EDUCATION OF JUDGES

BY
SIJMEN DE RANITZ
DE BRAU BLACKSTONE WETBROEK,
LINKLATERS AND ALLIANCE, THE NETHERLANDS

INTRODUCTION

Not the education of judges in general, but only the education of judges involved in insolvency proceedings will be the subject of this brief paper.

A further limitation is that I will focus of the role and education of the insolvency judge dealing with *corporate* insolvency. This is not because I feel that the insolvency of private persons is not important, or that the role of the judge in insolvency proceedings of a private person is not relevant. It is because I believe not only that the over all economic impact of corporate insolvency is often bigger, but also that the handling of a corporate insolvency is as good as always more complicated, and requires additional skills.

As you will have read in the "Annotations" I will have to address three questions (see: annotations, page 116).

Before I give any views on those questions I would like to raise and address some questions myself, as an introduction to my views. My first question is:

WHY DO WE NEED THE JUDICIARY AT ALL IN CORPORATE INSOLVENCY PROCEEDINGS? CAN WE NOT DO WITHOUT THEM?

This may seem an absurd question, but nevertheless a leading insolvency judge in the Netherlands recently raised it. His question was why the judiciary should be involved in the insolvency proceedings once they had started. Could not the court open insolvency proceedings and leave the process to the administrator, the debtor, the creditors and the creditors committee? What value could the court add once the more or less professional parties of interest were at work? Could not the court sit and wait until, if ever, there was a dispute between some parties in interest about ranking or similar problems and then play its traditional role as decision-maker in a dispute?

I think not.

In my mind the two main reasons for involvement of the judiciary in the

insolvency proceedings are:
a. there must be fairness in the process;
b. the process requires important decisions to be taken not only swiftly but also with authority.

Ad a. Fairness in the process is not properly secured if the process is dealt with without judicial control. Insolvency is a game with many players: the debtor, the ordinary creditors, secured creditors, employees, bondholders, shareholders, subordinated creditors, suppliers and customers to name just a few. Their interests will vary considerably. Their relative positions will vary also. Some players run faster then others, some are stronger, some do not mind to play foul play. It is the court that should, at least in my mind, see to it that creditors are properly informed and stay informed about the process, that they are given the opportunity to timely interfere if they feel they are treated wrongly, and, in general, that there is order and balance in the process.

Also, administrators, or trustees or whatever names you may give to the insolvency practitioner handling the case, must sometimes be guided, and their work needs to be controlled and monitored, in order to have conformity in the process.

Ad b. Speed and authority. Time is of the essence in insolvency proceedings. Assets that are not properly used in an economic sense create loss for society. An enterprise without proper working capital and proper financing possibilities will loose ground and it will not create economic growth. Money not repaid to creditors is "dead money" and it does not contribute to society. Therefor, in my view, insolvency proceedings should not be delayed. Now, as I wrote above, many players in the insolvency game have conflicting interests: secured creditors may see things totally different from employees, customers will often have different views than suppliers. Ranking issues may rise, preferences disputed, and worse, the sale of assets may be disputed, the transfer of the business enterprise may be hindered.

This all should not interfere too much with the speed of the insolvency process. And this is where the judge may have to step in. It is simply not always possible to combine speed with absolute fairness; it is not possible to deliberate for years on issues that delay the insolvency proceedings. Then a swift decision of an impartial, respected third party, with authority, is needed. This is where the judges have to play their role, even if the decision to be made is more then just interpretation of the laws, even if business issues are

involved.

And then it is my view that the authority of the judiciary, the respect for an objective decision by a judge is extremely helpful. It is my experience that, even if I thought a court decision to be totally wrong, or pathetic and absurd, most parties acknowledge the fact that it is a decision of the judge and that the decision must therefore be respected. This is where and how the judiciary can increase the efficiency of the insolvency proceedings.

The second question I would like to raise is:

WHAT ROLE DOES THE INSOLVENCY JUDGE PLAY IN INSOLVENCY PROCEEDINGS? THE QUESTION OF *CAPTAIN* OR *TRAFFIC COP*.

One can (basically) determine two totally different roles of the judiciary. The first and dominant role is the *traditional role* of the judge. In this role the judge is asked by a party to take a decision in a dispute arisen between two or more parties. A dispute they, or their lawyers, have not been able to solve themselves. The dispute is normally more or less concise. The procedure is clear: the parties are heard and the judge rules. His judgement is (may be after appeals) binding for the parties and *only* for the parties involved in the proceedings. It does not directly influence the legal position of third parties.

This traditional role of the judiciary I will refer to as the "*Traffic Cop*" role: one party argues that the car should turn left, the other argues that it should turn right, and the judge decides: left, right or, sometimes: just straight-ahead. The judge is passive; he listens to the arguments raised, and often only to the arguments raised, and then he renders his judgement, based on the interpretation of the law and the evidence shown.

This is not the role of the insolvency judge. The role of the insolvency judge is a different one. Already the opening of insolvency proceedings show the difference. If a creditor requests the court to adjudicate the compulsory liquidation of the debtor, to start insolvency proceedings and declare the debtor bankrupt, this seems at first sight a normal legal procedure. A dispute between two parties, and one party asks the court to make a fair judgement: declare my debtor bankrupt. But this court decision does not only directly affect the rights of the parties involved, it may, it will have a direct legal effect on the rights (and obligations) of all creditors, of shareholders, bondholders, lenders, employees and many others, who are often not even aware of the proceedings.

And once the insolvency proceedings are opened, the role of the insolvency judge is often even more different form the ordinary role of the judiciary. In many jurisdictions the insolvency judge plays fairly active role. It is the judge who monitors the process, who may give instructions to the administrator. Those instructions are not only based on interpretation of the law, but could be business decisions. The question whether or not to continue a business enterprise during insolvency proceedings is sometimes in the hands of the judge. The answer is not to be found in the law only. Here the insolvency judge is not the Traffic Cop, but the Captain of the ship, in stormy weather, mid ocean, huge waves, the Captain who has to instruct which heading to go, which harbour to seek. In any legal system wherein the insolvency judge may have to play this role, this Captain-role, additional skills are required.

NOW, BACK TO THE QUESTIONS RAISED IN THE ANNOTATIONS

The first part of question 1 is:

"Given the variety in the recruitment system for judges among the countries, what mechanisms can be introduced to ensure that competent judges are assigned to insolvency proceedings?"

The answer lies in the question.

If the recruitment system of a specific country is such that only experienced practitioners are appointed as insolvency judges, one does not have much to fear. If I am not mistaken, this is more or less the English system. Quite often barristers, in their late forties or early fifties, with lengthy experience both in the legal profession as in the business field, being too tired for their job, or having made enough money to do something they prefer, seek a carrier in the judiciary and are appointed as insolvency judges. Likewise, in the Netherlands there is a tendency, although not too strong, to appoint former insolvency practitioners, lawyers who have great experience in acting as insolvency practitioner, as judge, specifically for insolvency cases. Such a system is probably ideal: recruit experts from the legal system, with fair experience in business and financial law and insolvency cases, allow them some years to acquire judicial experience, and let them then handle insolvency cases.

"But what if such a recruitment system is not in place and can not be used

for whatever reason?"

Here I can combine my views with those on the 2nd question.

AN INSOLVENCY JUDGE IS, IN MY VIEW, FIRST OF ALL A JUDGE. His authority is linked to the respect for the judiciary. So first of all, the insolvency judge must be a trained judge with experience in normal commercial cases. It is, in my mind, inconceivable that an insolvency judge should not have proper knowledge of the law on contracts, the laws on security rights, of business-disputes or should not have experience in handling cases in that area. The interpretation of the laws by insolvency judges should not be different from the interpretation by the other courts or judges in a certain jurisdiction. Then of course the insolvency judge must have proper knowledge of the insolvency law. But this, in my opinion, is not a major issue. A law as well as case law can be studied and discussed. Any general judge can get acquainted with the insolvency law.

But further training is required.

It is important that the insolvency judge understands the economic and commercial considerations that play a role in the context of a stable economic development. An insolvency judge must understand why an effective insolvency system provides fresh air for the economy, whist an ineffective, inefficient system suffocates the economy.

It is important for the insolvency judge to understand the economic role of corporations, of corporate structures, to understand what role they play, to understand the objectives of managers, to understand that profit, risk and opportunity are closely related. It is equally important to understand the checks and balances that should be in place in a corporation or a corporate structure, and to understand the risks and dangers if such checks and balances are not in place.

It is important to understand the banking and finance sector. How do banks operate, and why? How is funding of corporations seen by bankers, and how by management of corporations? How do banks manage risk, what information should be provided to them in order to keep them in the game, in order to avoid that the banks feel cheated?

It is equally important to understand the basics of the regulatory and tax

issues; the reorganisation tools like debt for equity swobs, post-commencement financing, debt-trading and similar instruments.

Also, I am afraid, the insolvency judge must have reasonable knowledge of the accounting principles and practises in order to at least understand the language of accountants and the principles used. He must have some understanding of the influence of the checks and balances in a corporation on the reliability of business figures.

And quite important is to learn what really matters for the major players in insolvency. Just to give an example, in my experience lenders really do understand that, under certain circumstances, they do have to take a "haircut", they do have to make a deal on outstanding loans. But before agreeing to any proposal, they need, they must have, reliable financial information. They must be convinced that they get fair treatment. Also the banker must defend his decision to his boss. Communication is then, as often, essential. If the insolvency judge does understand such much is won.

Transparency and communication are key issues.

Some conclusions on the education issue are therefore:

- Judicial authority is effective and should be safeguarded;
- Judges should have experience in handling commercial cases prior to be appointed as insolvency judge;
- Judges should, if possible, have experience and knowledge of commercial, corporate and financial law prior to being appointed as insolvency judge;
- Education on local insolvency law issues may be helpful, but is often not strictly necessary; the judge is more then often able to resolve the strictly legal issues properly;
- Education on economic issues, like how corporations, lenders, managers operate in a commercial, or in the local commercial, environment is often much more useful. The economic rationales of entrepreneurs and lenders must be understood;
- Education on tax and regulatory issues will help;
- Accounting principles and financial analysis should be studied, so that at least the language of financial experts is understood and necessary questions are asked.

QUESTION 1, SECOND PART: THE USE OF BUSINESS PROFES-

SIONALS FOR FULL TIME OR "AD HOC" JUDGES.

To start provocative, I would like to rephrase some words of a German judge, Dr. Voss. When asked about the issue of appointing senior businessmen, senior lawyers and similar outsiders as judges, he stated that that would be excellent, but that one should take care not to appoint people who did not make a proper career in their own field. And as people who made that career may not easily be interested in a job that pays less, it is difficult to find the proper outsider. Also, according to Dr. Voss, successful outsiders will be accustomed to excellent secretarial and other support, something not often offered to insolvency judges.

I think Dr. Voss may well be right. Although this system of appointing outsiders with experience works in some countries (like England) where outsiders may have made sufficient money when they are in their early fifties, one should be aware of the risk of appointing "losers" on the bench. The authority of and respect for the judiciary must be safeguarded.

But, if bankers with a legal background and a proper career, or lawyers with insolvency experience and a successful history, or legally trained businessmen seeking a challenge after retirement can be found and are willing to accept appointment, this may increase the quality of the insolvency court. But, again, I would prefer some general judicial training for those outsiders before they are appointed as insolvency judge. And one must be convinced on the issue of impartiality.

THE LAST QUESTION: EXTERNAL EXPERTS AS ADVISORS

Again, I will be provocative and hopefully stimulate the discussion. I do not believe that an insolvency judge should seek advice from external experts when handling a specific case. Leaving alone the question whom is to pick up the bill for the costs involved, I do not think it is appropriate. It is the judge who appoints the administrator, and I trust he will appoint an administrator that he has confidence in. If specific advice is needed, I think it is the administrator who should seek that advice, either on his own request, and with approval of the judge, or on request of the judge. It is the administrator who is responsible for the objectivity of his choice of the external expert and for the objectivity of the expert himself. It is the administrator who should identify, and can identify, conflicts of interest and it is the administrator who should investigate this. It is the administrator who should inform the creditors committee about his intention to appoint an external expert, so that his choice

can be discussed. And if a conflict arises, then the judge may have to step in. That judge should not be hindered by his involvement by the choice of the expert.

If the advice of the external expert is contested, it is the judge who decides if another expert should be asked to review the opinion rendered. If the wrong expert is chosen, or the wrong advise given, this should never be the liability of the judge, but a liability of the administrator.

In what areas may external advice be sought? In my experience the options are few. If the administrator is professional lawyer, the advice of financial experts may be needed, and vice versa. Also, sometimes the advice of people with specific know how of the market, of that type of business, may be asked to give their views on the business-plan, on the position of the product and on the position of the company in the market, or of the fair value of the enterprise. But basically, I feel that the experienced administrator will know where he needs advice, and when.

FINAL REMARKS

In my own professional organisation in Holland I do have a nickname: "Mr Education". I strongly believe that ongoing education is a must for all insolvency professionals, including the insolvency judges. But one must be realistic: training costs time and money, and both are scarce.

When I was a young lawyer, involved in insolvency cases, I had the great opportunity to work for some years with an older, very experienced insolvency practitioner. I have learned much from him.

May be that is why I am of the opinion that the best training for judges is the training by experienced senior judges, combined with special courses given by practitioners, financial experts and economic experts on the practical, financial and economic issues related to the insolvency process.

BANKRUPTCY DIVISION AND COMMISSIONER

BY
SOOGEUN OH
PROFESSOR OF LAW
EWHA WOMANS UNIVERSITY
SEOUL, KOREA

BACKGROUND

It was on the top of the list of complaints on insolvency mechanisms[1] that judges who handled insolvency cases were incompetent for handling the insolvency cases. Judges, critics argued, were not knowledgeable on accounting, corporate finance, business activities and management. Criticism drew the evidence from the fact that the procedures were delayed, rehabilitation rate was low, and creditors received small amount of repayment. Strengthening judicial expertise was an urgent demand.

Right after the foreign currency crisis in 1997, a specialized bankruptcy court was proposed as a solution for the necessary expertise. The Ministry of Finance made an amendment proposal to establish the bankruptcy court.[2] As

[1] Korea has three types of insolvency mechanisms; corporate reorganization, composition and bankruptcy. Each has separate applicable statutes. Corporate reorganization procedure aims at rehabilitating big business corporations whereas composition procedure mainly concerns firms with less than certain amount of debts and sole proprietorships. Bankruptcy procedure is for liquidation and winding-up of individuals and corporations. Composition was seldom used before the foreign currency crisis in 1997. Composition has attracted rehabilitation cases much more than corporate reorganization because composition procedures allow existing management to hold control over firms even before and after the commencement of composition proceedings. The following table shows the number of cases in this field.

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
*Boodo**	4,107	6,159	10,769	9,502	11,255	13,992	11,589	17,168	22,828	6,718
Bankruptcy	27	16	14	26	18	12	18	38	467	733
Composition	-	-	-	-	-	13	9	322	728	140
Reorganization	15	64	87	45	68	79	52	132	148	37

* Boodo means non-payment of promissory notes, which are main method of payment in business transaction in Korea.

[2] The Corporation Reorganization Act and the Composition Act were enacted in 1962 and were not substantially amended until 1997. The Ministry of Finance prepared amendment proposals of those insolvency statutes from the early 1997 before the crisis. Due to its proposal, it was possible to amend insolvency statutes so early as Feb. 24, 1998.

the Korean government promised to slim-line the insolvency procedures to international institutions, IBRD and IMF strongly recommended the establishment of the bankruptcy court to strengthen judicial expertise.

Although there were controversies on the issue, the Supreme Court did not oppose itself but doubted the usefulness of the bankruptcy court. The Ministry of Justice, which was in charge of the amendment of insolvency laws, concluded that the bankruptcy court could not be the best solution to enhance the efficiency of insolvency mechanism. So the final amendment draft in 1998 did not adopt the specialized bankruptcy court.

Then the ball was in the court of the court. The Supreme Court put the highest priority on the task of strengthening judicial expertise. The Korean judiciary had had very strong pride over the intelligence of judges. The Supreme Court had thought judges were the most brilliant group in Korea. The Supreme Court could not bear the criticism that judges were incompetent.

I will look into how the Supreme Court of Korea tackled this problem and draw some lessons for further reform in insolvency mechanism. At first, I will review the pros and cons over the specialized bankruptcy court and why the Korean government chose not to adopt it. The Supreme Court has reinforced the ability of judges who handle insolvency cases in several ways including selection of brilliant judges for the insolvency cases, training of insolvency judges and operation of the Management Committee. I will explain and analyze them in two categories; Bankruptcy Division and the Management Committee. I will conclude my paper with some lessons for strengthening judicial expertise from the Korean experience.

PROS AND CONS ON A SPECIALIZED BANKRUPTCY COURT

The logic for and against a specialized court is similar regardless of its specialized fields. The first and utmost merit is specialization. As related cases are concentrated to the specialized court, it can be an arena for judges to develop their knowledge and skill on the specific subject. This merit, however, might diminish when judges move into and out of the specialized court. Specialization can be possible if the specialized court hires its own judges. But it would be another complex issue how much the specialized court had independence form the general judiciary system.

In the specialized court, it is easier to utilize non-judge experts in the structure of established institution. For example, engineers can be judges in the patent court. In normal court structure, it is impossible for non-judge ex-

pert to play a role of judges in Korea.

Specialization depends, to some degree, on the ability of quality of judges. If the specialized area is attractive to competent judges, the specialized court can easily recruit capable judges. If honest and intelligent judges do not like to work for the specialized court, the performance of the specialized court would be far below the expectation.

Another issue related with specialization is how specific the specialized court shall be. If the number of cases on a specialized issue is not big enough to run the specialized court, the court should have jurisdiction over cases in more broad categories. In that case, conflict of jurisdiction is inevitable.

We have to calculate the cost of the specialized court also. Separate courts spend additional managerial costs that are irrelevant to the quality of courts' performance. Applicants should go to the specialized court far away from neighbor courts.

Korea has 3 specialized courts; the Family Court, the Administration Court and the Patent Court. Comparing with these courts, the insolvency court could not obtain enough support for its establishment. The number of insolvency cases was far smaller than those in other specialized areas. The fluctuation of its number also did not give confidence to legislators. Under the strict rotation system of the Korean judiciary, the effect of specialization can be achieved in other ways. Bankruptcy Divisions and the Management Committee were the answer of the Supreme Court.

BANKRUPTCY DIVISION

Korea has chosen to intensify the division in charge of insolvency cases in district courts instead of creating a specialized court like a bankruptcy court. District courts have several divisions, each of which is consist of 1 senior judge of district court and 2 judges, and several sole judgeships, which is consist of single judge.[3] Insolvency cases are usually handled by a division in which a judge with highest seniority presides in that district court (the division is called as top division). The Seoul District Court, however, established two separate bankruptcy divisions because the number of insolvency cases filed to the court is enough to make 2 divisions exclusively specialized to insolvency cases.[4] The

[3] The Korean judiciary has the promotion system of judges; judge, senior judge of district court, senior judge of higher court, chief of district court, chief of higher court, supreme court justice and chief justice.

[4] Almost half of insolvency cases have been file to the Seoul District Court.

Supreme Court has selected most brilliant judges for bankruptcy divisions.

During the last 3 years, bankruptcy divisions in Seoul District Court performed great amount job in the sense of case number and quality. In that period, they handled as many cases as accumulated cases from 1962 through 1997. They also encountered many new situations arising from chaebol[5] companies and various industries. Many of decisions they rendered were new precedents and became leading cases.

The most important thing was that they documented their experience and made principles and published them. Those documents have become references for other judges and practicing lawyers. Judges in other courts frequently asked their colleagues in the Bankruptcy Divisions who had more experience. The Bankruptcy Divisions have played successful roles in refining the practice and spreading their experts. Recently they published *Practice Manual for Corporate Reorganization.*

Though the Supreme Court cannot directly supervises judges in lower courts as each judge is an independent institution, the Supreme Court has put various efforts to higher the standard of practice in insolvency cases. It published the manual for composition procedure and revised the Rule on Corporate Reorganization Procedure.

It has also held a workshop once a year for judges who are in charge of insolvency cases. The workshop usually consists of two sessions: discussion and lectures. Participating judges share their experience with each other during discussion session. Special lectures are delivered by experts including insolvency law professors, certified public accountants and financial specialists. Undoubtedly discrepancy among insolvency practices can be adjusted through this kind of workshop.

MANAGEMENT COMMITTEE AND COMMISSIONER

The 1998 amendment established the Management Committee in the corporate reorganization and composition mechanism to provide professional expertise in corporate restructuring and help the court in supervising trustees.[6] Various concern were presented in the debate over the establishment of the

[5] Large conglomerate in Korea owned and controlled by a family.

[6] A new chapter with three articles was inserted to the Corporate Reorganization Act in 1998 amendment to establish the Management Committee.

Chapter 2-2 Management Committee

Art. 93-2 (Establishment)

Management Committee. The most serious concern was that it might impair the identity of judgeship. Only judges may render court decisions in Korean judicial procedures. Korea has no magistrate or any other kinds of quasi-judgeship. There had been strong opposition against the idea to create any institution that allows to substitutes non-judges or quasi-judges for regular judges because of some historical reasons. In the midst of constructing new judiciary after the independence, many positions in the court including clerks asked judgeship. The conflict left unpleasant memory and formed the tradition to strictly divide judgeship and other positions.

The second concern was that whether commissioners could maintain in-

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The Management Committees shall be established in the district courts, according to the Supreme Court Rule, to handle corporate reorganization cases, bankruptcy cases, and composition cases in a fair and speedy manner.

Art. 93-3 (Affairs and Authority of the Management Committee)

The Management Committee conducts the following affairs under the direction of the court.

1. Presentation of the opinion concerning the selection of interim trustees, trustees and examiners.
2. Supervision and assessment on reasonableness of the execution of affairs by interim trustees, trustees and examiners.
3. Review of reorganization plans.
4. Formation of Creditors' Conference and provision of information to creditors.
5. Assessment of progress of corporate procedures.
6. Affairs assigned by statutes or the court.

The Management Committee may delegate some of its affairs stipulated in the Section ¨ç to its commissioner in order to conduct its affairs efficiently.

The court may direct the Management Committee to transfer the delegated affairs to other commissioner if the court acknowledges that it is inappropriate for the former commissioner to conduct the delegated affairs under the Section ¨è.

In case that the Management Committee is not organized, provisions on commissioners in the Art.24 Sec.¨ê, the Art.54-2, the Art.54-3, the Art.95-2, the Art.284 Sec.¨ç and provisions on the Management Committee in Art.24 Sec.¨ê, the Art.39 Sec. ¨ç, ¨é, ¨ê, the Art.46, the Art.94, the Art.112-2 Sec.¨é, the Art.179, the Art.181-2 Sec. ¨ç, the Art.247 Sec.¨é, ¨ê, the Art.274 and the Art.277 Sec.¨ç are not applicable.

Art. 93-4 (The Formation of the Management Committee)

The Management Committee is composed of more than 3 and less than 15 commissioners including 1 chief commissioner.

The tenure of commissioners is 3 years and the majority of commissioners are full-time commissioners.

The chief of the district court commissions the person with one of the following qualifications as a commissioner.

1. The person who has the license of attorney-at-law or certified public account.
2. The person who worked for the financial institutions as defined in the Banking Act over 15 years or who worked for the listed corporations as a board member.
3. The person who worked over 7 years in the related field with master or higher degree in

tegrity as high as average judges. The Korean judges have pride on the relatively less corrupted and fairer in their conduct of affairs than any other public sectors. Many worried that commissioners might be biased or influenced for private purpose.

The third concern was that the institution had double functions that could not be efficiently achieved simultaneously. Professional expertise and daily monitoring cannot be compatible. If the court needs professional expertise, commissioners shall be experts in the field, who are not appropriate for monitoring daily operation.

Though it is too early to evaluate the merits and demerits of the Management Committee because only Seoul District Court has the Management Committee, the judges of the bankruptcy division are generally satisfied with the function of commissioners.

The Management Committee of the Seoul District Court had 3 standing commissioners and 2 non-standing commissioners. At the outset, 3 standing commissioners were a certified public accountant, a former bank employee and a former court appointed trustee. The certified public accountant resigned and newly delegated commissioner is a former bank employee who worked as a trustee. Out of two non-standing commissioners, one is an economist and the other a former bank employee.

The main business of 3 standing commissioners is to review the reorganization plans and to monitor the firms under reorganization procedures by meet-

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jurisprudence, business management, economics and similar disciplines.

4. The person who has knowledge and experience with the similar level as in the case of Subsection 1, 2 and 3.

The person who is in one of the following subsections shall not be a commissioner.

1. An incompetent person, a quasi-incompetent person, a bankrupt who is not reinstated.
2. Any person who was sentenced to an imprisonment or heavier penalty and the execution of which has not yet terminated (including the case where it is deemed to be the termination of execution), or spent less than 5 years after the exemption of execution.
3. Any person who was sentenced to the suspension of imprisonment or heavier penalty and spent less than 2 years after the expiration of the probation period.
4. Any person who was sentenced to the suspension of imposition of imprisonment or heavier penalty and are in the suspension period.
5. Any person who was imposed of deprivation or suspension of qualification by the court decision or by other statutes.

The Management Committee shall make decisions with the attendance of the majority of total members and the concurrence of present members.

The Supreme Court Rules shall determine the establishment, organization and operation of the Management Committee, and the qualification of, status protection of, and disciplinary action against commissioners, and other necessary matters.

Commissioners shall be deemed to be public servants in the case of the application of punishment under the Criminal Code and other statutes.

ing trustees and analyzing reports from trustees. Standing commissioners give informal as well as formal opinion if requested by the court. The court can crosscheck the condition of firms with commissioners' opinion and decide the petitions for approval by trustees.[7] In addition, the court delegates commissioners to approve some routine chores including monthly wage payment and repayment of small claims.

The Corporate Reorganization Act stipulates that the court shall hear the opinion of the Management Committee in certain matters like selection of trustees and approval of reorganization plans. The Committee resolves its opinion through the plenary session which 2 non-standing commissioners attend.

The Supreme Court Rules stipulate payment for the service of commissioners. Standing commissioners are paid monthly about 1 million Korean Won (about US$ 800), which is far below the average reward for professionals. The bankruptcy divisions have tried to compensate for their service by appointing them as a supervisor of composition procedures. However, the total amount is not enough for the full compensation. Adequate payment is an urgent problem to be solved in near future.

Commissioners help the court in several ways. They lessen the workload of judges significantly by monitoring and handling everyday operation of firms. They give official opinion in documents on the matters required by statutes. They also answer the questions by judges mostly concerning bank operation and loan practice.

The most important function of commissioners would be to become the practical resources of precedents. In insolvency cases, there are many situations that are very important in handling cases but cannot be found in formal court documents. Commissioners can provide judges with their experience in former cases.

This function plays a great role in the judge transfer system of Korea. Almost every judge in any ranks (except supreme court justices) shall be transferred to other positions in every 2 years. So it is impossible for judges to focus on some specific topics like insolvency, tax and patents for more than 2 years. They have to leave as soon as they get to have knowledge and insight on the topic to some degree. Commissioners can be mentors for newly coming judges in this situation.

[7] Trustees have to get the approval of the court on some important decisions including payment over certain amount, investment, and major contracts.

CONCLUSION

Though insolvency lawyers are tempted to argue that insolvency law and cases are of unique character comparing with other area of jurisprudence, I have to confess that insolvency is just one of subjects which lawyers handle everyday. The efficiency of insolvency mechanism is to be discussed in the overall structure of judicial system. The efficiency of insolvency mechanism depends primarily on the efficiency of the general judicial system. It cannot be better or worse.

Honest and intelligent judges are the key factor for the efficient judicial system, so the recruitment of those judges is very important. If the structure of judicial system hinders judges to be honest and intelligent, the reform of judicial system is urgent.

The best way to strengthen judicial expertise is to have honest and intelligent judges handle as many cases as possible. The very reason for the lack of competency in Korea was that insolvency cases were so rare that judges handled just one insolvency case on average in their tenure before the crisis in 1997. Though many firms went insolvent in the past, the Korean government intervened the corporate exit mechanism in the name of industrial rationalization measures, workout and big deals. The court could not have enough chances to develop and accumulate expertise and know-how on insolvency cases.

Most insolvency lawyers in Korea now agree with the opinion that insolvency practice has been much improved and incompetence of insolvency judges is not problem any more in many district courts where many applications were filed including Seoul, Daegu and Changwon. Without ample cases, no judges can be experts just like in the case of medical doctors.

In some nations where total number of insolvency cases is large, a specialized insolvency court can be a solution. But the cost in maintaining such specialized court should be analyzed thoroughly from the users' viewpoint as well as court's viewpoint. Under the insolvency court system, applicants are forced to travel to the court and the court should monitor firms far away from them.

The Supreme Court of Korea has taken the policy to enhance the ability of bankruptcy divisions of the Seoul District Court and to spread their expertise to other courts. Judges who are in charge of insolvency cases realize the importance of insolvency matters enough to put every effort available in handling the cases. They do not hesitate to share the expertise with each other. So the progress during the last two years was remarkable.

There still remain many issues on the road toward efficient corporate exit

mechanisms. Governance issue in creditor banks and debtor firms is the hottest one. Revision and consolidation of 3 insolvency statutes is also urgent topic. Strengthening judicial expertise becomes relatively less serious because of prompt and adequate response by the court, which is very unusual in Korea.

We do not need to change all golf clubs at a time to be a single golfer from boggy players. Just a new putter can save a few pars.

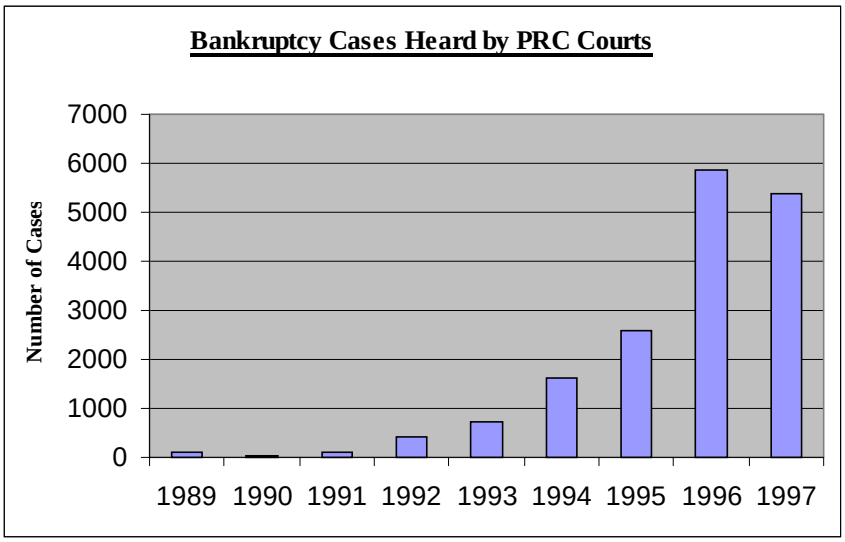
STRENGTHENING JUDICIAL EXPERTISE IN BANKRUPTCY PROCEEDINGS IN CHINA

BY
WANG WEIGUO
CHINA UNIVERSITY OF POLITICS AND LAW
CHINA

THE FUNCTION OF JUDGES IN BANKRUPTCY PROCEEDINGS

China had no bankruptcy law for a long period of time until the Enterprise Bankruptcy Law promulgated in 1986. After the Law became effective in November 1998 the number of bankruptcy cases increased rapidly. Bankruptcies of all forms of enterprises together rose from 277 per annum in 1989-93 to 2,100 p.a. in 1994-95, and further to 5,640 per year in 1996-97.[1]

From 1998 to 2000 the figure has become stable at the level of around



[1] The data and the chart are quoted from the World Bank report "Bankruptcy of State Enterprises in China", Draft September 2000, Washington, DC.

5,000 per year, partly due to the control of the Central Government on the scale of bankruptcies in order to keep social stability and avoid financial crisis.[2]

The judges dealing with bankruptcy cases have long been those at the "economic trial courts" (recently renamed "second civil courts") of the people's courts in different levels. Approximately, China has 30,000 judges working in economic trial courts and dealing with 1.5 million economic cases per year.[3] It can be therefore seen that the 5,000 bankruptcy cases occupy only 0.3% of the total.[4] Under such circumstances it is understandable that PRC has almost no specialized bankruptcy court except one in Shenzhen, a young city in south China that is well known as a pioneer in China's economic reform. Therefore it is difficult to estimate the number of qualified "bankruptcy judges".

According to the existing Enterprise Bankruptcy Law, judges play an important role in bankruptcy proceedings. They are empowered to decide a lot of matters, either procedural or substantial, among which the following are remarkable:

- To accept or deny a petition for a bankruptcy case;
- To summon the first creditors' meeting and appoint a chairman of the meeting;
- To summon the subsequent meeting(s) when the court deems necessary;
- To adjudicate a resolution of the creditors' meeting to be null and void by reason that it violates the law;
- To accept or deny the application for composition proceeding;
- To confirm or revoke a composition agreement reached between the debtor and the creditors' meeting;
- To adjudicates the debtor to be bankrupt;
- To appoint a liquidation team to take over the debtor's assets and deal with the liquidation affairs;
- To decide a pre-bankruptcy transaction made by the debtor and third party to be null and void, and order to recover the property transferred thereby;

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[2] The figures in this paragraph are provided by a chief judge at the Supreme People's Court.

[3] Most of the economic cases are those of disputes on commercial contracts. This figure is also provided by the above-mentioned chief judge at the Supreme People's Court.

[4] Additionally, according to official data, China has approximately 157,000 enterprises including 54,000 SOEs (State-owned enterprises) in 2000. Therefore the 5,000 bankruptcies come to 3% of the total enterprises. Furthermore, 1.5% of the total SOEs went into bankruptcy proceedings in 1999-2000. In comparison, around 35% of the total SOEs are deficit in the same period.

- To decide the disputes concerning the debtor's property and claims;
- To confirm a scheme for assets distribution prepared by the liquidation team and approved by the creditors' meeting;
- To decide to close the bankruptcy proceeding when distribution scheme is executed.

It is fair to say that the implementation of China's bankruptcy law relies very much upon judges. The more their powers, the more their accountabilities. Since China is a country in the process of institutional transition, the social environment is complicated and "rule of law" is a long time goal that have not been achieved, it seems too early to expect we have a mature bankruptcy "expertise" in the judicial rank.

JUDGES' PREDICAMENTS IN BANKRUPTCY PROCEEDINGS

Based on 12 years' practice, China has established a considerable scale of judicial profession in bankruptcy law. Among the more than 30 thousands bankruptcy case dealt with in the past years, most of them have been fairly well appraised. However, since the bankruptcy legislation has not been perfected, the social environment in such a transitional period is complicated and the professional rank needs to become experienced in general, there are some predicaments that the judges are confronted with.

The Multiplicity of Bankruptcy Systems. The existing Enterprise Bankruptcy Law is only applicable to SOE (State-owned enterprises) bankruptcies. Besides there are various regulations and circulars issued by the Central Government that are applied to SOE bankruptcies *de facto* in priority over the Law. The most prominent example for this situation is the practice under the Capital Structure Optimization Program for industrial SOEs in a number of pilot cities since 1994. This Program addressed social constraints by earmarking land use rights of the liquidated debtor to pay for the "rehabilitation" of its workers. The SOEs for this Program have been selected quite administratively and the process, although involving the courts, has largely been handled by local government. The task of judges in this process is in fact no more than carrying out the schedules prepared by the local government beforehand. On the other hand, non-SOE bankruptcies involving mainly firms with collective, private, and mixed ownership fall under some rudimentary provisions in the Civil Procedures Law and Company Law, and Opinions of the Supreme Court.

The deficiencies of this sketchy framework have shown in many bankruptcy cases involving large listed debtors or foreign creditors. Frankly, we can understand how hard the judges work when coping with so many gaps and flaws of the bankruptcy regimes.

Hardship in Keeping Equitable Treatment to Creditors. Due to some complex social factors, including courts' lack of entire independence from the government authorities, judicial justice has become a serious topic in China today. As far as bankruptcy proceeding is concerned, equitable treatment to creditors is most concerned with. It can be seen in many cases that the treatment of creditors has been inconsistent within classes of creditors, across municipalities, and case-by-case. For instance, there is often inconsistency in how creditor claims are addressed. There were cases where the assets were distributed to local creditors while claims from other jurisdictions were disregarded. Sometimes major creditors such as commercial banks had strong voice in the proceeding but trade creditors were virtually ignored and were even not necessarily notified of the bankruptcy in writing. Creditors often appeal that the proceeding lacks transparency in some important matters such as the information of assets and claims, pre-bankruptcy transactions, liquidation fees and expenses, asset valuation and disposition.

Pressure of Workers' Rehabilitation. In case of SOE bankruptcy, the payment of employee rehabilitation fees is a big problem puzzling both the government and judges. In some cases, the bankruptcy proceedings were hard to push forward because the workers were not satisfied with the arrangement for their rehabilitation. It seems common practice that where assets of a insolvent SOE does not suffice to cover the entire rehabilitation expenses and the government does not work out a satisfactory arrangement, the court would refuse to accept the bankruptcy case. The reason for this refusal is quite simple: like other state authorities, courts are also politically responsible to the social stability.

Limited Capacity of Some Judges. Limited capacity of judges in dealing with bankruptcy cases has been another source of irregularities and inefficiencies. While groups of judges in large cities have accumulated considerable bankruptcy experience, courts in small cities and undeveloped regions have not. Since they are often asked to transfer their case to higher courts, the opportunity for judges to build up experience is very limited there. Moreover, bankruptcy has not got enough attention in the education of judges. Many of the judges have not got systematic knowledge in bankruptcy law and relative

commercial laws such as real property law, contract law, security law and company law, and few of them are able to fully understand accounting reports.

Want of Outside Expertise. Up to the date liquidation teams (liquidators) in bankruptcy cases in many cities have been mainly composed of government officers. However, it seems a common trend that more and more practitioners such as lawyers, accountants and auditors take part in this job. In some metropolises, for instance Wuhan and Tianjin, there have appeared specialized liquidation firms. Generally speaking, however, the number of bankruptcy practitioners today is far smaller than needed.

SUPPOSED ROLE IN REORGANIZATION

A drafting work for new bankruptcy law of PRC was started in 1994. The Draft Law on Enterprise Bankruptcy and Reorganization has become ready to be submitted to the National People's Congress (the parliament). It would apply to state and non-state enterprises, and cover also natural person enterprises. The draft largely resembles the bankruptcy laws of market economies. For example, it envisages a proper function of administrator (trustee), strengthens the role of creditors' meeting, and provides an elaborate option of court-supervised reorganization that can be initiated by debtors, creditors or shareholders.

According to the Draft judges dealing with insolvency cases are empowered to, as far as reorganization proceeding is concerned, (1) decide to accept, or not to accept, an insolvency case with application for reorganization; (2) appoint administrator; (3) make a decision on opening of reorganization proceeding when a bankruptcy case has been initiated; (4) approve the application for extension of the period of reorganization; (5) make decision on discontinuation of part or entire business operation by request of interested parties; (6) summon creditors' meeting for vote on plan; (7) make decision on confirmation of plan which has been, or has not been, adopted by creditors' meeting; (8) decide to terminate the reorganization proceeding ahead of schedule; (9) make a decision to close the insolvency case when the plan has been fully performed. It can be therefore seen that reorganization proceeding is, like other civil proceedings, supposed to be handled by judges at every step.

Obviously, reorganization is much more complicated than liquidation. It is more likely in reorganization proceeding that the negligence of judges leads to huge damages to creditors. A competence of a judge dealing with reorganization requires more knowledge and skill in law and business operation.

SPECIALIZED BANKRUPTCY JUDGES

The only specialized bankruptcy trail court was established by the Shenzhen Intermediate People's Court in December 1993. Until the end of 2000 it accepted 486 cases and closed 373, or averagely 69 accepted and 53 closed per year. These figures tower above all other intermediate courts nation-wide. The specialized bankruptcy judges in the court are 8~10 in recent years. Up to now it has formulated a series of professional instructions, such as the Operating Rules of Bankruptcy Court, the Instructions on Time Limit in Bankruptcy Cases and the Operating Rules of Liquidation Teams.[5] It has kept a list of bankruptcy practitioners, which is mainly composed of experienced lawyers, for appointment of liquidation teams. These measure are proved to be successful for efficiency and lawfulness in bankruptcy practice. It is expectable that when the new bankruptcy legislation comes into force, China needs thousands of ad hoc judges to deal with increasing bankruptcy and reorganization cases.

FUTURE EDUCATION OF JUDGES

When drafting the new PRC bankruptcy law, we realize that Court pays a very important role in the future legal framework of our bankruptcy and reorganization regimes. In the meantime, we also understand that the role of judges in bankruptcy proceedings must be kept within two reasonable borderlines. First, any absolute power including judicial one is harmful so that the function of bankruptcy judges must be checked and balanced by some other functions, for instance creditors' meeting, administrator and procurators. Second, if we say that an orderly and effective proceeding is the basic objective of bankruptcy law, the main function of bankruptcy judges lies more on legal order than efficiency. As bankruptcy proceeding is becoming more commercial and technological, we cannot expect judges to be knowledgeable in every aspect of corporate liquidation and even reorganization. Anyhow, it is not to be denied that a qualified rank of judges is a key element in the future development of bankruptcy law.

To response the coming new bankruptcy law, China has to think about the future steps for a qualified rank of bankruptcy judges. What this paper is willing to suggest may focus on the following aspects.

First, the Supreme People's Court should formulate elaborate rules for op-

[5] Furthermore, the judges of this court wrote collectively a book *The Trial Procedure for Bankruptcy Case*, which is published by the People's Court Press in June 1997.

erating bankruptcy proceedings. Actually this work has started for years although on the basis of the existing bankruptcy legislation and supposed to be revised after the new law's promulgation. The Court should also have a perennial expert team in order to answer the difficult questions put forward by local judges from time to time. Furthermore, it may entrust senior judges and law professors to compile textbooks and casebooks for guiding bankruptcy judges.

Second, the Supreme People's Court should establish a long-term training program for bankruptcy judges. We need intellectual and financial resources to support this program. The State Judge Institute, an adult school for judge training run by the Supreme People's Court, has shown its interest to do that. The law schools of ordinary universities in and out of Beijing may also be involved. In the meantime bankruptcy law should become one of the major courses for university students.

Third, some institutional measures should be taken to address the shortage of experience with bankruptcy i n courts of small cities or undeveloped regions, for instance revisiting rules about the transfer of cases to higher courts, rotating individual judges more actively among courts so as to impart experience in bankruptcy and related matters, and establish specialized bankruptcy courts in large cities and comparatively developed regions.

THE MEXICAN ADMINISTRATOR FOR INSOLVENCY PROCEDURES

BY
LUIS MANUEL C. MEJAN CARRER
INSTITUTO FEDERAL DE ESPECIALISTAS DE CONCURSOS MERCHANTILES, MEXICO

In August 2000, Mexico's congress approved the new Insolvency Law_that is based on the domestic experience of the former law and takes into consideration the recommendations of the World Bank and the international experiences regarding these matters.

The primary task of this new Law is to preserve the rights of the actors involved in an insolvency procedure, based on the judicial principles of the Constitution. The main features of this new law are:

- It pursues to preserve the social and economic value of the enterprises;
- It enforces timely and transparent insolvency procedures;
- It enforces efficient insolvency mechanisms and rules in accordance with the UNCITRAL model;
- It also considers that the insolvency procedure is not only a judiciary issue but it involves all the economic and social factors as well;
- It places the insolvency procedure under a Federal jurisdiction;
- It makes very clear that the judicial matters of the insolvency procedure are under the Judge responsibility and that for non-judicial matters the Judge will be supported by the Federal Institute of Specialists on Mercantile Procedures, IFECOM.

The new Insolvency Law states, very clearly, that the rector of the insolvency processes is the Judge in charge of the insolvency procedure supported by the staff of an Institute which is responsible for administrating the insolvency mechanisms, for all non-judicial matters and procedures. Letting the Judge be judge and to concentrate on the legal affectations regarding each case.

The Federal Institute of Specialists on Mercantile Procedures, IFECOM, is technically and operatively autonomous besides being a multidisciplinary institution of the Judiciary Conference which shares, with the Judges, the

same concern: to make the insolvency proceedings a mechanism that works quickly, efficiently and fairly preserving the rights of all the parties involved.

The IFECOM is ruled by a General Director and a board of 4 members, it is also conformed, by a think-tank of experts that are committed themselves with the objectives of the Institute as well as the professional, ethical and transparent actions and work that are the norm of this institution

The mission of the IFECOM states clearly its main purpose:

> " To maximize the social value of the enterprises and to support all the extra-judicial preventive processes, the judicial, as well as the rights of the involved actors, promoting a vanguard insolvency culture based on the Law and on the international standards with a multidisciplinary management vision, and also promoting the ethics an excellence in the professional performance of its personnel and the appointed Specialists"

The Federal Institute of Specialists on Mercantile Procedures, IFECOM, has developed a strategy that is integrated in two main issues:

a. Multidisciplinary professional support and mechanisms for non-judicial matters for the judges, creditors and debtors;
b. A preventive approach based on the development and promotion of an Insolvency Culture which is focused on anticipating the insolvency process by helping all the parties involved with the professional support of its multidisciplinary staff and the appointed Specialists, trustees.

To fulfill the first issue, about Support, the IFECOM is accountable for creating, maintaining and supporting a team of independent professionals to act as specialists on insolvency procedures, trustees. In order to do so, the IFECOM has developed a Specialists System, which has a close control over the administration of those specialists. The administration includes the selection of appropriate professionals, the regulation and supervision of their performance and fees and to keep them updated on matters related to the insolvency procedures.

This multidisciplinary group of independent professional specialists on insolvency procedures and mechanisms will release Judges from having to deal with non-legal issues.

The specialist, with the supervision and support of the IFECOM, will deal

with all matters relating to the commercial activity such as: administration, finance, accounting, economics or restructuring choices, creating a framework that will support the Judge with the proper, fair and professional advise in all non judicial matters, allowing him to perform his judicial duties.

The specialists, trustees, perform their duties in the following phases, that for practical reasons are summarized as follows:

- The first stage is to determine if the insolvency procedure proceeds. In this stage the Specialist, Auditor, will audit the debtor's data, assets and other pertinent information that will provide the judge, in a standard form, all the information regarding the financial status of the debtor;
- The second stage starts once the judge has declared the insolvency procedure. In this phase the Specialist, Conciliator, will professionally support the judge, and will be impartial towards the debtor and the creditors and will try to achieve an agreement that will be beneficial for all the involved parties. He will always act to preserve the value of the assets that might lead to extra-judicial agreements between creditors and debtor;
- In the third phase, when the bankruptcy has been declared. The Specialist, Official Receiver, will support the parties involved in performing his best to preserve and maximize the value of the assets for the benefit of all the involved parties.

With this strategy, the IFECOM provides support to all the actors involved in an insolvency procedure; judges, creditors and debtors. These new reforming insolvency mechanisms, the New Law, the Judge and the IFECOM, will ensure the predictability of the insolvency procedure. Creditors and debtors will have the certainty that the trial will be carried out with transparency and decisions will be predictable.

The IFECOM has, also, developed a set of General Rules, which are the main performance policies for the specialists' interaction with the Court and the actors involved in an insolvency process. The General Rules define the duties, liabilities and fees of the specialists on insolvency procedures.

With a clear definition of the duties, benefits, responsibilities and dates that will be applicable to all the parties, the IFECOM contributes with the Judge to achieve the requirement of certainty in the insolvency procedures.

Regarding the second issue, Prevention, the IFECOM has developed a series of working programs designated to prevent the judicial trail of the insolvency process.

The Specialists System, in one of its chapters, deals with the support to merchants, creditors and the public in general with preventive projects that cover different fields. Those projects aim to help the parties to anticipate problems.

First, a registered specialist can participate as a direct support or as an adviser to the interested party.

Second, the IFECOM is preparing a series of seminars that are designed for individuals and organizations interested in the prevention of problems that might lead to insolvency.

The Research and Developing program will provide, the different parties, with information regarding the insolvency prediction, better ways to handle the insolvency processes, new techniques, reports and forms to facilitate the handling of information to all the involved parties.

The Statistics program deals with the developing of timely, accurate and meaningful information regarding: insolvency processes, the former law processes, economy sectors, economic variables and in general the information related to business that might help to prevent insolvency.

IFECOM is determined to make all the information public, therefore transparent, accurate and professional.

The Insolvency Culture program: this is perhaps the most sensitive program, and it is our main challenge. This program deals with the diffusion of all matters related to insolvency and it involves, not only the parties involved in an insolvency process but all the institutions, associations, universities that are related to the judicial, economic and social matters of the country. In other words this program deals with the public in general.

The main objective of the Insolvency Culture program is to educate society and to take the insolvency stigma off.

Through good communication, proper education, professional specialists and hard work, we, the IFECOM has started the development of this new Insolvency Culture that will use the preventive measures to anticipate insolvency. Society in general must understand that insolvency is not only judicial related but that should be approached with a multi-disciplinary vision. This vision should take into consideration that with the proper tools and mechanisms the problem can be prevented, that there are extra-judicial alternatives that might be used in the benefit of the creditors and debtors to preserve the value of the assets in benefit of all the involved parties.

As of today the mare existence of the New Law and the IFECOM has

decreased the number of insolvency claims, in relation to the number of demands handled by the former law. If the IFECOM can help to reduce the number of judicial processes, the IFECOM will be helping the Judges, and the creditors and debtors as well.

Understanding the insolvency procedure with this vision, the IFECOM vision, will help the Insolvency Culture to be assimilated by society, so trust will also be developed.

ADMINISTRATIVE SUPPORT TO THE JUDICIARY IN THE UK INSOLVENCY SYSTEM

BY
DESMOND FLYNN
THE INSOLVENCY SERVICE
DEPARTMENT OF TRADE AND INDUSTRY
LONDON

SUMMARY

In the UK the court, whilst exercising a nominal controlling jurisdiction over insolvency proceedings, in practice reserves its interventions for the *resolution of disputes* between interested parties to insolvency proceedings. Such interventions are almost invariably not of the court's own motion but rather in response to claims pressed by one of the parties to the insolvency procedure. The administration of all insolvency procedures is almost exclusively the province of public officials or insolvency professionals.

HISTORY

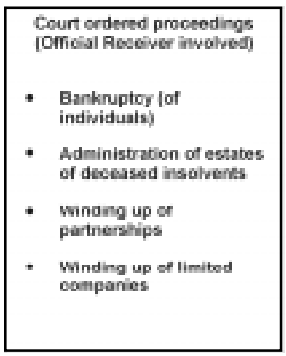
The system of creditors' control of insolvency cases that existed from 1706 to 1831 and from 1869 to 1883 was replaced by a system of joint control, or creditor participation. Since 1883, with the passage of the Bankruptcy Act, **the conduct (and particularly the administration) of insolvencies** has been the province of either officials (civil servants) or private sector insolvency practitioners. The particular civil servants whose role was brought into existence by the Bankruptcy Act 1883 were **Official Receivers**. They are statutory office-holders (previously under the 1883 Act, the 1914 Bankruptcy Act and currently under the successor act, the Insolvency Act 1986 and the Company Directors Disqualification Act, 1986) who have, in discharging their office as official receiver, trustee or liquidator in relation to insolvency cases, a legal personality separate from the Crown and the Secretary of State for Trade and Industry within whose department they are employed. In addition to their position as statutory office-holders, Official Receivers and their deputies are also officers of the courts to which they are appointed. These (in many ways curious) attributes enable Official Receivers to exercise their functions with a considerable amount of independence from political control. Indeed whilst

the current insolvency legislation (the **Insolvency Act, 1986**) provides that Official Receivers shall "act under the *general* (my emphasis) directions of the Secretary of State" it is settled law that this does not enable the Secretary of State to give directions to the Official Receiver in relation to specific cases. In other words the Secretary of State may direct how *all* cases are to be administered (within the law) he cannot direct how any *individual* case is to be dealt with. Despite these curiosities in their status Official Receivers and their staffs enjoy (if *enjoy* is the appropriate expression!) the same terms and conditions of employment as all other civil servants.

The dual status of Official Receivers (statutory office holders and officers of the court) enjoys further, practical recognition in the fact that, uniquely in insolvency proceedings, they are able to make reports to the court and the law provides that such reports are *prima facie* evidence of the matters (of fact) contained in them. All other parties (including any other office-holders) seeking the court's intervention must adduce evidence by way of *affidavit* (now called a statement of truth).

PRIVATE SECTOR INSOLVENCY PRACTITIONERS

Despite that the principal impetus for the bringing into being of Official Receivers was the large number of scandals involving legal practice in general and bankruptcy trustees in particular in the period 1830-1860 (for a trenchant insight into the appalling state of affairs of this branch of the law read *Charles Dickens*) private sector insolvency practitioners have always played a major role in the administration of insolvencies and particularly corporate insolvencies. Under current UK insolvency law insolvency procedures may be divided into two classes, those **ordered** by the court (on the petition of the debtor herself/itself, of a creditor or of a public authority) and those set in train voluntarily by the debtor and her creditors:



In practice, even where the court has made the order to initiate an insolvency proceeding, it rarely is (or needs to be) involved to any significant extent thereafter as regards the administration of the insolvency. The insolvency professional involved (be they Official Receivers and their staffs or private sector practitioners) are routinely expected to administer matters without the need to involve the court. The following examples may elucidate the extent to which routine administration is undertaken without recourse to the court:

- In a **bankruptcy** the court will make a bankruptcy order on the petition either of the debtor or of one of her creditors whereupon conduct of the case immediately passes to the Official Receiver attached to the court;
- The Official Receiver will immediately notify all the debtor's creditors and any other interested parties (e.g. current suppliers of goods and/or services) and will take steps to protect the debtor's assets;
- If the assets are minimal the Official Receiver will act as **trustee** but in cases where the assets are substantial he will summon a meeting of creditors. If the creditors resolve on the appointment of an insolvency practitioner as trustee in place of the Official Receiver notice of that appointment is simply filed with the court proceedings. Any dispute as to the conduct or conclusion of the meeting of creditors will be determined by the court – but this is very rare;
- Thereafter the trustee will realise the debtor's assets, agree the claims of creditors and pay any dividends which realisations permit. The court is only likely to be involved in ordering possession of the debtor's home (where the property has sufficient equity to justify its realisation) in the minority of cases in which the debtor does not give up possession voluntarily;
- If the debtor (or any third party) fails to give proper co-operation to the trustee the court may order such co-operation, and in the case of a recalcitrant debtor, may (on the application of the Official Receiver) suspend *pro tem* the coming into force of the automatic discharge after three years.

In summary, therefore, in the great majority of bankruptcies the court is unlikely to be involved at all after making the initial bankruptcy order and the same is true of court-ordered winding up, **compulsory liquidation.** In the drafting of the Insolvency Act 1986 the opportunity was taken to streamline the administration of, particularly, bankruptcies and compulsory liquidations where the automatic involvement of the Official Receiver (particularly where acting as trustee) was seen to be a guarantee of the proper working of such

streamlined procedures which removed the need for the court's involvement in many aspects of routine administration.

In **voluntary liquidations** the court will not, in most cases, be involved at all. Under this procedure the directors of an insolvent company approach an insolvency practitioner who in turn circulates the company's creditors with an invitation to a creditors' meeting together with financial information regarding the company's affairs. On an appointed day the shareholders meet and formally resolve for liquidation and nominate an insolvency practitioner to be liquidator. The creditors then meet and either confirm the shareholders' choice of liquidator or elect a different one. The creditors may also elect a **liquidation committee** of creditors which can exercise some supervisory functions, grant the liquidator permissions to undertake certain acts and decide on the liquidator's remuneration. If there is no liquidation committee the liquidator must obtain such permissions from the creditors in general meeting or failing that from the court. Otherwise the whole of the liquidation will, in the vast majority of cases, be conducted without *any* reference to the court at all. The same is true of **members voluntary liquidations** where there is a presumption of solvency and the appointment of the liquidator and any supervision of him is in the hands of the shareholders. Again whilst the court is available to resolve disputes such liquidations are routinely undertaken without any reference to the court.

INDIVIDUAL AND CORPORATE VOLUNTARY ARRANGEMENTS - COMPANY RESCUE MECHANISMS

The Insolvency Act 1986 was, substantially, an updating and streamlining of existing legislation. The Act did however provide for some 'new' procedures namely individual and corporate voluntary arrangements (IVAs and CVAs) and the Administration procedure. As may be imagined the voluntary arrangement procedures, both individual and corporate, provide for a company or individual to come to an agreement with its creditors to pay its debts, in whole or in part, over a period of time. In the case of an IVA a debtor approaches an insolvency practitioner who puts together a proposal which can be presented to creditors subject to the court agreeing that the matter can proceed. In most cases (nearly all) such agreement is 'rubberstamped'. When the creditors meet a 75% majority is required for acceptance of the proposal which, if accepted, is then supervised by the insolvency practitioner. He will make the realisations provided for in the agreement and distribute the funds

realised (minus the expenses of the procedure) to the creditors. The court may be involved in resolving disputes regarding the meeting of creditors and voting on the proposal but, once accepted, the voluntary arrangement is essentially a contract between the debtor and the creditors. The court does have an important role to play in an IVA in that where the debtor and his insolvency practitioner seek approval for the holding of meetings they will also invariably seek an 'interim order' which is effectively a stay on all proceedings by creditors. Again that stay is routinely 'rubberstamped' by the court.

The position is somewhat different in CVAs because the Insolvency Act 1986 makes no provision for a stay on creditors actions in relation to the CVA procedure. (This has been advanced as one of the reasons why the CVA procedure has not been adopted in greater numbers since its inception.) Again the court must be notified of the terms of proposal and can direct that a creditors meeting should not be held where, for some reason, it feels the proposal to be inadequate. In practice creditors meetings are invariably held where a proposal has been put the court. Again once approved by a 75% majority of the creditors the voluntary arrangement becomes a contractual matter between the debtor company and its creditors with the realisation of assets provided for in the agreement being supervised by the insolvency practitioner who also undertakes the distribution in due course to creditors. As with IVAs the involvement of the court is, in practice, limited to resolving disputes about the creditors meeting and terms on which the voluntary arrangement was accepted. In practice such disputes are rare.

[Readers may care to note that the absence of a moratorium in connection with a CVA will shortly be cured when the Insolvency Act 2000 is brought into force later this year. This provides that a company seeking to reach an agreement with its creditors may, if wishes, have the benefit of a short moratorium –initially 28 days and thereafter extendable with the consent of creditors to a maximum of three months– provided an insolvency practitioner is involved. It is hoped that this will make the CVA procedure more attractive, particularly to smaller companies, and that this will in turn lead to an increase in the number of creditor company rescues.]

Clearly corporate voluntary arrangements are entered into in order to enable the debtor company to reach an agreement with its creditors and thereby to survive and continue trading. The other 'company rescue mechanism' in-

troduced by the 1986 Insolvency Act was **Administration**. This procedure, arguably, provides a framework which may permit of consideration court involvement in the procedure.

Where a company is or is likely to become insolvent it may apply to the court for an order of its affairs, business and property should be managed by an administrator appointed by the court. The court would need to be persuaded that one of the statutory 'purposes' of making such an order will be achieved these being:

- The survival of the company, in whole or in part, as a going concern;
- The approval of the voluntary arrangement;
- The sanctioning of a scheme of arrangement under Section 425 of the Companies Act 1985; or
- A more advantageous realisation of the company's assets than could be achieved in a winding up.

The potential for court involvement is not a product of the drafting of the law creating a scheme of Administration but rather of the fact that administration has often been used in relation to very large companies whose affairs are invariably complex and often with an international dimension. Certainly the powers granted by the legislation to an administrator are very wide indeed and give him (as well as the court) leave to consent to a number of actions by creditors in breach of the stay. The courts have made it clear that they expect the Administrator to exercise his professional and commercial judgment in deciding such matters so as to obviate as far as possible the need for such applications to be made to the court. In very substantial and complex Administrations (e.g. Olympia and York, Barings and Maxwell Communications) administrators have actively involved the court in promoting their strategies for the survival, in whole or in part, of those companies and their businesses and some of the success in those and other cases can be attributed to a high (and unusual!) degree of judicial inventiveness and innovation.

APPLICATIONS FOR DIRECTIONS BY THE INSOLVENCY OFFICE HOLDER

Another variation of the court's function of dispute resolution is to respond to requests by office-holders seeking the court's direction that they act in a certain way in situations in which there is inevitably going to be some trade-off between the rights of parties. Such an application for directions can,

in such circumstances, be seen to anticipate the bringing of proceedings by one or more dissatisfied parties with the office-holder taking the initiative in bringing the relevant facts and the details of the parties in interest to the attention of the court in a strictly neutral way. Such neutrality as to the facts of any situation does not prevent the office-holder recommending what in his or her judgement would be the best outcome in the circumstances, indeed the court will rely on the professional experience and expertise of the office-holder to a considerable degree. Indeed in instances where the courts have felt that what they were being asked to decide was, essentially a commercial issue, they have declined to do arguing that such matters are properly left to the exercise of the commercial judgement of the office-holder. (In response to a relatively recent application by an office holder for an order that he take a particular course of action in relation to the business of the company with which he was dealing, the courts declined to make any order observing that the court "was not a bomb shelter" to provide comfort to office-holders in the exercise of their commercial judgement.

THE AUTHORISATION AND REGULATION OF INSOLVENCY PRACTITIONERS

The other principal area of innovation of the Insolvency Act 1986 was the creation of an insolvency practitioner profession through the medium of delegated regulation. The Act (Section 389) makes it an offence to act as an insolvency practitioner without being qualified to do so. Two methods of qualification are provided for in the Act the first, membership of and authorisation by a professional body recognised by the Secretary of State (Section 391) or, direct authorisation by a 'competent authority' for the time being the Secretary of State.

Historically insolvency practice in the UK has been the province of accountants and, to a lesser extent, lawyers. The idea of insolvency practice as a pre-eminent (rather than subsidiary) profession grew from the early 1960s with the formation of what was to become the Insolvency Practitioners Association. However at the time of the coming into force of the Insolvency Act 1986 the majority of those practising insolvency were not members of the Insolvency Practitioners Association but one of the accountancy or legal bodies. Thus it was that seven bodies were recognised by the Secretary of State as being able to authorise their members to act as insolvency practitioners, a number which may seem very large in view of the fact that there are only some

1,800 practitioners in total of whom only 800 regularly take insolvency appointments. The recognised bodies are:

- The Institute of Chartered Accountants in England and Wales;
- The Institute of Chartered Accountants in Scotland;
- The Institute of Chartered Accountants in Ireland;
- The Law Society (England and Wales);
- The Scottish Law Society;
- The Association of Chartered Certified Accountants;
- The Insolvency Practitioners Association.

The majority of those who regularly take insolvency appointments are members either of the Institute of Chartered Accountants (England and Wales) or the Insolvency Practitioners Association.

There are two levels of monitoring in pursuit of authorisation. The first, the Secretary of State monitors the recognised professional bodies to ensure that they keep their rules up to date, that those rules are applied efficiently and effectively to those of their members they have authorised to act as insolvency practitioners and that their disciplinary arrangements function so as to ensure that high standards of technical, commercial, professional and ethical conduct are maintained. At a second level, the individual recognised professional bodies monitor their individual members ensuring compliance with insolvency legislation, the rules of the recognised body and agreed best practice across the profession. The Secretary of State directly licenses some 130 individuals who are subject to ongoing monitoring and inspection by officers from the Insolvency Service.

Each recognised professional body has the capacity under its own rules to discipline licence holding members and, in extreme cases, to remove those licences. Similarly the Secretary of State may remove someone's licence (or decline to re-new it) on the grounds that they are unfit although the exercise of this discretion by the Secretary of State is subject to appeal to an independent Insolvency Practitioners Tribunal. Some 6/8 insolvency practitioners have their licences revoked or not renewed each year and a number of others are subject to monitoring in respect of undertakings they have been asked for in relation to future behaviour.

To say that the 'professionalisation' of insolvency practice has been a success is to invite, no doubt, the wrath of the gods but by and large standards of professional behaviour in this area have risen substantially since the coming

into force of the 1986 Act. There are very few cases of fraud, corruption or other criminality amongst insolvency practitioners and even fewer amongst Official Receivers and their staffs. That is not to say that there are not complaints about the way in which individual insolvency practitioners deal with individual cases or, more generally, about the level of fees, costs and charges in insolvency cases.

CONCLUSION

The scheme of the Insolvency Act 1986 was very much to leave Official Receivers and insolvency practitioners to deal with as much of the routine and administration of insolvency cases as possible and indeed in "voluntary" proceedings to leave it to the insolvency professionals in its entirety. The long history of public service of Official Receivers and their staffs and, latterly, the effective regulation of insolvency practitioners as a profession have underpinned confidence in their capacity to administer insolvencies in a fair, efficient and objective way. It is clear from a number of recent pronouncements that the courts would not wish to have any larger role in case administration than at present.