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Coordinated Hearings and Procedural Incrementalism in Cross-border Insolvency: A Commingling of Sovereignty and Comity

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Introduction

In the often colourful and always evolving world of modern cross-border insolvency, the relatively recent arrival of coordinated hearings[1] stands out amongst the multitude of developments and changes qua reform that have arisen since the 1990s.[2]

Cross-border insolvency, by its very nature, demands a rejoinder to the challenges presented by disparate and often conflicting domestic laws imposed by sovereign States with differing political, social and economic agendas. Courts, insolvency representatives and advisors dealing with collective debt collecting procedures in relation to transnational group enterprises with assets spread across multiple jurisdictions must find practical solutions for reconciling questions of choice-of-law and forum and differences in domestic laws in order to deliver outcomes to creditors and other stakeholders which are consistent, predictable, efficient and fair.

Meanwhile, the theoretical debate between universalism and territorialism rages on[3] and, together with their progeny of modified universalism[4] and modified territorialism,[5] provide a useful taxonomy for exploring and evaluating the evolution of solutions to those challenges which have led to the relatively recent advent of coordinated hearings.

Extant evidence establishing the credentials and benefits of coordinated hearings is scarce with only one notable instance, the *Nortel* case,[6] garnering scholarly attention thus far. It is, however, already apparent for reasons that will be made clear in this paper that coordinated hearings rise far and above the status of a nice-to-have mechanical tool for addressing issues of procedure and administration. Joint hearings are an exemplar of procedural incrementalism, not simply as a means for "*gradually increasing subjugation of sovereignty on seemingly less threatening, procedural matters*",[7] but as discussed in this paper they are a pragmatic mode of harmonisation.

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[1] In this paper, the term "coordinated hearings" is given the same meaning as that set out in the United Nations Commission on International Trade Law, *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment* (2019) at paragraph 87, page 49 accessed at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf. Other nomenclatures which are used for this term include joint, simultaneous or concurrent hearings.

[2] Pottow, JAE, '*Procedural Incrementalism: A Model for International Bankruptcy*' (2005) 45 Virginia J Intl L 935 at 937.

[3] Fletcher, Ian F., *Insolvency in Private International Law: National and International Approaches* (2005) at p 11.

[4] Pottow, John A. E., *Beyond Carve-Outs and toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 BROOK. J. CORP. FIN. & COM. L. 197 (2014) at p197.

[5] Supra n2 at 954.

[6] *In re Nortel Networks, Inc*, 532 BR 494 (Bankr D Del 2015) (**Nortel USA**); *Re Nortel Networks Corp*, 2015 ONSC 2987 (Ont SCJ [Commercial List]) (**Nortel Canada**).

[7] Supra n4 at 198.

Sovereignty and cross-border insolvency

The concept of sovereignty has been in existence for centuries, dating back to Aristotle, and is a fundamental principle of international law.[8] In the absence of physical force and invasion by another State or a global authority with universal power, a sovereign State has absolute authority and control within its territory and enjoys independence from, and (in relevant respects) equality with, every other sovereign State, and it can only be held accountable by the international community by way of mutual promises and respect.[9] This means a State has the freedom to chart its own independent course by means such as public law and social policy and foreign or international laws cannot supervene those domestic settings.

Each State is gifted with different natural resources and faces varying challenges which inform its political, social and economic policies and its laws and culture. Those differences can result in dramatically divergent views between States regarding the meaning and proper application of general principles,[10] such as fairness and equality which underpin substantive and procedural laws and other rules. Equally and as a consequence, domestic insolvency laws and procedures are infinitely diverse, driven by each country's public policy and social order and reflecting national mores and attitudes in relation to financial distress.[11]

The complexity and scale of cross-border insolvencies which has increased alongside the growth of international trade and globalisation has brought into sharp focus the adverse consequences of unreconciled inconsistencies in domestic laws of the countries in which an insolvent multinational has assets and has traded.[12] On the one hand, sovereignty and the freedom and independence it provides to States leads to those inconsistencies, but on the other hand sovereignty also means a State has the right to choose not to exercise jurisdiction and, instead, cede authority and control to the Courts and laws of other countries.

States are inherently cautious when it comes to relinquishing sovereignty and control over their people, real and personal property and other matters within their territorial boundaries. They are much more willing to give extraterritorial effect to their own control by exporting their laws and judicial orders, if other States will allow them to do so.[13]

Before traversing the landscape of solutions which have developed over time to address the inconsistencies in substantive law and procedure between States, it is helpful to consider the

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[8] Besson, S., "*Sovereignty*", Max Planck Encyclopedia of Public International Law (Oxford Public International Law), at [1] and [11] accessed on 30 January 2022 at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472.

[9] Ibid at [2] and [30].

[10] Supra n3 at p11.

[11] Supra n3 at [1.03], pp 4-5. See Crystal, M., "*'The Golden Thread': Universalism and Assistance in International Insolvency*", Jersey and Guernsey Law Review, Feb 2011 at [4]. See also Millett, P., *Cross-Border insolvency: The judicial approach*, 6 INT'l Insolvency REV. 99 (1997).at p109 for examples of differences between UK and US insolvency laws and procedures based on "*incompatible philosophies*".

[12] Supra n3 at p 7. Ibid: Millett, P. at p99. Mevorach, Irit., *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* 2018, Oxford University Press, Oxford at p47.

[13] Ibid: Mevorach, I. at pp 29-30.

conceptual framework which has evolved in the scholarly literature on cross-border insolvency, namely universalism and territorialism.[14]

Universalism and Territorialism

The conceptual roadmap for finding solutions to the challenges of cross-border insolvency has been divided into the two diametrically opposed schools of thought of universalism and territorialism.[15] In the prevailing times of a world brought closer together by globalisation - enabled by information technology and the meta-verse, faster and farther-reaching transport and regional and global institutions and accords - yet divided and isolated by the COVID-19 global pandemic, it seems apt to engage in a debate between two theories built on the dissonant principles of unity and plurality.[16]

On one side of the academic parley, universalists adopt the principle of unity in a model for cross-border insolvency which applies a single insolvency law to a global administration overseen by a single court responsible for determining all substantive and procedural legal issues in one proceeding.[17] By establishing a single international court which applies a single law for cross-border insolvency, universalists argue that a plethora of benefits, such as equality for all stakeholders, stability, efficiency and higher levels of predictability in commercial transactions will result in better preservation and maximisation of assets and value.[18]

On the other side, territorialists approach cross-border insolvency with the principle of plurality in mind to create a system of multiple laws and proceedings, each confined to the country and jurisdiction where proceedings are commenced, and divide the debtor's insolvency into parts.[19] According to the territorialists, the sovereignty and independence of each State means there should be no extraterritorial effect and each jurisdiction should have little or no regard for foreign proceedings applicable to the 'de-globalized' debtor.[20]

In a triumph of pragmatism over ideology, a broad middle ground between universalism and territorialism has arisen and evolved into a raft of modified versions of each extreme. The various modifications are distinguished by their approach to solving practical problems with modified universalism taking a worldwide single court, single law perspective to seeking solutions, whereas modified territorialism focuses on cooperation between courts to resolve practical difficulties.[21] Cooperation has been argued to be "*necessarily very limited*" due to divergences in domestic insolvency laws between States[22] which may explain why modified

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[14] Supra n3 at p 11.

[15] Ibid.

[16] Supra n3 at p2. Supra n12: Mevorach, Irit., at p106.

[17] Supra n3 at p2 *ff*.

[18] Westbrook, J., "*A Global Solution to Multinational Default*" (2000) 98 Mich. L. Rev. 2276 at p2293.

[19] Supra n2 at p5, footnote 27.

[20] Supra n12 at p 4-5.

[21] Supra n12 at p952 *ff*.

[22] Supra note 18 at p2301-2302.

universalism is becoming the dominant approach for solving real world problems in cross-border insolvencies.[23] Modified universalism has been described as the "golden thread running through English cross-border insolvency law since the eighteenth century".[24]

In terms of choice-of-law, modified universalism embraces the principle of *lex fori concursus*, meaning the law of the forum applies to the proceedings,[25] in contrast to modified territorialism which adopts the principle of *lex rei sitae*, meaning the law of the State in which the asset is located will apply, subject to the use of conventions to deal with the improper relocation of assets.[26]

Relevantly for the central thesis of this paper regarding the role of coordinated hearings in the future of cross-border insolvency, another point of departure between the universalist and territorialist camps is the former's belief that universalism will evolve in an iterative way and emerge dominant despite the weight of historical territorialism observed in relation to sovereign States.[27]

Comity and cooperation

In countries such as the United Kingdom, the United States and Australia, the traditional solutions for overcoming the difficulties presented by cross-border insolvency and inconsistent laws have mostly derived from the principle of comity in the form of cooperation and assistance between the Courts of those and other jurisdictions.[28] Historically, comity initially developed by way of judge-made law from the eighteenth and nineteenth centuries,[29] but also more recently by statute.[30]

Comity and cooperation bring with them principles foundational to international law such as mutuality and reciprocity which are not unique to cross-border insolvency.[31] Consistent with

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[23] Supra note 12 at p29, 32 *ff* .

[24] Per Lord Hoffman, *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at 30; see also Crystal, M., "*'The Golden Thread': Universalism and Assistance in International Insolvency*", Jersey and Guernsey Law Review, Feb 2011.

[25] Supra n16 at p21. Supra n4.

[26] Supra n2 at p955.

[27] Supra n12: Mevorach, Irit., at p31.

[28] Westbrook, J., "*Ian Fletcher and the Internationalist Principle*" 2015 (3) *NIBLeJ* 30 at p566. Supra n16 at p33. Supra n 3 at pp17 and 247. Supra n11: Millett, P., at p103.

[29] See, for example, *Solomons v Ross* (1764) 1 H Bl 131; *Hilton v Guyot* I59 US 113 (1895) at 228.

[30] See, for example, in the UK, section 122 of the *Bankruptcy Act 1914* (UK) and section 426 of the *Insolvency Act 1986* (UK); in the US, section 11 U.S.C. 304 and subsequently Chapter 15; in Australia, section 581 of the *Corporations Act 2001* (Cth); in Canada, section 275 of the *Bankruptcy and Insolvency Act*, R.S.C.1985 and section 52 *Companies' Creditors Arrangement Act*, R.S.C.1985; in New Zealand, section 8 of the *Insolvency (Cross-border) Act 2006* (NZ).

[31] Boshkoff, SG., "*Some Observations on Fairness, Public Policy and Reciprocity in Cross-Border Insolvencies*" in JS Ziegel (ed.), *Current Developments in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 (pp. 677-686) at p684. The importance of reciprocity is indicated by the "*distressed*" response noted in Westbrook, J., "*Ian Fletcher and the Internationalist Principle*" at pp565-566 to the decision in *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 in

the overriding importance of sovereignty, Courts must respect the territorial and jurisdictional limits of their State and anti-suit injunctions which purport to have extraterritorial effect should be exercised with restraint and a policy of non-intervention.[32] Courts should also avoid orders which embarrass, cause affront to, harm relations with, prejudice cooperation with or "antagonise" a foreign court.[33].

Despite a general desire of judges to cooperate in the name of comity, inconsistencies and a "want of symmetry" between domestic insolvency laws has, at times, been problematic in cross-border insolvency and has stood in the way of more efficient and economical outcomes.[34] Effective cooperation is more likely between courts of neighbouring countries with a tradition of comity.[35]

Harmonisation

If, as asserted by universalism, a single, universal set of insolvency laws is the holy grail of cross-border insolvency, then harmonisation is the crusade for achieving it. Across the world, legislators, judges, scholars and representative bodies have pursued changes to reduce inconsistencies and conflicts between the domestic insolvency laws of different States and, even if pure and unadulterated universality remains a chimera, the objective of harmonisation remains worthwhile and continues to be pursued.[36] Greater convergence in insolvency laws between States creates efficiencies for the cross-border administration of assets and should be promoted and encouraged.[37]

In pursuit of the benefits which flow from harmonisation, many countries and supranational bodies have adopted and implemented conventions and treaties on a bilateral or regional basis.[38] A prominent example is the European Union Insolvency Regulation[39] which is binding on Member States of the EU.[40]

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which the UK Supreme Court refused to enforce a US judgment and *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36 in which the Privy Council refused to grant a disclosure order which would not have been available in the foreign insolvency proceeding.

[32] Supra n11: Millett, P., at p105-106.

[33] Supra n11: Millett, P., pp106-108 and the example of where restraint was not exercised in *Felixstowe Dock and Railway Co v US Lines Inc* [1989] QB 360.

[34] Supra n3 at 225-227. Supra n16 p43, in particular the comments in note 284 in relation to the '*Gibbs rule*' (*Gibbs and Sons v La Societe Industrielle* [1890] 25 QBD 399 (CA) 406).

[35] Supra n16 at p46.

[36] Supra n3 at p445.

[37] Supra n3 at p7.

[38] Ibid.

[39] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) accessed on 14/2/2022 at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en

[40] Ibid at p L141/59 (following Article 92).

The wave of reforms to insolvency laws experienced around the globe in the 1990s, which had not crested by the dawn of the new millennium,[41] has continued unabated over the last 20 years and arguably accelerated in the area of extraterritorial recognition and cooperation to produce a plethora of, mostly regional, laws and treaties that attempt to provide a procedural bridge for the gaps and inconsistencies between domestic laws in the context of cross-border insolvency.[42]

However, even neighbouring countries such as the USA and Canada, which are closely connected geographically and economically and have similar cultures, have encountered difficulties in agreeing a treaty or convention in relation to insolvency[43], despite calls over many decades for such a bilateral treaty[44].

In contrast to the binding nature of conventions and treaties which makes them more difficult to adopt, in particular on a multilateral basis, a more flexible approach to harmonisation has been the use of model laws.[45]

An exemplar of this approach is the UNCITRAL Model Law on Cross-border Insolvency (**Model Law**).[46] The Model Law has been described by Professor Jay Westbrook as a "powerful trend toward universalism"[47] and, importantly, its objective is not to introduce or change substantive domestic insolvency laws, but to provide a framework for cooperation and facilitate and promote uniformity of approach to cross-border insolvency.[48] The Model Law is also cited as a form of "procedural incrementalism".[49]

To ensure that the Model Law operates as part of and consistently with domestic insolvency laws, Article 6 provides that nothing in the Model Law prevents a court from refusing to act if

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[41] Supra n18 at p2278.

[42] Supra n3 at p7.

[43] Perry, M., "*Lining-Up at the Border: Renewing the Call for a Canada-US Insolvency Convention in the 21st Century*", *Duke Journal of Comparative and International Law* 10 (2000) 469 at p 485.

[44] *Ibid* at p472.

[45] Supra n3 at p445.

[46] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-border Insolvency with Guide to Enactment and Interpretation* (1997) accessed at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf. The Model Law has been progressively adopted so far by 50 States in a total of 54 jurisdictions: sourced from United Nations Commission on International Trade Law website accessed on 6 February 2022 at: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

[47] Westbrook, J., "*Locating the eye of the financial storm*" (2007) *Brooklyn Journal of International Law* vol 32:3 at pp 1019-1020.

[48] United Nations, "*Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency*", (2013) Part Two I.3, at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf, accessed on 23 January 2022.

[49] Supra n2 at p995.

such action is manifestly contrary to the public policy of the State but this exception is expected to be "*rarely used*".[50]

The relational concepts of "main" and "non-main", which underpin the approach of the Model Law to competing cross-border insolvency proceedings, flow from the identification of a multinational company's "Centre of Main Interests" (**COMI**).[51] Consistent with the purpose of the Model Law to provide uniform procedural structure for recognition of foreign proceedings and transparency to avoid arbitrary decisions, the concept of COMI is intended to provide a means of determining the applicable forum for a cross-border insolvency which is more certain than relying on traditional principles of comity and reciprocity.[52]

The Model Law is silent on the choice of law to apply and Courts are required to fill that lacuna with the general rules of international law of *lex fori concursus* and *lex fori regit processum*, requiring deference to the substantive laws and procedures of the COMI forum respectively, subject to exceptions for special domestic protections on the basis of recognised public policies of the non-main State, such as preservation of local rights *in rem* where there is inconsistency between the relevant security laws of the COMI and non-main jurisdictions.[53]

Protocols and agreements

A more recent development derived from the principles of comity and cooperation has been the introduction of Court-approved and directed protocols which are a type of agreement between insolvency representatives from different countries in relation to the same debtor or multinational enterprise. Protocols are designed to reduce the scope for confrontation concerning certain substantive aspects of a cross-border insolvency and to facilitate coordination of administrative and procedural steps to create a more efficient and less costly outcome and maximise value for the benefit of creditors.[54]

A key advantage of a protocol is its flexibility to accommodate the particular circumstances of the cross-border insolvency and incorporate terms for the reorganisation of a multinational company as well as the distribution of funds realised in a liquidation scenario to creditors.[55]

In order to achieve a functional reconciliation of two conflicting parallel proceedings, the parties in the case of *Maxwell*[56] agreed an "operative protocol" which laid out the functions of the insolvency representatives appointed in each jurisdiction, including who was responsible for the assets and operations of the multinational enterprise, and a "distribution agreement"

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[50] Supra n41 at paragraph 21(e), p 26.

[51] Supra n4 at p197.

[52] Supra n42 at p1024.

[53] Supra n42 at p1022. Supra n16 at pp22-23, in particular n130 in relation to the treatment of security interests.

[54] Supra n11: Millett, P., at p112.

[55] Supra n11: Millett, P., at 113.

[56] *In re Maxwell Communication Corp*. 170 BR 800, 818 (Bankr SDNY 1994), affirmed 186 BR 807, 822 (SDNY 1995), affirmed 93 F.3d 1036, 1051 (2nd Cir 1996) ("***Maxwell***").

detailing a plan of reorganisation and scheme of arrangement adopted on a worldwide basis. This "operative protocol" is considered to be the first of its kind.[57]

A slew of cases involving court-approved protocols and agreements have come after the decision in *Maxwell*, particularly across the US and Canadian border, such as *In re Everfresh Beverages, Inc*.[58] and *In re Loewen Group, Inc. Securities Litigation*,[59] and other jurisdictions, including the United Kingdom and Cayman Islands, such as *In re Inverworld*.[60]

Nortel novelty

It is ironic that one of the most innovative cases of the new millennium in the sphere of cooperation and communications between courts in cross border insolvency should have as its subject an iconic but insolvent multinational (tele)communications conglomerate and involve a competition over the assets created by its innovation during the last millennium.

The restricted scope of the Model Law, namely that it applies to single entities and not group enterprises, may explain why a main proceeding was not filed in Nortel's COMI, arguably Canada. It may also explain why recognition was not sought in non-main proceedings in other countries where it conducted business. Instead, "parallel" proceedings were simultaneously filed in countries where entities in the Nortel group existed.[61]

The *Nortel* case provides two striking illustrations of the effectiveness of modern procedures for dealing with complex cross-border insolvency. First, a consensual agreement between the parties, approved by the courts, enabled the assets of the multinational group enterprise to be efficiently sold for significant value.[62] The consensus ended there, however, and in accordance with an agreement between the parties, judicial determination was required to deal with the allocation of the sale proceeds.[63]

Secondly, and uniquely at that time,[64] the courts of two neighbouring countries applying different laws and rules sat concurrently and heard evidence and submissions jointly by audio visual link before deliberating together with the consent of the parties and independently delivering consistent decisions with the practical effect of a modified pro rata allocation.[65] By pursuing the procedural novelty of coordinated hearings, extensive and costly litigation conducted over many years between several groups of competing claimants driven by self-

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[57] Westbrook, J., *International Judicial Negotiation*, 38 TEX. INT'l L.J. 567 (2003) at p572.

[58] No. 95-B-4545 (Bankr. S.D.N.Y. 1995); Court File No. 32-077978 (Ont. Crt. Gen. Div. 1995).

[59] No. 99-6740, 2001 WL 530544 (E.D. Pa. May 16, 2001); *see also In re* Cadillac Fairview, No. B28/95, 1995 WL 1727507 (Ont. Gen. Div. Mar. 7, 1995) (Can.).

[60] 267 BR 732, 740 n 10 (Bankr. W. D. Tex. 2001).

[61] Pottow, JAE, '*Two Cheers for Universalism: Nortel's Nifty Novelty*' at p359 in JP Sarra and Justice B Romaine (eds), *Annual Review of Insolvency Law* (Carswell 2015) at p335.

[62] Supra n6: Nortel USA at p531; Nortel Canada at [7].

[63] Nortel Canada at [4(ii)]. Supra n53 at p338.

[64] Nortel Canada at [4]. Ibid: Pottow, JAE, at p363.

[65] Supra n6: Nortel USA at p500; Nortel Canada at [8]-[10].

interest was resolved on a global cross-border basis consistent with universalism.[66] Indeed, an "*extraordinary result*".[67]

Halifax harmonisation

After the joint sittings in the *Nortel* case, almost a decade passed before the next landmark example of this novel cross-border fora arrived in Australia and New Zealand. In the matter of *Halifax*[68], the Federal Court of Australia sat concurrently with the High Court of New Zealand for the first time in parallel proceedings commenced in the two jurisdictions.[69]

Halifax was a financial services business comprised of two related entities, one registered in Australia and the other in New Zealand,[70] each of which facilitated investments by clients using various 'platforms' and by providing access to an on-line broker.[71] Clients deposited funds into bank accounts controlled by Halifax which were domiciled in either of the two jurisdictions and amounts were drawn from those accounts to purchase shares and other investments.[72]

Investor funds were impressed with a statutory trust pursuant to the laws of both Australia and New Zealand. [73] Those funds became commingled across both jurisdictions as a consequence of ad hoc transfers and other transactions over an extended period of time.[74] Critically, there was also a deficiency in the cash, shares and other investments available to meet investor entitlements to the tune of more than AUD15 million and both courts concluded there was a single deficient mixed fund.[75]

In light of the commingling and deficiency, the Liquidators sought judicial advice and directions in relation to the realisation and distribution of the trust assets. The importance to investors and to the administration of the liquidations of achieving consistency in the judicial advice and directions to be given by both courts was clearly recognised.[76]

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[66] Supra n6: Nortel USA at p549. Supra n 53: Pottow, JAE, at p351.

[67] Supra n6: Nortel USA at p560.

[68] *Kelly (Liquidator) in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo* 2021 FCA 531 (***Halifax AU v Loo***); *Halifax New Zealand Limited (in liquidation) v Loo & Ors* [2021] NZHC 1113 (***Halifax NZ v Loo***).

[69] *Minute No (4)* issued on 12 December 2019 (***HCNZ Minute No 4***) in the *Halifax NZ v Loo* proceedings at [23]; *Halifax AU v Loo* at [9] and [10].

[70] At the time that Halifax Investment Services Pty Ltd (in liquidation) (**Halifax AU**) was placed into administration it held 70% of the issued share capital of Halifax New Zealand Limited (in liquidation) (**Halifax NZ**): *Halifax AU v Loo* at [2]-[3] and *Halifax NZ v Loo* at [10].

[71] *Halifax AU v Loo* at [32]-[35]; *Halifax NZ v Loo* at [25] *ff*.

[72] *Halifax AU v Loo* at [79] *ff*; *Halifax NZ v Loo* at [71] *ff*.

[73] *Halifax AU v Loo* at [134]; *Halifax NZ v Loo* at [54] *ff*.

[74] *Halifax AU v Loo* at [159]; *Halifax NZ v Loo* at [90].

[75] *Halifax AU v Loo* at [160] *ff*; *Halifax NZ v Loo* at [64] and [91].

[76] *Kelly (No 5)* at [60]; *Halifax AU v Loo* at [23] and [27]-[28].

The Liquidators initially commenced proceedings in the Federal Court of Australia and applied for the issue of a letter of request seeking cooperation and assistance from the New Zealand High Court (**NZHC**) before filing parallel proceedings in New Zealand. The Liquidators proposed a joint hearing with the NZHC and submitted that there was 'nothing radical' in relation to two courts sitting concurrently within the same country and pointed to Articles 25 and 27(e) of the Model Law regarding the coordination of proceedings and an example of state and federal courts sitting jointly in Australia.[77]

In delivering judgment in relation to the liquidators' application for the issue of a letter of request, Gleeson J stated at [59] and [60] in *Halifax No. 5*:[78]

> "59 I do not have any difficulty with the general proposition that this Court and the NZHC should endeavour to cooperate to the extent possible to promote the objectives of the liquidations of Halifax AU and Halifax NZ. Nor do I have any difficulty with the general idea that such cooperation could include a concurrent hearing of this court and the NZHC, if the NZHC were amenable to such a hearing.
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> "60 Further, I accept that the proposed letter of request is a request “to act in aid of, and be auxiliary to” this Court in the matter of the claims for the substantive relief in the interlocutory process, at least to the extent that any pooling order of the kind sought will require recognition in New Zealand because it will affect bank accounts in New Zealand held in the name of Halifax NZ. Thus, this is a case where the effective exercise of this Court’s jurisdiction in New Zealand may be affected by a lack of recognition in New Zealand. Further, it can be readily appreciated that, if the liquidators’ applications are not coordinated, there is a real and obvious prospect of inconsistent findings, inconsistent directions or advice and consequent additional litigation, all potentially to the detriment of creditors of Halifax AU. One means by which the NZHC might act in aid of and be auxiliary to this Court in connection with the application for the pooling order might be to participate in a concurrent hearing of the proposed NZ application with the hearing of the interlocutory process."

At [76] and [77], her Honour concludes:

> "76 For the reasons set out above, I accept the liquidators’ submission that this case presents as a **classic candidate for cross-border cooperation between courts to facilitate the fair and efficient administration of the winding up** of Halifax AU (and Halifax NZ) that will protect the interests of all relevant persons, particularly the investor

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[77] *BMW Australia Ltd v Brewster* (2019) 343 FLR 176; *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21.

[78] *Re Kelly; Halifax Investment Services Pty Ltd (in liq) (No 5)* [2019] FCA at 1341; (2019) 139 ACSR 56 (***Kelly (No 5)***).

clients of Halifax AU and Halifax NZ who may have claims against the funds held by Halifax AU.

"77 I also consider that the liquidators' proposed letter of request does not raise concerns of international comity. In this context, I take "comity" to refer to mutual respect between courts of different countries for the territorial integrity of the other's jurisdiction: *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 827."[79]

(Emphasis added.)

The parallel sets of proceedings were case managed concurrently and a joint sitting was convened in order for the courts to hear the same cross examination of witnesses and the parties' oral submissions in respect of the liquidators' application for judicial advice and directions.[80] At the hearing, counsel for the parties were physically present in Sydney, Australia or Auckland, New Zealand and appeared simultaneously before both Courts which were connected by way of a 'Virtual Meeting Room' link.[81] Whilst a joint sitting of the Courts in the same physical location had been contemplated, COVID-19 travel restrictions made that impractical.

With the consent of the parties, the courts engaged in joint deliberations.[82] On the basis of evidence from Halifax's liquidators that it was not practically feasible to identify and trace almost all of the investments and funds as belonging to any particular investor,[83] both Courts provided judicial advice and directions that the liquidators were justified in pooling the assets and distributing them on a pari passu basis amongst the investors of both Halifax AU and Halifax NZ.[84]

Procedural incrementalism

At one level, the coordinated hearings in the *Nortel* and *Halifax* cases are ground breaking for their procedural innovation. Facilitating a joint sitting of two courts from different countries connected by secure audio visual link involves a myriad of cultural, technological, ceremonial and other challenges.[85]

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[79] *Kelly (No 5)* at [76]-[77].

[80] *Halifax AU v Loo* at at [25].

[81] *Halifax NZ v Loo* at [8].

[82] *Halifax AU v Loo* at [30]; *Halifax NZ v Loo* at [9].

[83] *Halifax AU v Loo* at [97]; *Halifax NZ v Loo* at [89]. A small percentage of investments were identified as not having been acquired with funds tainted by the deficiency, such as shares transferred by investors from another broker to Halifax, and those investments (labelled Categories 3 and 5) were to be carved out of the pooling and made available for an in specie distribution: *Halifax AU v Loo* at [232] *ff* and [266]-[267]]; *Halifax NZ v Loo* at [151] *ff* and [225].

[84] *Halifax AU v Loo* at [97]; *Halifax NZ v Loo* at [225] and [244]; but noting the carve out for Categories 3 and 5 referred to in the preceding footnote.

[85] Supra n1 at [88], p49.

A physical joint sitting of a foreign court together with a domestic court in one location is even more problematic than a 'virtual' hearing by AVL given the additional hurdle of establishing jurisdiction and constitutional validity for the foreign court to convene on the soil of another State. In *Halifax*, Venning J of the NZHC concluded that there was no reason in principle why a physical joint sitting could not occur between the Federal Court of Australia and the High Court of New Zealand.[86] However, due to the intervention of COVID and international travel restrictions brought on by the pandemic, the Halifax hearings were conducted by videoconferencing facilities.[87]

During the course of the hearings, both courts and practitioners developed a greater familiarity with the other court's rules, processes, traditions and expectations. This is consistent with the elements of acclimation and desensitisation described by Professor Pottow in relation to "procedural incrementalism".[88]

At a second order level, where pure procedure is the first order, the joint sittings in *Nortel* and *Halifax* provided a pragmatic answer to potential questions of choice-of-law, forum and jurisdiction (and its limitations) in circumstances where there was uncertainty regarding location of and entitlement to assets and realisations in the context of complex cross-border insolvencies. Each court retained its determinative independence by delivering separate judgments based on the laws of the relevant State, consistent with territorialism, and achieved a global outcome which was fair and equitable, thereby meeting one of the goals of universalism.

The coordinated hearings also facilitated a form of harmonisation in both cases in that the two courts in each set of parallel proceedings delivered consistent orders, notwithstanding different domestic statutes and precedent case law.

Conclusion

The body of substantive law, procedures, practices and customs that are the complex patchwork of cross-border insolvency are never static and continue to evolve. When viewed in the context of historical developments in cross-border insolvency, joint sittings could be characterised as another evolutionary step along the lines of protocols and an extension of the Model Law.

However, the advent of joint hearings in the context of cross-border insolvency represents much more than a procedural step forward in relation to comity and cooperation between courts of different States. Joint sittings are a pragmatic and valuable tool for achieving harmonisation while simultaneously respecting sovereignty, placing this novel procedure firmly in the middle ground between universalism and territorialism.

The two coordinated hearings between courts of different States in the *Nortel* and *Halifax* cases are obviously an insufficient sample by which to conduct an empirical study of any significance in order to draw data-based conclusions regarding the correlation, if any, between the outcomes and decisions reached in single and joint sittings in cross-border insolvency proceedings. Intuitively, however, one might speculate that the transparency of joint court proceedings and the weight of stakeholder expectations, both domestic and foreign, might

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[86] *HCNZ Minute No 4* at [23] ff, in particular [40].

[87] *Halifax AU v Loo* at [24]; *Halifax NZ v Loo* at [8].

[88] Supra n2.

have a bearing on a judge's efforts to reach a consistent outcome with her foreign counterpart and avoid the adverse consequences of a deadlock, in particular where a discretionary jurisdiction or power is available to be exercised. Professor Westbrook's concepts of 'Transaction Gain' and 'Rough Wash'[89] and the principles of fairness and value preservation are likely to be front of mind for judges sitting and deliberating jointly. This, however, will remain mere speculation until coordinated hearings increase in prevalence and evolve from a curious novelty to a fully-fledged tool for cross-border harmonisation.

[89] Supra n2 at p948 *ff*.

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