

HOW THE MAXWELL SAUSAGE WAS MADE

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Everyone “of a certain age” in the restructuring world knows about the cross-border insolvency proceedings involving Maxwell Communication Corporation. Maxwell was the first major cross-border insolvency situation involving plenary proceedings in two jurisdictions (the UK and the US), the first major insolvency in which a “Protocol” was negotiated by the parties and received dual court approval, the first major cross-border restructuring (as opposed to liquidation), blah blah blah. It got to the point that there were so many panels and articles about Maxwell that, in the late 1990s, programs started to include panels entitled “Beyond Maxwell...”

Thus, while I was asked to write a piece about Maxwell as the insolvency milestone it truly was, I think the milestone bits are already very well known. So, instead, I thought I would tell the “untold story” of how the Maxwell Protocol came to be; in other words, how the Maxwell sausage was made.

Maxwell was a UK-listed holding company with more than 400 subsidiaries around the world, primarily engaged in media and communications enterprises. In substance, the Maxwell Communication Corporation empire was the empire of Mr. Robert Maxwell, one of those remarkably charismatic self-made entrepreneurs capable of obtaining \$2 billion in financing via the classic “handshake loan.” However, when Robert Maxwell disappeared at sea (did he jump? was he pushed?), the banks quickly realized that there was no more hand to shake, and the walls came tumbling down. Anticipating a likely insolvency application by the banks in London, Maxwell’s board of directors opted for a pre-emptive Chapter 11 filing in NY in a bid to retain management control. The board then applied for UK administration the following day. The sparks then began to fly.

The UK Court, in the person of then-High Court Justice Leonard Hoffmann, appointed the banks' choice (PwC) as administrators, led by Mark Homan, rather than Maxwell's choice. PwC then quickly obtained a UK order mandating that Maxwell's board of directors dismiss the Chapter 11 proceedings so that the insolvency of Maxwell -- a UK-registered company -- could be administered in the UK. Back in the States, the US Court, in the person of then-Bankruptcy Judge Tina Brozman, was not persuaded that dismissal was the best option, but neither was she anxious to further the hostilities before other avenues could be explored. So, as she told me later, she gulped and decided to appoint a neutral as her own emissary to investigate whether the world could be made safe for cross-border insolvencies. This led to the appointment of Richard Gitlin as "Examiner," meaning he was independent of both management and the US Court and he was charged with the task of engaging with the parties and recommending a course of action. PwC responded by obtaining a UK Court order threatening the board of directors with imprisonment if they did not comply with the order to obtain dismissal of the Chapter 11.

It was thus that, on less than 24 hours' notice, Gitlin attended a Saturday morning meeting at the offices of PwC's US counsel, Milbank, Tweed, Hadley & McCloy. To carry his bags, Gitlin brought along a bright-eyed and bushy-tailed young Hebb & Gitlin partner -- yours truly. (Hebb & Gitlin merged into Bingham McCutchen in 1999 and, for that matter, Tina Brozman "merged" into Bingham McCutchen in 2000).

Arriving at Milbank, Gitlin and pup were faced with a "Let's Make A Deal!" choice of three rooms. Behind Door No. 1 were about thirty business persons and lawyers representing the management team, basically seeking to preserve "the American Way," i.e., their jobs. Behind Door No. 2 were about 50 bankers with US and UK lawyers, brandishing six feet of pleadings they were about to file in the hope of obtaining dismissal of the Chapter 11 case in favor of a

Section 304 “ancillary proceeding.” Behind Door No. 3 were 70 or so from PwC UK and US, including UK and US lawyers, all hell-bent on ensuring that Britannia ruled the waves. (Memory may exaggerate the numbers, but suffice it to say that the two of us felt like Butch and Sundance at their last stand in Bolivia.)

After an initial lambasting by all and sundry, we made the strategic decision to retreat behind Door No. 4, which happened to lead to a nearby Irish pub. We returned, newly stout-hearted (yes, that was a sad Guinness pun), and charged into the valley like Tennyson’s Light Brigade. Gitlin, of course, flash’d his saber, while I did my best to avoid the thundering cannon by ducking into a nearby office.

While pondering our wretched fate, I sort of accidentally hacked into a Milbank computer (sneaky geek that I was) and started typing some random thoughts. Perhaps 30 minutes later, just as the battle of the titans was reaching fever pitch, I meekly handed to Gitlin a list of 10 points that I thought could form the basis of an agreement. (I can’t take credit for the title “Protocol”, however -- I’m pretty sure John Jerome came up with that.)

Truth is, I can’t remember whether anything on that list remotely resembled anything that appeared in the final Protocol. If anything, it probably served to bring together Gitlin and Homan because it was something they could both share a hearty laugh over. But the parties did cease hostilities long enough to discuss whether there could be peace in the valley. The conversations continued and, 9 days later, after a 40-hour straight session at PwC in London, we finalized the Maxwell Protocol. It being 3:30 p.m. on New Year’s Eve, we then rushed to see Justice Hoffmann before the UK courts shut down for the month of January. Given that I was dead on my feet, all I really remember is a room full of powdered wigs and Justice Hoffmann peering down from his perch, nodding sagely as a dozen QCs tried to explain why he should

cooperate with a US insolvency proceeding for an English company, including giving a “Get Out of Jail Free” card to the American members of the board of directors who had violated his earlier orders.

Six weeks later, we were in front of Judge Brozman for the same purpose (albeit sans the powdered wigs), and with several important modifications from her, the Protocol was approved.

The concept of the Protocol was to allocate responsibilities logically between the two Courts and between the Administrators, the Examiner and US management. Geography played an important factor, as did critical public policy compromises such as recognizing the Administrators as the “debtor in possession” for Chapter 11 purposes but requiring the Administrators to obtain the Examiner’s consent should they consider a change to the senior US management team. Both Courts retained jurisdiction over everything but demonstrated, not only in word but by subsequent deeds, that they had a great deal of respect for each other and for each other’s systems, with cooperation and deference always being preferred wherever possible.

Perhaps the best evidence of the success of the Protocol was that, while the Protocol contained detailed provisions for Court resolution of any disputes between the Administrators and the Examiner, no such dispute was ever brought to Court. To be sure, the Administrators and the Examiner did not always agree at first instance, but they did always recognize the critical importance of cooperation not only for the benefit of value maximization but also as strongly encouraged by the two Courts.

Thus was the sausage made, and thus was it consumed without indigestion. Maxwell started out as a recipe for disaster, with different Courts, different management regimes, different insolvency objectives and different cultures all conspiring in favor of a transatlantic meltdown. In truth, cooperation and the Protocol started out as the least likely choices in Maxwell, but they

proved to be the only choices that ultimately made sense for maximizing value while preserving the integrity of two Courts and two systems. I was very fortunate to have been an observer and minor participant in Maxwell, as were many others, but 99% of the credit goes to Richard Gitlin and Mark Homan, for turning their swords into plowshares, and to Tina Brozman and Lennie Hoffmann, for their judicial courage in going where no Courts had gone before. The four of them created a model that has been the standard ever since for cross-border cooperation and value maximization in multinational restructuring proceedings.