

In re Blackwell & In re Inverworld

[263 BR 505, 506 \(WD Tex 2000\)](#)

4th May 2000

267 BR 732, 740 (Bankr W D Tex 2001)

21st June 2001

United States, Cayman Islands, England

US District Court for the Western District of Texas

Key Words

Fraud; cooperation protocol; court cooperation; cross-border insolvency; recognition; enforcement;

Summary of Facts of the Case

The *Blackwell* case concerned Inverworld, which collapsed in a scandal after defrauding investors in the United States and several Latin American countries. Insolvency proceedings were brought in the United States, Cayman Islands, and England. Ancillary relief was sought in the United States to guard against the piecemeal resolution of cross-border insolvency proceedings pursuant to section 304 of the Bankruptcy Code. It was a high-profile case with interest from parties from multiple jurisdictions as well as the US Securities and Exchange Commission and the Department of Justice, which was engaged in ongoing criminal investigations regarding the collapse.

Accountants uncovered substantial assets for distribution, though less than would be needed to pay creditors in full. The majority of the creditors who appeared were Mexican residents, who claimed pursuant to confidentiality due to the danger posed by their publicity. The facts of this case are complex and long and are not key to the discussion of this case note. What is important is the achievement of a protocol that effectively coordinated the parallel multi-jurisdictional cases.

The case could have amounted to extremely expensive litigation in three national courts and for conflicting decisions which would have reduced the residue available to distribute to creditors significantly reduced. To avoid this, the representatives created protocols that were accepted by the courts involved.

For a detailed discussion of the Inverworld Case, see Jay Lawrence Westbrook, 'International Judicial Negotiation' (2003) 38 Texas Int'l LJ 567, 571.



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Cooperation and/ or Coordination Issue

In an international multi-jurisdictional case of this nature with multiple parallel proceedings, coordination can be a challenge. The protocol devised effectively coordinated proceedings that led to the dismissal of a proceeding in one jurisdiction (United Kingdom) in favour of a proceeding in another jurisdiction (United States). The protocol also effectively coordinate the distribution of proceeds, the recognition and enforcement of the various judgments, and an overall reduction in costs to the benefit of all creditors.

Resolution

A protocol was agreed that led to the dismissal of the English insolvency proceedings if certain conditions to protect claimants were met between the other two courts. The US Court was tasked with resolving the outstanding legal and factual issues, while the Cayman court oversaw the creation and operation of the mechanism formulated to distribute the claimants' proceeds, with full recognition and enforceability agreed between the courts. It is generally considered that this led to a successful worldwide settlement at a much lower cost that would have occurred if the three courts struggled for power over the case. The key factor that is attributable to the success of this case and its protocol is the substantial amount of communication aimed at resolving the global case. The judges involved:

...actively encouraged the professionals to engage in cross-border negotiations with an emphasis on non-litigious solutions despite plausible conflicting claims for several groups of claimants under each of the seven arguably applicable laws...Judicial activism combined with a first-rate performance by the professionals produced spectacularly fast, fair, and efficient results (Westbrook 2018).

See Jay L Westbrook. 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of A Central Court' (2018) 96 Tex L Rev 1473, 1493.

Applicability to Preventive Restructuring

The Preventive Restructuring Directive requires the implementation of a preventive restructuring framework in every Member State, but it has left much of the scope of the provisions within the power of Member State legislators by providing numerous choices and derogations that may well lead to a variety of procedures, rather than a fully harmonised ideal. Given the growth of large corporate groups, and the increasing popularity of rescue over liquidation, it is not outside of the realm of possibility that a complex multi-jurisdictional case along the lines of Inverworld and Blackwell could arise within the EU.

Issues such as deferring to another jurisdiction which has taken the preliminary proceedings; coordinating tasks among different secondary proceedings depending on the activities of the company in individual jurisdictions; ensuring cross-border recognition and enforceability of the findings of the primary proceedings; and protecting certain domestic interests are elements that could arise in a cross-border preventive restructuring. An overly complex case may also require the agreement of a bespoke protocol along the lines of what was achieved in Blackwell/Inverworld as existing rules and guidelines may not provide all of the answers.

Applicability of Existing Rules and Guidelines

Coordination of proceedings- deferring to another jurisdiction

The EIR Recast give a clear rule on when another should be deferred to where two proceedings are contemplated in two different jurisdictions (or multiple for that matter). Were such a multi-jurisdictional case brought under the EIR Recast, the first proceedings in time that is brought should take precedence as long as they satisfy the COMI ('the place where the debtor conducts the administration of its interests in a regular basis and which is ascertainable to third parties' – Article 3(1)). Any other proceedings would need to be opened as secondary proceedings restricted to the assets of the debtor situated in that territory (Article 3(2&3)).

Recognition and enforcement

Once primary proceedings have been filed, any decisions derived from that central court should benefit from automatic recognition and enforcement throughout the EU subsequent to Article 19 of the EIR Recast, without the need for any further formalities (Article 20). This recognition extends to the enforceability of judgments taken in the in the main proceedings subsequent to Article 32, which refers to enforcement being in accordance with the Brussels Regulation 1215/2012 Articles 39-44 and 47-57.

Coordination of proceeds distribution

Coordination of proceeds will fall into a similar category as the coordination of the assets for realisation and distribution. This is a key factor to ensure an efficient process that preserves as much value in the assets as possible in order to provide a maximised return to creditors. The JudgeCo principles deal with this in Principle 8, which notes that a stay or moratorium may be needed to ensure that assets (or proceeds) are coordinated effectively and without dissolution by individualistic creditor actions against the debtor's estate. As the PRD provides for a stay or moratorium, this aspect should already be available under the incoming preventive restructuring frameworks. Principle 19 also considers the role of insolvency practitioners, and recommends obtaining court approval if required by local law before dealing with assets in another jurisdiction, in other words, following local law where necessary and in so doing respecting the integrity of other courts and legal systems.

The CoCo guidelines requires practitioners to minimise conflicts between different procedures and maximise the prospects for the rehabilitation and reorganisation of the debtor's business or the value of the debtor's assets subject to realisation pursuant to Guideline 12 para 2, if a reorganisation or restructuring is not feasible. Guideline 13 recommends cooperation with other practitioners with regards to dealing with a debtors' assets in order to achieve maximum value and that where courts are involved, they should do the same. Apart from an exhortation to ensure value maximisation through cooperation, there is little specific guidance on how that should be accomplished.