International Corporate Rescue

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

Annual Subscriptions:
Subscription prices 2011 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

The Emerging Framework of Cross-Border Insolvency in and around Australia: Saad Investments, Japan Airlines and Lehman Brothers – Part Two[1]

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In Part I of this two part article, Scott Atkins examined the Australian jurisprudence concerning the Model Law on Cross-Border Insolvency (Model Law) published by the United Nations Commission on International Trade (UNCITRAL) since the enactment of the *Cross-Border Insolvency Act 2008* (C'th) (CBIA), using the medium of the recent Federal Court of Australia decision of *Ackers v Saad Investments Co Limited (in official liq)*[3] (*Ackers v Saad*).

In this second and final part, Stewart Maiden describes how the Model Law assisted the trustees of the Japan Airlines group to protect the value of that group's business as a going concern during its transnational restructuring in 2010-11. Professor Rosalind Mason discusses the liquidation of Lehman Brothers, which demonstrates how private arrangements can provide solutions to cross-border problems that might be beyond the reach of existing legislation.

Together, those three discussions conclude that both the Model Law and private initiatives have found a place in assisting the winding up and restructuring of large and complex multinational organisations in the Australian neighbourhood.

B. Japan Airlines

Japan Airlines Corporation and its affiliated companies (for convenience, referred to as JAL) filed for court-assisted reorganisation in January 2010. It was the largest failure by a non-financial firm in Japanese history.[4] JAL undertook a pre-packaged restructuring utilising judicial corporate reorganisation proceedings with the assistance of the Japanese government, through the Enterprise Turnaround Initiative Corporation of Japan (ETIC). All of its shares were cancelled, and new share capital was issued to ETIC in exchange for a JPY 350 billion capital injection. The group's debts were to be paid over a seven year period, with unsecured creditors 'taking a haircut' of 87.5%. The proceeding was perhaps the highest profile Asian restructuring in recent years. It demonstrates how the Model Law can be used to assist a complex international reorganisation.

Taxiing toward trouble

JAL is one of the world's largest air carriers. In addition to significant international carriage and cargo services, it runs the largest domestic air passenger business in Japan.[5] In 2009, it provided passenger services to approximately 11 million international and 41 million domestic passengers[6] and was Asia's largest airline by revenue.[7]

Notes

1 The authors presented an earlier version of this article at the INSOL International Academics' Group Meeting in Singapore on 13 March 2011.
2 Scott Atkins and Stewart Maiden are Fellows, INSOL International.
3 [2010] FCA 1221.
4 James Thomson, 'Japan Airlines Files for Bankruptcy', *Smart Company*, 20 January 2010 <www.smartcompany.com.au/transport-and-logistics/20100120-japan-airlines-files-for-bankruptcy.html>, visited 21 March 2011.
5 *Katayama v Japan Airlines Corporation* (2010) 79 ACSR 286; [2010] FCA 794, paragraph 12.
6 First Report of the Information Officer in the matter of Japan Airlines Corporation, Japan Airlines International Co Ltd and JAL Capital Co Ltd (Ontario Superior Court of Justice Proceeding CV-10-869200CL) <www.deloitte.com/assets/Dcom-Canada/Local%20Assets/Documents/Insolvencies/JAL/ca_en_insolv_JAI_FirstReportInfoOfficer_073010.pdf> (IO First Report), paragraph 16.
7 Reuters, 'JAL to cut more staff, overseas flights: reports', <www.reuters.com/article/idUSTRE58E04L20090915>, visited 28 January 2011.

By June 2009, financial difficulties had led JAL to obtain loans totalling JPY 100 billion from the Development Bank of Japan and other financiers[8] – its third injection of public funds since 2001.[9] JAL blamed its financial position on several matters: the September 11 terrorist attacks, the Iraq war, the outbreak of Severe Acute Respiratory Syndrome, declines in tourism caused by increased fuel prices and corollary surcharges, and the global financial crisis of 2008.[10] ETIC would later point to JAL's inefficient and inflexible organisation and problems with its business structure as the underlying causes of its distress. Those causes left JAL without the agility necessary to respond to falls in demand caused by significant events such as the collapse of Lehman Brothers and the outbreak of the H1N1 ('swine flu') virus.[11]

Attempts at out-of-court restructure

In late October 2009, JAL sought the assistance of the newly-formed ETIC in undertaking a restructuring.[12] ETIC had been established by the Japanese government as a joint stock company with a mandate to 'provide support for the revitalisation of operations' at companies which had turnaround potential but excessive debt.[13] It was given the power to negotiate with creditors, purchase debts, make loans or equity investments, and contribute managerial expertise.[14]

By 13 November 2009, JAL announced that 'immediate radical restructuring measures' were unavoidable.[15] It submitted an application for 'certified alternative dispute resolution' (ADR) under the *Act on Special Measures for Revitalization of Industrial Vitality and Innovation of Industrial Activities*. That Act creates a 'turnaround ADR' process, allowing a debtor to seek judicial assistance in achieving a workout pursuant to out-of-court guidelines in the face of minority creditor opposition, and providing for preferential treatment of 'pre-DIP' financing, encouraging creditors to fund a debtor through an out-of-court workout.[16] The mediation process focuses on restructuring financier debt, while trade creditor relationships continue as usual. It enabled JAL to suspend interest payments while it negotiated with its lenders.[17]

JAL files for reorganisation

JAL held its first creditors' meeting under the turnaround ADR process on 20 November 2009, but before its second meeting (at which the fairness and feasibility of the proposed workout would have been explained to creditors[18]), three principal JAL companies filed proceedings (the Japanese Proceedings) in the District Court of Tokyo under the *Corporate Reorganisation Act* (the CRA). The mediators terminated the ADR process.[19]

The three filing companies were Japan Airlines International Co., Ltd (JALI), Japan Airlines Corporation, and JAL Capital Co., Ltd (together the JAL Debtors). At the time of filing, the JAL Debtors reported total liabilities (current 30 September 2009) of some JPY 2.3 trillion. Some JPY 780 billion of that was interest bearing debt.[20] One press report suggested that JAL's market capitalisation had fallen to less than the price of a single passenger jet.[21]

The filing of the Japanese Proceedings had the support of ETIC, the Development Bank of Japan and other significant financiers.[22]

Notes

8 JAL Press Release, 19 January 2009, <press.jal.co.jp/en/release/201001/001432.html>, visited 28 January 2011 (JAL Filing Press Release).
9 AFP, 'JAL to Restructure Under New State-Backed Agency', *The Age*, 26 October 2009, <www.theage.com.au/business/world-business/jal-to-restructure-under-new-statebacked-agency-20091026-hewm.html>, visited 28 January 2011.
10 JAL Filing Press Release.
11 Enterprise Turnaround Initiative Corporation of Japan, *Notice of Decision to Provide Support to Japan Airlines*, 19 January 2010, <press.jal.co.jp/en/uploads/Notice%20of%20Decision%20to%20Provide%20Support%20to%20Japan%20Airlines.pdf> (ETIC Notice), visited 28 January 2011, page 2.
12 JAL Press Release, 29 October 2009, <press.jal.co.jp/en/release/200910/001358.html>, visited 28 January 2011.
13 Enterprise Turnaround Initiative Corporation of Japan, <www.etic-j.co.jp/pdf/english.pdf>, visited 28 January 2011.
14 Enterprise Turnaround Initiative Corporation of Japan, <www.etic-j.co.jp/pdf/english.pdf>, visited 28 January 2011.
15 JAL Press release, 13 November 2009, <www.google.com.au/url?sa=t&source=web&cd=2&ved=0CB0QFjAB&url=http%3A%2F%2Fwww.jal.com%2Fen%2Fir%2Ffinance%2Fpdf%2F091113_01.pdf&rct=j&q=immediate%20radical%20restructuring%20measures&ei=X35BTZGPLMzJcYOHge0N&usg=AFQjCNHCUtzObNmMvqj99idGNs5rwjxgmg&sig2=gp0lhgzyfGEoiT69I4yR-A&cad=rja>, visited 28 January 2011.
16 See generally Shinjiro Takagi, 'Out-of-Court Workout based on the Guidelines and the Alternative Dispute Resolution Scheme for Business Reorganisation in Japan' (2009) 6(1) *International Corporate Rescue*.
17 Affidavit of Eiji Katayama sworn 12 April 2010 in Ontario Superior Court of Justice proceeding numbered CV-10-8692-00CL, <www.deloitte.com/assets/Dcom-Canada/Local%20Assets/Documents/Insolvencies/JAL/ca_en_insolv_JAI_AppRecord_Tab2AffidavitKatayama_041210.pdf> (Katayama Affidavit), visited 28 January 2011, paragraph 23.
18 Shinjiro Takagi, 'The Japanese Out-of-Court Workout Restructuring and Its International Implications' (2007) 4 *International Corporate Rescue*.
19 JAL Filing Press Release.
20 ETIC Notice, page 10.
21 James Thomson, 'Japan Airlines Files for Bankruptcy', *Smart Company*, 20 January 2010 <www.smartcompany.com.au/transport-and-logistics/20100120-japan-airlines-files-for-bankruptcy.html>, visited 28 January 2011.
22 JAL Filing Press Release.

The reorganisation proceedings

The CRA is not debtor-in-possession legislation. It provides for the court to appoint a trustee to manage the debtor's assets and undertakings, subject to the court's supervision.[23] The District Court appointed ETIC and a lawyer, Eiji Katayama, as the trustees of JAL.[24]

There is no official English translation of the CRA. However, Mr Katayama summarised the applicable procedures under the CRA in an affidavit filed in recognition proceedings in Ontario:[25]

> 'Once the Japanese Court has issued the formal commencement order, various restrictions are imposed upon the rights and interests of creditors, lien holders, equity holders and other parties in interest. Specifically, such parties are prohibited from attaching and executing liens against a debtor's assets, resorting to foreclosure and other remedies, and commencing or continuing litigation against a debtor on account of prepetition obligations.
>
> The Japanese Court's commencement order, in addition to staying creditors' exercise of actions against a debtor's assets, designates one, or multiple, trustees who assume full responsibility for managing the company through formulation, confirmation and full performance of a corporate reorganization plan ... [T]he Japanese court generally will appoint a third party or parties to serve as trustee and administrator of the debtor's assets. Further, under the JRA, a trustee is vested with powers to operate the debtor's business and to administer and dispose of the debtor's property, regardless of location.
>
> By the due date which is set within one year of entry of the commencement order and may be extended twice for cause shown, the trustee must formulate and submit a formal plan of reorganization to the Japanese Court presiding over the restructuring. The plan is then submitted to the debtor's creditors (and stockholders if the debtor's assets exceed its liabilities) for formal approval ... Generally, the applicable voting percentages required to approve a plan depend upon the plan's treatment of affected creditors, and, in addition, whether the plan proposes a restructuring versus a liquidation ...
>
> Although the JRA provides relatively strict requirements for approval and confirmation of the plan, the restructuring plan generally can compromise the prepetition obligations owing to, among other parties, secured creditors.
>
> If the requisite votes in favour of plan approval are not obtained, the Japanese Court must either terminate the reorganization proceedings, or, in the alternative, confirm the plan over dissenting creditors. The JRA contemplates a procedure similar to the U.S. Bankruptcy Code's 'cram down' mechanism and the Japanese Court can unilaterally amend the plan in certain circumstances.'

The trustees appointed 25 deputy trustees and replaced the existing management. They appointed Kazuo Inamori (a past chairman of Kyocera Corporation) as the chairman of each of the JAL Debtors. Thirty other executives were similarly appointed.[26]

The trustees obtained court approval authorising JAL's continued payment of certain crucial creditors, including fuel suppliers and lessors.[27] The trustees were authorised to continue to honour pre-existing terms with certain essential trading partners.[28]

JAL obtained JPY 600 billion in reorganisation finance from the Development Bank of Japan, Inc and ETIC[29] to provide it with the liquidity necessary to continue to trade during the restructuring process.[30]

ETIC identified several measures as essential to the success of the reorganisation: the maintenance of existing trading relationships and the terms of those relationships; the protection of the rights of frequent flyer mileage holders; ongoing payment of aircraft leases on existing terms; and revision of the corporate pension program.[31] As will be seen, the trustees sought the assistance of foreign courts under the Model Law to achieve those objectives. ETIC propounded a turnaround business plan which focussed on safety enhancements, a transition from large passenger aircraft to smaller more fuel-efficient jets, the withdrawal

Notes

23 Kazuhiro Yanagida, 'Tools for Corporate Reorganisations in Japan' (2008) 5 *International Corporate Rescue*. If an officer or management team of the debtor is not potentially subject to an officer liability investigation, he or they may be appointed as trustees: see Samuel L. Bufford and Kazuhiro Yanagida, 'Japan's Revised Laws on Business Reorganization: An Analysis' (2006) 39 *Cornell International Law Journal* 1, at page 9.

24 Judgment (English translation for reference purposes) <www.jal.com/en/other/pdf/100119.pdf> (visited 23 May 2011), paragraph 2.

25 Katayama Affidavit, paragraphs 25-31. The operation of the CRA is also summarised in Lionel Meehan, 'Cross border insolvency law: Reform and recent developments in light of the JAL corporate reorganisation filing', (2011) 22 *Journal of Banking and Finance Law and Practice*, 40, at pages 41-42.

26 Trustees' press release, 31 August 2010, <www.jal.co.jp/en/other/100831_01.pdf> (JAL Submission Press Release), visited 28 January 2011, page 4.

27 JAL Filing Press Release.

28 Letter from JAL companies to business partners, 19 January 2010, <*www.jal.com/en/other/pdf/100119_2.pdf*>, visited 28 January 2011.

29 ETIC Notice, page 4.

30 Katayama Affidavit, paragraph 35.

31 ETIC Notice, pages 7-8.

from unprofitable routes and the development of code-sharing alliances to preserve JAL's route network, and significant adjustments to workforce size and composition and decision-making processes.[32]

A compliance investigation committee, comprised of two former Supreme Court judges, two lawyers and an accountant, was briefed to investigate the reasons that the debtors became insolvent, and past compliance and managerial problems. The committee found that JAL was 'beset' by (among other things) 'a bloated organisation, a weak corporate culture and weak corporate finances'. While it concluded that there were problems in managerial judgment and corporate governance, it opined that it would be difficult to find the directors criminally or civilly liable.[33] In widely-publicised comments, new chairman Inamori accused the previous management of being unsuitable even to run a grocery store.[34]

While they worked toward submitting a restructuring plan to the Court, the trustees began the process of turning around the companies' businesses. Among other things, they:

- discontinued services on 15 international and 30 domestic routes, with the result of reducing JAL's 'available seat kilometre' capacity by 40% and 30%, respectively, compared to 2008 levels;[35]
- reviewed JAL's cargo business, and ceased the use of cargo only planes;[36]
- reduced labour costs by significantly eliminating positions through voluntary retirement and other measures, electing not to renew the contracts of temporary and contract workers, divesting subsidiaries which employed staff, and not replacing staff who left through usual attrition;[37]
- began to retire large Boeing 747-400 and Airbus 300-600 aircraft and replace them with smaller aircraft, and altered aircraft configurations to improve profitability on short haul flights;[38]
- commenced the disposal of non-core assets including a wholly-owned hotel business which operated 58 hotels in Japan;[39] and
- commenced reform of the companies' wage structure, pensions and benefits, facilities, procurement processes and airport-related cost structures.[40]

Meanwhile, creditors worldwide were invited to submit their claims. While claims notices were prepared in both Japanese and English, all claims were to be submitted and administered in the Japanese proceeding.[41]

Dealing with foreign claims was one of several cross-border issues with which the trustees had to deal. In order to address most of the critical issues identified by ETIC,[42] the trustees had to seek the assistance of foreign courts.

Cross-border proceedings

Until relatively recently, Japan's insolvency system reflected principles of territoriality,[43] refusing to recognise foreign insolvency proceedings and not claiming any extraterritorial reach for its own. The commencement of the *Law on Recognition of and Assistance in Foreign Insolvency Proceedings* in 2001 and amendments to the CRA in 2002 allowed universalist elements to be applied in corporate reorganisation proceedings, both those begun within Japan and without.[44] A trustee appointed in Japanese insolvency proceedings now has the power to deal with the company's assets abroad,

Notes

32 ETIC Notice, pages 8-10.
33 Report by the Compliance Investigation Committee, 31 August 2010, <rgst.jal.co.jp/en/other/100831_03.pdf>, visited 28 January 2011.
34 Wall Street Journal, 'The Cost of JAL's Long Delay', <online.wsj.com/article/SB10001424052748703555804576101461700807204.html>, visited 2 February 2011.
35 IO First Report, paragraph 24.
36 JAL Submission Press Release, page 5.
37 IO First Report, paragraph 25.
38 IO First Report, paragraph 26.
39 Status Report of the Foreign Representative Regarding the Settlement of Certain Antitrust Litigation in the matter of Japan Airlines Corporation et al., Debtors in a Foreign Proceeding (United States Bankruptcy Court for the Southern District of New York, Case No. 10-10198) (Appendix 'B' to the IO First Report) (FR Report), paragraph 8.
40 JAL Submission Press Release, page 5.
41 IO First Report, paragraph 39.
42 ETIC Notice, pages 7-8.
43 Shinichiro Abe, 'Japan', in Look Chan Ho, *Cross-Border Insolvency* (2009), at 139.
44 Shinichiro Abe, 'Japan', in Look Chan Ho, *Cross-Border Insolvency* (2009), at 139; Kazuhiko Yamanoto, *The New Japanese Legislation on Cross-border Insolvency Compared with the UNCITRAL Model Law*, International Insolvency Institute, <www.iiiglobal.org/component/jdownloads/?task=finish&cid=1055&catid=152>, visited 29 January 2011. Some of the limitations on the universalism, and departures from the Model Law in the *Law on Recognition of and Assistance in Foreign Insolvency Proceedings*, are pointed out in Lionel Meehan, 'Cross border insolvency law: Reform and recent developments in light of the JAL corporate reorganisation filing', (2011) 22 *Journal of Banking and Finance Law and Practice* 40, at pages 47-49.

and foreign creditors have the ability to file claims Japanese proceedings.[45]

The trustees sought recognition of the Japanese Proceedings in four jurisdictions in which the Model Law has been adopted. It appears to have been uncontroversial that JAL's centre of main interests (COMI) was Japan, and consequently, each court found that the Japanese Proceedings were foreign main proceedings.

On the day of the Tokyo filing, the trustees filed a petition for recognition under Chapter 15 of the *United States Bankruptcy Code* (Bankruptcy Code) in the United States Bankruptcy Court for the Southern District of New York. Judge Peck granted the relief sought. Accordingly, JAL obtained the benefit of the automatic stay provided by Bankruptcy Code § 362. Judge Peck also allowed the trustees relief under Bankruptcy Code § 1521,[46] entrusting them with the administration or realisation of the debtors' assets located within the United States. Further, Judge Peck granted relief enabling JAL to conduct business as usual with the International Air Transport Association and other aviation industry counterparties, including by honouring prepetition claims arising in the ordinary course of business[47] – relief which ETIC had earlier stated was necessary to allow JAL to trade on during the reorganisation.

On 8 February 2010, the trustees sought recognition of the Japanese proceeding as a foreign main proceeding in the United Kingdom, under the *Cross-Border Insolvency Regulations 2006* (CBIR). Recognition was granted by Registrar Jaques on 10 February 2010.[48] The Court did not grant any significant further relief. It is interesting that the trustees did not obtain Article 21 relief under the CBIR.[49] Without such further relief, the CBIR preserves creditors' rights to enforce security, repossess goods the subject of hire purchase agreements, and set off claims.[50]

On 30 April 2010, the trustees filed recognition proceedings under Canada's *Companies' Creditors Arrangement Act* (CCAA), for the stated purposes of protecting JAL's Canadian assets, staying class action proceedings against JAL in Canada, and ensuring that JAL's Canadian operations suffered no operational disruption. That same day, Campbell J made orders recognising the Japanese Proceeding as a foreign main proceeding under Part IV of the CCAA, recognising the automatic stay provided by the Japanese Proceeding, and granting a further stay of any proceeding or enforcement action against JAL during the pendency of the Japanese Proceedings. His Honour also made orders compelling the continued provision of goods and services to JAL provided that payment under previous normal terms was made. The Court appointed an 'information officer' to provide quarterly reports to the Court concerning the status of the Japanese Proceedings and any foreign proceedings, and to assist the trustees to facilitate their compliance with the CCAA.[51]

On 10 June 2010, the trustees filed proceedings in the Federal Court of Australia under the CBIA. They sought orders recognising the Japanese Proceeding as a foreign main proceeding, and an order that they be entrusted with the administration and realisation of the trustees' assets located in Australia. Emmett J granted the application. His Honour's orders are supported by published written reasons, which illustrate the usefulness of the Model Law provisions in large and complex international insolvencies. Among other things, Emmett J stated:[52]

> 'As with other airlines, the Debtors' network of service routes requires precision in scheduling. Any error or delay in scheduling that might be caused by creditors attempting to seize assets would affect the entire international network as well as domestic services in Japan. Any interference, or threat of interference, with the assets of the Debtors could result in a potential loss of customers. The Debtors have a number of trade creditors in Australia who are presently being paid as and when their debts are due. If the Debtors' business partners were to stop providing, or increased the cost of, any of the goods and services which are presently being supplied as a consequence of the proposed reorganisation, it could potentially disrupt the Debtors' operations at a

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45 See generally Samuel L. Bufford and Kazuhiro Yanagida, 'Japan's Revised Laws on Business Reorganization: An Analysis' (2006) 39 *Cornell Int'l L.J.* 1, 56.

46 Corresponding to Model Law Article 21.

47 <www.deloitte.com/assets/Dcom-Canada/Local%20Assets/Documents/Insolvencies/JAL/ca_en_insolv_JAI_AppRecord_Tab2ExhM_OrderUSBankryCourtr_041210.pdf>, visited 28 January 2011.

48 <www.deloitte.com/assets/Dcom-Canada/Local%20Assets/Documents/Insolvencies/JAL/ca_en_insolv_JAI_AppRecord_Tab2ExhN_RecognitionOrder_041210.pdf>, visited 28 January 2011.

49 There is nothing in the judgment to indicate that such relief was sought, but equally, nothing to suggest that it might not have been.

50 *Cross-Border Insolvency Regulations 2006* (UK), Schedule 1, Article 20(3). The rights of secured creditors are subject to the representative's right to seek orders under sch 1, art. 21(1)(g) which would allow 'override' of the secured creditor's rights: see Ian F. Fletcher, *Insolvency in Private International Law*, Oxford University Press, Oxford (2nd Ed, 2005 with supplement, 2007), supplement 96. The ability to exercise the right of set off is the subject of some conjecture: see Look Chan Ho, 'England', in Look Chan Ho, *Cross-Border Insolvency* (2009), 125-126.

51 <www.deloitte.com/assets/Dcom-Canada/Local%20Assets/Documents/Insolvencies/JAL/ca_en_insolv_JAI_AppRecord_Tab4DraftOrder_043010.pdf>, visited 28 January 2011.

52 *Katayama v Japan Airlines Corporation* (2010) 79 ACSR 286; [2010] FCA 794, paragraphs 21-22.

critical time, leading to a loss of customer confidence and revenues. Such measures would distract management from focusing on restructuring.

It is intended that the operations of the Debtors will continue in as smooth and stable a manner as possible, notwithstanding the reorganisation which has commenced pursuant to the Japanese Proceeding. The Debtors have thousands of customers and business partners who depend upon their continued operation in the ordinary course of business despite the proposed reorganisation. Continued stable operations are essential to enable the Debtors to operate with a minimum of disruption or loss of sales. To minimise any loss of value to the business, it is the objective of the Debtors to engage in business as usual following the commencement of the reorganisation under the Japanese Proceeding with as little interruption to their operations as possible. That objective will be served by recognition of the Japanese Proceeding under the Act, to prevent business partners or creditors from disrupting the operations.'

Competition law proceedings

JAL might have obtained stays of actions against it in four continents thanks in large part to the Model Law, but those stays were not a panacea: JAL remained a defendant to class actions arising out of alleged anti-competitive conduct in both its cargo and passenger markets between 2000 and 2006, and regulatory action concerning alleged anti-competitive conduct in several markets.[53]

During the restructuring process, the trustees successfully compromised class actions relating to cargo markets in each of Canada and the United States, and a class action relating to passenger services in the United States.[54] The Tokyo District Court authorised the settlements. Fairness hearings in the other relevant jurisdictions are not yet complete.[55] The Canadian passenger class action, and an Australian class action related to cargo services, continue (albeit subject to the stays applicable following recognition).

Settlement of the class actions assisted the trustees to focus on restructuring the business rather than responding to litigation, and crystallised the claims of the class members against the relevant JAL company, simplifying the claims resolution process.[56]

Regulatory actions continued.[57] Following the grant of recognition in Australia, the Federal Court granted leave to the Australian Competition and Consumer Commission to continue a price fixing prosecution against JALI concerning air freight prices.[58] In November, JAL was fined for anti-trust violations in South Korea.[59] On 11 April 2011, JALI was fined USD 5.5 million and consented to certain restraints.[60]

It is not clear what effect the merger of the three JAL Debtors under the JAL's reorganisation (described below) will have on continued regulatory actions. Presumably, the class actions that were not settled have been dealt with via the claims resolution process under the CRA.

The reorganisation

The trustees submitted a business revitalisation plan to the Court on 31 August 2010. The Court made orders for a vote by creditors. 96% of creditors voted in favour of the plan, and it was approved by the Court on 30 November 2010.[61]

The plan involves a restructure of both JAL's business and its capital.

The business restructuring plan involves a reduction in fixed costs and an increase in operational flexibility.[62] Profitability is to be increased by reducing the number and size of aircraft models employed; eliminating

Notes

53 See Maurice Blackburn, 'Summary of Air Cargo Cartel Proceedings', undated, <www.mauriceblackburn.com.au/media/409674/summary%20of%20air%20cargo%20cartel%20proceedingsfinal.pdf>, visited 31 January 2011.

54 Second Report of the Information Officer in the matter of Japan Airlines Corporation, Japan Airlines International Co Ltd and JAL Capital Co Ltd (Ontario Superior Court of Justice Proceeding CV-10-869200CL), paragraphs 31-35; FR Report, paragraphs 10-21.

55 A hearing took place in the Ontario Superior Court of Justice on 13 January 2011. At the time of writing, hearings were scheduled in the Supreme Court of British Columbia (15 February 2011) and in the United States District Court for the Eastern District of New York and the Québec Superior Court (both 3 March 2011): see <www.aircargosettlement2.com/>, visited 28 January 2011.

56 FR Report, paragraph 21.

57 See notes 52-54 above.

58 Order made on 28 July 2010: see <www.comcourts.gov.au/file/Federal/P/NSD683/2010/3589894/event/26248388/document/196567>, visited 27 January 2011. The ACCC's press release concerning the prosecution is at <www.accc.gov.au/content/index.phtml/itemId/928666>, visited 28 January 2011.

59 Hisane Masaki, 'South Korea fines ANA, JAL in Anti-Trust Case', *Journal of Commerce* Online, 1 December 2010, <www.joc.com/air-expedited/south-korea-fines-ana-jal-anti-trust-case>, accessed 31 January 2011.

60 See *Australian Competition & Consumer Commission v Japan Airlines International Co Ltd* [2011] FCA 365.

61 Japan Airlines Press Release, *Approval of the Reorganization Plan*, 30 November 2010, <www.jal.co.jp/en/other/info2010_1130.html>, visited 28 January 2011; Judgment (English translation for reference purposes): <www.jal.co.jp/en/other/101130.pdf>, visited 28 January 2011.

62 JAL Submission Press Release, pages 1-2.

unprofitable routes and reducing the number of international routes serviced by relying on code sharing networks; reforming cost structures and reducing capital and labour costs (including a one-third reduction in headcount compared to 2009 levels); selling or liquidating non-core subsidiaries; preparing risk management plans capable of swift execution; and improving the quality of management.[63] Management intended the restructured group to be profitable and to have eliminated its excess liabilities in its first year of post-reorganisation operation.[64]

The capital structure was reorganised by merging the three JAL Debtors and two other JAL companies. JALI is the surviving entity. It changed its name to Nihon Koukuu Kabushiki Kaisha (Japan Airlines Co., Ltd) (JACL) and was recapitalised. All of the merged companies' share capital was (effectively) cancelled, and ETIC was issued with all of the new shares in JACL in exchange for a JPY 350 billion capital injection. Japanese newspaper *Yomiuri Shimbun* reported that the restructure involved a JPY 520 billion debt waiver by JAL's 'major creditor banks', but that report is not reflected in the restructuring plan.[65]

While shareholders were out of the money, creditors were to see some returns. Intra-group debts were cancelled, and claims against all three of the former debtor companies were to be paid pro rata. Secured claims were to be paid in full, and unsecured creditors were to receive 12.5% of their principal. Both classes of debts were to be paid in yearly instalments over seven years. With court approval, those instalment payments were convertible into earlier lump sum payments.[66]

The future

ETIC's capital injection, together with JPY 12.7 billion in further equity subscribed by eight other companies, and JPY 255 billion in loan finance, allowed JAL to pay all of the debts under the reorganisation plan in full.[67] Consistent with ETIC's expectations that the reorganisation would be completed by the end of March 2011,[68] the District Court recognised the conclusion of JAL's reorganisation on 28 March 2011.[69] The trustees' plans to return to profitability in the first year of post-restructure operations appear to have been realised: JACL made an operating profit of JPY 110 billion between April and September 2010, compared with JAL's loss of JPY 96 billion in the corresponding period of 2009.[70] ETIC has plans to work toward an 'initial' public offering of JACL shares.[71]

But has the business really turned around? *Yomuri Shimbun* suggests that the improvement in profits must be attributed to temporary factors such as declining fuel costs and a surge in the value of the yen. 'The recovery cannot be regarded as an indication that the airline's business will remain profitable from here on out'.[72] *The Wall Street Journal* suggests that trade liberalisation and JAL's delayed modernisation could endanger JAL's future.[73] And the impact of the Fukushima earthquake and resultant tsunami are yet to be felt in full. The restructuring itself remains controversial: 146 of the employees laid off during the turnaround have sued for wrongful dismissal.[74]

Notes

63 JAL Submission Press Release, page 5.
64 JAL Submission Press Release, page 5.
65 Yomiuri Shimbun, 'Real battle for JAL starts now, one year on', *Yomiuri Shimbun*, <www.yomiuri.co.jp/dy/editorial/T110119004904.htm>, accessed 2 February 2011.
66 JAL Submission Press Release, pages 9-13.
67 Chris Cooper, 'Japan Air Exits Administration With $3 Billion Financing, Smaller Network', *Bloomberg*, 28 March 2011 <www.bloomberg.com/news/2011-03-27/japan-air-focuses-on-tie-ups-as-once-world-s-no-1-exits-court-protection.html>, visited 1 May 2011; Ghim-Lay Yeo, 'JAL begins restructured life', *Flightglobal*, 18 April 2011, <www.flightglobal.com/articles/2011/04/18/355680/jal-begins-restructured-life.html>, visited 1 May 2011.
68 Chris Cooper and Kiyotada Matsuda, 'Japan Airlines Wins Court Approval for Turnaround Plan Backed by Lenders', *Bloomberg*, 30 November 2010 <www.bloomberg.com/news/2010-11-30/japan-airlines-wins-court-approval-for-turnaround-plan-backed-by-lenders.html>,visited 28 January 2011.
69 Japan Airlines Press Release, *Completion of Corporate Reorganization Proceedings*, 28 March 2011, <www.jal.co.jp/en/other/info2011_0328_02.html>, visited 1 May 2011; Judgment (English translation for reference purposes): <www.jal.co.jp/en/other/110328.pdf>, visited 1 May 2011.
70 Chris Cooper and Kiyotada Matsuda, 'Japan Airlines Wins Court Approval for Turnaround Plan Backed by Lenders', *Bloomberg*, 30 November 2010 <www.bloomberg.com/news/2010-11-30/japan-airlines-wins-court-approval-for-turnaround-plan-backed-by-lenders.html>,visited 28 January 2011.
71 Chris Cooper and Kiyotada Matsuda, 'Japan Airlines Wins Court Approval for Turnaround Plan Backed by Lenders', *Bloomberg*, 30 November 2010 <www.bloomberg.com/news/2010-11-30/japan-airlines-wins-court-approval-for-turnaround-plan-backed-by-lenders.html>,visited 28 January 2011.
72 Yomiuri Shimbun, 'Real battle for JAL starts now, one year on', *Yomiuri Shimbun*, <www.yomiuri.co.jp/dy/editorial/T110119004904.htm>, accessed 2 February 2011.
73 Wall Street Journal, 'The Cost of JAL's Long Delay', <online.wsj.com/article/SB10001424052748703555804576101461700807204.html>, visited 2 February 2011.
74 Mizuho Aoki, 'Axed pilots, cabin crews sue JAL', *The Japan Times Online*, <search.japantimes.co.jp/cgi-bin/nn20110120a2.html>, visited 4 February 2011.

According to JACL chairman Inamori, 'the most difficult thing in turning around JAL has been changing bureaucratic thinking'.[75] Ironically, if it wasn't for Japanese government intervention (and the investment of large amounts of public money) it seems unlikely the carrier would have turned around at all. But it was the speed and flexibility of the Model Law that enabled courts in four countries to make orders recognising the authority of the trustees and protecting essential elements of the JAL business in time to allow the restructuring plan to be formulated and implemented. Time will tell whether the judicial protection, government intervention and radical restructuring will enable JAL to survive and prosper.

C. Lehman Brothers

Lehman Brothers Holding Inc (Lehman Holdings) filed for Chapter 11 bankruptcy protection in the United States on 15 September 2008. Lehman Brothers was the fourth largest investment bank in America and the largest company ever to file for bankruptcy in the United States.[76] While the financial crisis which its collapse heralded[77] began in the United States, its effects were felt worldwide, including in the Asia-Pacific region. A telling statistic on the severity of the global downturn in trade is that the Asia-Pacific region led the decline in air cargo traffic with a record 26% decline between December 2007 and 2008.[78]

While Lehman Holdings was incorporated and based in New York, it operated through a network of affiliates across the globe.[79] As Lehman Holdings managed substantially all of the material cash resources of the Lehman Brothers group centrally, its inability to settle obligations of these affiliates resulted in some 75 separate and distinct insolvency proceedings commencing in 16 jurisdictions.[80] These proceedings covered the rescue-liquidate spectrum – from 'out-of-court workouts' through 'formal reorganisation proceedings' to 'liquidations'.

In these circumstances and given the integrated nature of the group and the type of operations and assets involved (being a financial services firm), it is hardly surprising that within weeks preliminary discussions began to explore a possible framework agreement for cooperation between the proceedings. An initial draft was circulated in February 2009 and a final agreement (Lehman Protocol) was approved by the United States Bankruptcy Court on 17 June 2009. The number of insolvency representatives from additional jurisdictions who have signed or otherwise engaged with this process has expanded. There have been a number of protocol meetings', co-chaired by a Hong Kong insolvency representative and a Dutch insolvency representative.

Meanwhile elements of Lehman Brothers' global business were being sold. On 17 September 2008, Barclays Capital announced it had acquired the North America fixed income and equity sales, trading and research; prime services; investment banking; principal investing; and private investment management businesses.[81] On 22 September 2008, Nomura Holdings announced its acquisition of the operations in the Asia Pacific region[82] and the following day it announced the further acquisition of the European and Middle Eastern equities and investment banking operations.[83]

Lehman Brothers provides a case study around which to discuss how multiple insolvency proceedings in the Asia-Pacific region of affiliates within a highly integrated insolvent global group have been initiated and then coordinated. Thus it provides useful insights into how cross-border insolvency issues may

Notes

75 Chris Cooper and Kiyotada Matsuda, 'Japan Airlines Wins Court Approval for Turnaround Plan Backed by Lenders', *Bloomberg*, 30 November 2010 <www.bloomberg.com/news/2010-11-30/japan-airlines-wins-court-approval-for-turnaround-plan-backed-by-lenders.html>,visited 28 January 2011.

76 Standard & Poor's *Ratings Direct*, 1 October 2008 p 2 <www2.standardandpoors.com/spf/pdf/media/Lehman_Bros_Bankruptcy.pdf> viewed 4 February 2011.

77 World Trade Organisation 'International Trade Statistics 2010: World Trade Developments' p 4 <www.wto.org/english/res_e/statis_e/its2010_e/section1_e/its10_highlights1_e.pdf>, visited 4 February 2011.

78 The International Air Transport Association reported a decline of 23% in December 2008 compared to a year earlier. 'To give some perspective on the magnitude of this drop, the decline recorded in September 2001, when most of the world's aircraft were temporarily grounded, was only 14%': World Trade Organisation Press Release 'WTO sees 9% global trade decline in 2009 as recession strikes' 24 March 2009 <www.wto.org/english/news_e/pres09_e/pr554_e.pdf> visited 4 February 2011.

79 There were more than 900 operating entities located in more than 40 countries with more than USD 600B in assets: Notice of Report of Activities through January 15, 2010 of the official representatives and Other Participating Affiliates pursuant to the Cross-border Insolvency Protocol, filed February 2, 2010 in United States Bankruptcy Court Southern District of New York. (2010 Protocol Report) <chapter11.epiqsystems.com/LBH/document/Default.aspx?rc=1> visited 4 February 2011.

80 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p 123 <www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf> visited 4 February 2011.

81 Barclays Capital Press Release, *Barclays announces agreement to acquire Lehman Brothers North American investment banking and capital markets businesses,* 17September 2008 and *Lehman Brothers Business Reopens Under Barclays Ownership,* 22 September 2008, <www.barcap.com> visited 5 February 2011.

82 <www.nomuraholdings.com/news/nr/holdings/20080922/20080922.html> visited 5 February 2011.

83 <www.nomuraholdings.com/news/nr/holdings/20080923/20080923.html> visited 5 February 2011.

be addressed – not only under domestic laws such as local enactments of the Model Law but also through practical merchant-led practices such as cross-border insolvency protocols.[84]

Lehman Asia

Lehman Holdings' filing for bankruptcy protection in New York at 1:45 am on 15 September 2008[85] precipitated numerous insolvency proceedings worldwide.

In Hong Kong, provisional liquidators were appointed on 17 and 19 September 2008 for five Lehman affiliates including Lehman Brothers Asia Holdings Ltd. These provisional liquidators were formally appointed as liquidators in March 2009.

In Singapore, provisional liquidators were appointed by a written resolution of the board of directors to Lehman Brothers Finance Asia Pte Ltd on 23 September 2008 with provisional liquidations commencing for additional Singaporean affiliates in early October 2008.

The prompt sale of the Asia-Pacific operations with its transfer of employees, information technology and offices to Nomura affected the extent of information available to the insolvency representatives, even with the cooperation of former Lehman employees and Nomura.[86] This challenge has been addressed not only through internal resources but also through the sharing of certain information pursuant to the cooperation provisions in the Lehman Protocol.

The process of realising the real estate assets has met with mixed success. Some 17% of Lehman's global real estate investment was in Asia, with substantial assets in Japan, Thailand and China. By late 2010, all except two positions of the considerable real estate investment in China had been realised – with approximately 95% return of the total principal outstanding at the time of the liquidators' appointment. By contrast the process has been more complicated in Thailand due to political unrest (the 'red shirt' protests) as well as significant challenges to the liquidators' authority.[87]

Lehman Japan

Lehman Brothers Japan Inc and affiliates also failed in the wake of Lehman Holdings' collapse – owing some JPY 3.43 trillion in liabilities.[88] On 16 September 2008, Lehman Brothers Holdings Japan plus three more affiliates all filed debtor-in-possession type proceedings under the Japanese *Civil Rehabilitation Law* in the Tokyo District Court.

On the same day, the Tokyo District Court ordered temporary measures to prevent any loss to the company's assets, during the period from the filing of an application until the commencement of the civil rehabilitation.[89] The Court also appointed a supervisor of the Lehman Japan business under the civil rehabilitation procedure.[90] In September 2010, plans for rehabilitation prepared by Lehman Japan were approved by the requisite majority of creditors and the Tokyo District Court.[91]

The Lehman Japan affiliates are now being wound down – however some of the reorganisation plans have been challenged by some creditor groups who have argued that the inter-company debts should be subordinated to all other debt.[92]

Lehman Australia

On 22 September 2008, the Japanese investment bank Nomura Holdings Inc announced it had agreed to acquire Lehman Brothers' franchise in the Asia Pacific

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84 See Rosalind Mason, *The role of the UNCITRAL Model Law and Cross-border Insolvency Agreements in facilitating cross-border insolvency cooperation,* paper presented at Banking & Financial Services Law Association, 27th Annual Conference, Queenstown, New Zealand, August 2010.

85 Voluntary Petition (Chapter 11), Docket No. 1, Lehman Brothers Holdings Inc., Case No. 08-13555 (Bankr. S.D.N.Y. Sept. 15, 2008); Docket Activity Report, Lehman Brothers Holdings Inc., Case No. 08-13555 (Bankr. S.D.N.Y. Sept. 15, 2008).

86 Eddie Middleton, Douglas Ferguson, Patrick Cowley, 'Liquidating Lehman', (2010) 6 (5) *A Plus* 23. <www.kpmg.com.hk/en/about/KPMG_news/Lehman_updates/A-Plus-20100506.pdf> visited 28 January 2011.

87 Eddie Middleton, 'Life and Times of a Lehman Liquidator', *INSOL World* Third Quarter 2010 at 33. <www.kpmg.com.cn/en/about/KPMG_news/Lehman_updates/INSOL-World-20100805.pdf> visited 28 January 2011.

88 Hiroko Nakata, 'Corporate Bankruptcy The Japanese Way', *The Japan Times Online* 28 April 2009 <search.japantimes.co.jp/cgi-bin/nn20090428i1.html> visited 5 February 2011.

89 'Shortly after the filing, the Financial Services Agency ordered Lehman Brothers Japan to suspend operations through Sept. 26 after receiving a report from the Japanese unit that warned it might default on its obligations in the longer term. As a precaution to protect local investors, the Financial Services Agency also ordered the unit to keep certain assets within Japan to prevent them from being transferred to other units and affiliates outside the country.' Lehman Brothers Japan files for bankruptcy' *The Japan Times Online* 17 September 2008 <search.japantimes.co.jp/cgi-bin/nb20080917a2.html> visited 4 February 2011.

90 Allen & Overy, *Recent Developments: Lehman Brothers' Bankruptcy – Japan Aspects* 18 September 2008 <elink.allenovery.com/getFile.aspx?ItemType=eAlert&id=845859b3-bed4-4eb6-99c2-ecd4134e7a35> viewed 5 February 2011.

91 Global Insolvency, *Lehman Japan Gets Court Nod For Liquidating,* 2 September 2010, <globalinsolvency.com/headlines/lehman-japan-gets-court-nod-liquidating> visited 5 February 2011.

92 Eddie Middleton, 'Life and Times of a Lehman Liquidator', *INSOL World* Third Quarter 2010 at 33. <www.kpmg.com.cn/en/about/KPMG_news/Lehman_updates/INSOL-World-20100805.pdf> visited 28 January 2011.

region. Nomura announced that the deal included all of Lehman Brothers' franchises and approximately 3,000 employees in multiple locations in the Asia-Pacific region including Hong Kong, Singapore, Australia, India, Thailand, and Japan. The deal did not include any trading assets or trading liabilities.[93]

On 26 September 2008, the directors of the Australian affiliates resolved that the various companies enter into voluntary administration and appointed joint and several administrators. In their subsequent report to creditors, the administrators recommended making a deed of company arrangement rather than going into liquidation or ending the administration. In June 2009, the administrators and Lehman Brothers Australia Ltd (Lehman Australia) executed a deed of company arrangement.

However some minority creditors challenged provisions of the deed that purported to provide for a moratorium on and release of claims that might be made by Lehman Australia's creditors against third parties.[94] The High Court upheld the Full Court of the Federal Court of Australia's determination that the terms of the deed were void. During this process, the deed administrators were appointed as liquidators on 2 October 2009.[95]

Comment

Insolvency regulation within the Asia-Pacific region differs widely between jurisdictions in the development of domestic insolvency laws and in the extent to which they address cross-border insolvency issues. In some of the jurisdictions where Lehman affiliates had a presence, for example through incorporation, carrying on business or holding assets, insolvency laws and related institutions only developed following the Asian financial crisis of the late 1990s. A number still do not adequately address cross-border issues.[96]

In 1997, UNCITRAL developed and recommended for domestic adoption the Model Law to assist with such issues. However at the time of the Lehman Brothers collapse more than a decade later, it had only been taken up within the region by Japan (2000), New Zealand (2006), Republic of Korea (2006), and Australia (2008).

While the Model Law approach to cross-border cooperation is relevant to the Lehman case[97] and the Lehman Protocol was approved by the United States Bankruptcy Court as authorised by that jurisdiction's adoption of the Model Law, it is not directly applicable.

Not all jurisdictions have adopted the Model Law and, of those who have, some have amended it in the process.[98] Australia has adopted it almost unchanged and in the process has provided guidance on the use of cross-border insolvency protocols where insolvency representatives cooperate under Article 26.[99] Japan did not introduce Article 25 on court cooperation, on the basis that Japanese courts already had inherent power to cooperate with foreign courts.[100]

Further, even though the Model Law addresses concurrent proceedings, it is based on the notion of a single debtor and is not directly applicable to a group enterprise with concurrent insolvency proceedings commenced for numerous interconnected affiliates.

Nevertheless, the Model Law is relevant to the Lehman scenario. The Bankruptcy Court in which Lehman Holdings' Chapter 11 petition was filed is situated in the United States, which adopted the Model Law in

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93 <www.nomuraholdings.com/news/nr/holdings/20080922/20080922.html> viewed 4 February 2011. The following day, Nomura announced it had also reached an agreement to acquire the European and Middle Eastern equities and investment banking operations of Lehman Brothers. The deal did not include any trading assets or trading liabilities and was subject to a number of conditions including regulatory approvals that were announced on 6 October 2008 as having been met.

94 *Lehman Brothers Holdings Inc v City of Swan* [2010] HCA 11 upholding the decision of the Full Court of the Federal Court of Australia [2009] FCFCA 130. The release was 'in respect of claims that Litigation Creditors had, not only against Lehman Australia, but also against Lehman Holdings (and other Lehman Entities), arising out of the creditors' investments in collateralised debt obligations and other financial products marketed by, or acquired or purchased pursuant to services or advice provided by, Lehman Australia' [2010] HCA 11 at 45.

95 In December 2010, the Federal Court approved the liquidators' proposed alternative dispute resolution scheme on adjudication of claims (assessment of their merits plus negotiation and, failing that, adjudication by an independent adjudicator).The proposal is intended to avoid the need for numerous, lengthy and potentially very expensive, highly complex processes and litigation, if the creditors in the claimant group were to seek to establish their claims by formal proof or litigation: *Singleton, in the matter of Lehman Brothers Australia Limited (in liq)* [2010] FCA 1491 (22 December 2010).

96 Eddie Middleton, 'Life and Times of a Lehman Liquidator', *INSOL World* Third Quarter 2010 at 32. <www.kpmg.com.cn/en/about/KPMG_news/Lehman_updates/INSOL-World-20100805.pdf> visited 28 January 2011.

97 Articles 25-26 mandate a local court or insolvency representative to co-operate with foreign courts or foreign representatives – either directly or through representatives. Article 27 provides examples of appropriate means of cooperation, including (d) 'approval or implementation by courts of agreements concerning the coordination of proceedings'.

98 The United Kingdom permits but does not mandate court cooperation under Article 25(1) Cross-Border Insolvency Regulations 2006<www.bailii.org/uk/legis/num_reg/2006/20061030.html> visited 1 August 2010>.

99 Federal Court Practice Note Corp 2 Cross-border Insolvency Cooperation with Foreign Courts or Foreign Representatives: <www.fedcourt.gov.au/how/practice_notes_corp2.html> (viewed 31 July 2010) and NSW Supreme Court Equity Division Practice Note SC Eq 6 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives: <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/db2a09ee87866a04ca257577007983ae?OpenDocument> visited 31 July 2010.

100 Shinichiro Abe, 'Japan' in Look Chan Ho (ed.), *Cross-border Insolvency Law*, 2nd ed, Globe Law & Business, London, 2009.

2005 through Chapter 15 of the Bankruptcy Code. That Court has approved the Lehman Protocol.

The need for the Lehman Protocol is succinctly outlined in Recital C:

> 'Given the integrated and global nature of Lehman's businesses, many of the debtor's assets and activities are spread across different jurisdictions, and require administration in and are subject to the laws of more than one Forum. The efficient administration of each of the Debtor's individual Proceedings would benefit from cooperation among the Official Representatives. In addition, cooperation and communication among Tribunals, where possible, would enable effective case management and consistency of judgments.'[101]

The initial signatories included the United States debtors and the representatives of proceedings in Germany, Hong Kong SAR, Singapore and Australia.[102] By early 2010 additional signatories included representatives representing affiliates in the Netherlands, the Netherlands Antilles, Luxembourg, and Switzerland. In addition, official representatives in Japan and Bermuda had participated in a series of activities and meetings designed to advance the Protocol's objectives. The Joint Administrators of Lehman Brothers International Europe have neither signed the Protocol nor attended protocol meetings, and instead of participating in the multilateral discussions, have entered bilateral memoranda of understanding with the Lehman Protocol signatories and other participating affiliates.[103]

Group protocol meetings have produced some key achievements including agreements on the use of Lehman Brothers' books at 14 September 2008 as the basis for inter-company claims, and on a valuation method for inter-company trades such as stock loans, over the counter derivatives and repos (sale and repurchase).[104]

Thus even though the Model Law has not been adopted by all the jurisdictions in which insolvency representatives have been appointed to Lehman affiliates, cooperation and communication are being achieved through the Lehman Protocol. Indeed, UNCITRAL has acknowledged the relevance of such cross-border insolvency agreements and adopted a Practice Guide on Cross-Border Insolvency Cooperation,[105] which refers to the Lehman Protocol on a number of occasions.[106]

Conclusion

The three cases described in this article demonstrate the ongoing development of the Australian cross-border insolvency regime. The CBIA provides a legislative framework consistent with that in many other developed economies, to which insolvency practitioners and creditors can look to enable the co-ordinated winding up or restructuring of insolvent businesses with international elements. *Saad v Ackers* shows that in Australia, consistent with the underlying objectives of the Model Law, and due in large part to its faithful implementation of the foundational text, the CBIA will be interpreted in harmony with its international counterparts. The JAL restructuring is an example of the use of those laws to preserve and maintain as a going concern the business of a multinational corporation to allow its (to date) successful restructuring. Finally, the Lehman Brothers case proves that the professions and the courts can provide solutions to complex cross-border problems where legislative assistance is unavailable. Those three strands of inquiry suggest that coming years are likely to bring further developments in both the private and public spheres of international insolvency law.

Notes

101 Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, recital C <chapter11.epiqsystems.com/LBH/document/Default.aspx?rc=1> visited 4 February 2011.

102 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p 124 <www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf> visited 4 February 2011.

103 2010 Protocol Report.

104 Eddie Middleton, Douglas Ferguson, Patrick Cowley, 'Liquidating Lehman', (2010) 6 (5) *A Plus* 23 at 26. <www.kpmg.com.hk/en/about/KPMG_news/Lehman_updates/A-Plus-20100506.pdf> visited 28 January 2011.

105 Other multilateral organisations have provided similar guides. In 2001 the American Law Institute (ALI) and The International Insolvency Institute (III) published the ALI/III Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases; <www.ali.org/doc/Guidelines.pdf> and in 2008 INSOL Europe adopted the European Communication & Cooperation Guidelines for Cross-border Insolvency <www.abiworld.org/committees/newsletters/international/vol4num4/European.html>.

106 <www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf> visited 29 May 2010.

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