of work has developed as a small area of activity reserved for a few key players. As Delaney (1992:7) observes for the USA:

The first interesting point that can be made about major corporate bankruptcy attorneys is that they are part of a very small club.

The added interest in the case of UK insolvency practice is that the small club has a mixed membership of accountants (the majority) and lawyers. Following the *Insolvency Act 1986*, only authorised insolvency practitioners may be appointed as "officeholders". In the UK, officeholders are predominantly accountants with lawyers largely acting as their advisers. This allocation of roles is a rule in all big cases of corporate insolvency. This paper aims to explore how the two professions came to develop their respective roles in what is a very competitive area of work. The spectacular rise in insolvency and corporate restructuring work over the early 1990s attracted new players, both accountants and lawyers, eager to compete for a share (Pritchard 1992). Charts 1 and 2 above illustrate the growth in corporate insolvency work reserved for authorised practitioners since 1987.

The degree to which the two professions are in competition (or not) over a relatively recently established field has important implications for the further development of the field. Certainly,

it has been recognised that competition and harmony are not irreconcilable. As Bourdieu (1987:823) notes:

The hostility between the holders of different types of juridical capital, who are committed to very divergent interests and world-views in their particular work of interpretation, does not preclude the complementary exercise of their functions. In fact, such hostility serves as the basis for a subtle form of division of the labor of symbolic domination in which adversaries, objectively complicitous with each other, ***fulfil mutual needs.*** *(Own emphasis)*

Insolvency, although long established in history, is still a developing field. Remarkable discretion is given, or at least not accounted for by the *Insolvency Act 1986*, to officeholders in their roles as *charges d'affaires* of businesses. Furthermore, no significant international norms have been established, either transatlantic or within the European Community. Even the main players in the Maxwell case warned that their resolution of transatlantic difficulties through the development of a *Protocol* between the US Examiner and the UK administrators should not be used as a template for future projects.

Insolvency work is of a cyclical nature; periods of growth are followed by periods of contraction. In relation to the economy as a whole, it is more apt to describe it as counter-cyclical: boom periods are insolvency practitioners' quiet periods, while during recessions they are in high demand. Insolvency practitioners, although licensed as being holders and suppliers of specific expertise, take their characteristics as insolvency practitioners as secondary to their primary identification of lawyer or accountant. These factors make it difficult to assess the stability of the insolvency field and the extent to which the profession has acquired its own professional identity.

2. METHODOLOGY

As Mr Maxwell left court an unidentified man - possibly a Maxwell pensioner - waved a £5 note under his nose and asked, "Are we going to get any money?" (Trapp 1992:20).

In this paper we explore the work of insolvency practitioners and the roles they play in big cases of corporate failure. As researchers, one of our options was to isolate corporate failure from its human cost, from its capacity to affect corporate losers at a non-corporate, personal level. This would not represent an easy option, despite the complications entailed in the opposite approach. Accounting for the human dimension of insolvency work and the suffering that hard business decisions often entail, would be very difficult; but leaving them out completely would not necessarily be any easier. We decided to explore but not impose their significance. We thus talked to practitioners and gave them an opportunity to describe the human dimension of corporate failure and the extent to which they were affected by it.

Our methodology is largely derived from Howard Becker's sociological analysis of the collective nature of creative work. Becker's study, *Art Worlds* (1982), illustrates the fallacy of thinking that the creative enterprise is a solitary affair. Collective work forms the centrepiece of most types of activity which require creative thinking. For example, Becker shows that *conceptual* artists are dependent on others who make the brushes, canvasses and paints, as well as on institutions such as galleries and museums to bring their work to the public. Creativity is also a large component of the work of professionals such as lawyers and accountants, in that they need to create and put together solutions for their clients.

Professionals rely on a whole range of people and institutions to give effect to their advice and strategies for action. Even though the press may lionise certain individuals for their particular skills (Flood 1995), the actual production of professional work demands careful orchestration of teams of workers, including professionals, para-professionals and support staff. The regular "drop-dead" deadlines that elite professionals must meet, combined with the complexity of their projects, necessitate a high degree of co-operative interaction. Whilst there may be a creative genius behind a project, its outcome will only be successful if the team involved brings it to fruition. Thus, this study investigates insolvency practice as the outcome of the collective efforts of a set of people engaged in many different roles.

Interviews with practitioners have been our major source of information. This is primarily a study of practitioners' perceptions and interpretations of corporate insolvency and their role in it. We have tried to adopt a case-study approach and to interview as many of those involved in the Maxwell string of cases as possible. As will be made clear later on, these cases have

involved a significant number of practitioners from a number of accounting and law firms. This approach, which has proved largely successful, was used to identify key-players in the field of corporate insolvency. Nevertheless, the scope of our interviews was not solely limited to the Maxwell cases.

The validity of the information gathered is a methodological issue that most researchers of elite groups face. Professionals might inflate the role they play, and justify it with reference to how difficult, demanding, and important it is. This is of particular relevance when exploring practice innovation, e.g., in the area of international insolvencies which involve a number of legal jurisdictions; practitioners' accounts may over-emphasise their particular role in bringing about innovation. As Delaney (1992:7) suggests:

There is no real way around this problem other than to attempt to triangulate information whenever possible using other sources and to insist that the interview subject provides specific details about his or her role in the events described.

In addition to interviews, we use another primary source, viz., the *Debtor's Disclosure Statement* (Milbank et al 1993), prepared by counsel to the administrators of MCC, and filed in the United States Bankruptcy Court of the Southern District of New York. The *Disclosure Statement* is a particularly rich yet stilted narrative of the Maxwell case (cf. Falk Moore 1992). It is a "grand" narrative, although partial in that it represents only certain actors' perceptions. It is purposive in that it is essentially a document of record deposited in the bankruptcy court. It is lacking because it denies the oral tradition that brought it into existence. It is a cultural artefact that represents a distillation of perceptions of action. It is truthful only insofar as it portrays the circumstances which the actors wish the *public* to see, so it has a cultural logic. Nevertheless, behind it were many struggles over the primacy of certain cultural beliefs over others. Our use of it as primary data reflects its significance as a record of an otherwise hidden process. However, it also reflects our interest in those voices that are absent from its grand narrative.

3. THE DEVELOPMENT OF INSOLVENCY PRACTICE AND THE RISE OF THE ACCOUNTING PROFESSION: AN HISTORICAL REVIEW

Capitalism without bankruptcy is like Christianity without hell (Frank Borman, CEO of Eastern Airlines, Observer 9 March 1986).

Work for an Emerging Profession

Insolvency work provided British accountants with their "first professional boost" (Napier and Noke 1992:34). Britain in the 19th century experienced the introduction of income taxation, the emergence of the limited liability company, and the setting up of large scale organisations (such as the railways); it also witnessed a high rate of company failures and a large number of insolvencies among these newly established organisations. As one of the basic economic and social features of 19th century Britain, insolvency had a particular influence on the development of professional accountancy. The bankruptcy laws of the 1820s and 1830s, and in particular the Bankruptcy Act of 1831, made reference to "official assignees" in matters of liquidation; their role was to liquidate the estates of bankrupts on behalf of their creditors. Such work was not reserved for any one group. Indeed, the 1831 Act listed a number of possible occupations that could act as assignees: merchants, brokers, accountants or persons engaged in trade.

The absence of lawyers from this list can be understood in terms of the modest rewards associated with insolvency work compared to other types of work that established lawyers undertook. The legislators' assumption appeared to be that insolvency work would not particularly attract lawyers. Linked to that was another assumption that insolvency work, with its emphasis on commercial skills, was not particularly relevant to the average lawyer (Hoppit 1987). The lawyers themselves did not protest against either of these assumptions and instead reinforced them by keeping out of insolvency work. This was especially true of solicitors whose established role as estate managers would have put them in a good position to capitalise on insolvency work. Yet, such an opportunity was rejected. This can only be understood with reference to the wider processes and conditions facing the legal profession. That is, the processes that made lawyers elevate social, moral and status concerns over immediate financial advantage when determining the parameters of their rather ambivalent professional role: to act as gentlemen, businessmen or both (Sugarman 1992). The association of insolvency work with debt collecting had unfavourable connotations for solicitors already conscious of their ambivalent moral and social position (Prest 1981).

It would be fair to say that accountants could not afford to turn down the emerging bankruptcy and insolvency work. The growing number of companies, following the introduction of the Joint Stock Companies Act 1844 and subsequent legislation, did not provide an immediate boost to the business of accountants (Napier and Noke 1992). The main boost came from the growth in the number of railway companies followed by the high number of failures in the 1840s and the introduction of the Winding Up Acts of 1848 and 1849 (Patient 1992). Corporate failure became a professional success for accountants. Indeed, insolvency work provided a boost not only to accountants' services, but also to their professional organisation. The profession has been described as "born out of a crisis — an attempt to control the insolvency practitioners of the 19th century" (Aldous 1992). Many leaders of the accounting profession gained their reputations through their work on railway company failures and corporate insolvency work. For most of the second half of the 19th century, alongside their reputation, many firms gained the vast majority of their fees from insolvency work, in one case recorded as high as 72 per cent compared to 11 per cent of fees generated by audit work (Jones 1981; Napier and Noke 1992). Napier and Noke (1992:35) quote Ernest Cooper of Cooper Brothers & Co about his youth in the 1860s: "If an accountant were required, he would be found at the bar of the nearest tavern to the Bankruptcy Court." It is not surprising that merely being seen in public with an accountant could be considered "an omen of disaster" (Waller 1991:14).

Accountants, Lawyers and Business

The dominant role of the growing accounting profession in insolvency practice could not be ignored by lawyers. Indeed, it was resented by some and Mr Justice Quain in 1875 argued that bankruptcy had become work for "an ignorant set of men called accountants". It was not only lawyers that expressed concern over insolvency practitioners' standards of practice and level of expertise. Some accountants too wished to see this type of work become a regulated, reserved activity. This is hardly surprising since insolvency work at the last quarter of the 19th Century provided the majority of the top firms' fees, but could not be claimed or closed off as their own area of work.[5]

By the end of the 19th Century, the two dominant accounting professional bodies, the Institute of Chartered Accountants in England and Wales and the Society of Accountants and Auditors, sought to establish registers of accountants and create a professional monopoly. Their attempts to close off areas of work from non-members provoked strong resistance from those left out. The main reason for being left out was failure to fulfil the prerequisite of articled clerkship before they could sit any examination. Many individuals had worked for years providing accounting services and either could not or would not put themselves in the position of an articled clerk just to gain membership. (Ironically, it was the fact that articled clerkship was *not* the only route to accountancy that allowed the accounting profession to expand fast enough to take advantage of the potential business that was being generated over most of the 19th century.)

The older bodies' attempt to keep people out eventually led to the growth of rival professional associations set to challenge their efforts. It took a court decision to stop the members of the London Association of Accountants Limited using the designation "incorporated accountant" (*The Society of Accountants and Auditors v. Goodway and the London Association of Accountants Limited* 1907). The Association was founded in 1904 as a rival to both the Institute and the Society and later developed into the ACCA. Another inter-professional battle arose in 1909 caused by yet another attempt to close the profession to members of the older accountancy bodies only. The Bill for the State Registration of Accountants, (which even the Institute's journal "The Accountant" described as "approved by English Chartered and Incorporated Accountants, but no others"), became a fundamental issue for the fragmented accounting profession, even after its failure at the House of Lords.

Accountants' preoccupation with intra-professional competition did not stop them from asserting their perceived advantage over lawyers in matters of business and finance when the need or opportunity arose. Such an opportunity was provided by the collapse of the Law, Guarantee, Trust and Accident Society Limited in 1910. What was essentially the creation of lawyers, resulted in colossal debt and voluntary liquidation. In January 1910, the Certified Accountants' Journal (1910b:11) commented under the heading "Lawyers and Finance":

In just the same way as in all probability most professional accountants would not make good lawyers, lawyers, no matter how exalted in their own profession, fail when it comes to a question of finance and accounting.

The leading article of its July 1910 issue was titled: "Are lawyers business men?" (Certified Accountants' Journal 1910b:105). Reflecting on the reporting of the position of the Law, Guarantee, Trust and Accident Society Ltd, the article commented:

Not for the first time, our contemporary pays a tribute to professional accountants. In the leading article these words occur: "The lawyers, in plain English, must stand on one side. The creditors and shareholders must place their interests, in regard to the real work of liquidation, in the hands of men of business and be prepared to act on their advice." (Certified Accountants' Journal 1910b:105).

Later references to insolvency work in accounting journals reveal the same claim to accountants' superior professional expertise in this area. They also reveal the claim of all professions to act for the public interest. In a paper on "The Accountant and the Community" (Bubb 1939:456) a member of the Council of the Society of Incorporated Accountants describes the role of the accountant "when a company is ill":

Here the accountant is called in to safeguard the interests of the community where it is apparent that the security is in jeopardy. He in effect collects the assets on behalf of the debenture holders and it is his duty to see that the proceeds thereof are properly applied...there may come a day when a company, finding itself unable to pay its debts, goes into liquidation and the accountant as a professional expert is called in to see that the assets are equitably divided between the interested parties.

Such presentations of accountants' role in insolvency provided a positive, if unexciting, account of their work. Emphasis was given to the professional respectability of practitioners, on their ability to follow the rules and creativity and innovation, although major components of the business mind, were kept out. Insolvency was increasingly perceived even by the accounting profession itself as a respectable but routine type of work. Most accountants came to rely on other types of work, auditing in particular, for their fees and reputation.

The Changing Appeal of Insolvency Work

To most people, accountants are grey book-keepers whose only attributes are that their jobs never change and that they keep them whatever happens to the economy. One firm's audit client cut down by recession is another's insolvency case (Economist 1992:25). Doing well when everybody else is doing badly did not win insolvency practitioners many friends. Yet, at least within the circle of accountants and lawyers, recessions tend to make insolvency work "sexy" as one insolvency lawyer described it.[6] In times of recession, insolvency — traditionally the poor relative of auditing, mergers and acquisitions, or commercial property transactions — can generate work and fees for the whole firm. Appointments to big corporate insolvencies, as officeholders or as legal advisers, raise the firm's profile and even make the news. Insolvency also yields spectacular professional fees. In 1992 top accountancy firms reported growth in insolvency fees of around 40 per cent. More interestingly, in times of recession, corporate insolvency work is associated with high job satisfaction and professional fulfilment, innovation, creativity, and achievement. As Price Waterhouse partner Colin Bird reflected:

In 1972, Price Waterhouse's insolvency department had one partner, Monty Eckman, and no offices outside London. We got the whole department into two cabs for the Christmas party....It was fairly boring until 1974, when the world fell apart with the property crash and the secondary banking crisis...Nobody had ever done a property receivership in living memory so we had to evolve the law and practice from scratch...It is the current recession however, which represents the biggest professional challenge to insolvency practitioners. We have seen more large and complex failures than ever before, even in relative terms...We [the three administrators of Maxwell Communication Corporation] had to get the US Chapter 11 and the UK administration working together, which meant negotiating transatlantic protocols where no common law existed (Insolvency Bulletin 1992a:17-18).

Our own interviews with practitioners reflected the same emphasis on doing a challenging, satisfying job, helping companies out of trouble, finding solutions and producing results.[7] The perceptions of their role to a large extent reflected basic changes in insolvency philosophy embodied in the *Insolvency Act 1986*, and first expressed by the Cork Committee. The conceptual view of the Committee was that the purpose of bankruptcy and insolvency was not to punish debtors but to protect them from their creditors and to protect creditors against any unfair advantage other creditors might gain (Penn et al 1987).

4. INSOLVENCY PRACTICE FOLLOWING THE 1986 ACT: OFFICE HOLDERS AND ADVISERS

[With the Insolvency Act 1986] the topic of insolvency finally emerged from the darker recesses of the Companies Act. Licensed insolvency practitioners lost the image of corporate undertakers and new disciplines were created in the area of corporate restructuring and rehabilitation (Groves 1992:17).

The Population of Authorised Insolvency Practitioners

Alongside a different philosophy of insolvency, the 1986 Act introduced a different insolvency practitioner: one that was granted exclusive professional jurisdiction over insolvency work in exchange for compliance with the authorisation process; also, one that could act in a new capacity, e.g., as a company's administrator, making use of the protection from any litigation or execution process afforded by an administration order.

The population of authorised insolvency practitioners that has emerged since 1986 is small, yet diverse. An analysis of their numbers leads to the conclusion that insolvency practitioners, like the accounting and legal professions, do not form a homogeneous group. Table 1 shows the numbers of authorised insolvency practitioners by authorising body.

Table 1. Authorised insolvency practitioners by authorising body - 1990 and 1994

Authorising Body	1990		1994	
	Number	% of total	Number	% of total
Law Society	192	9.60	192	10.00
Law Society of Scotland	31	1.50	29	1.60
IPA	271	13.60	261	13.50
ACCA	104	5.20	93	4.80
ICAEW	955	47.80	950	49.30
ICAI	99	4.90	63	3.30
ICAS	208	10.40	185	9.60
Secretary of State	138	6.90	152	7.90
Total	1,998	100.00	1,925	100.00

Source: Insolvency Service

In addition to their different professional backgrounds, they are split along other divisions, such as size and type of practice, geographical spread, and type of client. Insolvency practitioners operate from a variety of set ups: there are London firms and provincial firms; firms with offices nation-wide and local firms; small firms or even sole practices and Big Six firms; firms that deal with personal bankruptcy and small businesses in trouble and firms that handle big headline cases (Insolvency Service 1992).

A simple analysis of authorised practitioners that could — in theory — hold insolvency appointments reveals that accountants form the majority. In fact, 25 per cent of all authorised insolvency practitioners are found in the Big Six accountancy firms. In comparison the six top solicitors' firms absorb one per cent of authorised insolvency practitioners. In practice, the share of authorised insolvency work that accountants have is much greater than indicated by these statistics. Of the 200 solicitors in England and Wales that are authorised insolvency practitioners, no more than a handful actually take appointments. Even amongst accountants, authorisation does not mean taking appointments since most firms operate a rule that directs all appointments to partners only.

The population of insolvency practitioners could be described as homogeneous in relation to one factor only, viz., sex. Membership is nearly exclusively male, with only about 100 licensed practitioners being female (around 5 per cent). This could be explained in terms of the predominantly male character of both the legal and accounting practising professions, although it is found to a much larger degree in insolvency practice. A female insolvency partner at Cork Gully commented that "when you walk into a room, the men look behind you to see whom you are going to take notes for" (Maudesley-Thomas 1994).

Negative perceptions of women handling business and finance matters in the corporate world might be part of the explanation (Skordaki forthcoming). However, insolvency work in particular is seen as a difficult field for women to enter and succeed. The male character of the insolvency club can be understood in terms of its opening times: as our interviews revealed, club members are sometimes expected to attend 24 hours a day, give up weekends and holidays and on a good year, work the equivalent of two normal years (Insolvency Bulletin 1992a). The demands of insolvency work are associated with little occupational flexibility.[8]

The very low numbers of women enjoying partner status in insolvency departments is further indication of the perceived "masculine" character of insolvency work. As a male Cork Gully insolvency partner suggested: "insolvency can involve nasty situations, such as having to enforce confiscation order on drug traffickers ... it has been known for insolvency practitioners to be threatened at gun point in such situations" (Maudesley-Thomas 1994). The dynamic, hero-like approach required of the insolvency practitioner was also conveyed to us by most of our interviewees (in their majority male).

It is interesting to note, that solicitors are over-represented among female insolvency practitioners: eleven per cent of all insolvency practitioners are from the solicitors profession,

but the percentage rises to about 23 per cent when looking at *female* insolvency practitioners. It would be interesting to consider whether there is less cultural resistance towards female solicitors entering the insolvency field as *advisers*, compared to female accountants who would be expected to act as officeholders. This over-representation of legal advisers among female authorised practitioners and the non-partner status of most female accountants, guarantee that the number of women that are actually in a position to take on official insolvency appointments is extremely small.

The Role of Office Holders in Corporate Insolvency

When asked what he thought the role of an officeholder was, one senior accountant said bluntly, "We are debt collectors." The difference between ordinary debt collectors and licensed insolvency practitioners is one of scale and complexity. Insolvency practitioners often have to grasp the structure and details of large vertically and horizontally integrated organisations in very short time, all in moments of crisis. As another insolvency practitioner put it: "You've got to stop the assets walking out the door". Moreover, if the company is a people business, e.g., advertising, speed is essential in dealing with potentially insolvent situations to prevent the employees from jumping ship to another company, or losing a license. One accountant said travel companies were at particular risk here in that they could lose their licenses within 24 hours, "so you can't hang around".

The senior partner (SP) of one of the Big Six accounting firms provided the following example of the problem of time sensitivity and what was the ultimate goal of an officeholder, namely, to sell the company as a going concern. The company described below is a global money brokerage:

1. SP was appointed receiver at 11.30 pm on Friday night, London time.

2. From 11.30 pm until 5.30 am Saturday morning the receivers investigated the company's offices which were situated all over the world. SP also found a buyer for the company.

3. From 5.30 am until 6.00 pm Saturday night the lawyers drafted the sales documents.

4. From 6.00 pm until 4.30 am Sunday morning the receiver and buyers negotiated and finalised the sale. This had to be completed by the end of the weekend before the first markets opened — Singapore — at 9.00 pm, London time, and it became general knowledge to the markets and employees that the company had brought in receivers.

The same accountant reinforced this approach in telling of being appointed receiver of an advertising company and within six hours having sold the company in its entirety: "I like to sell companies as going concerns; it's much better for everyone. Selling companies is the most exciting part of all".

Another senior accountant depicted his role as follows; one which came into play before official appointments were made:

My role is preparing and working behind the scenes long before any 'official' action is taken, i.e., receivership, etcetera, to save the assets before they aren't saleable any more. Banks call me up saying, "it's not urgent but I'd like you to come and see me". The more times they said it wasn't urgent the more I realised it was urgent and if I didn't get over there quickly there wouldn't be any work left. Some insolvency practitioners merely process liquidations, others, like myself, are creative accountants that need to get as much money as possible back for the banks, and need to keep things in the air.

His meaning was clear, that the insolvency practitioner must be prepared to move when the client wants because, again, speed is of the essence. And not all the pre-appointment work is merely preliminary. A bank called one practitioner over two years ago concerned about a company owing the bank £240 million and he had been working on the matter since then without any official appointment having been made. Another way of describing this role is "turnaround doctor". But this particular practitioner preferred to be called an "innovative problem solver", since the term doctor implied a willingness and ability to save which one might not have.

The use of investigating accountants by banks prior to any formal appointment under the insolvency regime has been controversial. Press commentators in particular have emphasised "the perceived conflict of interest arising from a situation whereby the accountants investigating a company for a creditor — usually a bank holding a debenture — enjoy any subsequent receivership appointment" (Baker and Newton 1993). Furthermore, it has been suggested that barring investigating accountants from follow-on receivership work could reduce the number of companies put into receivership. The experience of the Royal Bank of Scotland is often cited in support of this. The Bank adopted a barring policy in January 1993 and since then there has been a reported drop of over 60 per cent in the number of receiverships appointed (Newton 1994). The Bank's introduction of competitive tenders was also reported to bring receivership costs down (Sach 1994). Insolvency practitioners criticised both policies as impractical and inefficient. One criticism over competitive tendering is that only a firm which had carried out an investigation would be able to form a realistic picture of the problems facing the company and no other firm would be able to give a binding cost estimate (Newton 1993). The disadvantages of barring an investigating accountant from taking up a resulting receivership post have also been stressed by insolvency practitioners:

to bring in another [insolvency practitioner], would mean effectively starting all over again. That would be costly and time consuming. Interestingly enough we would not expect to be any worse off if this did happen regularly. Other firms would get 'our' insolvency work but, if all things are equal, we should get our share of theirs. We should simply be on a merry-go-around — albeit a more expensive one than now! (Bird 1994)

This view has been convincing, at least for the courts, as seen in the MCC appointment of administrator. The main argument used to persuade the court as to Price Waterhouse's suitability was that they had already spent several weeks investigating MCC's affairs for the banks.

In addition to the disadvantages outlined above, the insolvency profession is also arguing that there is no inherent conflict of interest in allowing investigating accountants to act as officeholders in a subsequent receivership. An SPI survey, covering 518 investigating accountants appointments, showed that less than one third of the reports submitted by investigating accountants recommended a receivership. For two thirds of the companies reported on, alternative proposals or recommendations were made by the investigating accountant (Bradberry 1994).

When an official appointment is made, the officeholder — if not already involved in pre-appointment dealings with the company — must co-ordinate a massive exercise in coming to grips with the company's corporate state of affairs: the assets and their valuation, government agencies (e.g., customs and excise, inland revenue, national insurance, social security), the subsidiary companies, the employees, the creditors and their accountants and lawyers and so forth. This is the main reason why, under the UK legislation, accountants, more than lawyers, are likely to be officeholders. The big accounting firms possess staff resources far in excess of any large law firm: they have many branch offices whereas the law firms do not (Pratt 1992). In the space of hours they can dispatch staff members to all points to "stop the assets walking out the door". In part this is done by bringing in staff who normally work on the audit side of the business. The first month, then, of a receivership or administration is enormously labour-intensive. Two of the Big Six accounting firms appointed as administrators in the Maxwell collapse — Arthur Andersen with Headington Investments and Robert Maxwell Group; Price Waterhouse with MCC — have each employed more than 60 staff in these projects (Parker-Jervis and Bell 1992).

With liquidations the accountant's role is one of asset recovery, which can take the liquidator around the world and, as insolvency practitioners wished to emphasise, into awkward and potentially dangerous situations. One liquidator told how he tracked some valuable diamonds (one of which was worth £35 million) to Singapore. Rather than going through the courts, which would have taken too long and would not have guaranteed success, the liquidator decided to carry them out of the country in his briefcase: "I was told not to handcuff the case to my wrist because the people who would come after me would take my wrist as well as the case. Three people had already died on this case — a policeman, a solicitor and a judge!"

Accountants are used as officeholders because they claim to understand business, therefore they can run them, and know how to sell them. But even here they suffer the vicissitudes of the market. A senior accountant told how, occasionally, auction "rings" would form around the sale of a company. He was selling a company in which two buyers were interested. The bidding started at £30 million and rose to £40 million when the buyers stopped and left to talk to each other. One eventually returned with an offer of £32 million which the accountant was compelled to accept. Lawyers are not players or controllers in this game. Their role is more advisory than central.

The Role of Legal Advisers

Although the *Insolvency Act 1986* opened up the possibility for lawyers, as well as accountants, to become officeholders, no City lawyers actually take appointments.[9] Yet about 200 lawyers — i.e., solicitors, not barristers — possess insolvency licenses. The main reason for obtaining the license was for marketing purposes. The license showed a willingness on the part of the lawyer to commit time and effort to this specialism.[10] Nearly all lawyers with licenses were "grandfathered" under the Act without having to sit an examination because they had already been practising in this field. The head of one law firm's insolvency group said:

I got one while you could obtain it on the basis of experience. I thought I might as well apply for it. It helps to demonstrate to the outside world that you have that experience. It's also good for company directors to say that they've consulted an insolvency practitioner. Also, life might change and we could at some stage be prepared to take small appointments.

Lawyers articulate another reason for refusing to take appointments. One lawyer said, "If I start taking appointments that's the last work I get from the accountants". The work relationship between lawyers and accountants in insolvency has a large symbiotic component. They both need each other and respect each other's roles.

A leading insolvency lawyer described the lawyer's role(s) thus:

The role is different according to whether he is called in to advise the administrator, liquidator or receiver. In liquidation, it's mostly recovery work of assets, and overseeing administrative arrangements. Sometimes, there are questions about staff and what to do about their employment contracts.

Acting for an administrative receiver means first, looking at the floating charge under which the receiver is appointed. Lawyers need to make sure the receiver is firmly on the saddle. I have often come across invalid appointments. In some cases, the receiver must be dis-appointed and then appointed again under the right procedures. Secondly, lawyers usually go to the business premises and sit by the receiver's side when he speaks to the staff, or when the company's directors are removed. Other tasks include appeasing the creditors and fighting off reservation of title, dealing with the work force, which sometimes means down-sizing them. This involves negotiation but sometimes it can even get physical. Also, it might come to litigation and the lawyer must advise the receiver whether to fight it or pay the creditor. If the business is closed or sold as a going concern, the lawyers must take care of a number of issues: the drafting of the sale document, land law issues, transfers of intellectual property, pension fund arrangements, which involves instructing actuaries, tax law issues and international issues.

In cases of administration, the administrator is proposed by the company or its creditors. In most cases, the company is advised by its own lawyers. Once an administrator is appointed, new lawyers move in with the administrator. Administration is a much more court-driven procedure. The running business and dealing with employees issues are similar to those in receiverships except administrators have no power with debts only assets. The end however can be different. There can be a liquidation, and the administrator becomes the liquidator, or a CVA, where both shareholders and creditors must come to an agreement.

The lawyer who advised the administrator of an airline, explained some of the lengths to which the lawyers had to go.

The appointment was made by the company on day one, and immediately we tried to get the aircraft back from where they were scattered. It was hard because we had aircraft that had been arrested for unpaid landing fees. When we spoke to the airports, they demanded their fees and we had to tell them we couldn't pay them yet. They would have to wait, but meanwhile we'd like our planes back. Of course when they realised a stalemate meant our plane under arrest blocking their single runway...they soon gave up. We tried to preserve the scheduled routes but had to give them up to the CAA. This one took about 12 to 14 months, but minor moppings took another year. [11] *For the first month we had 5 to 6 partners, 18 assistants, and 6 articled clerks working 16 to 18 hours a day, with the first two to three days without sleep.*

Another lawyer distinguished contentious from non-contentious insolvency work. The former largely being asset recovery and the latter advising officeholders. Asset recovery can entail tracing the history of an asset over a two year period and command heavy use of resources from the law firm. Stephenson Harwood, acting for Robson Rhodes in the liquidation of Bishopsgate Investment Management, committed over 20 lawyers to the case in its early stages, with 24-hour days the norm for the first five days.

The lawyer's role is primarily technical and secondary to that of the officeholder. The lawyer is the *adviser.*[12] The lawyer acting for the administrators of MCC, explained that a case as complex as the Maxwell debacle required co-ordination of teams with various types of expertise. His initial step was to design a chart that allowed him to trace the connections between the 400 companies that made up the Maxwell empire: He said: "Every so often I cross one off when we've finally wound it up". He then put together several teams of lawyers to handle the different problems surfacing in MCC. These teams were: a US aspects group to work with Milbank Tweed, a Wall Street law firm; a funding security group; a litigation group; a property group; an investigation group; a reorganisation group; an insurance group; a banking group; an employment group; and a pensions and tax group. Price Waterhouse, MCC's administrators, had matching teams. The leaders of corresponding teams in the two firms would meet frequently and report to their organisation so that all lawyers and accountants would know what was being done in each part of the project.

Throughout its history, UK insolvency practice has been firmly in the hands of the accounting profession. It is therefore interesting to consider how lawyers came to be allocated such a big, albeit advisory, role in insolvency matters, apparently with the accounting profession's blessing. One answer must surely be that lawyers' involvement became more and more necessary as insolvencies came to reflect the increasing complexities of commercial activities in general. Another important aspect to be taken into account however, is the fact that the involvement of lawyers as advisers on technical legal issues was never perceived as threatening, but, on the opposite, was considered as further legitimation of the accounting profession's dominant position in the field. In a way, concessions to specific legal technical expertise served to highlight the wider business skills and problem solving outlook of accountants.

Co-operation and Competition in Corporate Insolvency Work

The previous two sections outlined the role that accountants and lawyers play in insolvency cases: accountants act, lawyers advise. According to this strict role allocation, neither profession could carry on doing its job without the help of the other. Furthermore, it could be argued that insolvency practice, as it stands, is one area where both accountants and lawyers have more to gain by co-operating rather than competing with each other. Again, this is a reflection of the role allocation described earlier, which encourages intra-professional rather than inter-professional conflict: advisers have to compete with other possible advisers and officeholders need to "win" appointments. Both officeholders and their advisers undergo a process of selection.

This section describes this process and examines the different levels at which competition can be found. Inevitably, it will review the significance of the role allocation that accountants and lawyers have come to identify, accept and maintain.

The key players in corporate insolvency mostly handle administrative receiverships and administrations. Liquidations, although higher in number overall, usually involve small businesses with no prospect of restructuring or sale as a going concern. Cork Gully estimate that in the first few years following the 1986 legislation, administrations comprised 2 per cent of all insolvency proceedings and administrative receiverships 17 per cent. The method of appointment of administrative receivers and administrators is different. The former are appointed by the debenture holder (bank or other lender) and the latter by the court on petition by the company involved. Since the largest part of big corporate insolvency work involves receiverships, the role that banks play in handing out appointments — especially the four clearing banks, National Westminster, Barclays, Midland and Lloyds — is very important. The banks appoint receivers but also play a role in selecting the legal advisers.

Selecting the right officeholder for a job has been described as a "matter of horses for courses" (Insolvency Bulletin 1992b:4). Banks feel there is no need to use one of the big firms to sort out a small company. When it comes to large companies with extensive, often world-wide operations, however, their choice of firm is limited to those with the resources to do the job. Insolvency practice is very much a people business and, as far as banks are concerned, practitioners are only as good as their last job. For big case appointments a track record is vital. As one big six partner said:

We do not usually have to tender for work. Appointments are not based on price, but mainly past experience. That's why it is important to get the bank to know us; we take them to lunch and keep in touch. And if for any reason you can't take the appointment yourself, you make back-scratching introductions.

Banks speak of qualities they are looking for in officeholders. The following list was provided by the Midland Bank: track record, partner involvement, quality of reports, commercial acumen, quality of support managers, meeting deadlines, price and regular feedback to the bank

(Insolvency Bulletin 1992b). While tendering is not common, cost controls are adopted by most banks. For example, Lloyds asks that receivership reports contain costs incurred to date, together with estimates of future costs, including those relating to other professional advisers acting for the receiver. Also, a breakdown of charge-out rates, for partners and managers, is requested at the outset of the appointment (Insolvency Bulletin 1992b).

The level of competition amongst insolvency practitioners for the big jobs is felt to be very high, even though it is restricted to a small circle of people. As an insolvency partner in a City firm of solicitors said:

New firms try to get into insolvency and the field is becoming more and more competitive. Accountants entertain people from the banks just to remind them they are there. The competition was high for the MCC administration appointment. Touche Ross was proposed by MCC but the banks wanted Price Waterhouse who eventually got it.

This view was echoed by other insolvency lawyers, who described the competition between accountants for appointments as "intense", "fierce", "a cut-throat business", "fighting like cat and dog". At times of recession, insolvency work has been used to sell other work to clients. Failing to capitalise on the insolvency boom could have serious consequences.

The growth of insolvency work has attracted more accountancy firms into the field; yet a firm has no hope of securing any big appointments unless it can front its team with experienced practitioners. Faced with an extremely busy period caused by rising insolvencies, most banks have not had the time to establish business relationships with unknowns. As a NatWest representative noted: "since we are so incredibly busy at the moment, it is difficult to go through the process of bringing in new firms" (Insolvency Bulletin 1992b:4).

Law firms have also been attracted to insolvency by its capacity to generate work and fees for the whole firm. Over the last couple of years, many firms have set up insolvency departments with lawyers transferred from less busy departments. The success or longevity of these departments is generally doubted. As Pritchard (1992:239) comments: "the traditionally strong firms have remained dominant". It is not accidental that the four firms that act as general legal advisers to the four clearing banks rank among the top firms in corporate insolvency. As Chambers (1992:148) suggest, in its research with accountancy firms, the names of the primary advisers to the four clearing banks, Clifford Chance (Midland), Lovell White Durrant (Barclays), Cameron Markby Hewitt (Lloyds) and Wilde Sapte (NatWest), figured above all others. For these firms insolvency work is very much linked to their banking work (Cameron Markby Hewitt 1992:6). The link between banking and insolvency work has indeed protected the top legal players from the effect of the overall reduction in insolvency work witnessed in 1994. Pritchard suggests (1994):

In general terms, insolvency work is beginning to decline. But, there is still enough insolvency and reconstruction work to keep the majors busy; in particular, it is the firms with established banking practices that have been involved in the major work (most of it involving substantial restructurings).

The role that banks play in the selection of legal advisers appears to be changing. Some have kept a bigger role for themselves than others. Generally, banks suggest that the officeholder uses the lawyers that advise the bank. However, some will insist on who should be appointed as adviser while others will allow the insolvency practitioner to decide. For example, a senior partner in a big-six firm said that NatWest mostly uses Wilde Sapte; in addition it has a list of 12 firms around the country and tends to insist that they are used. On the other hand, he described Midland as not insisting that Clifford Chance should act as the legal adviser. Another senior accountant also said that NatWest tend to nominate who should act as legal advisers, and also that the Bank of Scotland likes to use law firms that are clients of the bank. He added that he did not like banks making suggestions because they do not know who has the best skills. He said:

Our firm is a partner-led firm where partners work on a case on a full-time basis and we look for a similar approach with the lawyers we're going to work with.

A city law firm partner discussed the selection of professional advisers with reference to "favour banks" (cf. Wolfe 1987). He said:

Where banks appoint receivers they tend to suggest who should be the legal adviser; they give lists of possible firms. Some banks are keen to repay favours. Accountants too have favours to repay. However, they are less directive of late. Why? The field is more competitive and some firms are overloaded. Also accountants want to be left with the choice and ask to be given a range from which to choose. Sometimes solicitors will be appointed first and they will have to choose the accountants. How do they choose? According to expertise, taking into account conflicts of interest as well as favours to be repaid. It is a small world. One of the main factors for choosing a firm is "we worked well before".

The selection process, as described by those relying on it, produces a high level of intra-professional competition but little to be gained by either profession from competing with the other. As a senior insolvency lawyer said:

Accountants are happy to take on appointments to large cases; they can take people off auditing. We wouldn't have the ability, certainly not the manpower, to do the job ourselves. If we were to do it, we would have to call in an accounting department. Here in London, lawyers are not in competition with accountants. Accountants are in competition with each other, and lawyers are also in competition with each other. We know which side our bread is buttered. On the advising front, there is quite enough for us to do.

The same symbiotic relationship was expressed by another city solicitor:

On the whole, solicitors don't take appointments. Only mavericks do it. Why? The IP needs a vast staff of Indians, number crunchers and bodies on the ground. We don't have those resources. Also, accountants have vast audit staff to be turned to use in big insolvency cases. However, besides these problems of resources, there is a commercial case for lawyers not to take appointments. If we did, we would not be instructed by big accountancy firms, such as KPMG or Cork Gully.

A lawyer specialising in contentious insolvency echoed these remarks; she also spoke of some elements of tension between accountants and lawyers:

There is tension, rather than competition between lawyers and accountants. For example, dealing with the Maxwell case; the insolvency practitioner heads it up; he is a tough professional that knows the way he works and how to get results. The insolvency lawyer is the same sort of character. Demarcation can be difficult. As a lawyer, you must be careful not to overstep your mark, not to make too many decisions without involving the IP. On the other hand you are not meant to simply give a list of options. The insolvency practitioner needs the lawyer to analyse choices but also to give guidance as to what should be chosen. Both parties have to realise they are dealing with highly skilled professionals.

The same solicitor said that when a barristers' team was brought in the case, "there were more primadonas to deal with".

The Cost of Professional Services

As Christer (1992:29) notes, press comments about insolvency practitioners' fees sometimes use terms such as "obscene", "vultures", "vampires", and even "revenge of the wimps". His survey of insolvent company directors suggested that these terms were also used in relation to small companies which do not normally attract press interest.

The profession itself is aware of the bad media coverage concerning their fees. Cork Gully (1992) put forward a response to accusations of over-charging in their journal:

A handful of high-profile cases and the associated costs have dominated the media's coverage of insolvency in recent months...But the headlines take no account of the 99.9 per cent of cases which are hardly mentioned by the press.

The feature went on to calculate that the average fee per case in 1990 worked out at £7,064.86. As suggested by insolvency practitioners, most receivers' fees are fixed by the bank and are based on time and expenses. Insolvency practitioners are expected to share in the pain, or get a bit more if an exceptional job is done. In liquidation matters, practitioners may charge a percentage of the value of assets realised or distributed, or by the time given to the case, considering its complexity, any exceptional responsibilities to be undertaken and so forth. The creditors' committee authorises their remuneration. A particular criticism concerns accountants sitting in creditors' committees and authorising the remuneration of fellow accountants. This was rejected by a senior insolvency partner we interviewed, who had sat in creditors' committees as well as faced their scrutiny over fees.

You have to justify what has been done, and why so many hours are charged. You may also discuss bonus. It is very much a matter of how to approach people. Other accountants may be sitting in creditors' committees representing creditors. Some say this is a cosy club. But the last thing you want to do with a competitor, if you are sitting in the creditor's committee that authorises his fees, is to make them any bigger than they could be.

The practitioners interviewed were aware of possible criticisms about the level of their fees. One officeholder said that generally fees were not excessive, but there were a few that took too much money and attracted criticism, for example by mentioning in interviews the joys of vintage champagne and driving a Bentley. A lawyer spoke of how the wrong impression about fees could be created: "I had to attend the creditors meeting with the director and he drove me there — in his Aston Martin..."

In their majority, legal advisers charge on an hourly basis which, for cases of great complexity, might be significantly higher than their normal hourly rate.

The Human Dimension of Corporate Insolvency Work

Conventional accounting discourse views the world as rational, logical and analysable, divided and dissociated from the inner experience of people (Hines 1992). Yet, for officeholders trained in accountancy, corporate failure cannot be easily dissociated from the suffering of those affected. Creditors' meetings make the suffering and the anger clear. Having to take decisions about "down sizing" or "right sizing" the work force of a company also has its obvious human dimension. Most practitioners felt they could not ignore it, but had to detach themselves from it. A senior insolvency partner in a big six firm said:

I have been interviewed by someone doing a study on crisis management. Having to face angry creditors on the first day of a job is always hard. You must detach yourself and try to do the job well. Although demanding in hours, operating on a 24 hour clock, with very stressful periods, you must be able to switch off emotionally. Is the job stressful? I find dealing with my kids more stressful.

An insolvency lawyer, partner in a city firm, described the effect of the job on his private life:

In the [...] case, we went through a hectic week, including weekend. Contracts and documents had to be prepared and signed at all hours of the day and night. Some things had to be sacrificed because the job had to be done. One has to cut oneself off. For example, you may have to dismiss part of the work force. Anyone that can't face that is in the wrong business. At one stage, there were two people being prepared in this firm to take over the work of a retiring insolvency partner. One took to it well, the other couldn't stand it and gave up. You do get sleepless nights about a case. My sleepless nights are spent wrestling with a legal problem rather than the stress of the work. Having said that, insolvency practitioners definitely work too hard. Myself, I had to slow down after a mild heart attack.

Another insolvency lawyer described the pressures of his work:

At the start of a big case there is not much sleep. You work for 16-18 hours a day, away from your base at the premises of the company. In the [...] case for 2-3 days I ended up not going to bed, catching up with a bit of sleep on a sofa when possible. How do I cope? Meat and drink. Others get tired, they are wimps. With the [...] case we had to stop a plane at Gatwick before taking off. The plane was full of school kids on a skiing trip. It was hard to explain they weren't going to go anywhere. Also, in times of recession there are a lot of nursing homes going into receivership. Before

the 1986 legislation there were too many cowboys and a lot of malpractices in insolvency. Licensing began to weed these out. It must be a clean profession and be seen as a clean profession. Insolvency practitioners are dealing with the wreckage of people's businesses and in many cases also with the wreckage of their lives. Marital breakdown, deterioration of health often accompany those faced with insolvency. There is an enormous human dimension in insolvency work.

The demands of big case insolvency work were also explained by a litigation insolvency partner:

For the first five days of the [...] case we worked 24 hour days. You run on adrenaline and then fall over. You get hooked on adrenaline. There was a lot of press interest and that's something you could do without. With this case, involving pensioners, we decided to be as open as possible and to keep the people involved informed. As a professional you have to remove yourself from horror stories, you've got a job to do.

A fellow partner in non-contentious insolvency added to that:

But you should also be sensitive, for example when dealing with employees. You have to consider what they go through and think when can I tell them what their future is? In one receivership case we knew there was a party scheduled for disabled children. We could not justify going ahead with the party in financial terms. But we decided we couldn't cancel it and the party went ahead.[13]

Although the stress is intense, one lawyer commented that the pressure of insolvency work was no worse than some other time-critical fields such as contested take-overs. This indicates that the stress experienced in large-scale insolvencies has more to do with pressures of time and the complexity of the issues at hand, than the real-life dramas insolvency practitioners have to face. Interestingly, the human dimension of insolvency work has so far been flagged as an issue primarily by women insolvency practitioners. An international organisation has been set up recently, the International Women's Insolvency & Restructuring Confederation (IWIRC), to address the role of women in insolvency practice and the human dimension of insolvency work. IWIRC's main goals are to provide a vehicle for networking and business development and to create a forum for mentoring, but also, to address the socio-economic issues of insolvency (Hale 1994). IWIRC has been granted official observer status with the United Nations Commission on International Trade Law, which addresses the treatment of insolvencies worldwide.

5. INSOLVENCY PRACTICE IN TRANSITION

The Growing Internationalisation of Corporate Insolvency Work [14]

In the complex world of international commerce and finance, conflict and risk are inevitable. Corporate affairs are irrevocably global and whereas rules may change as borders are crossed, the world of international business does not necessarily respect these changes. International business is like the "Wild West", always on the frontier between respectability and lawlessness. Some argue that the solution is a *lex mercatoria*, a system of norms devised and practised by traders (cf. Teubner forthcoming 1995). Others argue no such system exists because a legal system requires a state for its legitimacy. The situation is intensified when there is an absence of international protocols and norms to resolve conflicts.

Paradoxically, the bigger the field of activity (here, covering the whole globe), the smaller the number of key players who are allowed to run in it. Membership to the international practitioners club is subject to knowing, and getting to be known by, its existing members; in other words, it works by reference. We asked the accountants and lawyers interviewed how they would locate an adviser in another jurisdiction. All said they would pick up the telephone and know whom to call. The global village of insolvency practitioners is so small that in most major jurisdictions there are known insolvency notables with an international reputation built on their *local* credibility. Such notables are seen as necessary to carry out rescue deals and to work out solutions at the local level by inspiring the confidence of institutions such as lending banks etc. (Soden 1995).

When asked about international norms being established for insolvency, there was a surprising lack of support and enthusiasm among the practitioners interviewed. Most practitioners were content with an ad hoc approach to insolvency problems. One accountant argued that some harmonisation of insolvency procedures across jurisdictional borders was necessary, but extensive standardisation would be impossible without harmonising the context of company law. No lawyer, however, made this argument. There have been attempts at promoting an EC directive on bankruptcy since the early 1960s, but it mainly exists in the twilight zone, occasionally seeking the light of day only to return to the gloom. On the wider international scene, a model code exists in the form of the Model International Insolvency Cooperation Act (MIICA), drafted in 1988 by the International Bar Association's Committee on Insolvency and Creditors' Rights (Commitee J). Much of MIICA derives from section 304 of the US Bankruptcy Code which provides for relief to foreign representatives by way of ancillary proceedings. The guiding principle behind MIICA is "universality" which "envisions a single

administration of the insolvent debtor's estate, providing protection of the estate and an equitable distribution of assets among both domestic and foreign creditors in liquidation, or equitable administration in a reorganisation or rehabilitation proceeding" (International Bar Association 1990). One lawyer remarked that the IBA's model international code might become an "attitude changer" but would never be adopted by any jurisdiction. Another lawyer expressed the need for insolvency professionals to appreciate that the international insolvency scene was not merely an extension of domestic:

Inexperienced professionals think they can do cross-border insolvencies. They could set bad precedents. We need some kind of global consulting body that they can resort to to create local solutions. Because at the public treaty level—which we desperately need—it will take years to get and the field is developing quickly. In dealing with cross-border insolvency sensitivity to others' ways is absolutely essential. So I won't deal with other professionals unless they have a similar degree of sensitivity.

The common view was that the field needed to mature considerably before rules could go global. Yet, it was generally felt that as the number of cross-border business failures increased, so did the need to reach international agreement over cross-border recovery of assets. Last year, Insol International, the worldwide federation of insolvency practitioners (both accountants and lawyers), set up a working party to formulate proposals for co-operation between courts in different countries. This working party is expected to report back in 1995.

Such plans for global insolvency accord will inevitably draw from the experience of Maxwell Communications Corporation (MCC), the most significant international insolvency case in recent history. MCC's collapse required a degree of creative problem-solving that went beyond the norm, and has highlighted the fundamental difference between the US Chapter 11 and UK administration procedures (Carrington and Murphy 1992). The US system leaves the debtor in possession whereas the UK system generally ousts the directors, and replaces them with an administrator. The MCC case has illustrated how a workable approach could develop from combining two very different insolvency regimes. Furthermore, it has demonstrated the role commercial effort could play as a force of harmonisation in areas such as insolvency where national and supranational institutions appear unable or unwilling to break new ground.

Robert Maxwell, by the time of his death, accumulated 400 companies, private and public. Among these, two are of major significance: Macmillan Inc, the publisher and the Official Airline Guide (OAG), an information services business. Macmillan was acquired in 1988 for approximately $2.6 billion; and OAG was also acquired in 1988 for $750 million. The assets of these corporations were held in the United States. Purchasing the two companies, especially Macmillan, involved MCC undertaking a heavy burden of debt which was not easy to service. So in the twilight of the 1980s MCC sold businesses and assumed new debt to refinance its existing borrowings. Its major debt came through the "Jumbo Bank Facility", arranged in 1989, an unsecured credit facility comprising a $990 million short term loan, a $1260 million medium term loan, and a $750 million standby revolving credit facility.[15]

By mid-1991 MCC's profits had dropped from £261 million in 1990 to £200 million; and the accounts showed gross assets of £3.6 billion and net assets of £1.1 billion after deducting borrowings of £1.8 billion. But MCC could not meet its debt service commitments without the further sale of businesses. This intense period of activity signified the decline of Maxwell's empire.

On 5 November 1991, Robert Maxwell died at sea. His death triggered a plunge in the value of MCC's shares from their 6 November value of 121p to 35p on 3 December when the stock exchange suspended trading. Maxwell's sons, Kevin and Ian, resigned as directors (and have since then been the subject of massive personal bankruptcy proceedings), and two of the private companies went into administration at the same time. Finally, on 16 December 1991 the board of MCC filed for Chapter 11 protection in the southern district of New York bankruptcy court.[16] Since 80 per cent of MCC's assets were based in the US, it made great sense to seek protection there. However, the UK assets were unprotected from individual action by creditors. On 20 December the directors petitioned the Chancery Division in London for an administration order under the 1986 Insolvency Act.[17]

Once mutual protection was established, the potential for an enormous clash of jurisdictions was created. Both the US and UK courts' jurisdictions were not limited to the company's assets within their particular jurisdiction, so what recognition would they give each other's orders? One hurdle the UK administrators had to overcome was to persuade the US bankruptcy court that the UK administrators were to be recognised as the corporate governance of MCC. One line of attack considered was asking the US court to discharge the Chapter 11 order. But as the lawyers thought that unlikely they sought alternative means.

In the Debtor's *Disclosure Statement* the development of the *Protocol* is presented as a prosaic process of relatively little consequence, which is understandable since the document is primarily concerned with the construction of a plausible future rather than accounting for the past. This is far from the truth as perceived by the major players. One of the American lawyers put it this way: "[The *Protocol*] is by US standards, as well as UK, a unique document." One of UK accountants said, "Maxwell is a very interesting example of cross-border co-operation by the courts in two jurisdictions and is breaking new ground".

The times of filing for Chapter 11 and petitioning for an administration order were occasions precipitating tremendous activity for many professionals. One American lawyer noted that "the Chapter 11 filing came as a complete surprise to the UK administrators". Another lawyer argued that the cultural differences between the UK and US insolvency procedures made it difficult for the two sides to understand each other. And one of the UK administrators characterised the differences this way:

In a UK case you put the professionals inside the company because of the appointment of administrators and so on. In a US case you have a debtor-in-possession and the professionals sort of go around.

The impetus for the idea of a negotiated solution to the problems, in the words of one of the American lawyers involved, came from the US Bankruptcy judge, Tina Brozman:

I think it was really Judge Brozman's suggestion that we find a negotiated solution to the potential tensions and conflicts between the two jurisdictions and between the two sets of officeholders. I would say the genesis of the idea that everyone had to be frank came from the US court.

The UK administrators had at first applied for a "responsible officer" (i.e., the administrator) to run the companies, but Judge Brozman denied the application and told the parties to sort out the case themselves because both the courts had extra-territorial jurisdiction without ways of enforcing it. Judge Brozman said, "I felt it was a pragmatic solution, not optimum because it was so expensive to do." Given that pressure from the US court a US lawyer described the general feeling:

It came quite clear to everyone that the hostage in all of this was in the first instance the US assets, substantial healthy businesses, which should not come up in a cloud; and secondly, the creditors of MCC themselves. So that everyone, I think, saw the legal merits and the commercial merits of fighting in the courts. I guess the initial areas of discussion were corporate governance. Secondly, the question of how the US plan of reorganisation process would be managed and administered. And then thirdly, what approach could be taken generally consistent with US law as well as UK law to obviate the need in every case to jump through the procedural hoops that US law imposes, or would impose, if the US jurisdiction encompassed all activities of MCC, which would be the sort of black-letter position of the US bankruptcy law: the court takes jurisdiction over property located anywhere. The UK courts take a roughly similar view, but they don't express it in such stark terms.

To help stay off the incursion of the English administrators, the directors of MCC applied to the Bankruptcy Court for the appointment of an Examiner under section 1104 of the US Bankruptcy code. The Examiner has wide powers which include:

...investigat[ing] the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of continuing such business and any other matter relevant to the case or to the formulation of a plan...The court may also require the examiner to perform certain of the duties of a Chapter 11 trustee to the extent the court orders the debtor in possession not to perform those duties (Milbank et al 1993: 49).

The Examiner's role is significant, one with authority and power and not merely symbolic. The lawyer selected by the US government's Trustee for this task was one who had made his career by staking out the field of international insolvency as one that would develop greatly in the future. Richard Gitlin practices with his own firm of Hebb & Gitlin in Hartford, Connecticut. Two features are notable here: first, the firm is outside the New York area; second, the firm is small. A lawyer described the firm's involvement in international insolvency this way:

The firm identified international insolvency as a field for the future back in 1980. It got active in international management and became very involved in the International Bar Association's international banking sub-committee. Richard [Gitlin] became active in INSOL and went to their first meeting in Monte Carlo in 1985. Considering they're mostly accountants, it was an honour

when he became their first lawyer chairman. You learn by reading a lot and meeting people and talking to them; most important thing is to sit down and talk to them about the problems.

When the approach was made by the US Trustee, Gitlin agreed to be Examiner on the condition he could use his own firm as backup. The judge accepted his condition and approved his appointment. Gitlin and his team then flew to New York to meet the administrators and the directors at Price Waterhouse's Fifth Avenue offices. Even though the Americans welcomed Gitlin's appointment, the British did not favour it and the administrators lodged an application to rehear and vacate the Examiner's appointment. One of the lawyers involved put it this way:

With over a billion dollars of assets and the welfare of the creditors at stake, there was certainly quite enough incentive for all the professionals involved to come up with a workable solution. We started that very weekend — the 20th was a Friday as I recall — and negotiated Saturday and Sunday and the following day and then broke for Christmas.

Conflicts were present across both state borders and professional boundaries as the British accountants attempted to assert their "authority" over the American lawyers. The potential for inter-professional tension is illustrated by the multiplicity and parallelism of the teams set up by Norton Rose and Price Waterhouse to manage this case. The lawyer acting for Price Waterhouse explained that a case as complex as the Maxwell debacle required co-ordination of teams with various types of expertise.

A lawyer on the Examiner's team spoke of the gloom that surrounded the beginning of the negotiations:

We met the folks from Price Waterhouse on Saturday morning, so needless to say we didn't have much background on whoever was involved. So Saturday morning really was no fun, just the two of us, armed with only an understanding of US law and a fairly good understanding of the company.

When we got there, there were three different groups at the meeting place. There was PW itself, Milbank Tweed, and Norton Rose was there. [18] *I don't want it to sound like a big deal, a lot of people in the case weren't with us. The managers had a newspaper to run: a lot of people in the US were trying to keep things together. Price Waterhouse, Milbank Tweed, and Norton Rose added up to fifteen people. In a different room was the management of the M&O Group and their counsel. And in a third room, although we didn't know it, were a group of bankers and their counsel. We wound up never knowing they were there.*

As we shuttled back and forth to PW and the managers, our initial approach meant we weren't really listening to Price Waterhouse's side of the story. They were involved in the case because MCC was an English company with primarily English creditors. As far as Price Waterhouse were concerned the whole Chapter 11 situation should just go away. Apparently, the banks were telling them we don't need these people, the managers [of Macmillans and OAG]. And of course Price Waterhouse's lawyers had a different approach, probably playing to our US background but saying that Chapter 11 was filed here first, the main operating company has US company status and these are valuable going concerns. To ship them over to England to be run by professionals, they wouldn't come up that badly. Clearly each party had a reason to be involved, which was appropriate.

Price Waterhouse was ordered by the English courts to take control, so there was self-interest to do their job. The US managers were also doing their jobs and wanted to be in control. Where we took it up is trying to worry less about the legality of the issues, 'cause the US judge had a central holding over the territory.

The story so far brings out clearly and dramatically the intensity and scope of the conflict embedded in the two cultures. The UK administrators abhorred the disruptive forces of Chapter 11 which would, from their viewpoint, leave in place the very managers who ought to be usurped. The managers - mainly David Shaffer, CEO of Macmillan and chairman of OAG, of the M&O group - believed they should stay in control because the companies were stable entities. The Examiner and his team appeared pulled in opposite directions with no resolvable middle ground.

Price Waterhouse's English lawyers, Norton Rose, had already convinced the English court to issue an injunction against the directors of MCC, but were doubtful of persuading the US bankruptcy court to accept the administrators as the corporate governance of MCC. Milbank Tweed had also started proceedings for ancillary relief under section 304 of the bankruptcy code to have the UK administrators recognised. In all, all sides to the case — the Examiner, the administrators, the banks/creditors, the management — could see a large-scale international litigation battle developing that would take years to resolve. If this happened MCC would crumble and blow away in the winds with no one benefiting. Realising this as a probable state of affairs and accepting it were two modes of thought some distance apart in the actors' minds, especially for the English.

Some American commentators have begun to argue that the social costs of Chapter 11 are too high and that there may be a case for a more English approach. Bradley and Rosenzweig write:

Bankruptcy law encourages corporate managers to reorganise their firms under court supervision, which effectively invites them to create a net equity position for stockholders by overstating expected cash flows and understating risk. While creditors may complain loudly in response, the Chapter 11 presumption in favour of reposing control of the debtor-in-possession in the hands of pre-bankruptcy management leaves creditors with too little influence over the reorganisation process to protect themselves adequately against such tendencies. The costs of these suboptimal managerial decisions are a major component of the social costs of court-supervised corporate reorganisations (Bradley & Rosenzweig 1992: 1052).

Thus the intensity of feelings raised was powerful, with each side convinced of the rectitude of their position. The level of involvement of professionals reflected this intensity. At the Fifth Avenue meeting there were nearly 40 lawyers and accountants present, which, as Judge Brozman indicated above, is an extremely expensive process, with billing rates of approximately $300 per hour for the Americans and £300 per hour for the English.

The English lawyers felt if they battled through the courts, they would lose against the Americans over Chapter 11 at first instance and eventually jeopardise the MCC assets. As the lead UK

lawyer put it, "We decided to do a deal with the Examiner. We didn't like it, but it was the lesser of evils". One of US Examiner's team was blunt in his perception of the way negotiations were going and could progress:

Price Waterhouse told us they had, or so we thought at the time, the support of all the banks—it wasn't exactly true. But our biggest concern, win or lose, even though we thought we could win, was that there was this big transatlantic battle going on, trying to get rid of Chapter 11. Price Waterhouse wanted to do it their way, but that would be chaotic in the marketplace.

Tensions between legality/formalism and the marketplace/informality emphasised the differences between the two cultures and the professional cultures. It was the accountants who were pressing for authoritative legal procedures to guide action and gain them control of the companies, and the lawyers who were arguing for a market based theory of action that would aid them in sustaining stability in the companies. Avoidance of long term battles became the uppermost concern. The Examiner, by this time, had hired an English legal firm Cameron Markby Hewitt, which, like Norton Rose (In the News 1992), had substantial experience in insolvency (Griffiths 1993). In addition, the Examiner retained Ernst & Young as his accounting consultants. He described the next step:

*So with our knowledge of US law and also consulting [our UK lawyer] we tried to understand what it was Price Waterhouse needed under UK law to be able to fulfil their duties, while we could persevere Chapter 11, that is, keep the US checks and balances. That way we ended up with the **Protocol**. At that time the English judge was in favour of getting rid of management, but we began to persuade Price Waterhouse that a wholesale change in management would have a drastic impact on the market, not just for the sale down the road but for those doing business with the M&O group now. It was during this weekend that we cleared up matters; we made love, not war. The best that Price Waterhouse and the management said they could do was go away and think about it.*

In that first week the Examiner began to stitch together a workable *Protocol*. Much of it was drawn from the work that he and members of his firm had done with INSOL and the IBA's Committee J on international insolvency. The purpose of the *Protocol* was to give control, but not absolute control, to the UK administrators and the US Examiner in such a way that management could continue to run the M&O group. Thus, the administrators could restructure the boards of Macmillan and OAG, with the approval of the Examiner, provided David Shaffer, the manager, was retained. The *Protocol* introduced a series of thresholds: up to a value of $7 million the administrators could sell stock without the consent of the Examiner; between $7 million and $25 million the administrators had to give prior notice to the Examiner; above $25 million the consent of the Examiner had to be granted.

In the days before Christmas the American lawyers except for the Examiner, who was covered by his UK legal counsel, flew to London to negotiate the *Protocol* with the administrators. On leaving New York, Price Waterhouse let it be known to the Examiner that they had stacks of pleadings ready to file to convert Chapter 11 into a Chapter 7 liquidation. That is, as the Examiner put it, "They still didn't like the idea of the *Protocol* and still wanted to go to war..."

The Examiner's law firm had defences prepared for this eventuality. Continuing the metaphor, an accountant said, "Both sides were making love and war simultaneously."

The US Bankruptcy Court favoured the approach of the *Protocol*, but within the English courts the American approach was not well-received. One of the tasks of the English lawyers, Norton Rose and Cameron Markby Hewitt, was to find a judge, the right one, who would endorse the *Protocol*. A lawyer described the search:

One name immediately popped out of the hat: Lenny Hoffman.[19] *He agreed to be our judge and sign the papers, with one proviso. He was leaving for a month's holiday on New Year's Day, so as long as we got the papers to him by then he would sign. We had to speed up. One lawyer wanted to work right through Christmas, but everyone said no, we're going home for Christmas. We were all back on Boxing Day.*

The first draft of the *Protocol* was completed at Christmas. The Examiner along with the other American lawyers spent the next week in London revising the draft. The administrators' lawyers took it apart line by line and the Examiner's lawyers stitched it back together again. Tempers were blowing. Price Waterhouse were still making love and war, demonstrated by their filing a motion with US court on 30 December to vacate the order appointing the Examiner. One lawyer said:

The negotiations went to 3 in the morning of New Year's Eve. Gitlin was miserable; we all knew we'd had enough. We got together at 8 in the morning and cut a deal on the first draft and rushed it over to Lenny who signed it and lifted the injunction against Shaffer.

Certainly, the appearance of the *Protocol* reflects the hurried, last minute dash to the court. The document now extant is covered in hand-written amendments, additions and deletions. As soon as the document was signed by the judge it was rushed to the banks. One of the Examiner's lawyers describes it:

They didn't know what was happening and they couldn't control it. We had to "fold them in" to the deal or it would all fall through.

The banks eventually agreed to be "folded in" and the *Protocol* was taken to the US Bankruptcy court where Judge Brozman signed it on 15 January. At the same time Price Waterhouse withdrew their motion to remove the Examiner.

The final version of the *Protocol* recognised the administrators as the corporate governance of MCC, with the power to file a Chapter 11 plan of reorganisation for MCC. Their powers were subject to the constraints of the Examiner who was granted investigatory powers and was required to harmonise the Chapter 11 case and administration in order to enhance MCC's reorganisation (Milbank et al 1993: 50-1). Despite gaining considerable control, Price Waterhouse kept up their threats to file suit in the US court against the Examiner until February. Nor has it been simple to practice the principles of the *Protocol*. Lawyers on both sides

commented that hardly a week went by after the signing of the document without a problem arising that would set the parties at each other. Monitoring and supervising the working of the *Protocol* required close co-operation between the two judges involved, Tina Brozman and Lenny Hoffman. One lawyer called it the "Lenny and Tina show". Judge Brozman called the parties in once a month for off-the-record chambers meetings to check that the case was on the rails. She followed strict guidelines:

I didn't discuss any matters that weren't raised; I wouldn't give advisory rulings. Nor would I discuss anything that concerned a party that wasn't present. If this hadn't been done - the ***Protocol*** *and the meetings - all of the assets would have gone in lawyers' fees.*

Since these early days, the Official Airline Guide and Macmillan have been sold at a greatly reduced prices, $417 million and $552.72 million respectively (McConnell 1993; Robinson 1993).

6. CONCLUSIONS

The UK insolvency regime, set up by the *Insolvency Act 1986*, provides authorisation for individual practitioners that can demonstrate specialist expertise in the handling of insolvency matters. The number of authorised practitioners is small, less than 2,000, and the number of practitioners that actually take appointments is even smaller. In Becker's terms, insolvency practitioners have created an "insolvency world" which allows corporate rescue to occur.

Insolvency Practitioners: The Emergence of a New Profession?

Lawyers and accountants enter insolvency work from different corners and, as described above, they stay in their different corners. The strict allocation of roles to each profession, advisers and officeholders, does not support the notion of an emerging new profession of insolvency practitioners.

For a single profession to emerge, membership of the "old" professions, i.e., law and accountancy, would have to become of secondary importance. As a senior partner of a big six firm suggested, "for me the main qualification is that of insolvency practitioner rather than chartered accountant". There is little to suggest that this is a widespread feeling, especially among lawyers specialising in insolvency work. However, developments such as the establishment of the Society for Practitioners in Insolvency (SPI) have presented opportunities for lawyers and accountants to begin to create a shared perspective.

The SPI was set up as a representative body for those working in insolvency whatever their profession. All those interviewed were in favour of its activities which include providing services to all members under one hat, helping with training, continuing professional education, the question of ethics, issuing guidance notes, and acting as a sounding board. About 80 per cent of all authorised insolvency practitioners belong to it; members authorised by the Law Society of Scotland have chosen to set up their own body.

About 90 per cent of authorised lawyers are members of the SPI. The senior partner mentioned above commented on the fact that at a recent conference in Prague, 30-40 per cent of those attending were lawyers. He thought this was useful because, generally speaking it made for a better conference. It would appear that accountants invite participation by lawyers and that lawyers feel they are invited to join in their activities. Not surprisingly joining in provides ample opportunity for building contacts, networking. As a senior partner in a City law firm said:

We wouldn't need to be under their umbrella but it's a good thing to be under it. Accountants value the contribution that lawyers make to it. If we were competing it would be different. We would have to employ them instead of them employing us. I can't see why we would do that.

The differences in training, expertise as well as expectations, between the two professions have been brought to the fore with the introduction of the Joint Insolvency Examination. As suggested by a senior insolvency lawyer:

The joint examination presents problems for lawyers. One of the questions in an exam asked candidates to present a cash flow in tabular form. There was flurry over this by lawyers. Accountants said that if you want to do the kind of work we do, you've got to know how to do this sort of thing.

It is indicative that since 1990 when the "grandfathering" clause ceased to operate only a handful of solicitors have been added to the list of authorised insolvency practitioners, out of around 25 solicitors attempting the exam in 1991 and 1992. Working with figures continues to be seen by lawyers as beyond their sphere of expertise. The following comment by an insolvency lawyer is indicative: "Lawyers are not the right people to wind up companies. You've got to understand how accountants work, how to work with figures".

For some lawyers, training was seen as the only solution. A senior insolvency solicitor commented:

Lawyers are not terribly successful at passing the insolvency exams. One of our associates attempted them; he failed the accountancy papers but I'm pleased to say he passed the law papers. Lawyers struggle with accounting questions asking for cash flows, etcetera. Proper training must be attended by both professions. There shouldn't be different exams, a single exam is necessary in order to create this new animal, the insolvency practitioner. I think the SPI will get it right and the system will become more workable.

His assumption of a 'new animal' was far from universally accepted. An insolvency partner in the same firm argued against it:

I am not convinced that there is an animal there or that we are not trying to create an animal that does not exist. In insolvency, there is a role for accountants and a role for lawyers. Insolvency accountants don't do anything else. Insolvency lawyers are able to do more than insolvency, for example, insurance or banking work. Lawyers have a particular role to play.

Insolvency Practice in the UK

In the UK, there is a strict allocation of roles between accountants and lawyers, the former taking appointments as office holders and the latter acting as their advisers. These informal codes, which are not set by legislation but produced through informal rule-setting by the practitioners themselves, result in what is seen by many critics of UK insolvency practice as a small and cosy club. The smallness of the club is even more noticeable when one looks at

mega-insolvencies; these inevitably require huge resources which can only be provided by a select minority of very large accounting firms and City lawyers.

The insolvency club is nearly exclusively male; the demands of insolvency work on an individual's time, (e.g. often involving deadlines which necessitate working through the night, weekends, holidays), its dangerous, action-packed image (in our interviews, stories about travelling alone, facing unknown, even life-threatening situations, formed an important element of practitioners' self-projections), and finally, the general resistance that still exists in the business world towards women in charge of financial affairs, make the insolvency world less than welcoming to women. There is no concrete evidence as to the effect of this near absence of female insolvency practitioners on the style and ethos of the insolvency profession. The human dimension of insolvency cases was acknowledged by the majority of our interviewees, yet most felt that human issues had to be subjugated to the need to act fast and do the job that had to be done. Apparently, those that got too involved, or too caring, did not stay in insolvency for long.

Appointments in large scale insolvencies are based on a variety of factors, including firm size, contacts and "favour-banks" with the banks and practitioners across the professional divide. An established reputation in the field is vital. The volume and pressure of business is such that although it appears to invite competition by professionals outside the club, the nature of the work and the relationships formed within it do not allow sufficient time for outsiders to confirm their bona fides with the institutions and other players. However, despite the fact that the field is limited to a very small number of players, there is fierce competition amongst them. Competition is found within the like players, accountant and accountant and lawyer and lawyer, but not between the two. Accountants and lawyers appear to have established a duopolistic mode of production in insolvency. They have developed a state of *temporary stability* which endows them with the legitimacy to define insolvency as their own problem, amenable to their very specific mode of reasoning and intervention (Miller and Power 1992).

The International Arena

Whereas some stability may be emerging in domestic insolvency work, the field is necessarily international and here it displays its profoundest lack of form. The professional world of international insolvency is small. As one accountant put it, "I know most other insolvency practitioners around the world better than I do my own partners." Turf wars between accountants and lawyers are not as straightforward on the international field as they are in the domestic scene. Even though differences in professional culture exist (not only across the two professions but also within each profession), insolvency experts are forced to transcend these differences if they are to function in the global economy. For example, Judge Brozman was at pains to point out to Price Waterhouse that they had to realise and accept they were *dual* fiduciaries in UK and US law. "I wouldn't have agreed to their becoming the corporate governance if they hadn't agreed to this condition", she said.

International insolvencies raise myriad problems for professionals since, as yet, no international treaty, European or global, has emerged to tackle the problems of cross-border insolvency. Therefore, there are two possible approaches: one is negotiation between fellow insolvency experts based on ad-hoc rules; the other is litigation often involving conflicting state regulations and the risk of the company's assets disappearing in the process. Until institutions tackle the problem of cross-border insolvencies, if they ever do, local solutions crafted by the small global community of insolvency professionals will continue to flourish as illustrated by the Maxwell case.

The US Examiner in the Maxwell case remarked that soon after the *Protocol* was settled, the lawyers working on the Olympia & York international insolvency called him to ask for a copy of the document. The *Protocol* was acquiring the status of a blueprint for future cross-national bankruptcies. However, as stated by those involved in its creation, private treaties such as the *Protocol* are by definition expensive; they are a luxury item which cannot be transformed into a mass product. Again by definition, private treaties are powered by commercial considerations and interests and cannot compensate for the lack of a public, internationally agreed, regulatory system which should take into account the wider issues involved in cross-border insolvencies and the interests of all stakeholders. For these reasons, efforts to formulate proposals for co-operation between courts in different countries, such as those by Insol International, the worldwide federation of insolvency practitioners, should be welcome by national governments and given full support.

NOTES

[1]The authorisation of RPBs to take over statutory powers is not only a feature of the *Insolvency Act 1986* but also in financial services. The list of recognised professional bodies (RPBs) in relation to insolvency is: the Chartered Association of Certified Accountants (ACCA), the three Institutes of Chartered Accountants (ICAEW/England and Wales — ICAS/Scotland — ICAI/Ireland), the Law Society (England and Wales, Scotland), and the Insolvency Practitioners Association (IPA). The IPA is a specialist qualifying body for the insolvency profession whose members include solicitors, accountants as well as those with no other professional qualifications. The RPBs sponsor the Society of Practitioners in Insolvency (SPI), the profession's representative body. Its main function is to prepare and provide technical guidance and to make recommendations on behalf of its members, but cannot authorise practitioners itself.

[2]The nature of the examination, its focus, and its fairly low pass rate are subject to debate and review. (In 1994, 350 candidates attempted the examination and the overall pass rate was 35%, compared to 53% in 1993.) Initially, following the introduction of the Insolvency Act in 1986, practitioners could make use of a "grandfathering" clause and be granted authorisation merely on the basis of their relative experience. Such a clause is no longer in operation and since May 1990 the examination route has been the only way to qualify as an insolvency practitioner.

[3]Fees of $63.6m were incurred in attempts to collect the bank's UK loan book and to manage investigations into major borrowers and other parties (including former auditors Ernst & Whinney and Price Waterhouse). In addition to their fees, over $5m of expenses have been claimed for expenses such as travel and subsistence.

[4]Arthur Andersen, the administrators of the Maxwell group of private companies, had billed £4 million, with a further £2 million unbilled, to the end of July 1992. Dealing with that section of the Maxwell empire also involved £5 million in legal fees. Price Waterhouse, the administrators of Maxwell Communication Corporation, has charged £7 million, with the US firm charging another £1 million, and legal fees for both sides of the Atlantic coming to around £5 million. Up to September 1992, Buchler Phillips, in charge of the receivership of Robert Maxwell's estate, had reported charging fees of £1 million, split equally between receivers and their legal advisers (European Accountant, January/February 1993).

[5]It is indicative that recognition of auditing as a *reserved* activity was a late victory for the profession (first introduced by the 1947 Companies Act and the 1948 Consolidated Companies Act) and was never granted to just one professional body; both members of ACCA and all

three Institutes of Chartered Accountants have a statutory entitlement to act as company auditors. Ironically, insolvency work remained an unreserved activity till 1986 and is even now open to members of a number of professions.

[6]Delaney (1992) makes similar observations about corporate bankruptcy law in the US and reports on its transformation into a "sexy" area of work for law students and law graduates.

[7]The following statement by Cork Gully is characteristic, "We do not assume insolvency is inevitable: we aim to bring innovative commercial solutions to business problems" (Cork Gully 1990).

[8]Occupational flexibility can be best understood as alternative, flexible, working practices (Nott 1989). However, occupational flexibility does not merely refer to how work is organised but, more importantly, to being able to change the order in which work commitments and other personal objectives and responsibilities are prioritised. In most professional organisations, lack of occupational flexibility is associated with a masculine culture and work ethos which in time can prove just as strong a deterrent against joining the professions as the lack of flexibility itself (Sommerlad and Allaker 1991; Skordaki forthoming).

[9]A few lawyers outside London take appointments, but they are usually for small receiverships or liquidations.

[10]The Law Society does not generally allow certification of specialisms, so this is the nearest a lawyer can come to claiming certified specialist expertise. And whereas the Law Society is one of the authorising bodies for insolvency practitioners, the bar has not attempted to claim a similar right for itself.

[11]Both lawyers and accountants told us a variant of the same story which is: when seeking assets all transactions have to be halted. This might entail arresting planes and ships. A crisis of conscience occurs when a plane to be arrested contains a large holiday party of schoolchildren about to travel on their first holiday abroad. Should the plane be stopped or allowed to go...?

[12]We should mention here the role of the bar which is not an authorising body. Nor do any barristers hold licences. There are about two sets of chambers, in Lincoln's Inn and Gray's Inn, that specialise in insolvency. As might be expected their work is concentrated on the court aspects, e.g., administrations and examinations.

[13]Insolvency practitioners' relationships with the business employees has become even more complex with the House of Lords decision *Re Paramount Airways Ltd*, which makes receivers and administrators liable for pay in lieu of notice and other liabilities under employment contracts for employees kept on for more than 14 days following the company's insolvency.

[14]For a fuller discussion of the internationalisation of insolvency see Flood and Skordaki (forthcoming 1995).

[15]The Jumbo Bank Facility was intended to consolidate the many loans and credit facilities of MCC.

[16]It is well known that the southern district of New York federal courts are favourable to debtors, i.e., the company boards, so companies make great efforts to establish links with New York that will give them a standing there (Lo Pucki and Whitford 1991).

[17]We don't intend to detail the entire list of MCC liabilities except to say they are many and large and their telling runs from pages 36 to 47 of the *Disclosure Statement*.

[18]Milbank Tweed were US counsel to Price Waterhouse, the administrators. Norton Rose were their English solicitors.

[19]At that time Mr Justice Hoffman was a judge in the Chancery Division. He has since been promoted to the Court of Appeal. A number of our interviewees, English and American, said Lenny's loss was a great one. Lord Justice Hoffman was an academic before going to the Bar and he recently demonstrated the radical moves the Chancery Division has made to become a busy commercial court (Hoffman 1993).

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