5 Normative Bricolage: Informal Rule-making by Accountants and Lawyers in Mega-insolvencies

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INTRODUCTION[1]

> The growth and deployment of accounting can be understood in relation to the emergence of particular political systems, and particular ways of seeking to govern the conduct of individuals. ... Understood as a mode of government of economic life, accounting can be appealed to as a way of seeking to act upon the conduct of individuals to remedy deficits of rationality and responsibility (Miller, 1994: 29).

This chapter explores occasions when such deficits arise and calculative strategies are deployed to fill them. While accounting plays a significant role, it operates within specific cultural and jurisdictional rubrics whose management is complex and open to continuing negotiation and renegotiation. These processes occur within actual transactions and are not hypothetical; moreover, they are negotiated within differing professional cultures. We will not address the interprofessional questions that arise from the case study in this chapter, but rather concentrate on the matter in which solutions to complex problems are achieved.

The governmentality of economic life is now more complex than ever. Corporations that had secure bases in particular countries now locate themselves so that they belong nowhere yet everywhere.[2] Nevertheless, a global distribution of resources creates new problems with communications across state boundaries, especially where those communications are of a legal and accounting nature. Sassen (1991) argues that there has been a

concentration of producer services within the key cities of New York, London and Tokyo. Although financial services is a 24-hour global industry, the ancillary services that facilitate its intercourse are still irredeemably locally-based. Banking, accounting and law have a global reach – for example, Crédit Suisse, Price Waterhouse, Baker & McKenzie – but they are located in cities within specific cultural milieux that shape their working practices and limit their activities. This global–local tension allows huge gaps to occur in what superficially appears to be a seamless web of commercial activity (see Muchlinski, chapter 4 in this volume). There is a further twist to this story: even though the globalization of producer service seems to render their actors mere anonyms, the expansion leads to diversification and specialization that creates a series of tightly-knit subcultures which continually interact with each other (Delaney, 1992; cf. Hebdige, 1979). For example, international corporate finance or international insolvency practitioners will know the other members of their 'club', both within their own jurisdictions and internationally, better than they might know their own partners. One leading Big Six accountant reinforced the view of insolvency practice as a small community where practitioners know each other well, and, because their role is demanding and pressurized, often requiring working on their own, it creates a 'special understanding'. The knowledge they have of, and the interaction they have with, each other sometimes encourages a degree of trust and risk management that overcomes national and other boundaries.

However, the depersonalization of much economic activity is not limitness. Technology cannot provide total solutions to communications. Without face-to-face interaction the normative structure of business would collapse (cf. Boden and Molotch, 1994). Face-to-face interaction is extremely important when the normal course of business goes astray. As companies disintegrate, contracts are dishonoured or government parties to joint ventures change, the need to reduce risk and rebuild trust rises (Flood, *et al.*, 1995; Boden, nd). Within this context *lex mercatoria* is ineluctably political, social and contingent: we agree with Teubner when he writes:

> We can expect global law to become politicized not via traditional political institutions but within the various processes under which law engages in 'structural coupling' with highly specialized discourses (Teubner p. 4 in this volume).

In recent years a striking example of the contingency of norm construction in the transnational context has appeared, the repercussions of which will occupy many professionals for years to come. We refer to the collapse of Robert Maxwell's empire, Maxwell Communications Corporation (MCC).[3]

The Maxwell insolvency debacle brings into sharp focus the tensions between the global and the local, and the creative faculties of the professionals who craft solutions in the absence of coherent normative systems. The lawyers and accountants who worked on this case struggled under severe time limits and mistrust of the others' motives. That any solution emerged is remarkable, as our story will show (cf. Macaulay, 1996).

Insolvency has changed from being a bas-relief of the boom of the 1980s to being a death's-head in the recession of the 1990s (Flood and Skordaki, 1995).[4] But insolvency regimes have lagged behind other moves towards globalization (Rajani, 1994; Walker and Fox, 1996).[5] No international protocols exist, although various lawyers have attempted to create model codes. The most important is the Model International Insolvency Cooperation Act (MIICA) which was drafted in 1988 by the Committee on Insolvency and Creditors' Rights (Committee J) of the International Bar Association. Much of MIICA derives from s. 304 of the United States Bankruptcy Code which provides for relief to foreign representatives by way of ancillary proceedings. And, indeed, in their 'Official Comment' to MIICA Committee J (1989: Appendix A, 3) said:

> The ultimate goal of model legislation for international insolvency cooperation is universality which envisions a single administration providing protection of the insolvent debtor's estate from dismemberment, and an equitable distribution of assets among both domestic and foreign creditors in liquidation, or the equitable administration of the estate in a reorganization, composition or rehabilitation proceeding. Insofar as possible, such universality should be the guiding principle of all efforts toward international insolvency cooperation, for it alone is truly compatible with the realization of equal treatment of all creditors, debtors, assets and liabilities, and the swift and effective administration of the estate. Within the parameters of this overarching principle, mechanisms must be provided for the recognition of foreign representatives, the stay of local proceedings, the production of documents and testimony, the integration of asset distribution and other forms of ancillary relief. In a world of increasing global integration and growth of true multinational business entities, these principles are the indispensable elements in attaining equity and fairness in international insolvency proceedings.

As yet MIICA has not been sympathetically received by any particular jurisdiction and its aims are still aspirational. Nor has the United Nations realized a solution (but see Herrmann, 1996).

Rajak (1993) also notes that 'the EC is still struggling towards a Convention to deal with insolvencies or bankruptcies which cross borders'. According to Willcock, governments are too involved:

> [G]overnments have been the main obstacle to progress towards a [European insolvency] convention, for the reason that they are often the main creditors in cross-border insolvencies. Demands for back taxes usually take priority in payouts from company collapses, and a big problem British receivers face is preventing continental governments from demanding first payment before any recoveries from businesses under their jurisdiction can be paid back to the UK (Willcock, 1994: 29).

The greatest philosophical divide concerning global insolvency is between the UK and the US (Fletcher, 1990; Boshkoff, 1990; Gitlin, Flaschen and Grimes, 1990). The US believes that bankruptcy law should protect the debtor-in-possession for a period of time – 120 days to over a year (Furman and Grant, 1993) – while the UK prefers to oust the management and install a receiver or an administrator. Conflict is therefore inevitable (Rice, 1993). This means that there are two sets of conflict in process: first, the normative conflict; and, second, the professional authority conflict (Abbott, 1988). Here we shall concentrate on the former and merely sketch the variables of the latter.

In the UK insolvency is largely accountant-driven: they become the office-holders – that is, the receivers and liquidators. Lawyers mainly act as advisers to office-holders. In the US, however, insolvency is totally dominated by lawyers, signalling the major role played by the courts in insolvency. Accountants are the lawyers' handmaidens: the terrain is ripe for turf wars (Dezalay, 1993).

Methodology

The story and analysis we present focuses on the development of a normative structure designed to permit MCC's major assets to continue in business – the *Protocol*. This arose because the companies and their governance were in different countries – namely, the US and the UK. Time limits were drastic: the principal players had only a matter of days to construct the *Protocol*. In appearance, the document is singularly unimpressive: 11 pages with two pages of schedules, all of which has been marked up with handwritten amendments. It is in fact an exhibit annexed to a 'Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators' of the US Bankruptcy Court of the Southern District of New York, and an 'Order for Joint Administrators' in the Chancery Division of the High Court plus another 'Order' in the Chancery Division varying the first.[6] But its importance and status compensates amply for its shabby presentation. And many thousands of dollars' worth of professionals' time was expended on its creation.[7]

Ideal-types of global economic law are frequently represented in contract. McCormick tells us that:

> ... the 1980s saw the explosion of what was then regarded as the 'global market' in securities. A vast number of new security instruments were devised during this period as well as a considerable number of new financial market instruments. Swaps, hedging instruments such as CAPs and COLLARs, etc., immediately spring to mind as well as an entire menagerie of acronym-entitled securities such as CATs, ZEBRAs, etc.
>
> In addition, we have seen the considerable growth in the 'securitisation' of assets – particularly in relation to domestic mortgages. No new legislation was necessary to permit the 'invention' of these transactions (although the legislation regulating the market in which they were traded had to be adapted from time to time) (McCormick, 1991: 5).

The Maxwell *Protocol* is a type of hybrid; neither contract nor legislation. It was ultimately legitimated by the US and UK courts, but those actions were peripheral to its effect. It was through the process of negotiation arriving at a fragile consensus that gave the *Protocol* its force. It is a form of private governance (cf. Macaulay, 1986).

As we researched this case, we came to understand and appreciate the compelling forces of narrative and social structure in the creation of the private 'ethno-normative' practice that led to a potential bridging of apparently incommensurable systems. Indeed, it is through narrative that the *Protocol* came into being. Without the participation of the various players it would not have existed. The *Protocol* was never a given. The actors' accounts are fascinating, rich in detail and tell us how the business world acts *in reality* as opposed to theory. One argument we present, unlike that of Bourdieu (1987), is that the constitutive force of the narrative of law is not dependent on the articulation of legal norms through the courts, although, of course, in many cases that is so. We suggest a counterfactual that takes account of the production of law and states of affairs at ground level – the actual work carried out by lawyers and accountants in their offices (for example, Mann, 1985; Flood, 1991; Power, 1991; Regal, 1994). It is the realm of private ordering. It takes place within the shadow of the courts and acknowledges them (Mnookin and Kornhauser, 1979), but the court is not the arbiter or sculptor of the outcome; that is left to the professionals in their day-to-day routines.

The professionals in our study are élites and therefore have the power, status and clientele to engage in private ordering on a large scale. And where there is an absence of norms, élite professionals are required by their clients – large corporations – to construct normative systems which fill the normative void.

Our methodology is derived from two sources: first, from Howard Becker's analysis of *Art Worlds* (1982); and second from the growing literature in narrative and cultural analyses of socio-legal and socio-accounting (Kessler, 1993; Milner, 1993; Hopwood and Miller, 1994). Becker's study of artists illustrates the fallacy of viewing the creative enterprise as a solitary affair. The question 'Who is an artist?' permits multiple answers. He shows that the *conceptual* artist is dependent on others who make the brushes, canvasses and paints. For certain types of artist – sculptors, for example – the work could not be represented without the intercession of foundrymen skilled in bronzing. Furthermore, the artworld needs a range of actors who bring the artists' works to the public – namely, galleries, auction houses and museums. Perhaps the classic display of the collective aspect of artistic work is the list of credits that follow a film (even including accounting and legal advisers). Collective work is the centrepiece of much legal and accounting activity. Even though the press may lionize certain actors for their particular skills (Flood, 1994; 1995), the actual production of professional work demands careful orchestration of teams of workers, including professionals, paraprofessionals and support staff. The regular 'life and death' deadlines that élite professionals must meet, combined with the complexity of their projects, necessitate a high degree of cooperative interaction among the actors. Whilst there may be a creative genius behind a project, its outcome will only be successful if the collectivity brings it to fruition.

We use two primary sources of data: the *Debtor's Disclosure Statement in Relation to Plan of Reorganization and Related Scheme of Arrangement for Maxwell Communication Corporation PLC* (Milbank Tweed Hadley and McCloy, 1993), and tape-recorded interviews with the actors involved. The *Disclosure Statement* is a particularly rich yet stilted narrative (cf. Falk Moore, 1992). It is a 'grand' narrative which is partial in that it represents certain actors' perceptions and purposive in that it is essentially a document of record deposited in the bankruptcy court. Its weakness lies in the fact that it denies the oral tradition that brought it into existence. It is a cultural artifact that represents a distillation of perceptions of action, but is it truthful? It is insofar as the document is the portrayal of the circumstances which the actors wish the public to see: it has a cultural logic. Nevertheless, behind it were many struggles over the primacy of certain cultural beliefs over others. We are interested in those voices that are absent from the grand narrative of the *Disclosure Statement*.

MAXWELL: THE BACKGROUND

The best source to date of the Maxwell mystery is the *Disclosure Statement* prepared by counsel to the administrators of Maxwell Communication Corporation plc (MCC), and filed in the United States Bankruptcy Court of the Southern District of New York.[8]

Robert Maxwell, by the time of his death, had accumulated 800 private and public companies[9] of which two are of major significance: Macmillan Inc, the publishing company and the Official Airline Guide (OAG), an information service business, collectively known as the M&O Group. Macmillan was acquired in 1988 for approximately $2.6 billion, and OAG was acquired for $750 million in 1988. The assets of these corporations were held in the US. 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 principal 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 stand-by revolving credit facility.[10]

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 are now subject of massive personal bankruptcy proceedings and fraud prosecutions). The decline became the fall. Finally, on 16 December MCC's directors filed for Chapter 11 protection in the US Bankruptcy Court; and on 17 December the directors petitioned the Chancery Division in London for an administration order under the 1986 Insolvency Act.[11] Table 5.1 illustrates some of the principal legal differences between UK administration and US Chapter 11 procedures.

The two court actions were a potential disaster for any rational resolution of the Maxwell affair, especially for a UK company with its most valuable assets based in the US.[12] But perhaps one of the most striking points about this case is that it involved two sets of *simultaneous primary proceedings* – that is, administration and Chapter 11 – and not the usual single primary and ancillary proceedings. S. 304 of the US Bankruptcy Code allows foreign

Table 5.1 Major legal differences between UK administration and US Chapter 11 procedures

Features	Differences	
	Administration	Chapter 11
Day-to-day control	Licensed insolvency practitioner	Debtor or trustee
Court involvement	Minor	Major
Power to liquidate assets	Wide	Restricted
Lodging or filing proofs of debt	Late	Early
Borrowing powers	Flexible	Cumbersome
Discretion over investment of surplus funds	Wide	Limited
Discretion to make duress payments	Wide	Limited
Approval for remuneration of professionals	Creditors' committee/ administrator	Court

Source: Jerome (1993).

representatives – for example, UK administrators – to appeal to the US courts for relief ancillary to foreign insolvency proceedings (Rajani, 1994: 40–41; Flaschen and Silverman, 1994: 635). One of the administrators commented on the dual primary proceedings:

> We had two contemporary primary proceedings with two in theory prepared to impose their law on the worldwide estate of the company. And potentially two different people responsible in the eyes of two different courts for running this company's affairs on a worldwide basis.
>
> And the simple solution would have been 304, 'Let's take the case over to England and deal with it under English law'. And the signals were that wouldn't work or it wouldn't work quickly enough to solve the immediate commercial problem.

With this in mind, the Maxwell case was set to implode or to engage

antagonistic factions in the development of creative solutions to hard problems.

CREATING THE PROTOCOL

In the *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 it is perceived by the major players. One of the US lawyers put it this way: '[The protocol] is by US standards, as well as UK, a unique document.' One of the UK accountants said, 'Maxwell is a very interesting example of cross-border cooperation 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 US 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 characterized 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 US lawyers involved, came from the US Bankruptcy Court 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.

Price Waterhouse had at first considered, but then rejected, applying for a 'responsible officer' (that is, the administrator) to run the companies under s. 304 of the US Bankruptcy Code. The directors of MCC in the US applied for a responsible officer other than the UK administrators to be appointed. Judge Brozman told the parties to sort out the case themselves because both the US and UK courts had extraterritorial 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.[13] 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 of corporate governance, at the MCC level and at the M&O group level. Secondly, the question of how the US plan of reorganization 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 stave off the offensive of the English administrators, the directors of MCC applied to the Bankruptcy Court for the appointment of an Examiner under s. 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 Tweed Hadley and McCloy, 1993: 49).

The Examiner's role is a commanding one with authority and power and not merely symbolic. Judge Brozman had a clear vision for the Examiner:

> What I wanted to achieve was a sort of balance with what is going on in Britain through the appointment of an Examiner here. The Administrator is certainly a party in interest with standing to be heard in these proceedings, and I will hear from the Administrator at every point in the case to the extent that the Administrator wishes to be heard. But I need a separate entity to administer this case for me here who is an analogue the Administrator in Britain. That's what I'm attempting to achieve through an Order appointing an Examiner and to facilitate the possibilities for rehabilitation and reorganization (quoted in Flaschen and Silverman, 1994: 626).

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 practises 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 with the firm described the firm's involvement in international insolvency this way:

> We identified international insolvency as a field for the future back in 1980. We got active in international management and I became very involved in the International Bar Association's international banking sub-committee. Richard became active in INSOL and went to their first meeting in Monte Carlo in 1985.[14] 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 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 back-up. 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 interprofessional 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 the coordination 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: '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 were:

- US aspects group to work with Milbank Tweed
- funding security group
- litigation group
- property group
- investigation group
- reorganization group
- insurance group
- banking group
- employment group
- pensions and tax group.

Price Waterhouse had matching teams. The leaders of the teams from both accountants and the law firm would meet frequently and report to the other teams so that all lawyers and accountants would know what was being done in each part of the project.

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, Gitlin and myself, 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.[15] 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, Dick [Gitlin] and I, were a group of bankers and their counsel, Weil Gotshal. Dick and I wound up never knowing they were there.
>
> As we, Dick and I, 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 Dick and I 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 lead administrator, Mark Homan, remarked that out of the first 30 days he spent in New York, one was devoted to the actual business and the remaining 29 were concerned with the legal issues. 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 and would benefit from their continuing expertise.[16] The Examiner and his team appeared to pull 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 s. 304 of the Bankruptcy Code to have the UK administrators recognized. 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 to no one's benefit. Realizing 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. Chapter 11 was anathema to them. As one of the administrators put it:

> Even though there is a theoretical pecking order among creditors in Chapter 11, because the directors stay in charge and put forward the reorganization plan, individual creditors begin to negotiate with the directors over their assent to the plan and their order in the process. This is known as 'warfare'. ... And the directors too are often concerned with their own welfare above that of the creditors and that manifests itself by the fact that business rescue by sale of the business is not on the agenda.

Some US commentators have also 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 reorganize 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 favor of reposing control of the debtor-in-possession in the hands of pre-bankruptcy management leaves creditors with too little influence over the reorganization 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 reorganizations (Bradley and Rosenzweig, 1992: 1052).

Powerfully intense feelings were aroused, with each side convinced of the correctness of their position. The level of the professionals' involvement 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 up to £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 jeopardize the MCC assets. As the lead English 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 Gitlin's team was blunt in their 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 emphasized the differences between the two 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 issue. The Examiner, by this time, had hired English counsel, John White of 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 John White we tried to

> understand what it was Price Waterhouse needed under UK law to be able to fulfill their duties, while we could persevere with 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 favor 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 mould 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 CEO, 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 Examinator; above $25 million the consent of the Examiner had to be granted. If the administrators wanted to borrow funds, pledge or charge assets, or to convert the Chapter 11 case to a Chapter 7 liquidation, they had to obtain the approval of the Examiner and the US court.

In the days before Christmas the US lawyers, with the exception of the Examiner, who was covered by John White, 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. The English lawyers involved, Norton Rose and Cameron Markby Hewitt, looked for the best judge to decide on the *Protocol*. Mr Justice Hoffman was favoured by all sides[17] and was allocated the case by the Vice Chancellor of the Chancery Division because of his familiarity with the Maxwell collapse. He had heard the original MCC administration petition, as well as matters relating to Bishopgate Investment Management and the 'private side' Maxwell companies. During the Christmas court recess, two Chancery

judges share vacation duty – one for the first part, between the end of sittings before Christmas and the end of December and the other for the second part, between 1 January and the resumption of normal term sittings. Mr Justice Hoffman was vacation judge for the first part that year. As all parties were eager to have the case, and the *Protocol*, decided by him, they had to finalize the *Protocol* under severe time pressure. A lawyer described this period:

> We had to speed up. John White 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. Gitlin, along with the other US lawyers spent the 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 the 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 handwritten 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.

LIFE WITH THE *PROTOCOL*

The *Protocol* recognized the administrators as the corporate governance of MCC, with the power to file a Chapter 11 plan of reorganization for MCC. Their powers were subject to the constraints of the Examiner who was

granted investigatory powers and was required to harmonize the Chapter 11 case and administration in order to enhance MCC's reorganization (Milbank Tweed Hadley & McCloy, 1993: 50–51). Despite gaining considerable control, Price Waterhouse kept up their threats to file suit in the US court against the Examiner until February. Nor was it simple to practise 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 against each other. Monitoring and supervising the working of the *Protocol* required close cooperation 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.

At this stage J.P. Morgan were brought in as the financial advisers to the administrators and the Examiner. Their main role was to value the M&O group and later assist in the sales of the businesses, which occurred in 1993.[18]

CONCLUSION

The 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. Similarly, one of the administrators was consulted by Olympia & York (UK) on whether they should apply for Chapter 11. His response was, 'Why do you want to throw sand in the banks' eyes?' And he has since campaigned against any importation of Chapter 11 into British insolvency law (Flood, Abbey and Aber, 1995). The *Protocol* has acquired the status of a model – a blueprint for future bankruptcies. But one conclusion drawn by all the participants in the Maxwell case is that the *Protocol* was a most expensive solution to the problem and will be used only in extreme cases. As a private treaty, it was seen as a luxury item which could not be transformed into a mass product.

International insolvencies raise myriad problems. There are no rules to govern cross-border cases. They have to be negotiated, or the result is continuous litigation and the disappearance of the assets. But 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'. This backwards ambiance of the enterprise has created an *esprit de corps* among practitioners, which requires them to deal with each other creatively, promoting their own *lex mercatoria*. In Becker's terms, by responding to commercial concerns, professionals have created an 'insolvency world' that allows corporate rescue to take place. Turf wars between accountants and lawyers are not as straightforward on the international field as they are in the domestic scene. Even though different professions are steeped in dissimilar professional cultures, they 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 realize 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.

As yet, no international treaty, European or global, has emerged to tackle the problems of international insolvency. 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 believed that insolvency professionals thought the international scene was merely an extension of domestic. She argued:

> 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.

Until institutions catch up – if they ever do – local solutions crafted by a global community of professionals will continue to flourish as illustrated by the Maxwell case. These solutions, powered by commercial efforts, cannot be assumed to reflect the wider issues involved in international insolvencies and the interests of all stakeholders. Some voices will continue to be absent.

NOTES

1 We are grateful to the Chartered Association of Certified Accountants for financial support for the research and to the ESRC for grant no. R000221505.

2 During 1994 a number of multinational companies in the UK announced that they would cease contributing to Conservative Party funds as their global reach made redundant any gains from expressions of political loyalty to the political parties of any one country.

3 The other major international demise has been that of the Bank of Credit and Commerce International (BCCI) (see Melnik, 1992).
4 For example, liquidations in England and Wales rose from 11 439 in 1987 to 24 424 in 1992; similarly administrative receiverships rose from 1 971 to 4 925 in the same period (DTI statistics and *Insolvency Bulletin*, February 1994).
5 In describing a colloquium on cross-border insolvency, Fletcher (1990: xxiv) writes:

> Speakers repeatedly emphasised the indefensible waste of assets which occurs where multiple, full-scale bankruptcies are conducted simultaneously in different jurisdictions, yet there was general agreement that it is unrealistic to suppose that any principle of universality of bankruptcy – that conceptual ideal to which many legal theorists have subscribed over the years – could be attained at the global, or even at regional, level in the foreseeable future. The differences between the individual national laws are such that it will continue to be unacceptable that interests and expectations arising under local law could be overridden by the effect of insolvency proceedings which take place elsewhere.

6 For a 'clean' version of the Order and *Protocol* see Flaschen and Silverman (1994: 636–45).
7 The House of Commons Social Security Committee (1993: xxviii) reported as follows on fees:

> To 31 March 1993 Price Waterhouse had spent over 120,000 hours and £14.5 million on the Maxwell assignment both here, in the US and elsewhere. Their lawyers in the UK, the US and elsewhere had spent over 47,000 hours at a total cost of £7.5 million. In total this amounts to over 167,000 man hours (equivalent to about 115 man years) at a combined cost of £22 million. In the UK the average hourly rate for Price Waterhouse is £120 and for Norton Rose the figure is £191.

8 Work began on the *Disclosure Statement* in mid-1992, and it was completed in February 1993.
9 This case study is concerned solely with the public companies. The others – the 'private side' – were held in a series of holding companies such as Robert Maxwell Group plc, Headington Investments Ltd, Headington Holdings Ltd, and London and Bishopsgate Group Ltd, all of which are insolvent and in UK administration. The main businesses within the 'private side' were Mirror Group Newspapers (Daily Mirror), Maxwell Newspapers Inc. (New York Daily News), and AGB International plc (Milbank Tweed Hadley & McCloy, 1993: 20–21). Most of Maxwell's fraudulent activities involved the 'private side' companies. Although the division between private and public superficially appears straightforward, it was in fact further complicated by Maxwell's use of a Liechtenstein corporation, the Maxwell Foundation, as the ultimate holding company of the 'private side'. Liechtenstein permits intense secrecy in corporate affairs (see Vinten, 1993).
10 The Jumbo Bank Facility was intended to consolidate the many loans and credit facilities of MCC.
11 We don't intend to detail the entire list of MCC liabilities except to say that they are many and large and their telling runs from pages 36 to 47 of the *Disclosure Statement*.
12 The granting of the administration order was problematic. The directors desired particular insolvency practitioners, but Mr Justice Hoffman instead appointed administrators requested by MCC's major bank creditors (Flaschen and Silverman, 1994: 624).

13 One problem was the amount of debt Macmillan and OAG were going to have to carry: the greater the debt the harder it would be to sell the businesses.
14 INSOL is an international organization of mostly accountants involved in insolvency work (see Cooper, 1996).
15 Milbank Tweed were US counsel to Price Waterhouse, the administrators, Norton Rose were their English solicitors.
16 Moreover, the M&O management thought it was not their fault that MCC became insolvent; indeed, they were running profitable businesses.
17 At that time Mr Justice Hoffman was a judge in the Chancery Division. He has since been promoted to the House of Lords. A number of our interviewees, both English and American, said that Lenny's loss from the Chancery Division was a great one. Lord 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).
18 Both parts of the M&O group were sold in 1993, for substantially less than Robert Maxwell paid. OAG was bought by Reed Elsevier, the printing and publishing group, for $417 million (less than half of Maxwell's purchase price) (McConnell 1993). Macmillan was taken in an auction by Paramount Communications, the Hollywood studio, for a $552.75 million bid (a quarter of Maxwell's purchase price) (Robinson, 1993).

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