

INTERNATIONAL ELEMENTS IN BANKRUPTCY: PROBLEMS AND SOLUTIONS

INTRODUCTION

AS the world becomes more and more of a global village, a country is less able to keep the administration of the affairs of persons who live and do business within its borders, within those borders. Consequently, the international ramifications for any area of law are becoming increasingly important. This is certainly the case in bankruptcy law where those charged with the administration of bankrupt estates, the trustees in bankruptcy, are finding that, in an increasing number of bankrupt estates, they are concerned with international elements. This is due to multifarious factors, such as the growth in international commerce, the greater use of international forms of business organisations, the developments in international travel and the comparative ease with which assets can be transferred from one jurisdiction to another.¹

The source of the difficulties which are experienced by trustees and other insolvency administrators where international elements are present is universally acknowledged. The world is divided into many separate political entities which guard their own sovereignty strictly and have different regimes for dealing with bankruptcy.² Despite many successful attempts to handle international aspects in other areas of law, relatively speaking, little has been achieved in international bankruptcy; it is all too obvious that there has been little success in refining the principles which are to apply to international bankruptcy problems.³ It has led one

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1 This was recognised by the Australian Law Reform Commission in its *General Insolvency Inquiry* (Report No 45, 1988) para 959.

2 Fletcher, *The Law of Insolvency* (Sweet & Maxwell, London 1990) p543.

3 Smart, *Cross-Border Insolvency* (Butterworths, London 1991) p ix.

commentator to describe the area as involving "murky and uncharted waters".⁴ The renowned commentator, Nadelmann, invokes the slogan "the bankruptcy of bankruptcy law" when referring to international bankruptcy law.⁵ This comment is supported by Mears when she says "[p]erhaps no other area of the law has suffered from such arrested development as international insolvency law".⁶

This paper is, ostensibly, concerned with identifying some of the major problems which face Australian trustees in bankruptcy when international elements impact on the administration of bankrupt estates, and examining some possible solutions to those problems while raising concomitant issues inherent in the solutions discussed.

The Problems

Each nation has its own scheme for handling the affairs of debtors who are in financial distress. Consequently, where there is an international flavour to a debtor's affairs there may be a conflict between how the affairs would be handled within the debtor's home jurisdiction on the one hand, and a foreign jurisdiction on the other. Also, the courts in a foreign jurisdiction may not recognise the orders of courts in the home jurisdiction, as far as they affect the bankrupt or their property. This is true, unfortunately, even when the jurisdictions involved have similar legal systems.

This situation will, in most cases, precipitate problems for a trustee in bankruptcy who wishes to take action outside of the borders of Australia. The rights given to them under the *Bankruptcy Act* 1966 (Cth) will not, usually, grant them similar rights in other countries and even the orders of Australian courts may be of little or no assistance.

Problems of a legal nature in the field of international bankruptcy are far from recent. They were before the courts in England in the eighteenth

4 Paskay, "Impact of the Bankruptcy Reform Act of 1978 on Foreign Debtors and Creditors" (1983) 12 *Stetson L Rev* 321 at 329, referred to by Lam, "Bankruptcy Code section 304(b)(3): 'Other Appropriate Relief' for Multinational Bankruptcy" (1990) 16 *Brooklyn J Int'l L* 479.

5 Nadelmann, "Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company" (1977) 52 *NYULR* 1.

6 Mears, "Cross-Border Insolvencies in the 21st Century: A Proposal for International Cooperation" (1991) 1 *Int'l Insolvency Rev* 23 at 24.

century.⁷ Earlier, in medieval times, some Italian city states effected bankruptcy treaties with one another to overcome the problems.⁸

In the early eighteenth century Jabez Henry produced the *Outline of Plan of an International Bankruptcy Code* which sought to establish a uniform system of bankruptcy laws for the European States.⁹ This did not, it appears, have a great impact in Europe. There have been many subsequent attempts to resolve or at least ameliorate the position. However, they have been, in the main, marked only by a lack of success. In 1894 the *American Law Review* stated that a multi-national conference on international bankruptcy was scheduled to be held in Holland. It noted that the *London Law Journal* did not think that the conference would lead to practical results.¹⁰ The Law Journal was correct and, as Boshkoff states,

the commercial world continues to wait for a rational co-operative approach to the administration of those insolvency proceedings whose impact cannot be confined within the borders of one country.¹¹

Efforts to bring harmony have been unsuccessful and principles of international bankruptcy remain primitive, while in other areas of law great developments have occurred. Even the European Economic Community, with all of its efforts to bring harmony to many aspects of life in the member countries, has failed to achieve any substantial amelioration as yet, although there is a Draft European Convention on Certain Aspects of Bankruptcy. This draft remains confidential.

Because of the isolation of Australia and its relatively small population, bankruptcy trustees in this country have been saved from having to deal with many of the problems which have existed for bankruptcy

7 For example, *Mackintosh v Ogilvie* (1747) 36 ER 900; *Solomons v Ross* (1764) 126 ER 79.

8 Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 309.

9 Nadelmann, "An International Bankruptcy Code: New Thoughts on an Old Idea" (1961) 10 *ICLQ* 70 at 74.

10 Referred to by Boshkoff, "United States Judicial Assistance in Cross-Border Insolvencies" (1987) 36 *ICLQ* 729.

11 As above.

administrators in Europe for many years. However, during the past ten years these problems have become more apparent in Australia.

One of the essential reasons for the failure of nations to facilitate the administration of bankruptcies across borders is the fact that international bankruptcy law "consisting mainly of municipal law governing transnational bankruptcies, has been torn between the doctrines of universality (or unity) and territoriality (or pluralism)".¹²

Pursuant to the universality doctrine international effect is granted to a local adjudication of a bankrupt estate so that the law of the jurisdiction where a person is bankrupted applies to the foreign aspects of the bankruptcy. This results in only one estate administered under the auspices of the trustee appointed in the nation where bankruptcy occurred.¹³ In contrast, the territoriality doctrine states that the bankruptcy laws of a nation are not to be recognised beyond its borders.¹⁴ Accordingly, multi-state bankruptcy proceedings may ensue. This dichotomy of approaches has acted, together with the failure of bankruptcy courts of different nations to co-operate with one another in their attempts to deal with bankruptcies which involve multiple states, as a barrier to the development of any effective system.

With this background it is interesting to consider that the problems of an international flavour which confront Australian trustees usually emanate either from the fact that the bankrupt has absconded overseas (before or after their bankruptcy commenced) or from the fact that property to which the trustee believes they are entitled, is situated in a foreign country.

12 Huber, "Creditor Equality in Transnational Bankruptcies: The United States Position" (1986) 19 *Vand J Transnat'l L* 741 at 744.

13 As above.

14 Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 309. The rationale for this view is that "any unilateral application of one state's bankruptcy law in an extra-territorial manner would violate the target-nation's sovereignty" (Huber, "Creditor Equality in Transnational Bankruptcies: The United States Position" (1986) 19 *Vand J Transnat'l L* 741 at 744).

Absconding Bankrupts

It is trite to say that the situation is better for a trustee where the bankrupt is resident in Australia rather than overseas. The trustee will want assistance from the bankrupt to enable them to administer the bankrupt estate more effectively. Naturally, if a bankrupt is resident in a foreign country it is far more difficult to communicate with the bankrupt and to subject them, if necessary, to the jurisdiction of the Australian courts.

Persons may abscond from Australia at various times while bankruptcy proceedings are running their course. A person who subsequently becomes bankrupt may even have departed from Australia before bankruptcy proceedings are initiated. Sub-section 272(a) of the *Bankruptcy Act* 1966 (Cth) provides that anyone who left Australia, in the six months prior to the presentation of the petition which led to their bankruptcy, or did an act preparatory to leaving Australia with intent to defeat or delay their creditors is guilty of an offence. It is also an offence to leave Australia, with an intention of defeating or delaying creditors, after the presentation of a petition, but before bankruptcy.¹⁵ Similarly, it is an offence to leave Australia or prepare to leave after a person has become a bankrupt unless the consent in writing of the trustee is secured.¹⁶ Also, since 1 July 1992 if the bankrupt is liable to make a contribution from their income to the trustee under s139P(1) or s139Q(1) it is an offence to leave Australia unless the permission of the Court is obtained.¹⁷

To facilitate the restrictions on the travel of the bankrupt the *Bankruptcy Act* 1966 (Cth) provides that when a person becomes a bankrupt they are required forthwith to give to the trustee their passport.¹⁸ It may, of course, be the case that a bankrupt departs before the trustee is aware of their flight and before the trustee can take measures to have the bankrupt's flight arrested.

15 Section 272(b).

16 Section 272(c). Zanker reveals that the *Annual Report on the Operation of the Bankruptcy Act* for the 1990-91 year states that there were two prosecutions against bankrupts for leaving Australia without the permission of the trustee during that period: (Zanker, "Bankrupt and Overseas" (Paper delivered at the Queensland Law Society's 1992 Symposium, 8 March 1992)).

17 Section 272(ba).

If a bankrupt is not required to contribute to their estate from their income and the bankrupt is refused permission by the trustee from travelling overseas, the bankrupt can apply to the Court and the Court may order the return of the bankrupt's passport.¹⁹ If the bankrupt is obliged to contribute to their estate from their income the Court's permission must be secured before journeying abroad.²⁰ A court is only entitled to grant permission if it is satisfied that the bankrupt needs to travel overseas in order to continue to derive income or it is appropriate to allow travel because of the death or serious illness of a close relative of the bankrupt, and contributions of income due during their absence are paid or satisfactory arrangements are made for the payment of same.²¹ The permission of the Court may be subject to certain conditions. For example, the bankrupt may be restricted to visiting specified countries.²²

This requirement that certain bankrupts are required to obtain the permission of the Court before going overseas was introduced by the *Bankruptcy Amendment Act* (Cth) 1991 and became operative from 1 July 1992. It has further restricted the position of bankrupts. In *Re Tyndall*,²³ Deane J clearly stated that bankruptcy is not a criminal offence, and consequently a person should be entitled to travel freely if and when their business or personal activities cause them to do so. His Honour said:

Restrictions upon such travel under the bankruptcy legislation must be seen as being aimed at insuring the proper administration of the bankruptcy laws and of bankrupt estates under such laws and not as a penalty imposed upon a citizen as a consequence of inability to pay debts leading to the making of a sequestration order.²⁴

While bankruptcy is not regarded as a criminal offence, the bankrupt is now more restricted because the Court does not have the same discretion which

18 Section 77(a)(ii).

19 Section 178; *Re Weiss* (1983) 1 FCR 40.

20 Section 139ZU(1).

21 Section 139ZU(2).

22 Section 139ZX.

23 (1977) 30 FLR 6.

24 At 15.

it once had. It is now being directed by s139ZU(2) to address specific and restrictive criteria.

Despite the restrictions introduced by the 1991 amendment, bankrupts will still be able to travel and remain outside of Australia if they wish. As mentioned earlier, persons may depart from Australia before bankruptcy occurs, or they may leave before surrendering their passports. Also the new legislative provisions will not stop a bankrupt, who has been given permission to travel, remaining overseas. It is difficult to envisage what the legislature could do to frustrate that course of action, given the fact that the bankrupt cannot be treated as a criminal and must, if the criteria in s139ZU(2) is satisfied, be allowed to travel. It is contended that it is questionable whether the Court had to be granted the exclusive power to permit the travel of those bankrupts required to contribute to their estates from their income. Generally, trustees have acted prudently and properly in relation to the return of passports. Traditionally, if they had any doubts they refused to return the passport and required the bankrupt to apply to the Court.

The only element which the 1991 amendment has introduced in respect of those persons who abscond overseas before or after bankruptcy and in breach of the *Bankruptcy Act* 1966 (Cth), is to provide that their discharge may be withheld for up to eight years from the date on which they return to Australia.²⁵ Section 149D contains the grounds on which a trustee can object to the discharge of a bankrupt. Two relevant grounds are s149D(1)(a) and (h). The grounds contained in these paragraphs are:

- (a) the bankrupt has, whether before, on or after the date of the bankruptcy, left Australia and has not returned to Australia;
- (h) while the bankrupt was absent from Australia he or she was requested by the trustee to return to Australia by a particular date or within a particular period but the bankrupt failed to return by that date or within that period.

As indicated earlier the difficulties for the trustee in not having the bankrupt resident in Australia is that they are not able to enjoy the assistance of the bankrupt or subject the bankrupt to the jurisdiction of the

²⁵ See s149A and paras 149D(1)(a) and (h).

Australian courts. The legal problems confronting a trustee who wishes to enlist the assistance of a bankrupt residing overseas are, essentially, three fold. First, if a person leaves Australia there is no mechanism for ensuring that the person returns. "A person cannot be extradited from another country simply because he or she is a bankrupt ..."26 The person must have committed an extraditable offence and being a bankrupt is not a criminal offence. Secondly, a trustee must convince a court to accede to a request for documents or process to be served on the bankrupt. In *Re the Application of Sherlock; Re Deposit and Investment Co Ltd (Receiver Appointed)*,27 Lockhart J refused to make an order requiring a person residing outside of Australia to attend an examination under s597 of the *Corporations Law* (NSW). However, earlier in *Re Mendonca*,28 Gibbs J had indicated that he would allow bankruptcy documents to be served out of the jurisdiction. Other Australian courts have said that while the service of an Australian court process would be inconsistent with international comity, unless there was a convention which existed and which allowed for the service, they will recognise, as effective, substituted service together with the sending of a notice to the bankrupt at their overseas residence.29

The third and, it is submitted, fundamental problem is the enforcement of any penalties that may be visited upon the bankrupt if they fail to comply with any documents or process served on them. This is illustrated by the judgment of Pincus J in *Re Skase*.30 In that case the trustee of a bankrupt estate sought the issue of summonses under s81 of the *Bankruptcy Act* 1966 (Cth). The section permits trustees, inter alia, to apply for a bankrupt or an examinable person to be examined on oath before a court, registrar or magistrate concerning the bankrupt and their examinable affairs.31 The application was referred, by the Registrar in Bankruptcy, to the Court as a

26 Zanker, "Bankrupt and Overseas" (Paper delivered at the Queensland Law Society's 1992 Symposium, 8 March 1992).

27 (1991) 30 FCR 463.

28 (1969) 15 FLR 256.

29 *Re Trimbole; ex parte Deputy Commissioner of Taxation*. (1984) 4 FCR 586. See also *Re Skase* (1991) 32 FCR 212.

30 (1991) 32 FCR 212.

31 Section 81(1)(1A). The term "examinable affairs" is defined in s5 of the *Bankruptcy Act* 1966 (Cth) and means "the [bankrupt's] dealings, transactions, property and affairs; and the financial affairs of an associated entity of the [bankrupt], in so far as they are, or appear to be relevant to the person or to any of his or her conduct, dealings transactions and affairs".

special case under Rule 119(1) of the Bankruptcy Rules. The reason for this referral was that the Registrar desired the Court to determine whether he could issue the summons sought because the proposed examinees were out of the jurisdiction, viz, Spain.

The specific question of law referred to Pincus J was:

Can a summons validly [sic] issued to a bankrupt out of the jurisdiction or to another person out of the jurisdiction under section 81 of the Bankruptcy Act 1966?³²

His Honour was of the view that the answer was "yes". Pincus J acknowledged that people can travel in and out of Australia more freely than in the past and in his view the legislature must have intended that a summons under s81 could be issued against someone outside of the jurisdiction.³³ Pincus J said that a distinction had to be drawn "between the power to issue the summons and the question of service and enforcement".³⁴ His Honour followed *Re Mendonca*³⁵ and said that a summons under s81 could be served by way of court-sanctioned, substituted service pursuant to s309 of the Act.³⁶ However, Pincus J recognised that if the proposed examinee did not comply with the summons, the trustee had problems in the enforcement of the penalties which were prescribed for non-compliance.³⁷ If a person summoned to attend an examination fails to do so the court, registrar or magistrate, before whom the examination is to take place, is empowered to issue a warrant for the apprehension of the proposed examinee.³⁸

32 *Re Skase* (1991) 32 FCR 212 at 212-213.

33 At 215.

34 At 215.

35 (1969) 15 FLR 256.

36 *Re Skase* at 216. Pincus J found further support for this view in *Re Trimbole and Amalgamated Wireless (Australia) Ltd v McDonald Douglas Corporation* (1987) 16 FCR 238. It is to be noted that Sheppard J in *Re Trimbole* shied away from ordering substituted service in relation to a person resident in a foreign country. His Honour opined that the recognised course of action was to order that notice of the fact that the process had been issued should be given to the foreign resident (at 587).

37 *Re Skase* at 217.

38 Section 264B.

If this were to occur where the bankrupt was resident in Australia the trustee's solicitor would draw the warrant,³⁹ have the registrar sign it and stamp it and when returned to them, arrange for the Federal Police to execute it. For such a warrant to be executed outside of Australia a convention with the country in which the bankrupt resides must exist or else one would be acting contrary to the principles of international comity, and this has been frowned upon.⁴⁰

Extradition treaties exist between Australia and other countries in relation to those who commit criminal offences in one country and flee to another. It may be argued that the failure to attend a bankruptcy examination is a criminal offence under s264A of the *Bankruptcy Act 1966* (Cth). However, it is questionable whether a foreign court would order extradition when the offence is connected with bankruptcy, which is at best quasi-criminal.⁴¹

There appears little likelihood of a foreign country extraditing a bankrupt for non-compliance with an order or direction under the *Bankruptcy Act 1966* (Cth) even though it may prescribe penal sanctions for the non-compliance.

Property Located Overseas

When a person becomes bankrupt their property vests in the trustee in bankruptcy.⁴² "Property" is defined in s5(1) of the *Bankruptcy Act 1966* (Cth) to mean

real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.

39 See Keay, *Bankruptcy Proceedings Handbook* (Longman Professional, Melbourne, 2nd ed 1992) Appendix 29

40 For example, *Re Trimbole*.

41 *Re Walsh; Hamilton v Walsh* (1982) 47 ALR 751 at 753; *Re Wheelahan; ex parte Commissioners of The State Bank of Victoria* (1982) 58 FLR 91 at 97.

42 Section 58. Certain property is exempted by s116. This is also the effect in England. See ss283 and 306 of the *Insolvency Act 1986* (UK).

As Zanker points out:⁴³

It is clear that in literal terms, the [*Bankruptcy Act*] purports to have universal application to persons and property, whether or not there is any territorial connexion between the person, or the property, and Australia.

This is only really an ambit claim because, in practice, the trustee is dependant upon the assistance of foreign courts or the assistance of the bankrupt in order to recover property located overseas.⁴⁴

A bankrupt may have been the owner of overseas property or transferred property overseas when bankruptcy was imminent in an attempt to conceal it from creditors, or put it out of their reach.

The trustee has the difficulty, inter alia, of identifying the property, establishing their title to it and in many cases asserting title in the face of a claim to the property by overseas creditors. In this last situation the courts in overseas countries have tended toward parochialism and favour creditors within their own jurisdiction.⁴⁵ Too infrequently does one find a court prepared to act like the Manitoba court in *Williams v Rice and Rice Knitting Mills Ltd.*⁴⁶ The Court held that a trustee under the *Bankruptcy Act* 1898 (US) was entitled to recover moneys belonging to the bankrupt and which had been sent and transferred to Manitoba from the United States, in fraud of the bankrupt's creditors. The historic position in the United States, for example, is that the American courts "have been

43 Zanker, "Bankrupt and Overseas" (Paper delivered at the Queensland Law Society's 1992 Symposium, 8 March 1992).

44 Bankrupts are required by s77(e)(g) of the Act to do all such things in relation to their property and its realisation as required by the *Bankruptcy Act* 1966 (Cth) or the trustee and to aid in the administration of their estate.

45 See the comments of O'Leary J in *Re CA Kennedy Co Ltd and Stibbe-Monk Ltd* (1977) 74 DLR (3d) 87 (Ontario High Court). Nadelmann, "Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Claims" (1973) *Am Bankr LJ* 147 regards this as the most serious problem in international bankruptcy (at 149).

46 [1926] WWR 192.

reluctant to recognise the claims of foreign trustees to property of the debtor located in the United States".⁴⁷

This position, while it relates to the United States, is very much representative of the situation in most jurisdictions. The Japanese bankruptcy law does not recognise foreign bankruptcy proceedings.⁴⁸ In some South American countries local creditors are given the right to priority payment from local assets before a foreign trustee can take the assets.⁴⁹ However, it must be noted that some countries, including the United States, are now displaying a less parochial view of bankruptcy cases.⁵⁰ This is evident in the fact that courts such as those in England are trying to adopt a balance whereby they recognise the desirability, in general, of giving effect to the acts of foreign courts but also recognise the need, in particular circumstances, to protect parties connected with England.⁵¹ Yet the situation one still finds in most countries is a latent parochialism and a refusal to balance the rights of the foreign administrator and those of local creditors. Perhaps the greatest difficulty for a trustee arises where the bankrupt is subject to a concurrent bankruptcy in the overseas jurisdiction. In that case the chances of the trustee receiving any interest in the assets or money are reduced appreciably. The tendency is to prefer the administration of the local trustee as against the administration of the foreign trustee.

Even where parochialism is not evident, trustees' rights are subject to the vagaries of private international law. Whether a trustee's rights and the orders of Australian courts will be recognised and given effect will depend

47 Schechter, "United States-Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?" (1990) 1 *Int'l Insolvency Rev* 99 at 107. This statement is borne out even recently in *Re Toga Manufacturing Ltd* (1983) 28 *Bankr & Ins R* 896. However it must be noted that Gitlin and Flaschen take the view that domestic policy would have been contravened if the foreign law had been enforced. Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307.

48 Article 3(2) of the *Bankruptcy Law* 1922 (Jap).

49 Nadelmann, "An International Bankruptcy Code: New Thoughts on an Old Idea" (1961) 10 *ICLQ* 70 at 74. The countries included are Argentina, Uruguay, Paraguay and Peru. See also Nadelmann, "Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Claims" (1973) *Am Bankr LJ* 147.

50 For example, see s304 of the *Bankruptcy Reform Act* 1978 (US).

51 Smart, *Cross-Border Insolvency* p253.

upon the rules of private international law employed by the particular legal system operating in the foreign country. Nadelmann has lamented at the great variety of private international rules applicable to bankruptcy in different countries.⁵² Fletcher has noted that:

Although a great deal of common ground exists in the realm of private international law, there are nevertheless important differences, in terms both of method and substance, between the conflicts rules developed by the various legal systems of the world.⁵³

In many countries the rules applicable to bankruptcy are in need of modernisation because they were formulated during a time when the approaches to bankruptcy were based upon principles which have been revised substantially.⁵⁴ Fletcher points out that many of the rules applied in England, for example, are founded upon cases decided in the eighteenth and nineteenth centuries and these cases remain the primary authorities on some points of law.⁵⁵ Some jurisdictions, such as England, have rules of private international law which are rigid,⁵⁶ and therefore there is less likelihood of the accommodation of foreign trustees.

The fact that a variety of conflicting rules are applied across the world means that if a trustee wishes to recover property in a foreign jurisdiction there will usually be a need to conduct considerable research to ascertain what rules are employed in the jurisdiction of interest. This not only consumes time but increases the cost of administration and ultimately reduces the dividends which will be received by the creditors.

Generally, it is a principle of private international law that the *lex fori* regulates all matters associated with procedure.⁵⁷ A number of the matters on which a trustee may wish a foreign court to adjudicate, from time to

52 Nadelmann, "Codification of Conflicts Rules for Bankruptcy" (1974) 30 *Ann Suisse de Dr Int'l* 57; referred to by Riensenfeld, "The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey" (1976) 24 *Am J Comp L* 288 at 290.

53 Fletcher, *The Law of Insolvency* p545.

54 As above.

55 As above.

56 Smart, *Cross-Border Insolvency* p253.

57 Fletcher, *The Law of Insolvency* p573.

time, may be characterised as procedural, for example, whether a warrant can be issued and served on an absconding bankrupt who fails to attend a public examination. The law of the forum may not satisfy a trustee because that law may be quite different from the law applicable in Australia.

Even where a matter is not procedural, countries may have adopted rules which provide that the law of the forum applies. For instance, in England in the case of the bankrupt's personal property situated in England the law maintains the principle that that property automatically vests in the bankrupt's foreign trustee from the moment of bankruptcy.⁵⁸ This is founded on the principle that the laws of the domicile of the owner regulate personal property.⁵⁹ However, when it comes to real property which belongs to a debtor adjudicated bankrupt in a foreign country, the law in England states that bankruptcy is not of itself capable of giving the trustee a right to the title of the property;⁶⁰ under traditional English law and accepted universally, in practice, real property is under the exclusive control of the laws of the country where it is located.⁶¹ The position is the same in Canada⁶² and Australia.⁶³

SOLUTIONS

Thus far this paper has identified the problems which face trustees in bankruptcy when the bankrupt has absconded overseas or where property which has vested in the trustee is located in a foreign jurisdiction. This section of the paper considers the avenues which may be available to

58 *Alivon v Furnival* (1834) 1 CM & R 277; 149 ER 174.

59 Schechter, "United States-Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?" (1990) 1 *Int'l Insolvency Rev* 99.

60 *Waite v Bingley* (1882) 21 Ch D 674.

61 Schechter, "United States-Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?" 1 *Int'l Insolvency Rev* 99 at 122; Fletcher, *The Law of Insolvency* p577.

62 *Re EH Clarke & Co* (1922) 23 OWN; [1923] 1 DLR 716; Story, *Commentaries in the Conflict of Laws* (Little Brown, Boston, 8th ed 1883) referred to by Schechter, "United States-Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?" 1 *Int'l Insolvency Rev* 99.

63 *Re Young* [1955] St R Qd 254; *AMP Society v Gregory* (1908) 5 CLR 615. Although it is to be noted that in the latter case the High Court said that it would have given priority to the assignee of the property of a Tasmanian insolvent as against the South African trustee even if the property of the insolvent could be characterised as personal.

trustees to overcome these problems. In examining these avenues it is intended to raise the associated difficulties.

Bankruptcy Proceedings in the Foreign Jurisdiction

One avenue which could be followed in some jurisdictions is to embark on full bankruptcy proceedings in the foreign jurisdiction in which the bankrupt is resident or in which property is located.⁶⁴ This would usually involve the filing of a petition or some similar process which seeks to have the person bankrupted in the foreign jurisdiction as well as in Australia.

Whether such a course of action is successful will depend on the criteria specified in the foreign jurisdiction and which must be met before a debtor can be the subject of a bankruptcy order. While resident in the foreign jurisdiction or owning property in that jurisdiction the bankrupt may not owe debts there and consequently the courts of that jurisdiction may have no power to make a bankruptcy order. Even if the bankrupt owes debts, they may not owe sufficient for a bankruptcy order or as far as their position is concerned in the foreign jurisdiction the bankrupt may be solvent that is, being able to pay their debts as they fall due out of their own money.

Even if bankruptcy proceedings could be initiated the prudence of following such a track is questionable. First, such action would, necessarily, be time-consuming. The trustee would have to comply with all formalities. Secondly, it would be cumbersome in that the trustee would have to co-ordinate two bankruptcies. Thirdly, such proceedings would be expensive as the trustee would have to, probably through their own solicitors, instruct legal representatives in the foreign jurisdiction and also pay court fees. Fourthly, the type of procedures which are available to the trustee in their home jurisdiction may not be available to the trustee in the foreign jurisdiction and hence the act of bankrupting the person again may

64 This is possible in the United States. Boshkoff, "United States Judicial Assistance in Cross-Border Insolvencies" (1987) 36 *ICLQ* 729. In Argentina *Ley de Concursos* Law No 19.551 would appear to allow a trustee to obtain a bankruptcy declaration if one has been obtained in a foreign country. The drawback is that claims payable in Argentina will be paid first in the administration of the Argentinian bankruptcy. See Nadelmann, "Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Claims" (1973) *Am Bankr LJ* 147.

be nugatory. Fifthly, the trustee may not be totally or even vaguely conversant with the procedures and practice of the foreign jurisdiction.

If property of the bankrupt is located in countries such as Japan, where the authority and standing of foreign bankruptcy trustees is not recognised, the only course of action would be for a creditor to initiate bankruptcy proceedings in the foreign country.

Seeking the Aid of Foreign Courts

An alternative for the trustee is to ask a court in Australia, with jurisdiction in bankruptcy, to seek the aid of the courts in the jurisdiction where the bankrupt is residing or the bankrupt's property is situated. The foreign courts may accede to the request pursuant to legislation similar to s29 of the Australian *Bankruptcy Act 1966* (Cth). That provides in ss2 that:

In all matters of bankruptcy, the Court -

- a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and
- b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

"Prescribed country" is specifically defined in s29(5) as the United Kingdom, New Zealand, Canada and a country prescribed for the purpose of the sub-section⁶⁵ and colonies, overseas territories or protectorates of the United Kingdom, New Zealand or Canada.

The Australian courts are able to aid foreign courts where a letter of request is received.⁶⁶ However, the aid which the Australian courts can give is circumscribed by s29(3). The Australian courts can only exercise such powers as they could exercise if the matter had occurred in Australia. This may not enable a foreign trustee to obtain the specific aid which they

65 Under rule 195B and Schedule 5 to the Rules this presently includes Jersey, Malaysia, Papua New Guinea, Singapore, Switzerland and the United States.

66 Section 29(3). An example of this is *Ayres v Evans* (1981) 56 FLR 235; 39 ALR 129 where aid was given to the High Court of New Zealand.

are really seeking, although in most cases a foreign trustee could be satisfied as the powers available to a court in Australia are extremely wide.⁶⁷ The nature, extent and terms of the aid granted by an Australian court is a matter for the discretion of the court.⁶⁸

If a bankruptcy order has been made against a person in a country which is within the definition of "prescribed country" in s29, "an Australian court should make orders vesting the Australian assets of the bankrupt in the foreign trustee - this is however not likely to be done where the bankrupt is already a bankrupt in Australia".⁶⁹

The United Kingdom has an analogous provision in s426(4) of its *Insolvency Act* 1986 (UK). That sub-section provides:

The courts having jurisdiction in relation to insolvency law in the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

"Relevant country or territory" is defined in ssII. It means any of the Channel Islands or Isle of Man or "any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument". Australia is one of the countries designated.⁷⁰

Unlike Australia, the courts in the United Kingdom appear not to be restricted as to the nature and effect of any aid to be given to a requesting court.⁷¹ This is manifested by s426(5) where it is stated:

For the purposes of sub-section (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is

67 *Ayres v Evans* (1981) 56 FLR 235 at 247, per Northrop J.

68 At 240, 247.

69 Zanker, "Bankrupt and Overseas" (Paper delivered at the Queensland Law Society's 1992 Symposium, 8 March 1992).

70 *Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order* (1986, SI 1986, No 2123) designated sixteen other countries besides Australia. All countries are members of the British Commonwealth.

71 Smart, *Cross-Border Insolvency* p260.

made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

New Zealand has a similar provision in s135 of its *Insolvency Act 1967* (NZ), although it is broader in its potential effect.⁷²

The Australia legislation empowers an Australian court to request courts in foreign countries to aid it in a bankruptcy matter.⁷³ Sub-section 29(4) states:

The [Australian] court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy.

In *Re Dunn and Edwards*⁷⁴ the trustee of an Australian bankrupt estate sought directions concerning the furnishing of a statement of affairs by the bankrupt who resided in England. The Supreme Court of Queensland ordered the issuing of a letter of request to the High Court of Justice in England seeking its aid in the examination of the bankrupt concerning his property situated in England.⁷⁵

A more recent example of the use of s29(4) occurred in *Re Clunies-Ross; ex parte Totterdell*.⁷⁶ Clunies-Ross had become a bankrupt in Australia. At the time of his bankruptcy Clunies-Ross was the owner of certain real and personal property located in the Cocos (Keeling) Islands. The bankrupt's trustee sought an order from the Federal Court of Australia that

72 The provision states that the New Zealand courts shall act in aid of any courts in a Commonwealth country which have bankruptcy jurisdiction and in aid of a court having jurisdiction in bankruptcy in any country.

73 A similar provision is contained in s581(4) of the *Corporations Law* with respect to the administration of companies. See *Re Dallhold Estates (UK) Pty Ltd* (1991) 6 ACSR 378 where Gummow J of the Federal Court ordered that a letter of request be addressed to the High Court of Justice in England seeking its assistance in the making of an administration order pursuant to the *Insolvency Act 1986* (UK).

74 (1935) 8 ABC 168.

75 The application for aid was pursuant to the *Bankruptcy Act 1924* (Cth).

76 (1988) 82 ALR 475.

a letter of request issue requesting the Supreme Court of the Cocos (Keeling) Islands to act in aid of the Federal Court in relation to the possession and control of the bankrupt's property located in that territory. The order was sought pursuant to s29(4). French J acceded to the application and ordered that a letter of request be sent seeking the assistance of the Justices of the Supreme Court of the Cocos (Keeling) Islands to vest in the trustee the bankrupt's real and personal property in the Cocos (Keeling) Islands.⁷⁷

It is fair to say that an Australian court exercising jurisdiction in bankruptcy could seek the aid of courts in those countries included in s29 or rule 195B to enforce a warrant issued under the *Bankruptcy Act* 1966 (Cth) or to seek other aid in relation to a bankruptcy matter, and the chances of those courts providing assistance are heightened by the existence of s29. It is very likely that the assistance of courts in the United Kingdom, New Zealand and Canada would be obtained.⁷⁸

The Principle of Comity

According to Fletcher there are in excess of 150 sovereign nations in the world,⁷⁹ and it is more than likely, on the probabilities, that a bankrupt may abscond to or hold property in a country which does not have a provision analogous to s29 of the *Bankruptcy Act* 1966 (Cth). If this is the case then it is pointless for the trustee to apply to an Australian court to request aid from the courts of the foreign country.

In such circumstances the trustee may seek to rely on the international principle of comity. This principle, which is difficult to encapsulate in a brief comment, is well established. It was recognised in the United States as early as 1883 in the decision of *Canadian Southern Railway Co v Gebhard*⁸⁰ and in England in *Le Mesurier v Le Mesurier*.⁸¹ The principle was succinctly defined in the oft cited United States case of *Hilton v Guyot*:

77 For the terms of the order made by French J see *Re Clunies-Ross* at 489.

78 This is also the view of the Australian Law Reform Commission in its *General Insolvency Inquiry* (Report No 45, 1988) para 971.

79 Fletcher, *The Law of Insolvency* p617.

80 109 US 527 (1883).

'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, 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 other persons who are under the protection of its law.⁸²

Far more recently in the case of *Laker Airways v Sabena Belgian World Airlines*⁸³ the object and limits of the principle were articulated:

'Comity' summarizes in a brief word a complex and elusive concept - the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain. However, the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international co-operation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced - the foreign court because its laws and policies have been vindicated; the domestic country because international co-operation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations. Comity is a necessary outgrowth of our international system of politically independent, socioeconomically interdependent nation States. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate,

81 [1895] AC (1895) 517; [1895-9] All ER 836.

82 159 US 113 (1895) at 163-164.

83 731 F 2d 909 (1984).

and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.

However, there are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.⁸⁴

The object behind recognising the principle of comity in bankruptcy is to enable "the assets of a debtor to be dispersed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion".⁸⁵

Comity has been granted in respect of foreign bankruptcy adjudications on a number of occasions in the United States⁸⁶ and Canada.⁸⁷ The English courts have also shown a willingness to embrace comity in bankruptcy and insolvency matters.

The principle was respected and applied in *Dulaney v Merry*⁸⁸ where the English High Court allowed a trustee under a deed of assignment for the benefit of creditors, executed by a foreign debtor, and valid in the country

84 At 937.

85 *Cunard Steamship Co v Salen Refer Services AB* 773 F 2d 452 (1985) at 457.

86 For example, *Clarkson Co v Shaheen* 544 F 2d 624 (1976); *Cornfeld v Investors Overseas Services Ltd* 471 F Supp 1255 (1979).

87 For example, *Williams v Rice and Rice Knitting Mills* [1926] WWR 192; *Re CA Kennedy Co Ltd and Stibbe Monk Ltd* (1976) 74 DLR (3d) 87; *Touche Ross Ltd v Sorrell Resources Ltd* (1987) 63 CBR (NS) 187.

88 [1901] 1 KB 536.

where executed, to establish good title in England as against an English execution creditor. This was even though the deed had not be registered pursuant to the *Deeds of Arrangement Act* (UK) 1887 which applied in England.⁸⁹

In *Felixstowe Dock and Railway Co v United States Lines Inc*⁹⁰ Hirst J emphasised that an English court would "in principle always wish to cooperate in every proper way with an order ... made by a court in a friendly jurisdiction".⁹¹ However, later in his judgment Hirst J allowed the question of reciprocity to surface in such a way as to influence him. His Lordship stated that he had doubts whether an American court would make the order which he was being asked to make.⁹²

Unfortunately all too frequently courts have refrained from granting comity or, if they purported to do so, they applied a special brand of parochialism. This has been possible because the principle has granted a wide discretion to the courts and often courts have "used it as a device to protect the interests of domestic creditors".⁹³ Therefore, if a trustee seeks to invoke the doctrine of comity he or she always runs the risk of the local creditors being favoured. This is well documented in the United States where, historically, American courts have refrained from recognising the claims of foreign trustees.⁹⁴ However, there is a trend in the United States in recent years to adopting a far more liberal attitude,⁹⁵ and the historical view of American courts in this area is now regarded by Huber as a minority view.⁹⁶

89 See also the House of Lords decision in *Galbraith v Grimshaw* [1910] AC 508; [1908-10] All ER 561.

90 [1988] 2 All ER 77

91 At 91.

92 At 101.

93 Huber, "Creditor Equality in Transactional Bankruptcies: The United States Position" (1986) 19 *Vand J Transnat'l L* 741 at 757-758.

94 See *Re Toga Manufacturing Ltd* (1983) 28 *Bankr & Ins R* 165.

95 For example, see *Cornfeld v Investors Overseas Services Ltd*.

96 Huber, "Creditor Equality in Transactional Bankruptcies: The United States Position" (1986) 19 *Vand J Transnat'l L* 741. Some, such as Boshkoff, take a more pessimistic view. See Boshkoff, "United States Judicial Assistance in Cross-Border Insolvencies" (1987) 36 *ICLQ* 729.

A barrier to the granting of comity by some courts is that the applicant hails from a jurisdiction which does not grant reciprocal rights. This is illustrated by the view of the United States court in *Hilton v Guyot*⁹⁷ where a French judgment was not accepted conclusively because France would not grant similar treatment to a judgement of a United States court. The Court said:

The reasonable, if not the necessary, conclusion appears to us to be that judgements rendered in France, or in any other foreign country, by the laws of which our own judgements are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim.

In holding such a judgement, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognised in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgement is not entitled to be considered conclusive.⁹⁸

The English courts have also relied upon reciprocity. The Court of Appeal in *Travers v Holley*⁹⁹ made reciprocity a condition for the granting of comity.¹⁰⁰ One finds an energetic debate as to whether reciprocity is an appropriate, let alone a necessary, element of comity. To some, reciprocity is an essential ingredient of comity while others would perceive it to be a stumbling block to more co-operation in the administration of cross-border bankruptcies.

97 159 US 113 (1895).

98 At 227-228.

99 [1953] P 246; 2 All ER 794 (references are to P).

100 At 257.

Trustees are hindered by the fact that there is a tendency against uniformity even within individual countries;¹⁰¹ a trustee is never able to guarantee that courts in a country will grant comity and yet a trustee can never decline to take proceedings because they are certain comity will be refused. It makes it all very difficult for trustees to determine what to do. This is illustrated by the decision in the United States in *Cunard Steamship Co v Saleen Reefer Services AB*,¹⁰² where the court held that reciprocity was an appropriate but not essential element of comity.¹⁰³ The court granted comity but Boshkoff expresses the view that the court would have been less willing to do this if there had been proof that the country from which the application originated (Sweden) would not similarly give recognition to an American bankruptcy.¹⁰⁴ Some may regard this as a sceptical view but given the history of comity it is submitted that it is a realistic one.

Whatever the merits of reciprocity, it is contended that in practice there appears little doubt that it will be, in general, a potent factor. This was highlighted by the judgement of Pincus J in *Re Skase*.¹⁰⁵

Pincus J considered whether a summons under s81 of the *Bankruptcy Act* 1966 (Cth) could be issued against someone outside of the jurisdiction. The bankrupt was resident in Spain and the trustee wished to examine him as to his affairs. Pincus J discussed the problems associated with the service of a summons. His Honour referred to the comments made by the counsel for the Australian Government Solicitor at the hearing that there was a Convention between the United Kingdom and Spain regarding Legal Proceedings in Civil and Commercial Matters. This had been made in June 1927 and Australia acceded to it in November 1933. The Convention provided for the service of judicial and extra-judicial documents, but Pincus J made the point that there could be no expectation that Spain would co-

101 As Boshkoff states: "It should also be remembered that attitudes towards all elements of the comity doctrine will vary throughout the United States. Each state is free, therefore, to determine whether or not reciprocity should be considered in reaching a decision on the comity issue." Boshkoff, "United States Judicial Assistance in Cross-Border Insolvencies" (1987) 36 *ICLQ* 729.

102 773 F 2d 452 (1985).

103 At 460.

104 Boshkoff, "United States Judicial Assistance in Cross-Border Insolvencies" (1987) 36 *ICLQ* 729 at 735.

105 (1991) 32 *FCR* 212.

operate because the evidence was that the Australian Government's policy was to refuse to serve overseas subpoenas and summonses to attend foreign courts where the sanction for non-attendance is penal.¹⁰⁶

As the sanction for non-attendance at a s81 examination may be penal under s264A, Pincus J said:

To put this point more simply, we can hardly expect the Spanish authorities to assist Australian courts in relation to a matter of a kind in which Australia would not assist Spanish courts.¹⁰⁷

It is submitted, respectfully, that his Honour adroitly saw the reality of enforcing bankruptcy proceedings overseas - reciprocity will be crucial and as the Australian Government may well be cool to the idea of granting reciprocity to the processes used in some countries, Australian trustees may be hindered further in applying for the extension of comity.

The application of the doctrine of comity is selective. The principle is "neither mandatory nor mechanical, but is rather a matter of discretion".¹⁰⁸ The courts may talk positively about the need to co-operate in the administration of international bankruptcies and the need for the giving of universal respect to the laws and judgements of other countries, but if comity was to prejudice the citizens of their own countries, courts tend to recoil from granting comity.¹⁰⁹ Such a parochial approach does a great disservice to the courts and the administration of bankruptcies. Furthermore, if such an approach is adopted by the courts of a country it will eventually affect the citizens of that country because foreign courts will not extend comity. Also, as Huber points out, if reciprocity is a condition of comity it unfairly punishes the trustee and creditors for the approach

106 At 217.

107 At 217.

108 Morales & Deutch, "Bankruptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Tyranny of Comity" (1984) 39 *Bus L* 1573 at 1576.

109 This appears to be recognised by s304 of the *Bankruptcy Reform Act* 1978 (US) which can allow foreign trustees to initiate ancillary bankruptcy proceedings in the United States. The section states that the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims is to be taken into account by the United States courts in deciding whether or not to grant relief.

taken by their own courts, about which they can do little.¹¹⁰ The selective approach taken by the courts with respect to the principle of comity makes it extremely difficult for a trustee to decide whether to proceed in a foreign jurisdiction when they must, of necessity, rely on the principle. More often than not trustees will adopt a conservative strategy and refrain from pursuing the matter overseas in order not to risk heavy costs to the estate.

Ancillary Proceedings

It was noted earlier that it is not practicable in most cases for a trustee to initiate full bankruptcy proceedings in the foreign jurisdiction:¹¹¹ essentially, this is because of the cost, time, inappropriateness of available procedures and complexity of running two separate bankruptcies. These difficulties have been acknowledged in some jurisdictions which have developed legislation allowing a foreign trustee to initiate an ancillary action in the jurisdiction, that is, the action is ancillary to the bankruptcy proceedings in the home jurisdiction. The prime example is s304 of the *Bankruptcy Reform Act 1978* (US).¹¹²

Prior to the introduction of s304 a foreign trustee wishing to obtain help from the courts in the United States would have had to rely on the concept of comity or have commenced an involuntary bankruptcy pursuant to s303(b)(4) of the *Bankruptcy Reform Act 1978* (US). These avenues are still available and may have to be relied on. With the advent of s304 a trustee¹¹³ is entitled to ask the United States courts to give assistance to the principal foreign proceeding.¹¹⁴ Section 304 relief is intended to be

110 Huber, "Creditor Equality in Transactional Bankruptcies: The United States Position" (1986) *Vand J Transnat'l L* 741 at 760.

111 See above p251.

112 Australia, pursuant to s29 of the *Bankruptcy Act 1966* (Cth) and New Zealand under s135 of its *Insolvency Act 1967* (NZ) also provide assistance. The assistance is granted in the United Kingdom under s426 of the *Insolvency Act 1986* (UK) but it only applies to certain countries.

113 The foreign proceeding under which the applicant for s304 relief has been appointed must be a judicial or administrative proceeding. Therefore, a trustee administering an estate under the *Bankruptcy Act 1966* (Cth) would qualify.

114 See House of Representatives Report No 595, 95th Congress, 1st Session 324 (1977); Senate Report No 989, 95th Congress, 2nd Session 35 (1978), referred to in Powers & Mears, "Protecting a U.S. Debtor's Assets in International Bankruptcy: A

complementary to any action taken or ordered pursuant to the main proceedings. The s304 proceedings are intended to act as a "procedural device to permit co-operation with another jurisdiction".¹¹⁵ They would allow a foreign trustee to administer the assets of the bankrupt in the United States and "to prevent the dismemberment of such assets by local creditors".¹¹⁶

The court in *Re Gee*¹¹⁷ summarised the nature of s304 as follows:

A case under section 304 is not a full scale bankruptcy case ... Rather, a section 304 case is a limited one, designed to function in aid of a proceeding pending in a foreign court.¹¹⁸

In enacting section 304, which had no predecessor under the former Bankruptcy Act, Congress provided a mechanism for the courts in this country to aid foreign courts and accommodate the increasing number of foreign insolvency proceedings having extraterritorial effects within the United States.

Section 304 undoubtedly indicates a move towards the acceptance of the universality doctrine and the extraterritorial effect of the decisions of foreign bankruptcy courts.¹¹⁹ However, it is to be noted that before the

Survey and Proposal for Reciprocity" (1985) 10 *NC J Int'l Law & Com Reg* 303 at 341.

115 Boshkoff, "United States Judicial Assistance in Cross-Border Insolvencies" (1987) 36 *ICLQ* 729.

116 Powers & Mears, "Protecting a US Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity" (1985) 10 *NC J Int'l Law & Com Reg* 303 at 341.

117 (1985) 53 *Bankr & Ins R* 891.

118 At 896, cited by Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307. Lam, "Bankruptcy, Code Section 304(b)(3): 'Other Appropriate Relief' for Multinational Bankruptcy" (1990) 16 *Brooklyn J Int'l L* 479 describes a s304 ancillary proceeding as involving "only a mini-administration" (at 481).

119 Powers & Mears, "Protecting a US Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity" (1985) 10 *NC J Int'l Law and Com Reg* 303 at 341. One of the major reasons for saying this is that under s304 a trustee may gain control of American assets and be permitted to take them back to his or her home jurisdiction.

section applies certain prerequisites must be fulfilled¹²⁰ and these are characteristic of the plurality doctrine.¹²¹

Sub-section 304(b) provides that if a petition seeking ancillary relief is filed under the section an American court may:

- (1) enjoin the commencement or continuation of -
 - (A) any action against-
 - (i) a debtor with respect to property involved in such foreign proceedings: or
 - (ii) such property: or
 - (B) the enforcement of any judgement against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceedings to create or enforce a lien against the property of such estate;
- (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
- (3) order other appropriate relief.¹²²

Whether relief is to be granted is, in essence, left to the discretion of the court. Also, the courts are given discretion in "tailoring the relief to the particular circumstances" which are before them.¹²³ However, unlike the days prior to s304 when the courts were guided by the "nebulous concept

120 Contained in s304(c).

121 Nielsen, "Section 304 of the Bankruptcy Code: Has It Fostered the Development of an International Bankruptcy System" (1984) 22 *Col J Transnat'l L* 541 at 562.

122 Discussed by Lam, "Bankruptcy Code Section 304(b)(3): 'Other Appropriate Relief for Multinational Bankruptcy'" (1990) 16 *Brooklyn J Int'l L* 479.

123 Given & Vilpana, "Comity Revisited: Multinational Bankruptcy Cases under section 304 of the Bankruptcy Code" (1983) *Arizona State LJ* 325 at 339.

of comity",¹²⁴ the courts must be "guided by what will best assure an economical and expeditious administration of such estate".¹²⁵ This is a general concept and the courts are provided with, in s304(c), six principles of policy which expand on the general concept. They are:

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

It has been held that the court's central concern, before granting relief, is that the relief sought by the petitioners will "afford equality of distribution of the available assets".¹²⁶

When a petition is filed interested parties may oppose the petition on, *inter alia*, the basis that the foreign proceedings do not satisfy the principles contained in s304(c).¹²⁷ Consequently, the manner in which the United

124 Morales & Deutsch, "Bankruptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Tyranny of Comity" (1984) 39 *Bus L* 1573 at 1575.

125 Sub-section 304(c).

126 *Re Culmer* (1982) 25 *Bankr & Ins R* 621 at 628, referred to by Huber, "Creditor Equality in Transactional Bankruptcies: The United States Position" (1986) 19 *Vand J Transnat'l L* 741 at 749.

127 Powers & Mears, "Protecting a US Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity" (1985) 10 *NC J Int'l Law and Com Reg* 303 at 343. The procedure which is applicable to s304 petitions is discussed by Given &

States courts interpret and apply these six principles may substantially affect the outcome of any petition filed under s304.¹²⁸

The question may be asked whether s304 can be employed by a trustee who wishes to obtain assistance in having an absconding bankrupt returned to Australia. Most of the cases under s304 have been concerned with the recovery of property, either directly or indirectly. However, it is submitted that s304 may be a potential tool in the hands of the trustee where a bankrupt has absconded to the United States. It appears to make no difference whether such a bankrupt owns or does not own property in that country. Sub-section 109(a) of the *Bankruptcy Reform Act 1978* (US) allows petitions to be filed against "a debtor", and a person who simply resides in the United States would qualify.

A trustee should seek relief from the United States court in relation to an absconding bankrupt on the "other appropriate relief" ground in s304(b)(3). This ground has been broadly interpreted. This was acknowledged in *Re Metzeler*¹²⁹ and the Court in *Re Culmer* referred to s304(b)(3) as giving a "blank check [sic]".¹³⁰ The courts have been given great flexibility in "confronting the multitude of complex and unforeseen problems that are associated with international bankruptcy cases".¹³¹ As Gitlin and Flaschen point out, "the purpose of a section 304 case is to assist the foreign court".¹³²

Section 304 manifests a change in the United States from a largely territorialist position to one which is ready to give assistance to foreign trustees.¹³³ Huber is of the opinion that

Vilpana, "Comity Revisited: Multinational Bankruptcy Cases under section 304 of the Bankruptcy Code" (1983) *Arizona State LJ* 325 at 329-337.

128 Nielsen, "Section 304 of the Bankruptcy Code: Has it Fostered the Development of an International Bankruptcy System" (1984) 22 *Col J Transnat'l L* 541 at 553-562.

129 (1987) 78 *Bankr & Ins R* 674 at 679.

130 (1982) 25 *Bankr & Ins R* 621 at 624.

131 *Re Gee* (1985) 53 *Bankr & Ins R* 891 at 896-897.

132 Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 319.

133 Schechter, "United States-Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?" (1990) 1 *Int'l Insolvency Rev* 99 at 127.

the design of section 304 to recognise foreign bankruptcies and to support them unilaterally without requesting reciprocity indicates the municipal bankruptcy law is able to reject the doctrine of territoriality and follow the universality doctrine.¹³⁴

The provision has attracted the Australian Law Reform Commission and it has recommended the inclusion of the provision in s29 of the Australian legislation.¹³⁵ Despite this approbation and the support of commentators, there are numerous shortcomings with the provision itself and the ways in which it has been applied by the courts.¹³⁶ This is understandable when one has an innovation like s304. It is not within the scope of this paper to articulate the shortcomings. One of the more severe critics of the provision, Nielsen, has done that.¹³⁷ Her major criticism is that the courts in interpreting s304 will "defer to the foreign administration of US assets only if the rights of US creditors are adequately protected".¹³⁸

Despite the shortcomings with s304 it is a step in the right direction and it is hoped that, as was intended by the United States Congress, the section will encourage other countries to adopt a similar approach in their bankruptcy laws and this will produce greater uniformity.¹³⁹ Boshkoff may be correct when he states that "[t]he enactment of section 304 provides an opportunity to move toward a more international orientation in the administration of cross-border insolvencies".¹⁴⁰

Fletcher, who provides a non-American view, is of the opinion that s304 has "proved to be a successful innovation, and has inspired law reformers

134 Huber, "Creditor Equality in Transactional Bankruptcies: The United States Position" (1986) 19 *Vand J Transnat'l Law* 741 at 771.

135 ALRC, *General Insolvency Inquiry* (Report No 45, 1988) para 974.

136 For example, Unger, "United States Recognition of Foreign Bankruptcies" (1985) 19 *In'l Lawyer* 1153 at 1178-1183.

137 Nielsen, "Section 304 of the Bankruptcy Code: Has it Fostered the Development of an International Bankruptcy System" (1984) 22 *Col J Transnat'l L* 541.

138 At 543.

139 At 544. See also Schechter, "United States-Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?" (1990) *Int'l Insolvency Rev* 99.

140 Boshkoff, "United States Judicial Assistance in Cross-Border Insolvencies" (1987) 36 *ICLQ* 729 at 749-50.

and legislators, in other common law jurisdictions to explore similar models of co-operation".¹⁴¹

As far as an Australian trustee is concerned relief under s304 appears to be an avenue worth pursuing if they are confronted with a bankrupt who has absconded to the United States or the bankrupt estate which they are administering has rights over property located in the United States. All one can hope for is that more countries will adopt similar provisions.

THE FUTURE

Undoubtedly the chances of an Australian trustee succeeding in obtaining assistance in a foreign jurisdiction are not great. They are likely to find support in countries such as the United Kingdom, the United States, Canada and New Zealand, however there remains a large residue of nations where little or no assistance will be granted. The answer for trustees and all insolvency administrators is the development of greater co-operation at a government level. The nature of the problem is such that the unilateral action of countries, without taking into account the systems and laws of other nations, cannot resolve it.¹⁴² Without doubt "the need for international bankruptcy co-operation is increasing virtually on a daily basis".¹⁴³

The solution to international problems has been, historically, the making of an international convention. Many attempts have been made to achieve bi-lateral or tri-lateral treaties. A few have been successful, but others have been marked by little progress despite factors being present which, one would think, would produce a satisfactory outcome.¹⁴⁴ The most notable examples of unsuccessful attempts to arrive at treaties are the attempts of the European Economic Community and the bi-lateral negotiations between the United States and Canada. The European Economic

141 Fletcher, *The Law of Insolvency* p625.

142 Mears, "Cross-Border Insolvencies in the 21st Century: A Proposal for International Co-operation" (1991) 1 *Int'l Insolvency Rev* 24 at 26.

143 Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 324.

144 For an example of a successful treaty see the *Nordic Bankruptcy Convention* made between Denmark, Finland, Iceland, Norway and Sweden on 7 November 1933, referred to by Fletcher, *The Law of Insolvency* p618.

Community worked for many years on a bankruptcy convention until it was abandoned in 1980.¹⁴⁵ One might expect that there would be little difficulty in the United States and Canada securing a treaty because they have similar legal systems, they are neighbours and they have co-operated in other areas with success. Despite major improvements in the relationship between the two nations with respect to bankruptcy, no treaty has been finalised.¹⁴⁶ Perhaps the situation with these countries is representative of what has frequently occurred: much discussion and little resolution. As Gitlin and Flaschen point out, the United States and Canada

have engaged in sporadic negotiations toward a bilateral bankruptcy treaty for a number of years, yet they are no closer to an agreement now than when they started, despite the growing number of bankruptcy cases involving substantial assets and operations in both countries.¹⁴⁷

A problem in negotiating a treaty which provides a unified approach is identified by Mears:

An agreement ... requires so much specificity and the resolution of so many issues and policies, that most drafts become impossibly detailed, complex, and therefore unworkable.¹⁴⁸

145 Fletcher, *The Law of Insolvency* p619.

146 Schechter, "United States-Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?" (1990) 1 *Int'l Insolvency Rev* 99 at 145.

147 Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 310. A draft of the United States-Canada Bankruptcy Treaty was published on 29 October 1979. It has been widely criticised, most notably by Nadelmann, "A Reflection on Bankruptcy Jurisdiction: News from the European Common Market, the United States and Canada" (1982) 27 *Revue De Droit De McGill* 541 at 551.

148 Mears, "Cross-Border Insolvencies in the 21st Century: A Proposal for International Co-operation" (1991) 1 *Int'l Insolvency Rev* 24 at 27.

Certainly there are substantial legal barriers to the finalisation of treaties but perhaps the most substantial barrier is a practical one.¹⁴⁹ This barrier is discussed by Gitlin and Flaschen:

The practical barrier to international bankruptcy co-operation appears to be bankruptcy's status as a matter of primarily private concern, which has not received the level of governmental attention that other matters have received. The state is involved only to the extent of supervising the bankruptcy proceedings and establishing rules consistent with local policy. Because most bankruptcy laws grant the state priority status as a creditor, the state has little direct interest in the extraterritorial effect of bankruptcy on general creditors.¹⁵⁰

The result is, as Honsberger states, "most governments do not have any policy respecting bankruptcy treaties. As a consequence a bankruptcy treaty will not be negotiated until the desire to have a treaty becomes the policy of the government concerned".¹⁵¹

Despite the palpable problems experienced in finalising treaties the Australian Law Reform Commission has supported the adoption of multilateral treaties which provide for common basic elements of insolvency laws and the recognition of insolvency laws between nations.¹⁵²

A different avenue of resolving international bankruptcy problems which has been proposed in recent years has been a *Model International Insolvency Co-operation Act* (hereafter "MIICA") that may be adopted by

149 Some commentators such as Woloniecki, "Co-operation Between National Courts in International Insolvencies: Recent United Kingdom Legislation" (1986) 35 *ICLQ* 644, regard such treaties as impractical.

150 Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 310.

151 Honsberger, *The Negotiation of a Bankruptcy Treaty* 4-5 (1985), reprinted in 1985 Meredith Memorial Lectures (McGill University) 287, quoted by Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 310.

152 ALRC, *General Insolvency Inquiry* (Report No 45, 1988) paras 968-969. The Commission recognises the fact that the making of treaties may take "considerable time and require significant commitment".

local legislation in separate jurisdictions. The hope is that this "will create a network of reciprocal co-operation for international insolvency proceedings".¹⁵³

Committee J of the International Bar Association has been working on MIICA for some years.¹⁵⁴ The enactment of MIICA would lead to "a single, or at least central, proceeding in a single place ..."¹⁵⁵ MIICA has emanated from the frustrations and concerns of practitioners involved in international proceedings.¹⁵⁶ Committee J of the International Bar Association believed that the central principle which should regulate international bankruptcies is universality and MIICA was drafted on this basis.¹⁵⁷

If a jurisdiction adopts MIICA its courts must,¹⁵⁸

- (1) recognise a foreign representative of a debtor;
- (2) act in aid of and be auxiliary to a foreign proceeding that is underway in a country that has adopted domestic legislation substantially the same as MIICA; and
- (3) provide such aid to foreign proceedings in any other country if
 - (a) that locale is a proper and convenient forum, and
 - (b) it is in the overall interest of the creditors to administer the estate there.

This is similar to s304 of the *Bankruptcy Reform Act 1978* (US).¹⁵⁹

153 Mears, "Cross-Border Insolvencies in the 21st Century: A Proposal for International Co-operation" (1991) 1 *Int'l Insolvency Rev* 24 at 27.

154 A Third Draft was published on 1 November 1988.

155 Mears, "Cross-Border Insolvencies in the 21st Century: A Proposal for International Co-operation" (1991) 1 *Int'l Insolvency Rev* 24 at 27.

156 At 28.

157 At 30. The following draws on Mears' detailed discussion of MIICA (at 31-33).

158 MIICA s1.

159 The provision is also based on English, Australian and Canadian law.

A trustee would be able to initiate, in the courts of the jurisdiction adopting MIICA, a case ancillary to the proceeding in the home jurisdiction.¹⁶⁰ MIICA is broad in its scope and this is demonstrated by the fact that the courts of a jurisdiction adopting it are authorised to exercise "such additional powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction".¹⁶¹ In an attempt to provide for unity of proceedings all proceedings in the jurisdiction relating to the bankrupt will be consolidated with the proceedings initiated by the foreign trustee.¹⁶² Ancillary proceedings may not be possible so s3 of MIICA provides that:

In the event that ancillary proceedings ... are unavailable or denied, a foreign representative of the estate in a foreign proceeding concerning a person, may commence an insolvency proceeding against such person in this jurisdiction in accordance with the provisions of the applicable laws of this jurisdiction.

If this was necessary MIICA specifies that the foreign court is to apply the substantive insolvency law applicable in its jurisdiction.¹⁶³ In contrast, if an ancillary proceeding is initiated, the foreign court is to apply the substantive insolvency law of the jurisdiction from where the principal proceeding emanates, "unless after giving due consideration to principles of private international law and conflict of laws, the Court determines that it must apply the substantive insolvency law" applicable in its jurisdiction.¹⁶⁴

The final section of MIICA, s7, recognises the paramountcy of any treaty made in relation to co-operation between the nations concerning an international insolvency proceeding. It provides:

Any treaty or convention governing matters of insolvency cooperation, which has been ratified by this country and the country in which a foreign proceeding is pending, shall

¹⁶⁰ MIICA s2. This is reminiscent of s304(a) and (b) of the *Bankruptcy Reform Act 1978* (US).

¹⁶¹ MIICA s2(a).

¹⁶² Section 2(b).

¹⁶³ Section 4(b).

¹⁶⁴ Section 4(a).

override this Act with regard to such matters between such countries, unless the treaty or convention shall otherwise provide.

Even though the aims of MIICA may be modest, the reality is that many jurisdictions will have to be convinced about the benefits of MIICA.¹⁶⁵ Other jurisdictions will be antagonistic or at least indifferent. This is acknowledged by Mears, a great supporter of the concept of MIICA, when she states:

A long process of advocacy and negotiation will have to occur, country by country, except in those rare instances where integrated legal systems may provide the opportunity for adoption at a multinational level covering a number of jurisdictions.¹⁶⁶

The efforts and goals of the drafters of MIICA are meritorious. However, the task which they have set themselves is huge. Even Mears acknowledges this. She recognises the fact that civil law jurisdictions may not be able to adopt the procedure detailed in MIICA to their own legal structure, other jurisdictions may be unable to accept MIICA because preferential treatment for local creditors will determine the policies invoked, and other jurisdictions "will argue that the theory and substance of MIICA are not sufficiently jurisdiction - neutral ever to be taken seriously in their own or other jurisdictions".¹⁶⁷

CONCLUSION

International elements are being encountered increasingly by bankruptcy trustees in the estates which they are charged to administer. This trend is likely to continue given the integration of the global economy, the growth in international economic interdependence and the greater mobility of people and property. The problems of an international nature with which trustees are called upon to grapple most frequently emerge from the

165 Zanker, "Bankrupt and Overseas" (Paper delivered at the Queensland Law Society's 1992 Symposium, 8 March 1992).

166 Mears, "Cross-Border Insolvencies in the 21st Century: A Proposal for International Co-operation" (1991) 1 *Int'l Insolvency Rev* 24 at 37-38.

167 As above.

situation where the bankrupt has absconded overseas or the situation where the property of the bankrupt is located in a foreign country.

The solutions available to a trustee are not satisfactory. All possibilities are, generally speaking, fraught with difficulties except perhaps, for an Australian trustee, where they are dealing with the United Kingdom, Canada, New Zealand or the United States. There is too much uncertainty. Foreign courts *may* grant comity to decisions of the courts in the jurisdiction where the bankruptcy was adjudicated. Foreign courts *may* assist the courts of the home jurisdiction. Added to the uncertainty factor is the concern that if action is taken it is likely to be costly and time-consuming.

Of all the avenues discussed in this paper, the ancillary proceedings available under s304 of the *Bankruptcy Reform Act 1978* (US) probably represent the best possibility of success for an Australian trustee when dealing with countries outside of the British Commonwealth. It is certainly to be hoped that, as a first step, an increasing number of nations adopt legislation similar to s304.

Australia may now be starting to recognise, what has been recognised in many countries for many years, that the problems encountered in bankruptcies containing cross-border implications call for an urgent development of some kind of framework for international co-operation and mutual assistance.

This paper has discussed briefly two ways of achieving this: the finalisation of treaties and the adoption of the *Model International Insolvency Co-operation Act*. Both of these have their problems and much effort will have to be expended before either start to overcome the present deficiencies in international bankruptcy. The ideal is to have a uniform international practice as far as bankruptcy administration is concerned so that a bankrupt is only subject to the jurisdiction of one country.¹⁶⁸ There will have to be a substantial amount of negotiating and compromising to achieve this and the advice of Gitlin and Flaschen that "the ideal must be

¹⁶⁸ Fletcher, *The Law of Insolvency* p544.

tempered by the practical" is sage.¹⁶⁹ It is submitted that the strategy proposed by these commentators has much to recommend it:

The first step to increased bankruptcy co-operation is domestic legislation providing for the general recognition of foreign bankruptcy proceedings. Section 304 [*Bankruptcy Reform Act 1978* (U.S.)], although somewhat vaguely drafted, fits that description. The second step is bilateral understandings ... The third step is multilateral conventions.¹⁷⁰

Undoubtedly the present situation is unsatisfactory because the problems and costs involved in resolving, or attempting to resolve, international aspects of an estate may cause a trustee to recommend to the creditors that no action be taken. Yet it is inequitable if creditors are not able to be satisfied from property of the bankrupt which is held overseas. It is also an affront to the administration of bankruptcy if bankrupts are able to depart from Australia and avoid giving assistance to the trustee in their investigations.

However, until there is greater certainty and less complexity trustees will be reluctant to press claims which they have in jurisdictions overseas or "chase" bankrupts overseas. The unfortunate result is that bankruptcy administration will be regarded, in some quarters, cynically and in others with disdain.

169 Gitlin & Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 *Bus L* 307 at 309.

170 At 324.