**TITLE:**

**ANALYSE THE USE OF CROSS-BORDER PROTOCOLS IN CROSS-BORDER INSOLVENCY PROCEEDINGS**

 **TABLE OF CONTENTS**

**INTRODUCTION**

**THE USE OF CROSS BORDER PROTOCOLS IN CROSS-BORDER INSOLVENCY PROCEEDINGS:**

**What are Cross Border Proceedings?**

**Existing Cross Border Protocols**

**Legal Challenges of applying Cross-Border Protocols**

**CONCLUSION**

**BIBLIOGRAPHY**

1. **INTRODUCTION**
	1. One of the benefits of living in the 21st century is that you have the privilege to live in a digitized world. The Covid 19 pandemic amplified the digitalization by establishing the reality of a virtual economy so much so that even INSOL was constrained to make the GIPC course virtual for the first time.

This digitized economy has also made it easier for businesses to slide through borders. However, while the businesses are easily sliding through borders, they are regulated by different laws. In other words, though the boundaries are flexible, the laws remain fixed. The critical question that would then arise is that- if some of the businesses begin to have insolvency proceedings by different creditors in different jurisdictions, which law would apply? Can the law of one jurisdiction regulate the entire proceedings if the companies are part of a Group company? How would the assets be dispersed? Can the Courts and Insolvency Professionals coordinate in the interest of maximizing the assets of the debtor?

While some may have proposed different approaches to manage the growing challenge of these questions (e.g. the universality, territorial or modified universality approach), it is apparent that there is yet to be an absolute solution to manage Cross Border Insolvency proceedings.

* 1. Cross Border Protocols seem to have tried to provide a platform to regulate Cross Border Proceedings. Thus, the objective of this paper is to analyse the use of Cross Border Protocols in Cross Border Insolvency Proceedings and ascertain how useful it has been to regulate Cross Border Insolvency Proceedings.

I shall also consider what can be done to ensure that all the objectives of the Protocol(s) are met in order to avoid any attempt by the debtor to exploit the system.

1. **THE USE OF CROSS BORDER PROTOCOLS IN CROSS-BORDER INSOLVENCY PROCEEDINGS:**
	1. What are Cross Border Proceedings? A Cross Border Proceeding may simply be defined as a situation where insolvency proceedings are commenced in one jurisdiction against a debtor that has assets or liabilities in at least another jurisdiction. In some complex cases, a multinational enterprise (set up as a group of companies) may have business operations in dozens of jurisdictions carried out by subsidiaries, branches, and other affiliated entities with a wide variety of different types of assets and liabilities in different locations and numerous creditors[[1]](#footnote-1). For some of the debtors with cross-border business activities, the effect of this cross-border activity is an incentive to conceal assets outside the insolvent estate and thereby make them unavailable for collective distribution to the creditors of that debtor.

In order to address the potential scheme to circumvent creditors and also make international trade more predictable and transparent, it became necessary to establish some protocols that would govern the cross-border debt recovery process. Amongst the British Commonwealth countries, a common law principle of “comity” was developed. The principle allows the courts in one common law jurisdiction to recognise the courts in another jurisdiction and to assist each other in the enforcement of their respective judgments. In *Hilton v Guyot* (1895) 159 US 113, 163-4, the United States Supreme Court described the principle as follows:

 “*Comity in the legal sense, is neither a matter of absolute obligation, on one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law*”.

* 1. At this point, it is worthy to mention that the UNICTRAL Model Law on Cross Border Insolvency is the primary international instrument relating to multinational insolvency matters[[2]](#footnote-2). The goals of the Model law are modest. There is no attempt to harmonize the substantive insolvency law of different jurisdictions. Instead, the Model law is designed to provide a legal framework to permit cooperation and coordination among multiple jurisdictions when a proceeding pending in one jurisdiction requires assistance in another. The Model law is premised on four key concepts:
1. Access-providing access of foreign representatives and creditors
2. Recognition- recognition of foreign proceedings
3. Relief- providing appropriate relief; and
4. Co-operation- facilitating co-operation with foreign courts and foreign representatives
	1. The Model law is designed to fit into any domestic legislation which is evidenced by alignment of relief, rights of local creditors respected, public policy safeguard, flexible form of Model law etc and has served as a reference point to many Protocols.

**Existing Cross-Border Insolvency Protocols:**

* 1. A Cross-Border Insolvency Protocol specifies procedural and administrative provisions designed to facilitate case management and establish a framework of principles addressing administrative issues involved in complex cases in different jurisdictions[[3]](#footnote-3). There is no prescribed format for a typical Cross-Border Insolvency Protocol. This is essentially because Protocols are intended to address the issues that are important to the actual case before the Courts and these factors will vary from cases to case. Protocols, therefore, invariably provide for amendments or modifications which in turn, must be approved by the Courts involved[[4]](#footnote-4).
	2. The first major modern protocol was developed in Maxwell Communication which had administrations in the United States and England. Thereafter, a more modest protocol was developed between Canada and the United States in Re Olympia & York Developments Ltd. Shortly after the adoption of the International Bar Association’s Cross Border Insolvency Concordat, another Canada-US protocol was developed in Re Everfresh Beverages Inc, which involved two judges who had participated in the deliberations leading to the development of the Concordat. Subsequently, protocols have been developed between the United States and Israel (Re Nakash), and the Lehman brothers case.
	3. A brief analysis of the Protocols developed in Maxwell Communication, Re Nakash and The Lehman brothers would be discussed below:

**Maxwell Communication Corporation Plc (MCC)[[5]](#footnote-5)**

* 1. MCC was the present company of the media conglomerate created by the late Robert Maxwell. MCC was an English company with its headquarters in London, but the majority (in value) of its assets were in the United States. After Mr Maxwell’s sudden death in 1991 and the financial difficulties of MCC was too exposed, MCC needed to file for insolvency relief. What made MCC different was that management petitioned for insolvency protection not only in London, but also in New York. This immediately created the potential for conflict between the English High Court of Justice, which had jurisdiction over MCC’s UK Administration proceedings and the United States Bankruptcy Court for Southern District of New York, which had jurisdiction over MCC’s chapter 11 case. To compound the situation, English law provided for the immediate appointment of Administrators to assume management and take control of MCC, while the Bankruptcy Code left the existing management in place as the “debtor in possession”.
	2. Whereas Section 304 contemplates a main insolvency proceeding in another country and an ancillary proceeding in the United States, MCC’s situation presented two main insolvency proceedings in two different countries for the same debtor. As both countries applied their laws extraterritorially, it immediately became apparent that the participants in the administration and in the Chapter 11 case would need to coordinate and cooperate in order to avoid international chaos. Judge Tina L. Brozman sought to fill the void by putting in place an estate representative with the mandate to facilitate the coordination of the Chapter 11 case with the Administration. She could have ordered the appointment of a Chapter 11 trustee[[6]](#footnote-6), but this would have resulted in the trustee assuming the role of corporate management[[7]](#footnote-7), which she did not consider to be warranted under the circumstances. Instead, she seized upon the examiner provisions of the Bankruptcy Code[[8]](#footnote-8). Examiners are normally appointed “to conduct an investigation of the debtor as appropriate, but in this case Judge Brozman took advantage of a statutory cross-reference to “any other matter relevant to the case” to order the appointment of an Examiner to fulfil the facilitation role she envisioned.
	3. The Examiner was directed to facilitate the administration of the two primary cases, and because of the far-reaching powers given to him, was in an ideal position to do so. His role was seen more as a mediator and facilitator, as he was appointed to search “for means that would enable the two proceedings and the two insolvency courts to coexist in a manner that would maximize the value of MCC for the parties concerned. The Examiner and the UK administrators adopted a ground-breaking approach to international insolvencies. Instead of solely relying on the unilateral measures provided for by each legal system, the Examiner, and the administrators sought to coordinate the procedures of the insolvency proceedings through the use of a Protocol. The main provisions of the Maxwell Protocol are as follows:

 *The Protocol tends to emphasize the creation and administration of a system for the disposition of assets of great value in England and in the United States. Similarly, it also dealt with the system to be applied to distribute the proceeds derived from the disposition of the assets to the Maxwell creditors.*

*In order to honor the statutory role of the United States Examiner, the Maxwell Protocol provided for the Joint Administrators to consult with the Examiner and to make a continuing good faith attempt to obtain the consent of the American-appointed Examiner when taking significant steps in the bankruptcy…*

* 1. One significant function of the Maxwell Protocol was to solidify the management of the precarious group of Maxwell companies. The position of the administrators’ as existing management was confirmed; procedures were also established for orderly transitions. Among other provisions setting out in detail the functions of the Joint Administrators and the Examiner, the Protocol gave the Examiner powers to act as a mediator should disputes arise and provided that both the Joint Administrators and Examiner would be recognized as parties in interest in bankruptcy proceeding in both the United States and in England. The spirit of the arrangement under the Protocol is exemplified by the opening paragraph of Judge Brozman’s approving Order, which “refers to the administration under English law and express ‘a desire by this Court, the High Court of England, the Examiner, the Joint Administrators, and the Debtor (i) to harmonize the within proceedings with the Administration and (ii) to facilitate a rehabilitation and reorganization of the Debtor.
	2. The Protocol and the appointment of the Examiner were successes[[9]](#footnote-9). After the approval of the Protocol by both the US Bankruptcy Court and the London High Court, the Examiner and the Joint Administrators of the UK estate negotiated, within the frameworks laid out in the Protocol, the reorganization of MCC. A Chapter 11 Plan of Reorganization was approved by the US Court in only 18 months, quickly followed by UK Court approval of a related UK Scheme of Arrangement[[10]](#footnote-10)”.

**Joseph Nakash[[11]](#footnote-11)**

* 1. “Joseph Nakash, the debtor, had a variety of business interests worldwide, including shipping operations, real estate etc. Among other things, he was also a member of the Board of Directors of the North American Bank (NAB) in Israel, which was put into receivership after experiencing financial challenges. A judgment was rendered against Nakash personally in the amount of $160 million, due to his role as a director of NAB. While that judgment was still on appeal, the Official Receiver of the State of Israel (the “Official Receiver”), who was appointed as the receiver of NAB, filed an involuntary bankruptcy petition against Nakash in Israel. The Israeli Court granted the petition, and Nakash appealed.
	2. In the midst of the legal battle surrounding the insolvency petition in Israel, the Receiver obtained an order of attachment against Nakash in the Federal Court of New York. Three days after the order of attachment was granted, Nakash commenced voluntary Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York. As in the MCC case, Nakash was subjected to two main uncoordinated proceedings, this time in the US and Israel. All of this was further complicated by the fact that the Official Receiver had filed a second involuntary bankruptcy petition in Israel to correct possible deficiencies in the first insolvency proceeding. In connection with the second filing, the Official Receiver also took steps to attach the assets of Nakash in Curaco, the Netherlands and Luxembourg. Meanwhile, back in the US, Nakash asserted that the Official Receiver’s second bankruptcy filing, and related asset attachments violated the US automatic stay[[12]](#footnote-12) and the US Bankruptcy Court ultimately agreed[[13]](#footnote-13).

In order to attempt to bring order to this international chaos, the US Bankruptcy Judge Burton R. Lifland appointed Richard A Gitlin to serve as Examiner. Ultimately, the Examiner negotiated a Protocol with the Official Receiver. The Nakash Protocol has been described as follows:

 *The need for a Protocol in the Nakash proceedings was critical. In the absence of a Protocol, litigation would continue unbated between the debtor and Official Receiver, and there would be a continuing and possibly escalating risk of undesirable conflict between the U.S Court and the Israeli Court. Meanwhile, the value of Debtor’s worldwide business operations would undoubtedly deteriorate amid such wasteful and distracting litigation*.

* 1. The parties agreed that for the actions to be taken in Israel or the United States, the Israeli or the US court, respectively, would be the primary addressee for the relief, and that each court would respect the jurisdiction of the other. With respect to issues existing outside of the United States and Israel, the parties agreed that they would coordinate their efforts “to avoid conflict rulings whenever possible”. In order to do so, the parties and the court agreed that they would use the Official Receiver and the Examiner to consult with each other, and to have direct telephone conferences whenever possible.
	2. It is especially noteworthy that the Nakash Protocol was the first Protocol that was concluded between a common law country, in which the bankruptcy judges traditionally enjoy wide discretion, and a civil law country, in which judges are confined to the limits of their statutorily prescribed boundaries. The Nakash Protocol is also very unusual in that, not only was it not signed by the Debtor, but also the Debtor actively opposed its approval and filed appeals in both the US and Israel. Ultimately, with the active mediation of the Examiner, the Debtor and the Official Receiver resolved their differences consensually, and both the US and Israeli Bankruptcy cases were dismissed by agreement of the parties[[14]](#footnote-14)”.

**Re Lehman Brothers Protocol[[15]](#footnote-15)**

* 1. Another interesting case which buttresses the use of Protocols in Cross-Bother Insolvency Proceedings is the Lehman Brothers Protocol. This is a case where a very large investment bank in the US filed for chapter 11 bankruptcy. The company operated in over 40 countries and more than 650 legal entities outside the US. The bankruptcy filing resulted in over 75 separate proceedings with more than 16 administrators and the law of each country widely varied[[16]](#footnote-16). To facilitate the process, interested parties entered a Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies (Lehman Protocol) with two primary objectives-effective case management and consistency of judgments.
	2. Some of the material terms of the Protocol (which should guide future Protocols) are as follows: Coordination (with the objective to reduce cost of proceedings, provide predictability, maximize recovery for creditors), Communication (between Courts and Insolvency Professionals involved), Information and data sharing (particularly amongst Insolvency Professionals amongst the different jurisdictions to save time), Asset preservation (identified, preserved and maximized for all interested parties), Claims reconciliation (efficient and transparent claim process for each interested party), Maximization of recoveries and Comity (ability to maintain independent jurisdiction regardless of the cross-border proceedings), Notice (Emails as means of issuing notice), Rights of Official Representatives and Creditors (equal access for all parties), Communication Among Tribunals, Communication Among Committees etc.
	3. A careful review of the terms of the Lehman Protocol would reveal that parties, insolvency professionals and even the courts are “parties” to the Protocols. This is essentially because the refusal by any relevant court or practitioner in any jurisdiction to adopt the Protocol (for reasons which may include conflict with local law or misunderstanding of the scope of the Protocol) may abort the objective of the Protocol and frustrate the proceeding in a local jurisdiction.

**Legal Challenges of applying Cross-Border Protocols**

* 1. As earlier mentioned, Protocols are not static. They are simply intended to address the issues that are important to the actual case before the Courts and these factors will vary from cases to case. The use of Protocol(s) has therefore served as an interim measure to manage cross-border proceedings. However, the question is how long can this interim measure manage the rapid growth of international businesses in several countries? For instance, if there are cross-border proceedings in over 30 jurisdictions, would the 30 courts appoint 30 different Insolvency Professionals to come up with a Protocol? What if some of these jurisdictions are extremely creditor friendly and seek to protect only the interest of the local creditors with no interest or deep understanding of international restructuring?
	2. In Access Bank Plc v Robert Dyson & Diket Limited & 3 Ors[[17]](#footnote-17), the Bank instituted an action against the purported debtor for the purported debt of about N50 billion Naira (which is about US$88m). For context, the Bank had previously instituted an action against the purported Debtor and obtained Judgment of about N26 Billion Naira. The purported Debtor appealed and after several legal arguments, the parties settled amicably and executed terms of settlement for the sum of N12B and the Settlement agreement was entered as Consent Judgment. According to the Settlement Agreement, the sum of N1B would be paid while the N11B would be paid via an asset swap with assets in Nigeria, Dubai, and US. However, the purported Debtor disclosed that it was exposed to some financial liabilities to an international creditor in the sum of about $3m which said sum would be deducted and balance paid to the Bank.

In the instant case, there was no need for a cross-border protocol because the proceeding was in only one country (Nigeria). However, there was need for the Bankruptcy lawyers in the different jurisdictions (Nigeria, Dubai, and US) to establish a Protocol and agree on the mode on how the assets would be sold and utilised to get the maximum value and pay the outstanding debt to the relevant creditors.

The purported failure of the Parties and Insolvency Professionals to establish a Protocol which should have contained essential provisions on Information and data sharing, Asset preservation, Claims’ reconciliation etc frustrated the recovery and led the local Bank to challenge the consent judgment and seek the original judgment sum against the purported Debtor. This buttresses the point that the agreement to the use of a Protocol is limited to the agreement of the parties, professionals, and the Court. Moreso, even with the agreement of the relevant stakeholders, the success of the implementation of the provisions of the Protocol is limited to their knowledge and understanding of international restructuring.

**CONCLUSION:**

* 1. The use of Protocols is an interim, unpredictable measure to manage cross-border proceedings by providing predictability as the procedure of the proceedings and maximization of the assets for the stakeholders. With the explosive growth of businesses around several jurisdictions (whether debtor friendly or creditor friendly), the uncertainty occasioned by the pandemic, the politics involved in domesticating any legislation, one of the essential measures to adopt to ensure that the future use of Protocols would be received well amongst several jurisdictions is to deepen the knowledge of international restructuring with the courts and professionals.
	2. Moreso, it may be pertinent to also consider how to regulate insolvency professionals globally. The objective of regulating Insolvency Professionals globally would attempt to ensure that regardless of the jurisdiction where the Insolvency Professional is acting, the IP would be obligated to act in line with the Guidelines of INSOL. The IPs would therefore have an obligation to guide the Court and their respective clients through the established INSOL Guidelines on Cross-Border Proceedings.

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4. Bruce Leonard, International Insolvency Institute: Co-ordinating Cross Border Insolvency Cases June 11-12, 2021 [↑](#footnote-ref-4)
5. In Re Maxwell Communication Corporation Plc, Case No. 91-B-15741 (TLB) (Bankr. S.D.N.Y 1991) [↑](#footnote-ref-5)
6. Once a court has ordered the appointment of a Chapter 11 trustee or examiner, the United States trustee makes the actual appointment. See 11 USC s 1104 (d) [↑](#footnote-ref-6)
7. See 11 USC s 1104, 1106 & 1108 [↑](#footnote-ref-7)
8. See 11 USC s. 1106 [↑](#footnote-ref-8)
9. See Jay Lawrence Westbrook, Creating International Insolvency Law, 70 Am, Bankr. L.J. 563, 567 (1996) (recommending Maxwell Protocol as a potential “model protocol” for court cooperation in the NAFTA countries). [↑](#footnote-ref-9)
10. The entire facts and summary of the issues in MCC case were extracted from “Foreign Representatives in US Chapter 11 Cases: Filling the void in the Law of Multinational Insolvencies by Evan D. Fleschen, Anthony J. Smith and Leo Plank [↑](#footnote-ref-10)
11. In Re Nakash Case No 94-B-44840 (BRL) (Bankr. SDNY 1984) [↑](#footnote-ref-11)
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