

“Two Systems Divided By A Common Language”¹
US Chapter 11 -v- English Administration- A Practical Comparison

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¹ With apologies to George Bernard Shaw ("England and America are two countries divided by a common language").

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Introduction

Whilst the US and the UK have historically taken similar approaches to many different areas of law, at the present time their insolvency systems differ substantially. The purpose of this paper is to provide a balanced comparison of US Chapter 11 and its closest English relative, administration proceedings. This paper does not endorse one régime as being preferable to the other. Rather, this paper examines the differences in the respective régimes in the hope of stimulating creativity through exposure to diverse concepts that US and English practitioners can implement in both domestic and cross-border insolvency cases.

To highlight the differences between the two systems, this paper draws examples from the recent global insolvency filings of the Collins & Aikman (“C&A”) group. C&A is a worldwide manufacturer of interior parts and trim for the automotive industry. In recent years, C&A has experienced global difficulties due to an increasingly competitive market coupled with greater price pressures and base costs. On 17 May 2005, C&A placed its US operations into Chapter 11 protection. On 15 July 2005, the European operations of C&A (covering 24 companies located in 10 European countries) were placed into administration pursuant to the EC Regulation on Insolvency Proceedings 2000 (the EIR).

Philosophy of Insolvency

There are significant underlying philosophical differences between the US and English systems. In the US there is little to no opprobrium associated with the onset of insolvency. The US Chapter 11 scheme is founded upon a philosophy that encourages rehabilitation where at all possible. Accordingly, a Chapter 11 case is generally considered most successful when the debtor’s existing management remains in control and continues to operate the company during the bankruptcy proceedings, working cooperatively with creditors and other parties-in-interest to resolve the issues that resulted in the bankruptcy filing. Where this happens, the debtor often emerges from Chapter 11 as a viable going concern, generating a greater recovery for creditors than would have been the case had it simply liquidated its assets.

Chapter 11 is radically different from an administration proceeding, in which one or more independent insolvency practitioners is parachuted into an ailing company with the task of taking over the management of the affairs, business, and property of the company from the incumbent directors. Quite simply, the English system still attaches a stigma to the deterioration of a business leading to insolvency, and it would be anathema to English creditors to allow the management responsible for the distressed financial condition of a company to remain in control of its business. The English régime instead looks to independent third parties to secure the best outcome for creditors and other stakeholders. As described further below, the prevailing view in administration proceedings is that this optimal result will be achieved through a prompt disposal of the company’s business or the realisation of its assets.

Goals of Insolvency

The first statutory purpose of administration proceedings is the rescue of the company as a going concern. If it is not possible to achieve this purpose, the administration must be

directed towards achieving a better result for the company's mass of creditors as a whole than would otherwise be possible in a liquidation, or else realising property in order to make a distribution to one or more secured or preferential creditors.²

The viability of accomplishing the first statutory purpose is often considered and discounted in the preparatory stages preceding an administration filing. Typically, and as is likely to be the case in C&A, if a company is to continue operating as a going concern, its rescue occurs outside of the administration process.³ In C&A, as with other administrations, the purpose of the administration must then be directed toward selling the business of the company subject to the administration order to the highest bidder, thus creating the best realisation for creditors, leaving the "empty vessel" of the residual corporate entity. As described below, this process generally occurs on an expedited basis; indeed, at the date of presentation of this paper, the European C&A group is in advanced negotiations with interested bidders.

The distinction with the Chapter 11 process is palpable. Although the goal of a Chapter 11 case, like that of an administration, is to achieve the greatest recovery for creditors, a fundamental premise of the Chapter 11 process is that creditors will receive the greatest recovery if, instead of stripping out its assets and business, the company itself is "rescued" from its temporary economic hardships and allowed to recover in the cocoon provided by Chapter 11 protection. In this sense, the debtor (in many cases at the instigation of creditors) can utilize the Chapter 11 process to rid itself of unmanageable debt and burdensome contracts in order to regain economic viability and produce the capital necessary to pay its creditors and other parties-in-interest.

Whilst the goals of Chapter 11 are laudable, they often take a substantial period of time.⁴ The first months of a Chapter 11 case often revolve around the debtor's efforts to obtain and maintain the necessary financing, professional support and, in some cases, replacement personnel to stabilize its operations and provide it with the "breathing space" necessary to allow it to assess its operations, negotiate with creditors and propose a plan of reorganization. The US C&A debtors spent the first three months of their Chapter 11 proceedings soliciting and negotiating various debtor-in-possession financing facilities, replacing members of management and convincing their creditors – or where that was not possible, the court -- to approve these and other decisions. Generally, it is not until the company becomes relatively stable that the Chapter 11 debtor will propose a potential plan of reorganization and begin the process of negotiating the terms of such a plan with its creditors.

² See paragraph 3(1) of Schedule B1 to the Insolvency Act 1986 ("IA 1986").

³ This is subject to those cases where administration is used as a protective measure and a "pre-packaged" sale is achieved.

⁴ US lawmakers recently approved a number of crucial amendments to the current Chapter 11 laws, which amendments are scheduled to become effective on 17 October 2005. These amendments are likely to increase the general pace of Chapter 11 proceedings. As a result, it is likely that in the coming years, the course of Chapter 11 proceedings will necessarily quicken to keep pace with the new statutory requirements. The open question, of course, is whether the quickened pace of the proceedings will result in more companies finding themselves unable to reorganize their operations and continue as a going concern - resulting in increased liquidations.

Having said this, it must be noted that many Chapter 11 debtors ultimately sell some or all of their assets in the Chapter 11 process. These sales may occur relatively early on in the case, with analogous timing to an administration, or they may occur as part of the overall debtor's reorganization through a plan of reorganization.

Who's In Charge?

The United States has historically fostered a debtor-in-possession régime. As a result, except in circumstances of ineptitude or fraud, the debtor's management has been permitted (and, in fact, encouraged) to continue operating the company in bankruptcy, subject to creditor and court supervision. The theory behind the United States régime is that the debtor's existing management has the greatest knowledge about the debtor's business, which core knowledge will be a crucial element of the debtor's attempts to reorganize its debt and operations. Where the debtor-in-possession cannot (or is not permitted to) continue to function, a third-party trustee must be appointed to either run the business or liquidate the assets.

As a practical matter, it is often difficult to entice current management to continue in office after a Chapter 11 filing. In the past, debtors often sought court approval of key employee retention plans, which were designed to provide incentives for the debtors' management personnel to continue their employment through a successful reorganization. The requirements of the new US bankruptcy legislation will make it substantially more difficult for debtors to obtain court approval of proposed retention plans.⁵ Consequently, in the future debtors may encounter difficulties in retaining their essential management personnel.

The new US bankruptcy legislation, which imposes additional financial and logistical burdens on the debtor-in-possession, may lead to a shift in the historical landscape of the debtor-in-possession régime. In the coming years, it will be interesting to see whether this new legislation causes more debtors-in-possession to fall "out of possession", possibly resulting in the more frequent appointment of Chapter 11 or Chapter 7 trustees and virtually ensuring more contested motions over such issues.

English law takes a diametrically opposing view to the debtor-in-possession approach adopted in the US, considering such an arrangement akin to "leaving a drunk in charge of a pub". Independent administrators are therefore appointed to an insolvent company and then are bestowed with a wide range of powers, including the ability to remove and appoint directors.⁶ Further, under the provisions of Paragraph 64 (1) IA 1986, once a company is placed into administration, its directors may not exercise any management powers without the consent of the administrator(s).

The application of these provisions is evident from the status of the European C&A companies. The independent insolvency practitioners from the corporate restructuring team of Kroll Worldwide, in tandem with an extensive internal support network in each

⁵ The new section 503(c) of the Bankruptcy Code forbids a debtor from paying a retention award to an insider absent findings by the court that the payment is necessary to retain the insider because: (a) the person already has a bona fide job offer from another business at the same or greater rate of compensation and (b) the person's services are "essential to the business."

⁶ See paragraphs 59 and 61 of Schedule B1 to IA 1986.

jurisdiction, have been responsible for all aspects of the day-to-day trading of the entire European C&A group since its entry into insolvency proceedings on 15 July 2005. The responsibilities of the incumbent directors have been usurped in favour of the administrators and their representatives, although to ensure a smooth transition, the administrators have continued to work in conjunction with some members of C&A's UK and European management.

The Players

Besides the Bankruptcy Court and the debtor itself, there are many players in a Chapter 11 proceeding. For example, one or more United States Trustees is appointed in each jurisdiction to oversee the administrative aspects of bankruptcy proceedings. United States Trustees ensure that debtors comply with various administrative requirements, weigh in on the reasonableness of professional fees, and appoint official committees to represent a debtor's various constituencies.

In each case, the Bankruptcy Code requires the United States Trustee to appoint a committee of unsecured creditors. The United States Trustee also has the discretion to appoint additional committees – including committees of bondholders and equityholders. All “official” committees are permitted to retain professionals and, subject to court approval, to require the debtor's estate to pay the resulting professional costs.

In addition to the participation of these “official” committees, the Bankruptcy Code permits all “parties-in-interest” to participate in the Chapter 11 proceedings. In effect, this means that any interested individual -- no matter the size of his or her stake in the debtor -- is entitled to obtain information regarding the course of the proceedings and to object and be heard by the Bankruptcy Court at all stages of the proceedings.

The presence and participation of these various players constitutes a significant administrative workload for the debtor -in-possession, which has to negotiate with, appease or litigate against all of these parties (which often have, amongst themselves, competing agendas) during the reorganization process. At the date of submission of this paper for publication, parties in the US C&A proceedings had made well in excess of a thousand filings with the Bankruptcy Court in just three-and-a half months. The vast majority of these filings are the result of the various parties taking adversarial positions against the debtor-in-possession or one another.

Whilst the adversarial nature of Chapter 11 necessarily increases the overall costs for all parties involved, it also obliges the parties to deal with matters openly and to take action to resolve the critical issues in the case, either consensually or with court intervention, with the ultimate goal of arriving at a consensual disposition of the debtor's estate.

The situation is not the same in England and Wales, where the administrators are able to undertake their task with limited formal creditor involvement and little or no recourse to the courts. The first opportunity that English insolvency law allows for the creditors to provide any input on the administration proceedings is at an initial creditors' meeting that must be held within 10 weeks of the making of the administration order. At this meeting the administrators must obtain the support of a simple majority of the creditors present and voting for their proposals. Moreover, whilst the administration proceedings are run under the aegis of the court, it is rare for the English court to be seized in connection with the

administration, and often the process can run its course and then conclude without any court involvement whatsoever.⁷

In C&A UK, there have been limited applications made to the court on specific issues at the behest of the administrators themselves, but no creditor or other stakeholder has sought the intervention of the English courts. Further, whilst informal discussions have been taking place with creditors relating to ongoing trading issues, the initial creditors' meetings scheduled for mid-September represents the first official opportunity for the creditors to influence the conduct and outcome of the administration proceedings.

Venue and Jurisdictional Considerations

An interesting distinction between Chapter 11 and administration is that relating to venue. The United States Code provides that a Chapter 11 filing can be made in the district court for the district “*in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case has been located for the one hundred and eighty days immediately preceding such commencement.*”⁸ The only requirement for a debtor to file proceedings in a particular state (or in the United States generally) is therefore that it has a place of business or property in the United States. As a result, domestic debtors can theoretically prepare for a Chapter 11 filing by placing assets into a jurisdiction with a favourable stance on issues deemed of critical importance. If a debtor abuses or attempts to manipulate this system, however, a party can file a motion to remove venue to another district or, where appropriate, dismiss the case.

The US venue laws would, on their face, allow certain foreign debtors to file Chapter 11 proceedings in a US jurisdiction. Indeed, the United States Bankruptcy Court for the Southern District of Texas applied the Bankruptcy Code's venue rules to find that Yukos Oil Company, a Russian entity, was eligible to be a debtor under Chapter 11 because: (i) one of its subsidiaries had approximately \$2 million in funds on deposit in a bank located in the Southern District of Texas; (ii) it had deposited approximately \$6 million into a trust account held by its United States attorneys; (iii) approximately 15% of its stock was held by United States institutional investors; and (iv) its chief executive officer was resident in Texas.⁹ The same court later dismissed Yukos' Chapter 11 proceeding, however, finding that Yukos: (i) was not pursuing a financial reorganization; (ii) could effectively pursue insolvency proceedings in other forums – including its native Russia; and (iii) had acted in bad faith by attempting artificially to create US jurisdiction (and thus avoid the application of Russian law) by depositing company funds in the US less than one week before the bankruptcy filing.¹⁰ This ruling, of course, raises the question of exactly how long a company must

⁷ A court hearing is not required for the initial application if the new “out of court” procedure introduced by the Enterprise Act 2002 is adopted. This was not appropriate in C&A because of the sophisticated jurisdictional issues involved. An example of an administration using this new procedure without involving the English courts is the case of Woven Electronics Limited (Case number 556/2005).

⁸ 28 U.S.C.A. § 1408 (West 2005).

⁹ *In re Yukos Oil Company*, 320 B.R. 130 (Bankr. S.D. Tex. 2004).

maintain a presence in the US prior to a Chapter 11 filing in order to establish the necessary minimum contacts to render jurisdiction appropriate.

The scope of application of administration filings has now been extended through the operation of the provisions of the EIR. These days, administration proceedings can be commenced in respect of any entity that has its “centre of main interests” in the UK. As we all now know by rote, the centre of main interests of a debtor corresponds to the place where it conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.¹¹ In brief, this test revolves around creditors’ perceptions of the location of command and control of a company, rather than the actual location of its corporate HQ or property. In C&A, of the 24 companies placed into UK administration proceedings, only 6 were incorporated in England & Wales. The remainder were incorporated in 9 other European jurisdictions under the applicable local laws. In his judgment dated 15 July 2005 (admitting all 24 companies into English insolvency proceedings), Mr. Justice Lawrence Collins held that, given that the main administrative functions (e.g. cash co-ordination, human resources, information systems, sales etc.) of each of these companies had been carried out in the UK (at least since the entry of the US parent into bankruptcy protection on 17 May 2005), the centre of main interests of each company was located in the UK and hence, the English courts had jurisdiction to make administration orders in respect of each of them.

An interesting distinction can be drawn between the US, where some level of physical presence in the relevant district is required to maintain a Chapter 11 case, and England (and by extension through the operation of the EIR all of Europe), where a physical presence in a particular jurisdiction is not required for the commencement of main proceedings under the EIR in that jurisdiction, and regard will instead be had to the perceived location of that company’s management.

One potential disadvantage of this application of the EIR is that it may entail challenges to the administrators’ control of the process resulting from the bringing of secondary proceedings in the jurisdiction of incorporation over the assets of that debtor located in the secondary jurisdiction. By way of comparison, once a debtor commences a Chapter 11 proceeding in one United States jurisdiction, that jurisdiction has complete control over the course of the proceedings. Neither the debtor nor any third party is permitted to institute separate proceedings in any other United States jurisdiction.¹²

¹⁰ *In re Yukos Oil Company*, 321 B.R. 396 (Bankr. S.D. Tex. 2005) (noting that Section 1112(b) of the Bankruptcy Code permits a court to dismiss a case for “cause”, including the debtor’s bad faith and the totality of the circumstances surrounding the debtor’s bankruptcy case.).

¹¹ See Recital 13 to the EIR.

¹² If, however, a creditor, party in interest or the Bankruptcy Court believes that the debtor inappropriately commenced its Chapter 11 case in a particular jurisdiction, the case may be transferred to another jurisdiction.

Timing

As noted above, Chapter 11 can be a lengthy process. This is particularly the case in circumstances that involve large and complex corporations or where stakeholders take particularly adversarial positions. On the other hand, Chapter 11 proceedings can also proceed quite quickly. Consecro, Inc. filed bankruptcy proceedings in December 2003. The company was able to sell substantially all of its finance operations within three months of filing (at a price of more than one billion dollars) and was then able to confirm a plan of reorganization dealing with remainder of its operations just six months after the sale. Generally speaking, however, Chapter 11 is by nature a consensus-driven process involving many interested parties -- and when consensus cannot be easily reached, the process can take a substantial period of time.¹³

By comparison, the administration process operates to an expedited timetable. The applicable legislation sets down a maximum duration of the administration of just one year, and most administrations are dealt with in a much shorter period.¹⁴ The rationale behind this aggressive timing is a belief that the going concern value of the business of the company in administration will deteriorate as a result of its ongoing insolvency. For these reasons, administrations are often "pre-packaged" and the company is placed in administration only to be sold immediately to an approved bidder. This was the case in the recent sale of the Red Letter Days gift voucher business, in which Kroll acted as the administrators. In such scenarios, administration is often used as a shelter from creditor pressures in which to conclude the sale negotiations.

The contrast between the two systems is evident in the C&A proceedings. By the time that this paper is presented, bids for the C&A European businesses will be well advanced and initial creditors' meetings held in respect of each of the companies in administration. In the ordinary course, the businesses should be sold shortly thereafter. On the other hand, it is unlikely that C&A US will have had the opportunity to present any long-term plan before its European counterparts consummate the sale of their assets.¹⁵ Despite the slower process, however, C&A US may ultimately experience an increase in both the value of its business and the value of its assets as a result of its stabilization in Chapter 11. The question of which approach ultimately reaps the greatest overall benefit for creditors thus remains the subject of considerable debate both domestically and internationally.

¹³ The overall speed of Chapter 11 cases may increase as a result of the new US bankruptcy laws. For example, under the current law, debtors have the exclusive right to file a plan of reorganization for 120 days from the beginning of the case. Courts routinely extend this deadline -- sometimes for several years -- to permit the debtor to stabilize and negotiate a consensual plan of reorganization with its creditors. Under the new law, courts will only be able to extend the exclusivity period to 18 months from the beginning of the case. This may increase the overall pace of Chapter 11 cases by requiring debtors to begin the plan formulation process at a much earlier stage. It could also, however, extend the duration of Chapter 11 cases if debtors are unable to meet this shortened deadline and other parties-in-interest seize the opportunity to file competing plans of reorganization -- all of which will have to be litigated in the courts.

¹⁴ The one-year time period is, of course, subject to extension by application to the court.

¹⁵ C&A US will undoubtedly take advantage of the time it is given in the Chapter 11 process to attempt to reorganize and generate a greater return for its creditors than it would had it immediately liquidated.

Familiarity

Chapter 11, which has been functioning in its present form since 1978, is a “tried and tested” mechanism for dealing with an insolvent US debtor. Any number of professional restructuring firms can offer a prospective debtor extensive experience to guide it through the perils of Chapter 11. Additionally, many entities have extensive experience in the procedures and requirements of Chapter 11 as a result of, among other things, their practice of frequently purchasing assets in a bankruptcy context or lending funds to debtors-in-possession. This familiar landscape is likely to change once the new US bankruptcy laws become effective on 17 October 2005. At that time, even the most well-seasoned bankruptcy courts and professionals will be faced with the task of interpreting and applying the new, unfamiliar US bankruptcy laws, which will create substantial uncertainty in the Chapter 11 process.

Although there have been significant recent changes to the applicable law (principally through the amendments introduced by the Enterprise Act 2002, e.g. with respect to the rôle of administrative receivers), English practitioners remain reasonably familiar with the administration procedure itself. However, in recent years, uncertainties have arisen from the extension of the administration process into Europe through the operation of the EIR. Frequently, an English administration must be implemented in a foreign jurisdiction that has a civil law approach and a fundamentally different domestic insolvency régime, leading to linguistic, conceptual and practical difficulties. Further, and as described above, secondary proceedings in respect of the assets of companies in any particular jurisdiction can intervene causing difficulties, for example, in the realm of security to protect external funding and the administrators’ fees and expenses.¹⁶

The EIR has also been accused of paradoxically encouraging the very phenomenon it set out to tackle – “forum shopping”. Some commentators have observed that the potential reach of the EIR encourages parties to be proactive in seeking out the venue best suited to their needs, a practice not unlike that often engaged in by US debtors instituting Chapter 11 proceedings. Many European creditors instituting insolvency proceedings may view the “creditor-friendly” English administration system as preferable to other European systems. Similarly, debtors in the US instituting their own Chapter 11 proceedings often choose to file their cases, where possible, in the District of Delaware or the Southern District of New York because of the perceived sophistication of the courts and the vast body of established case law.

Disclosure of Information

Nearly every document filed in a Chapter 11 proceeding is public.¹⁷ This means that in most cases any person or entity – regardless of its affiliation with the debtor -- can stay abreast of the debtor’s operations and proceedings by simply locating relevant documents on the Internet or requesting them from the court. Creditors and parties-in-interest can also require the debtor to send to them notice of every filing made in connection with the Chapter 11

¹⁶ There are of course several well-known examples of domestic courts taking issue with a foreign court’s interpretation of, and application of, the EIR, leading to extensive litigation.

¹⁷ A debtor or party in interest may request that a court permit it to file certain documents under seal (i.e., for the court’s eyes only). For example, in the United Airlines bankruptcy case, the court permitted a substantial number of documents relating to confidential aircraft leasing deals to be filed under seal.

proceedings. Additionally, the Bankruptcy Code requires the debtor to mail the proposed plan and disclosure statement (which generally contain detailed financial and operational information) to every creditor and party-in-interest in the case, regardless of whether any such party has expressed an interest in receiving such documents. Finally, members of the official creditors' committee are entitled to view (together with their professional advisers) confidential and proprietary information subject to the execution of a confidentiality agreement.¹⁸

In administration proceedings, the evidence submitted by a debtor to the court in support of its application for administration is generally protected by and subject to a confidentiality order, the effect of which is that creditors are not entitled to see the relevant information. The administrators are required to provide the creditors with certain categories of information during the course of the administration, but the content and extent of this information is of a very restricted nature compared to that disclosed in US proceedings. For example, two weeks prior to the initial creditors' meeting, the administrators must send to the creditors a report dealing with certain prescribed matters relating to their conduct of the administration and the status of the company in administration. Following the initial creditors' meeting, English law only prescribes that a progress report must be issued to the creditors within seven months of the commencement of administration.

Conclusions

Chapter 11 is a tried and tested flexible rescue mechanism that aims to rehabilitate a debtor, to the extent possible, in order to reap as substantial a return as possible for creditors. Chapter 11 cases typically involve a large number of interested parties and the significant involvement of the Bankruptcy Court. By comparison, administration, whilst also a flexible process, is very time-sensitive and is controlled by fresh parties, with little or no court involvement. However, this process is frequently orientated towards the disposal of a company's assets rather than its rehabilitation. Whilst both systems are geared toward creditors, it is a question of both intellectual debate and great economic significance as to which method -- if either -- results in the greatest value for such creditors, and it may be that some sharing of ideas and processes between the systems will result in a system superior to either one standing alone.

Many European jurisdictions have sought with varying degrees of success to emulate the perceived success of Chapter 11 by establishing similar régimes. However, these régimes are often very different from both Chapter 11 and each other by virtue of the particularities of their jurisdiction's legal system and its approach to insolvency (e.g. favouring creditors or other stakeholders, such as employees). In recent years, a level of co-ordination between these different European régimes has developed through the use of the EIR, which in the case of C&A has provided the opportunity for an orderly disposal of a complex multinational business that would previously have been much more difficult.

¹⁸ The new US bankruptcy laws (effective from 17 October 2005) will also require creditors' committees to provide access to information to non-committee members that hold claims of the kind represented by the committee (i.e., unsecured claimants will receive information from the unsecured creditors' committee). The application of this law is likely to raise issues regarding the proper balance between the debtor-in-possession's legitimate right to keep confidential its proprietary information and creditors' rights to receive information regarding the bankrupt entity.

Whilst the EIR has provided a collective solution within Europe, as yet there is no formal mechanism to reconcile Europe and the US. Co-operation is possible, but practical arrangements must be made on an *ad hoc* basis to deal with some of the fundamental differences between the two systems, such as court and management involvement and the volume of information disclosed. The newly enacted Chapter 15 of the US Bankruptcy Code, which allows a US bankruptcy court to grant recognition to a foreign proceeding after notice and a hearing, subject to certain requirements being met, may ultimately provide an enhanced framework for accomplishing and managing cross-border proceedings. This enactment effectively codifies the UNCITRAL Model Law on Cross-Border Insolvency. It will be interesting to see which European companies follow suit in years to come.

The differences between the insolvency régimes in place in the US and many European countries, including England, are substantial. Each system has both good points and bad. Courts and lawmakers in each country have attempted to balance many competing interests (i.e., cultural beliefs, political ideologies, societal values and historical backgrounds), and serendipity drives their judgment as to which competing interests should prevail. An evaluation and understanding of the differences between the various régimes is an invaluable tool for practitioners in all jurisdictions that can be used to enhance their own practices. Practitioners are free, within the rules of their particular legal system, to adopt the ideas currently being utilized in other jurisdictions to which they are exposed. We would submit that such a mutual exchange of insights and co-operation should be encouraged and pursued whenever possible. By understanding and incorporating these “foreign” principles, practitioners will be better equipped to develop innovative solutions to the problems faced by their clients in whatever jurisdiction they practice.