The Future of Cross-Border Insolvency Protocols

From a Civil Law Perspective

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Annex A: III Prospective model international cross-border insolvency protocol
(also includes the ALI Guidelines for Court-to-Court Communication)

Annex B: Cross-Border Insolvency Concordat

List of abbreviations

ALI	American Law Institute
CoCo Guidelines	Communication and Cooperation Guidelines for Cross-border EU insolvency-proceedings
Committee J	Insolvency and Creditor's Rights Committee of the Section of Business Law, International Bar Association (Since may 2004 renamed in: Section on Insolvency, Restructuring and Creditors' Rights, Legal Practice Division)
Concordat	International Bar Association Cross-Border Insolvency Concordat
IBA	International Bar Association
III	International Insolvency Institute
MIICA	Model International Insolvency Cooperation Act
Model Law	UNCITRAL Model Law on Cross-Border Insolvency Proceedings
Model Protocol	Model International Cross-Border Insolvency Protocol (see Annex A)
NAFTA	North-American Free Trade Organisation
The Guidelines	The Transnational Insolvency Project Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases
TIP	Transnational Insolvency Project
UNCITRAL	United Nations Commission on International Trade Law
INSOL International	International Association of Restructuring, Insolvency and Bankruptcy Professionals
Working Group V	The United Nations Commission on International Trade Law Working Group on Insolvency Law

Introduction

At the start of the 21st century, the world of international commerce has rapidly undergone a massive transformation due to an increased level of globalization. With the steady, rising use of cutting edge communicative and informational technologies, businesses nowadays are capable of operating on a global scheme, communicating with their offices and subsidiaries abroad as if they were only just down the street from the head office. Decisions that effect the corporation's global operations can be made in the blink of an eye, and resources can be allocated internationally in a manner which best suits the company's objectives.

And yet, in the onset of an impending insolvency case, all that global cohesive business is swiftly broken down until all that remains is a series of disconnected segments in different countries, and multiple proceedings in varying foreign jurisdictions. With manifold representatives and creditors all adhering to their own national laws, it seems almost inevitable that both legal and practical conflicts must ensue from these concurrent proceedings.[1]

In the absence of multilateral treaty arrangements with global effect, and the inadequacy of existing national laws to deal with the inconsistencies between the insolvency laws of different jurisdictions, insolvency practitioners (particularly those operating from an Anglo-American perspective) have developed the custom of utilizing so-called "protocols" to deal with these conflicts, during the 90's. These protocols were designed to help coordinate the proceedings and facilitate direct communication between the different courts and representatives.[2] And despite an increasing number of international projects and measures to alleviate the conflict-of-law issues in international insolvencies, the number of cases in which the representatives drew upon the usage of a protocol, has only increased during the past decade.[3] In recent large cross-border insolvency cases such as those of the Lehman Brothers bank and Bernard Madoff, (at least) attempting to come to an agreement concerning the implementation of a protocol in such a large international insolvency case appears to be considered almost absolute. As a result of this growing practice, the International Insolvency Institute is in the process of crafting a "Model International Cross-Border Insolvency Protocol". A draft version of which has been prepared by Bruce Leonard and

[1] Leonard 2005, p.1.
[2] Flaschen 1998, p. 589.
[3] Leonard 2005, p.6.

Joseph Bellissimo[4], who have based their design on provisions and experience from existing protocols. The question begs if this "Model Protocol" might be applicable in insolvency matters involving civil law courts as well, since the majority of cases in which cross-border insolvency protocols have been approved concerned cross-border insolvency cases between Canada and the United States. Though it is not entirely without precedent that protocols were applied in international insolvency cases involving a civil law jurisdiction,[5] examples of such cases are limited, and authors worldwide are skeptical and divided as to what legal status can be attributed to these protocols by a civil law court. This is why, in this thesis, I will attempt to answer the question what the future prospects are for application of cross-border insolvency protocols in civil law countries and if this proposed Model Protocol can also find use in cross-border insolvency proceedings involving a civil law jurisdiction.

To this end, I will first delineate the development of cross-border insolvency protocols over the past decades in light of international and global developments in the field of cross-border insolvency to create an international standard, to ascertain where the protocol stands today in the field of international insolvency. In the second and third chapter, I will attempt to clarify what legal authority a civil law representative and a civil law judge might have to enter into such an agreement concerning a protocol and what binding power it can be ascribed. In chapter four, I will consider if their usage actually contributes in creating a more universal approach for insolvency practitioners worldwide, or if they in fact represent the territorial methodology. And lastly in this thesis, in chapter five, I will discuss a few practical concerns regarding the use of protocols expressed by authors in the past and contemplate if these apprehensions can still be deemed legitimate. By the end of this thesis, I will have given a reasonable overview of the legal and practical concerns that authors have expressed over the years regarding the usage of protocols in international insolvency cases and be able to formulate a well-substantiated legal opinion as to their application from a civil law perspective. And finally, based on my conclusions, I will be able to answer the question if the proposed Model Protocol might find application in civil law countries as well.

[4] See Annex A.
[5] Working Group V 2009, III.A.5. paragraph 19.

Chapter 1: A Brief History of the Cross-Border Insolvency Protocol

"Global enterprises operating in global markets,
must inevitably produce global bankruptcies", [6]
Jay L. Westbrook

Insolvency law by its very nature must be symmetrical with the market, because it must govern the interests of all parties throughout the market whose interests are implicated in an insolvency matter. Consequently, in this increasingly global world that we live in, containing a global market with global interests, our insolvency law must be global as well.[7] Thus, with the rapid growth of the number of multinational corporations since the 1980's, the need increased for mechanisms to deal with the difficulties that arose in cross-border insolvency cases. Unfortunately, the failure of negotiators in North America and the European Union to produce a continental framework for cross-border cooperation insolvencies at the time, signaled that a harmonization of substantive law or treaties regarding international insolvencies was not likely to be achieved in the near future.[8]

And so, in the absence of adequate formal law or regularized institutional responses, practitioners themselves were challenged to overcome the difficulties that might arise in cross-border insolvencies. In fact, they were left no other choice: the amount of bankruptcies concerning large multinational corporate groups was increasing and treaties or legislation remained absent.[9] So to tackle this problem, legal practitioners experimented with various strategies over the years, the first of which would be the Model International Insolvency Cooperation Act or MIICA.

[6] Westbrook 2001, p. 99.
[7] Westbrook 2000, p. 2283-2287.
[8] Halliday 2009, p. 41.
[9] Halliday 2009, p. 41.

1.1. MIICA

In 1986, Committee J of the International Bar Association (IBA)[10] took it upon itself to fill the void left by legislators in the field of international insolvency. This IBA Committee on Insolvency and Creditors rights strived to develop a legal instrument requiring the application of the substantive law of a foreign court in a cross-border insolvency matter, albeit with some discretion to apply local law where the court feels it must.[11] A praiseworthy goal, but the question begged what type of legal technology would be best suited to fill this global gap in cross-border insolvency law. The logical choice: a convention, required parties to obtain complete consensus on the wording of the document that would have to be adopted without alteration by all countries and accepted as binding in their own law. But because of great dissimilarities between different national insolvency laws, the difficulties in reaching such an agreement were immense. This is why the IBA Committee J attempted to create an instrument that would produce sufficient harmonization, without becoming a legal straightjacket.[12]

So their weapon of choice in this matter became a "model law": a flexible instrument to be adopted by countries, but with the option for considerable modification in order to be effectively integrated with domestic legislation. The model law combined adherence to the master principles, with the possibility of variation on the detail. Nations can deviate from the model, but are encouraged not to do so.[13] This effort would cumulate in the Model International Insolvency Cooperation Act, or MIICA. Mainly, the act provided that an adopting country would have to recognize a foreign bankruptcy proceeding in the "principal forum" (though the act failed to specify where this "principal forum" would be).[14]

Unfortunately, to become a success the MIICA needed an early adoption by a leading nation, which failed to occur. The U.S. did not make the first move, because implementation of the MIICA would have profound effects on U.S. bankruptcy law and eliminate some of its critical

[10] Since 2004 known as the IBA's Section on Insolvency, Restructuring & Creditor's rights (SIRC), see: (<<www.ibanet.org>>).
[11] Westbrook 2009, p. 43.
[12] Halliday 2009, p. 43.
[13] Halliday 2009, p.44.
[14] Wessels 2006a, para. 10102; Lopucki 2005, p.83; Westbrook 1994, p. 483.

details.[15] The Europeans on the other hand suspected the MIICA of being a wolf in sheep's clothing for introducing the American system of allowing management to stay in control during the proceedings, and thus it failed to receive international support there.[16] Subsequently, no other nation was inclined to adopt the MIICA[17] and in my research I have encountered no evidence that any country has ever seriously considered adopting it. The project was not a complete loss however. The designers of the code demonstrated what might be possible in the field of cross-border insolvency. More importantly, the concept of a Model Law was a legal technology that would prove a valuable instrument in the hands of UNCITRAL in a few years time. UNCITRAL concluded from the MIICA experience, that the creational process of a model law would require legal experts and government officials and representative to work together.[18] Statutory enactment is required with a model law, which is why it would be necessary to involve legislators in the creation process of a model law concerning cross-border insolvencies. UNCITRAL would not make the same mistakes.[19]

1.2. The first protocol: Maxwell Corp.

In the meantime, insolvency practitioner however urgently required a legal instrument to help coordinate cross-border insolvency matters. This professional need led to the development of the first cross-border insolvency protocol: the Maxwell protocol.

On the 5th of November 1991, English media mogul Robert Maxwell shuffled off his mortal coil when he fell off the deck of his luxury yacht, leaving behind a large global corporate group on the edge of financial collapse. With some four hundred subsidiaries worldwide and the company's default on a $2 billion dollar loan, the threat of dismemberment by creditors around the globe was imminent.[20]

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[15] Halliday 2009, p.46.
[16] Fletcher 1999, p. 325; Israël 2005, p. 66-67.
[17] Halliday 2009, p.46.
[18] See: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, available at (<<www.uncitral.org>>), para. I.7-18.
[19] Halliday 2009, p. 46-47.
[20] Mason 2008, p. 37; Halliday 2009, p. 41.

From a British perspective, Maxwell Corp. had very little connection with the U.S.: it had no place of business in the U.S., there was only one U.S. resident director and the company had virtually no U.S. creditors.[21] Maxwell management however, had no intention of losing control of its company and because some 70 to 80 percent of the company was vested in subsidiaries in the US, they were able to file for protection from creditors under Chapter 11 of the U.S. Bankruptcy Code on December 16, 1991. The following day in London, Maxwell's English Council, placed the company into administration under the United Kingdom's Insolvency Act of 1986.[22] Confronted with "the opportunities for confusion, chaos and paralysis" by placing the fate of Maxwell Corp. in the hands of two separate jurisdictions, the English High Court, in the person of then-High Court Justice Leonard Hoffmann, approved and adopted an order and protocol to govern a coordinated response on the 31st of December 1999. Fifteen days later, the U.S. High Court of Bankruptcy Judge Tina Brozman followed the English High Court example and she approved of the protocol (after a few modifications) as well.[23]

The goals of the Maxwell protocol were to maximize the value of the estate and to harmonize the proceedings to minimize expense, waste and jurisdictional conflict. As a means to achieve these goals, the Maxwell protocol provided a framework to coordinate the functions of the U.K. administrators (PwC, led by Mark Homan) and the U.S. examiner Richard Gitlin.[24] The U.K. administrators were recognized as the corporate governance of the Maxwell estate, but major decisions concerning the estate would require the consent of the U.S. examiner or approval of the U.S. court. As a guiding principle, the Maxwell protocol provided that the parties had to develop a coordinated plan of reorganization and scheme of arrangement.[25] With almost $2 billion in assets and over $4 billion of liabilities involved in the Maxwell proceedings, it was a remarkable achievement that U.K. administrators and the U.S. examiner were able reach consensus on all matters of coordination and cooperation, in a manner that not a single conflict arose between the two jurisdictions requiring a judicial solution.[26]

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[21] Bridge 2001, p. 250.
[22] Israël 2005, p. 89-90; Halliday 2009, p. 47; Bridge 2001, p. 250.
[23] Mason 2008, p. 38; Halliday 2009, p, 47; Flaschen 2009, p.2, available at: (<<evanflaschen.net/Maxwell%20Sausage.pdf>>) [last visited: 10 november 2009].
[24] Flaschen 2009, p.2., available at: (see footnote 24).
[25] Flaschen 1998, p. 591.
[26] Flaschen 1998, p. 592.

The success of the Maxwell reorganization showed that an ad hoc solution between two courts with flexible judges, could serve the purpose that the MIICA could not. With modest goals (merely to resolve the potential conflicts of a single case between two leading common law courts) the Maxwell protocol provided an instrument that might be more readily applied in cross-border insolvencies than other, more demanding instruments, such as conventions, treaties or model laws.[27]

1.3. The Cross-Border Insolvency Concordat, a Model Protocol?

In light of the (relative) failure of the MIICA and the success of the protocol used in the case of Maxwell, it was clear that, at the time, an instrument based on the Maxwell protocol would have the best chance of success in the field of cross-border insolvencies. This instrument would have to be precise enough that it facilitated predictability but abstract enough to be applied across various jurisdictions: in short, a master protocol.[28] As a result, two New York corporate insolvency lawyers: Mike Sigal and Karen Wagner, took it upon themselves to begin the draft of such a master protocol - or Concordat as they called it -, a set of principles to govern relations among courts in cross-border insolvencies. Later on, they enlisted the IBA's Committee on Insolvency and Creditor's Rights: Committee J (which also created the MIICA, see chapter 1.1.), to help take on the demanding international project of drafting such an instrument.[29]

The IBA recognized that the subject of cross-border insolvencies was rarely addressed in treaties and that international commerce would be encouraged if general guidelines were established for the treatment of cross-border insolvencies.[30] Therefore, the International Bar Association took it upon itself to further develop the Concordat for use in cross-border insolvencies. To this end the IBA brought a multi-country subcommittee into existence that was comprised of academics, insolvency practitioners from over 25 countries and judges from eight different countries.[31] These three groups represented both civil and common law traditions and the language was translated from "common-law language" to "neutral language" by an

[27] Halliday 2009, p. 48-49.
[28] Halliday 2009, p. 49.
[29] Halliday 2009, p. 49.
[30] In *re Hackett*, 184 B.R. 656m 658, n.3 (Bankr. S.D.N.Y. 1995), as mentioned by: Nielsen 1996, p. 533.
[31] Leonard 2005, p.4; Wessels 2006a, para. 10114.

American/Belgian practitioner.[32] Eventually, Committee J developed a Cross-Border Insolvency Concordat ("the Concordat", see Annex B) that provided a set of ten generalized principles that the participants could adjust to fit the particular circumstances in an individual cross-border insolvency case. A non-binding protocol for the approach and harmonization of cross-border insolvency proceedings, aimed at better collaboration and equity. However, the Concordat was not intended to be used as, or as a substitute for, a treaty or a statute. Rather, the Concordat aimed to be an interim measure until such treaties or statutes were adopted by commercial nations. It was not supposed to be a rigid set of rules, but expected to change as it was used.[33]

In a way, the Concordat responded to a double failure: that of politicians following the route of diplomacy and treaties and that of lawyers following the legislative route. The technology of the Concordat provided a solution where lawyers relied on their professional counterparts, the judges, to implement it. Practitioners allied with the Courts to produce a practical solution to the failure of the diplomatic and legislative route. This participation between both judges and practitioners would be key to the success that followed the Cross-Border Insolvency Concordat[34] after its approval by the IBA Council in 1996.[35]. The Concordat served its purpose as a master protocol and provided an example for future protocols in many insolvency cases in the years that followed it. The basis for the increased use of protocols in cross-border insolvency cases in the past decade has been largely derived from the introduction and the success of the Cross-Border Insolvency Concordat by the IBA. [36]

1.4. UNCITRAL Model Law

Yet in spite of their advances, the MIICA, the Maxwell protocol and the Concordat, provided only partial solutions for advanced economies in close trading relationships. But the MIICA did demonstrate that a model law might be achieved, but that it would also have to transcend a particular professional association for it to be taken seriously by governments; the Concordat on

[32] Culmer 1999, p 563; Leonard 1998, p. 543.
[33] Annex B: IBA, "*Cross-Border Insolvency Concordat",* Introduction, p.4; Wessels 2007, p. 21; Wessels 2006a, para. 10113, 10114.
[34] Leonard 2005, p. 4.
[35] Halliday 2009, p. 49.
[36] Leonard 2005, p.5.

the other hand had shown that a cooperation based on principles, between (relatively similar) courts could significantly improve efficiency in cross-border insolvencies. Then again, the Concordat would probably only find application in a small amount of cross-border insolvency cases and only in common law countries[37] (although it was recognized that with suitable encouragement and possibly statutory assistance, it might also be applied in civil law countries).

In 1997, a new response to the growing need for a global insolvency law came from UNCITRAL in the form of a Model Law on Cross-Border Insolvency ("The Model Law"). This Model Law respected the differences in national insolvency laws and did not attempt a substantive harmonization of international insolvency law. Instead it was designed to assist states to equip their national insolvency laws with a framework that effectively addresses cross-border insolvency cases.[38] The Model Law resembles a simple convention, in that it determines the foreign insolvency proceedings that will be recognized, based on the exercise of jurisdictions in acceptable circumstances.[39] Summarized, it allows flexibility for adaptation among countries with different legal systems considering insolvency issues (articles 1-8), and it deals with the legal standing of foreign representatives in domestic legal proceedings (articles 9-14), the recognition of foreign proceedings (articles 15-24) and issues of cooperation among courts and insolvency representatives of different jurisdictions (articles 25-27).

So far, legislation based on the Model Law has been enacted in Australia (2008), British Virgin Islands (2003), Colombia (2006), Eritrea (1998), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006),Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), USA (2005) overseas territory of the United Kingdom (2005), and within Great Britain (England, Wales and Scotland) (2006).[40] The way in which the model law served as an inspiration for lawmakers differs substantially though, from staying very close to the original text (USA and Great Britain), to excluding

[37] Halliday 2009, p. 55.
[38] Guide to Encactment of the UNCITRAL Model Law on Cross-Border Insolvency, supra note 43, para. 1-3; Wessels 2007, p. 21.
[39] Mason 2008, p. 55.
[40] An updated list of countries who have adapted the model law is available at the website of UNCITRAL: (<<http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>>), [last visited: November 10, 2009].

various sections (Japan and Mexico)[41], to applying the Model Law on a reciprocal basis (British Virgin Islands, Mexico, Romania, South Africa and to a lesser extent New Zealand).[42] Also, other countries, e.g. Spain, the Netherlands and Canada, have chosen to follow the Model Law, not in its legislative form, but in the considerations which have led to legislation on this topic.[43]

Despite these differences though, the Model Law was an important leap forward in the field of international insolvency. For the first time, an attempt to harmonize the law on international insolvency proceedings was a truly successful one. Because of its global intentions however, the Model Law is inherently limited in its scope. And as a result of this, the next step in international cooperation in cross-border insolvency cases came at a more regional level, like the EU insolvency regulation and the Transnational Insolvency Project.[44]

1.5. The Transnational Insolvency Project

In the mid 90's prospects for harmonization of formal legislation or a comprehensive insolvency treaty between the countries involved in the North American Free Trade Agreement (NAFTA)[45] were still dim. Because of this, the American Law Institute (ALI) believed that a private-sector initiative in the cross-border insolvency field would be a useful next step within NAFTA. And so it came to be that the ALI initiated the Transnational Insolvency Project (TIP) to develop cooperative procedures for use in business insolvency cases involving companies with assets in more than one of the three NAFTA countries.[46] This project was proceeded in two phases: the first phase was to produce authoritative summaries of the insolvency law and practice of the three NAFTA countries. The second phase was aimed at the development of principles and procedures that would be acceptable all three of the countries involved, which should lead to the harmonization and coordination of insolvency proceedings involving the jurisdictions of multiple

[41] For an overview of these exclusions made by Japan and Mexico see: Wessels 2006b, p. 202-203, available at: (<<www.iiiglobal.org>>).
[42] Wessels 2007, p. 10; Wessels 2006b, p. 205, available at: (<<www.iiiglobal.org>>).
[43] Wessels 2009b, p. 25; Canada proclaimed UNCITRAL model law amendments on September 18, 2009, not using Model Law language, but the Canadian government announced that it had enacted the Model Law. The new Canadian implementation does have many omissions compared to the Model Law though, see generally on this subject: Ziegel 2007, p. 1055-1060.
[44] Westbrook 2001, p. 101.
[45] i.e. The United States & Canada common law jurisdictions, and Mexico civil code.
[46] Leonard 2005, p.16; Westbrook 2001, p. 101.

NAFTA countries. This second phase would result, among other things, in the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ("The Guidelines").[47]

However, the TIP was not intended to abolish the use of protocols in Cross-Border Insolvency cases altogether. It was designed to offer parties and courts a common set of principles from which they could negotiate agreements on a case-by-case basis. The TIP offered a set of principles designed to be "adopted" by court order, where such an adoption would establish baselines for further progress at an early stage in a cross-border insolvency case and help the parties and courts to develop specific procedures as the case continued.[48]

On the 16th of May 2000 the American Law Institute (ALI) and the International Insolvency Institute (III) adopted the Guidelines in "The Principles of Cooperation among NAFTA Countries". Since then the Guidelines have been applied on a regular basis in both the US and Canada.[49] In 2007 judges had applied the Guidelines in over 20 cross-border insolvency cases.[50] In the US though, the Guidelines have not been adopted nation-wide.[51]

1.6. The use of protocols in a Model Law era

But the great progress made by the introduction of the Model Law, the Transnational Insolvency Project and the European Insolvency regulation has not led to a decline of the use of protocols over the years. On the contrary: since the 1990's courts in different countries have increasingly entered into arrangements and have established cross-border insolvency protocols to harmonize and coordinate cross-border reorganizations.[52] As the insolvency professionals gained experience with cross-border insolvency cases, protocols based on the example of the Concordat became more and more common[53] and their increasing use (though currently limited to a handful of states) suggests that they may become the norm in insolvency cases with a significant

[47] Leonard 2005, p. 16; Westbrook 2001, p. 102.
[48] Westbrook 2001, p. 103.
[49] Wessels 2008a, p. 18.
[50] Wessels 2007, p. 32; See for instance: *Re Calpine Corporation*; *Re Pope & Talbot Ltd.*; *Re Quebecor World (USA) Inc.*; *Re Progressive Moulded Products Ltd.*; *Re Masonite International Inc., Re Nortel Networks, Re Madoff Securities* at para 5.
[51] Wessels 2008a, p. 18.
[52] Leonard 2005, p. 4.
[53] Leonard 2005, p.5.

international element.[54] In fact, The Model Law probably contributes to the use of protocols, because it specifically recognizes their usage. Article 27 (d) of the UNCITRAL Model Law states that cooperation with foreign courts and representatives may be implemented by use of an agreement. And although cross-border agreements do not replace the enactment of the Model Law as a means of facilitating cross-border cooperation and coordination, it may be used in conjunction with enactment of the Model Law and to complement it.[55] Furthermore, the CoCo guidelines not only recognize but even recommend the use of a cross-border agreement as the best means of achieving cooperation and the TIP Guidelines for Court-to-Court communication refer to the use of a cross-border agreement in the context of joint hearings. Some protocols incorporate these instruments by reference, others model specific provisions used in these texts.[56]

All in all, it is safe to say that the growing use of protocols has reduced the cost of litigation and enabled parties to focus on the conduct of the insolvency proceedings, instead of resolving conflict of law.[57] The solutions that cross-border protocols deal with even have the potential to develop into a "common law" of cross-border insolvency and as businesses tend to become more and more international, the opportunities to implement protocols for the benefit of the stakeholders involved in a cross-border insolvency case will only increase.[58]

[54] Working Group V 2009, p. 27, III.A.1, paragraph 7.
[55] Working Group V 2009, p. 23, II.D, paragraph 13.
[56] Working Group V 2009, p. 26, III.A, paragraph 2.
[57] Working Group V 2009, p. 27, III.A.1, paragraph 7.
[58] Leonard 2005, p.6; Wessels 2008a, p. 31.

Chapter 2: The authority of the insolvency representative

For a cross-border insolvency protocol to be effective, it is vital that the parties negotiating it possess the requisite authority and/or capacity to enter into such an agreement and to commit to it. However who possesses this capacity may differ from state to state as different national laws are applicable. But frequently they are entered into the by the insolvency representatives, sometimes by the debtor and may involve the creditor committee. It is rarely the case that a protocol is entered into between the courts.[59] Because of this, I will first discuss the authority of the insolvency representative in civil law countries to enter into a protocol, and return on the matter of judicial authority concerning protocols, further on.

To understand if the insolvency representative in a civil law country possesses the necessary authority and capacity to enter into the agreement of the use of a protocol, it is needed to examine the legal nature of such an agreement from a civil law perspective.

The German legal author Mario Hortig attempted to answer this question from his country's point of view and to achieve this he discerned three legal approaches to protocols:[60]

1) The "binding" protocol (das "Verbindliche" protocol)
2) The "non-binding" protocol (das "Unverbindliche" protocol)
3) The "in principle non-binding" protocol (das "Grundsätzlich unverbindliche protocol")

These three approaches can be placed on a spectrum between binding power ("Bindungsintensität") and flexibility. With at one end of the spectrum the "binding" protocol (greatest binding power, but with almost zero flexibility), at the other end of the spectrum the "non-binding" protocol (highest flexibility, though with almost no binding power) and somewhere hovering in the middle the "in principle non-binding" protocol.[61]

[59] Working Group V 2009, p. 30, III.A.4, paragraph 14.
[60] Hortig 2008, p. 216-231.
[61] Hortig 2008, p. 216-231.

2.1. The "binding" protocol (similar to a contract)

The "binding" protocol can be viewed as a binding cooperative agreement between the relevant parties. It binds the relevant parties in a way similar to a contract, and of the three approaches, this approach would give the protocol the greatest binding power over the relevant parties. And because it is formed as a contract, deviation from the protocol is in conflict with contract-law, and so consequently it provides the greatest legal certainty.[62] Unfortunately the other side of the medallion is that it does so at the cost of the flexibility in use of the protocol. If the circumstances in an insolvency case change, it is difficult to respond to that new situation because of the rigid "contract"-form of this approach towards protocols.[63]

Hortig, along with other German authors such as Eidenmüller and Wittinghofer[64], promotes this idea of a "binding" protocol in the form of an administration contract ("Insolvenzverwaltungsvertrag").[65] This legal approach is based on the notion that, by German Law, the insolvency court has the obligation to take any measures to avoid a negative change in the assets of the debtor and thus also has the obligation to imply an administration contract if that can avoid a negative effect on the debtor's assets (§21 under 1, of the German Insolvency Law). Based on this article a judge can either enter into such a contract himself or instruct the representative to do so, if this provides for a better value of the estate.[66] The authors Eidenmüller, Wittinghofer and Hortig are all sceptical however when it comes to the inclusion of judges in the administration contract.[67] An objection that has been raised against viewing the protocol as an 'administration contract' or, for that matter, any form of 'contract' is that it presupposes that smaller creditors are sufficiently informed and are able to defend their interests, which can not always be assumed.[68]

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[62] Hortig 2008, p. 218.
[63] Hortig 2008, p. 218.
[64] See: Eidenmüller 2001, p. 29-36; Wittinghofer 2004; both mentioned in: Paulus 2006, available at: (http://siteresources.worldbank.org/GILD/Resources/GJF2006JudicialCooperationinInsolvency_PaulusEN.pdf) [last visited: November 25 2009].
[65] This notion of the administration contract or 'Insolvenzverwaltungsvertrag' was first introduced by Horst Eidenmüller in: Eidenmüller 1999, p. 91.
[66] Eidenmüller 1999, p. 91.
[67] Eidenmüller 2001, p. 16; Hortig 2008, p. 231; See also: Paulus in 2006, Annex C, available at: (see footnote 63)
[68] Grossfeld 2000, p. 989.

2.2. The "non-binding" protocol (similar to a gentleman's agreement)

The second legal approach Hortig discusses finds itself on the other side of the spectrum between "flexibility" and "legal certainty". As far as its binding power is concerned, the "non-binding protocol" can be viewed as a gentleman's agreement. The binding power over the relevant parties is merely psychological and solely on a voluntary basis. This approach has the advantage of having a protocol with a certain obligatory nature to it, whilst parties are still able to deviate from it, if the situation so requires.[69] However from a German perspective, Hortig does make a few critical remarks to this approach:

Firstly, in practice, cooperative agreements such as these are always written, which immediately greatly diminishes the flexibility of this gentleman's agreement.[70] More importantly is that, by German law, the binding power of such an arrangement ("eine Abrede") flows forth solely from the will of the parties to be bound to the agreement ("rechtsbindungswillen") and not from external factors. These factors can only help to interpret this "will to be bound" of the parties involved.[71] But such a written gentleman's agreement would be nearly indistinguishable from an administration contract. To distinguish between the two, parties would have to incorporate the "non-binding" power of the protocol in a clause. Otherwise is would de facto become a "binding" protocol (i.e. an administration contract). However this clause by itself may only have an indicative effect when interpreting the protocol, as the concept of "falsa demonstratio non nocet" shows.[72] The same could be said from a Dutch perspective, because by Dutch law the content of a contract is subject to what good faith would require in a specific situation and it is possible that this might deviate from the actual text of the agreement.[73] So even when a clause has been put in the protocol explaining its non-binding properties, the protocol still might be binding to the parties involved. Thirdly, the binding effect of the protocol by using this approach would be based on the concept of honour and the conviction that the other party is a reliable one. However the only penalty for breaking this "vow of honour" to another

[69] Hortig 2008, p. 218-219.
[70] Hortig 2008, p. 219.
[71] Hortig 2008, p. 219; See generally: Bork 2006, para. 675-677.
[72] A false or mistaken description does not vitiate. See: Osborn, P. G., *A Concise Law Dictionary, 4th Edition* (London: Sweet & Maxwell, 1954); Hortig 2008, p. 219.
[73] For a more extensive explanation on the interpretation of contracts in Dutch law see: Kornet 2005, p.54-58.

party is that the violator of the trust will be excluded as a partner from future agreements. Consequently, for this sanction to have any effect, a certain group of insolvency practitioners would have to enter into such agreements on a regular basis. Since this (at presently) is simply not the case, Hortig argues that this system turns out to be hugely ineffective. [74]

Hortig concludes that considering these disadvantages, it becomes apparent that the approach of the "non-binding" protocol has no real practical value.[75]

2.3. The "in principle non-binding" protocol (similar to a guideline)

The German author Ericke introduced this legal approach to protocols, which can best be compared with regarding them a "guideline". Ehricke proposed a differentiation between the German concept of the administration contract and the (mostly American-Canadian) concept of an insolvency protocol. His approach entails a, voluntary, self-binding form of protocol, seen as a concretization of certain obligations imposed on a representative by EU and national law. This legal basis, Ehricke submits, would give the protocol a great amount of flexibility and make it easier to react quickly to differentiating circumstances, whilst still maintaining a firm legal basis.[76]

a) EU Insolvency regulation

Ehricke viewed the protocol from the perspective of article 31 of the EU insolvency regulation, which imposes on the liquidator a "duty to cooperate and communicate information" with other liquidators in a secondary proceedings. He concluded that article 31 could be seen as a legal basis for the use of protocols in international insolvency cases.[77] However the EU insolvency regulation in itself does not entail a penalty on violation of this duty to cooperate. Therefore the national law would have to impose such a penalty. [78]

[74] Hortig 2008, p. 219.
[75] Hortig 2008, p. 219.
[76] Ehricke 2001, p. 360-361; Hortig 2008, p. 220.
[77] Ehricke 2001, p. 361; Hortig 2008, p. 221.
[78] Hortig 2008, p. 223.

b) National laws

In order to provide legal certainty, the protocol has to ensure that an agreement on a specific action in the protocol binds the party to this specific action and imposes a penalty on violation of the protocol.[79] This binding power of the protocol can flow forth from the national law of the insolvency representative, where it concerns the duties and powers of a representative. National civil laws often provide a standard of care which the representative has to uphold when performing his duties. Viewing the protocol as a concretization of this standard of care, instead of regarding it as a contractual agreement, provides for a more flexible and case-specific approach in an insolvency matter, with the possibility of deviation from certain provisions of the protocol in parallel proceedings.[80]

i) German Law

From a German perspective, the articles 58-61 of the German Insolvency Law are applicable. In case of a violation of the protocol, the representative could be fined under the German Insolvency Law (article 58) for failing to fulfil his duties as a representative. As stated above, the rules and cooperative intentions set out in the protocol can be seen as a concretization of this concept of "duties as a representative". Consequently, under German Law, when the representative is in violation of the protocol, he is in violation of carrying out his "duties as a representative" and therefore subject to being fined under article 58 of the German Insolvency Law.[81]

But these respective articles of the German Insolvency Law only supply measurements of judicial oversight, and a foreign insolvency representative has no access to this form of judicial intervention. If he wishes to enforce a specific rule of the protocol, like the fine of article 58 of the German Insolvency Law, a foreign representative can merely suggest such an intervention to a German judge. He has no capacity to impose such a penalty on his own authority.[82]

[79] Hortig 20082008, p. 220.
[80] Hortig 2008, p. 220.
[81] Hortig 2008, p. 220.
[82] Hortig 2008, p. 223.

ii) Dutch and Belgian Law

The Dutch law does not contain such a penalty, but in case the representative acts in violation of the "standard of care" ("zorgvuldigheidsnorm"), he may be held liable for damages that occur as a result of this behaviour on the grounds of tort.[83] One could view the protocol as a concretization of this standard of care, and so the representative might be held responsible for a violation of the protocol (if that violation results in damages). However, in principle, this responsibility for damages can only be recovered from the estate. For personal liability of the representative, he would have to violate the standard of care which entails that he is expected to have a reasonable insight into the case and that he is to act as can be reasonably expected from an experienced representative.[84] One could argue that an experienced representative would be familiar with the use of protocols in cross-border insolvency cases, and thus that upholding the protocol would form part of the standard of care. Experience shows however that only in case of a flagrant violation of the powers given to him under Dutch law will the representative be held personally responsible.[85]

Similarly, in Belgium the representative can only be held liable for damages on the grounds of tort when he is in violation of the standard of care that can be expected from a "good housefather" ("Goed huisvader", article 40 Belgium Insolvency Law).[86]

So as under German law, the representative has to fulfil his duties as a representative to a certain standard of care, of which the protocol can be seen as a concretization. However, because Dutch and Belgian laws both do not know a system of simply fining the representative when he violates this standard of care (i.e. the protocol) as under German law, to enforce a penalty for such a violation is far more difficult under those national laws. And so, as a consequence, this legal approach to protocols does provide less legal certainty in Belgium and the Netherlands, compared to Germany.

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[83] Wessels 2008b, p. 179-198
[84] 'Maclou'-case, HR 19-04-1996, *NJ* 1996, 727
[85] See also: Wessels 2008b, p. 179-198; Koop 2005, p. 86-88.
[86] Vander Meulen 2007, p. 478;Dirix 2003, p 74-75; and the case: Antwerpen 15-01-2001, *R.W*. 2001-2002, 534 (as mentioned bij Dirix).

2.4. A critical note by Hortig

However, Hortig submits a few critical remarks to this approach proposed by Ehricke, which are worth discussing here:

First off, Hortig states that if the content of the protocol is binding on the basis of the legal obligation for the representative to cooperate, this means that deviation from that content is very difficult. The only ground for deviation would be if other duties of the representative weighed heavier than the duty to cooperate. Hortig argues that seeing as how this assessment of internal duties of the Representative is nearly impossible to predict, this approach to protocols would offer a low legal certainty for the parties involved.[87] He also submits, as said earlier, that the EU insolvency regulation itself does not entail a penalty on violation of this duty to cooperate. The national law will have to impose such a penalty. [88]

But most importantly, he argues that seeing a protocol as a concretization of either article 31 of the European Insolvency Regulation or a national insolvency law, is in conflict with the powers a representative has in a civil law country. For if the representative has the capacity to concretize his legal "duty to cooperate" by formulating and entering into a protocol, it could be regarded as him having legislative powers. In other words: he can't concretize the "duty to cooperate", his "duties as a representative" or his "standard of care", because from a civil law perspective he simply does not have the legislative powers to do so. Because of this the question whether or not a representative fulfils his duty to cooperate imposed on him can never be answered solely by considering if he acted in violation with the protocol, for it can never truly be the concretization of that duty, Hortig argues.[89] Because of this seemingly impossible conclusion that the representative would possess legislative powers under the "in principle non-binding"-protocol, Hortig opts for the approach of the "binding"-protocol and the use of the "administration contract" as the best legal stature for a protocol, an approach shared by other German authors.

[87] Hortig 2008, p. 222.
[88] Hortig 2008, p. 223.
[89] Hortig 2008, p. 222.

2.5. This author's own modest opinion:

However I do no fully agree with Hortig on this last objection that he puts forward. I believe it could well be argued that in the concretization of the representative's "duty to cooperate" or his "standard of care" by using a protocol, the representative does not act as if endowed with legislative powers. On the contrary: the representative merely complies with what is already common practice in international insolvency cases, to what some authors have submitted might even be regarded as international customary law.

Bob Wessels raises this question too, whether protocols could be regarded as customary international law:

"The question might even be posed whether the Guidelines and related protocols, provide a substitute for a possible convention or treaty and could be regarded as 'customary international law' (…)".[90]

And Bruce Leonard sees this potential in protocols as well:

"The solutions to cross-border issues that protocols deal with have the potential to develop into a set of rules and precedents which, in turn, may evolve into a form of "common law" of cross-border and multinational reorganizations."[91]

This would imply that protocols could have the status of a source of law within the meaning of article 38 of the Statute of the UN International Court of Justice[92]. Therefore I believe that the standardization of the content of protocols ensures that the representative is not endowed with legislative powers when he applies an "in principle non-binding" protocol, because the content of that protocol has been largely derived from what can already be considered as being customary law.

[90] Wessels 2008a, p. 31.
[91] Leonard 2005, p.6.
[92] Wessels 2008a, p. 31; see generally on this article and on international custom: Aljaghoub 2006, p. 146-147.

2.6. Conclusion

Of the three approaches to protocols described above, the German authors Hortig, Eidenmüller and Wittinghofer all advocate the promotion of the administration contract in Germany ("Insolvenzverwaltungsvertrag") which binds the representatives, but they have reservations when it comes to the inclusion of judges. In my personal opinion, I believe that the Model Protocol (and other protocols used before it) can hardly function without the inclusion of judges, seeing as how this is an essential part of the use of protocols.[93] Consequently I have strong reservations when it comes to this "contract"-approach to protocols.

The German author Ehricke on the other hand promoted the concept of the "in principle non-binding" protocol which provides more flexibility than the administration contract in parallel insolvency cases. Hortig discards this approach, mainly because it would endow the representative with legislative powers, but I am not fully convinced his objections are solid enough to discard this approach entirely, for the following reason: I believe it does not endow the representative with legislative powers, if we regard the protocol as a legal instrument that has been used in such a widespread manner that it can not be said that the representatives concretized the duty to cooperate by using a protocol, because the content of a protocol has by enlarge already been formulated in other international insolvency cases where protocols were applied.

And this is where the Model Protocol could play a valuable role: because the basis of the Model Protocol lies in all the protocols used in the past and is not formed to suit a specific insolvency case and not drafted by the representatives themselves, it could never be said that the representative concretized his "duty to cooperate" or his "standard of care" on his own. By using a Model Protocol, he merely complies with what might already be regarded as customary international law. Consequently by using this legal approach, the representative can enter into a protocol based on his legal "duty to cooperate" in EU law and the "standard of care" in national civil laws that he has to uphold.

[93] See chapter 4 of the Model Protocol, "the role of the courts", and the protocols mentioned in the separate articles therein.

But even though it is perhaps too soon to accept the use of protocols as international customary law, the reference to it in the UNCITRAL Model Law, the ALI principles and the CoCo Guidelines, does bode well for this approach. This is why I believe that the model proposed by Ehricke of the "in principle non-binding" protocol that provides both a legal basis and the necessary flexibility needed in parallel proceedings, though certainly not free of critique, does give a workable legal ground for the use of protocols in civil law countries. In Germany most authors appear to reject Ehricke's view, but perhaps his approach on the legal stature of a protocol will prove to be more acceptable in other civil law countries, like the Netherlands.

Chapter 3: The authority of the insolvency judge

"Two roads diverged in a wood and I –
I took the one less travelled by,
And that has made all the difference."
Robert Frost – The Road not Taken

For civil law countries in particular, the question also arises as to what legal authority judges possess to implement a protocol (if any), and by what means they are capable of doing so. In order for a protocol to be adopted and/or approved by the civil law court, the court may require the necessary statutory authorization for such adoption/approval as it might not be covered by the court's general equitable or inherent powers, [94] because from a civil law perspective the court is limited in, or sometimes simply lacks, these powers. Therefore, in the past, some commentators have expressed skepticism regarding this judicial authority in civil law countries to approve/adopt a protocol, because of the lack of judicial discretion comparable to that under common law, especially in the absence of enactment of the UNCITRAL Model Law.[95] Others on the other hand have speculated that a civil law judge could enter into a protocol, based on its statutory obligation to prevent actions that could negatively influence thevalue of the estate.[96]

To answer this question whether a civil law court indeed has the authority to implement the Model Protocol (or any protocol for that matter), I will first examine what would be the preferred approach for a Model Protocol in order to be applicable in civil law countries and to this end I will concentrate on two examples: 'adoption' by the court (like the ALI Guidelines for Court-to-Court Communication require)[97] or 'approval' by the court (like most protocols used in the past require), assuming there is a legal difference between the two.[98]

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[94] Working Group V 2009, p. 27, III.A.5, paragraph 17.
[95] Working Group V 2009, p. 27, III.A.5, paragraph 17; see for example: Wessels 2006a, para. 10118.
[96] Working Group V 20092009, p. 27, III.A.5, paragraph 18; see for example: Paulus 1998.
[97] *ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases,* Introduction, p. 1, para. 3.
[98] See *Re Calpine Corporation,* para. 31; *Re Systech Retail Systems Corporation*, para. 25; *Re Mosaic Group Inc.*, para. 24; *Re Pioneer Companies*, para. 21; *360Networks Inc.*, para. 25; *Re Laidlaw Inc.*, para. 23; *PSINet Inc. et al.*, para. 29; *Re Matlack Inc.*, para. 21; *Re Philip Services Corporation*, para. 24; *Re Loewen Group*, para. 25; *Re Pope & Talbot Ltd.*, para. 25; *Re Quebecor World (USA) Inc.*, para. 25; *Re Progressive Moulded Products Ltd.*, para. 25; *Nortel Networks*, para 23; *Smurfit-Stone Container*, para 23; *SemCanada Crude*, para 29; *Masonite International*, para 26.

3.1. Adoption

The ALI Guidelines for Court-to-Court Communications ("the Guidelines") were designed to be "adopted" by court order where such an adoption would provide a set of basic rules for further progress at an early stage in an international insolvency case. From this common foundation offered by the Guidelines courts could negotiate agreements when necessary, on a case-by-case basis.[99] This "adoption" of the Guidelines was a method that could be easily applied in common law countries, where judges have an active position including the creation of judge-made law. In civil law countries however, judges have a more passive (or idle) role, unless requested by a party with an interest. In other words: in principle civil law judges only provide judge-made law when their constitutional or procedural position applying existing law allows them do so, most likely after the relevant parties have invited the judge to do so in that matter.[100] So a civil law court will most likely lack the authority to adopt a protocol or Guidelines on its own authority.

Because in many civil law countries a court simply lacks this needed authority, the court runs the risk of having its adoption of a protocol or Guidelines being nullified if a party would appeal against this decision. This risk of nullification makes the route of adoption time consuming and unproductive, and will likely be condemned by a civil law court.[101]

"Adoption", in the eyes of this author, would imply that the initiative for use of a protocol lies with the court, rather than with the involved parties. This seems to clash with the idea that a protocol should be a private agreement between the parties involved.[102]

3.2. Approval

Protocols were introduced as a method by which private agreements could fill the gap left by cross-border public law in international insolvency matters[103] and unlike the Guidelines, rather than "adopted", a protocol is more typically "approved" by each of the courts having jurisdiction

[99] Westbrook 2001, p. 101.
[100] Wessels 2008a, para. 25.
[101] Wessels 2008a, para 24.
[102] Westbrook 2001, p. 101.
[103] Westbrook 2001, p. 101.

over a part of the affairs and assets of the insolvent company.[104] This path of 'court approval' is also chosen by the authors of the Model Protocol.[105] Once approved the protocol would have the effect of a court order and bind the parties involved.[106] One of the advantages of court approval is that it removes the possibility for dissenting creditors and parties to litigate matters in a way that might undermine the protocol. [107] And, by using this approach of "approval", the parties involved are emphasizing (more than with "adoption") that in principle the protocol is a private agreement between them and in doing so, hopefully prevent the civil law judge from overstepping the civil law boundaries that constrict him.

The concept that a protocol should be initiated by the parties involved was also underlined by the Alberta Court of Queen's Bench in the case of Calpine Energy Ltd. The court, by person of Madam Justice Barbara Romaine, held that the negotiation of a cross-border protocol should be a matter of discussion, negotiation and cooperation between the parties involved, before it is to be presented to the court for review and approval.[108] However, this does not mean that it is not possible for a court to encourage the parties to enter into such a negotiations.[109] Furthermore, the term "approval" is also used in the UNCITRAL Model Law which states that "Approval or implementation by courts of agreements concerning the coordination of proceedings"[110], may be used as a means to implement articles 25 and 26 of the Model Law concerning cooperation with foreign courts and representatives. Civil law countries that have already implemented the Model Law, can connect with the terminology and the concept of "approval" via the Model Law.

Although the "approval at the initiative of the relevant parties" is no guarantee for success in all civil Law countries, I believe that it is more consistent with the limited authority that a civil

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[104] See *Re Calpine Corporation*, para. 31; *Re Systech Retail Systems Corporation*, para. 25; *Re Mosaic Group Inc.*, para. 24; *Re Pioneer Companies*, para. 21; *360Networks Inc.*, para. 25; *Re Laidlaw Inc.*, para. 23; *PSINet Inc. et al.*, para. 29; *Re Matlack Inc.*, para. 21; *Re Philip Services Corporation*, para. 24; *Re Loewen Group*, para. 25; *Re Pope & Talbot Ltd.*, para. 25; *Re Quebecor World (USA) Inc.*, para. 25; *Re Progressive Moulded Products Ltd.*, para. 25; *Nortel Networks*, para 23; *Smurfit-Stone Container*, para 23; *SemCanada Crude*, para 29; *Masonite International*, para 26.

[105] Annex A, para. 7.1.

[106] Working Group V 2009, p. 27, III.A.8, paragraph 29

[107] Working Group V 2009, p. 27, III.A.8, paragraph 29

[108] Discussed in: Sarra 2008, p. 89.

[109] See, for example *Nakash*, recitals p.3.: "(…) the Israeli NAB Liquidation Court expressed the view that it might be desirable to reach an agreement between the interested parties and the Courts in the United States and the State of Israel".

[110] UNCITRAL Model Law on Cross-Border Insolvency, article 27 (<<www.uncitral.org>>).

law court has compared to that of a common law court. So I agree with the authors of the Model Protocol that requiring 'approval' is preferred, for it to become a globally applicable instrument.

3.3. Adopted and approved?

When regarding the Model Protocol, as said, like most (if not all) protocols used over the past years, it has to be approved by both courts having jurisdiction to become effective.[111] But the Guidelines are also implemented in the Model Protocol[112] and, as stated above, they were originally designed to be adopted by court order. So in light of this conflict of terms, the question begs whether it is possible to merely "approve" the Model Protocol or if a court would have to "adopt" the Model Protocol and/or Guidelines at the same time. In further accordance with other protocols that implemented the Guidelines used in the past, the Model Protocol also states that its terms prevail over the Guidelines[113]. Because of this clause, the question whether the Model Protocol requires approval or adoption can only lead to one out of two possible outcomes, either:

a) The Model Protocol will have to be "approved and adopted" by both courts (or at least the Guidelines would have to be "adopted") because one does not exclude the other; or

b) The Model Protocol only requires "approval" by both courts in order to be effective. Adoption is not required, because the Model Protocol itself only requires approval, and its terms prevail over those of the Guidelines.

Looking at recent cross-border insolvency cases that made use of protocols, it seems to be common practice that when using a protocol (even if it is based on, or includes the Guidelines), both courts will merely approve of the use of the terms of the protocol rather than also adopt

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[111] Annex A, para. 7.1; See *Re Calpine Corporation,* para. 31; *Re Systech Retail Systems Corporation*, para. 25; *Re Mosaic Group Inc.*, para. 24; *Re Pioneer Companies*, para. 21; *360Networks Inc.*, para. 25; *Re Laidlaw Inc.*, para. 23; *PSINet Inc. et al.*, para. 29; *Re Matlack Inc.*, para. 21; *Re Philip Services Corporation*, para. 24; *Re Loewen Group*, para. 25; *Re Pope & Talbot Ltd.*, para. 25; *Re Quebecor World (USA) Inc.*, para. 25; *Re Progressive Moulded Products Ltd.*, para. 25; *Nortel Networks*, para 23; *Smurfit-Stone Container*, para 23; *SemCanada Crude*, para 29; *Masonite International*, para 26.

[112] Annex A, preamble, p.1.

[113] Annex A, preamble, p.1. See the preambles of: *Re Calpine Corporation*; *Re Pope & Talbot Ltd.*; *Re Quebecor World (USA) Inc.*; *Re Progressive Moulded Products Ltd.*; *Re Masonite International Inc., Re Nortel Networks;* and *Re Madoff Securities* at para 5.1.

them. In the Masonite case for instance, a protocol was approved that incorporated the Guidelines in a similar manner to the Model Protocol: according to the preamble of the Masonite protocol both the terms of the protocol and the Guidelines would apply. In the case of a discrepancy between the two however, like in the Model Protocol as well, the terms of the Masonite protocol would prevail. The Ontario Superior Court of Justice by person of Mr. Justice Colin Campbell, chose to solely approve the use of the protocol, rather than to (also) adopt it or the Guidelines.[114] And although Bruce Leonard mentions that in the insolvency case of Matlack Inc., the Guidelines were adopted and approved by the United States and Canadian courts,[115] based on the court order by the Ontario Superior Court of Justice, I have found no evidence to substantiate this claim. In fact the court order of the Ontario Superior Court of Justice by person of Mr. Justice James Farley in the insolvency case of Matlack Inc., though it specifically mentions the protocol and the Guidelines separately, also solely utilizes the term "approval" and not "adoption".[116]

Therefore, I conclude that option (b) appears to be the preferred approach in practice, and that approving of the Model Protocol will suffice. This also provides for a better ground for use of the Model Protocol in civil law countries, since mere 'approval' (as explained above) better befits the civil law court's limited authority, compared to that of a common law court.

3.4. Theory put to Practice

I therefore come to the provisional conclusion that "approval" of a protocol by a court might (emphasis on 'might') find success in civil law countries. And indeed it is not without precedent that a civil law court approved of the use of a protocol:

For instance, in the insolvency case Nakash, a conflict between the U.S. and Israeli proceedings arose that led to a jurisdictional impasse. Consequently, the need for an agreement to help break this stalemate of national laws became apparent and the U.S. court appointed

[114] See: *Re Masonite International Inc., et al,* Initial order, para. 43; and similarly: *Re PSINet Inc. et al.*, court order, para. 2.
[115] Leonard 2005, p.20.
[116] See: *Re Matlack Inc.*, court order, para. 14.

examiner formulated a protocol to use, to which the official receiver agreed, but the debtor (Joseph Nakash) did not.[117] So the examiner and the receiver approached the Israeli court for approval of the protocol and concerning this approval, Judge Hecht of the Israeli court, declared that:

"I have found no preclusion in the law of the court for liquidation which shall preclude it from cooperating with [the United States] court to achieve the same goal (…)".[118]

Similarly, in the AIOC case an agreement for use of a protocol was reached between the United States and the Swiss insolvency representatives, and the protocols used in the cases ISA-Daisytek, SENDO and Swissair are further examples of the successful use of protocols between civil law and common law countries.[119] It should be noted though that Flaschen et al. submit that, in the case of Nakash, the protocol could be approved because Israeli insolvency laws followed the English Insolvency system. He also submits that in the case of AIOC, a protocol was most likely approved because the courts in that case were engaged in the simpler process of coordinating liquidation, rather than reorganization.[120]

i) The Netherlands

Concerning the use of protocols in the Netherlands (a civil law country that has not implemented the Model Law) it has been argued that "approval", like "adoption", may be a method that can not be easily applied by courts. For example, in the insolvency case of United Pan-Europe Communications N.V.[121] the debtors' Dutch counsel claimed that a protocol was not permissible under Dutch law and consequently no written agreement was reached. Instead the Dutch and US Counsel worked closely together to resolve any issues that occurred during the two parallel proceedings in the U.S. and the Netherlands, based on an oral alignment of

[117] Discussed in: Flaschen 1998, p. 595; Consequently, in the case of Nakash the protocol was binding to a party (Nakash himself) who was not a participant in agreeing to the protocol(!) for general purposes in the proceeding.
[118] As cited in: Flaschen 1998, p. 596, 599.
[119] Working Group V 2009, p. 27, III.A.5, paragraph 19.
[120] Flaschen 2001, p. 13-14.
[121] UPC-case: Netherlands: *Rechtbank Amsterdam* 13 March 2003, LJN AF5870; U.S.: *United States Bankruptcy Court for the Southern District of New York* (Case No. 02-16020).

activities.[122] And Wessels also argued in 2006[123], that court "approval" ("homologatie") for a protocol ("akkoord") would not be possible because:

i) Dutch courts and supervisory judges are not likely to demonstrate an active attitude;
ii) The system of Dutch Insolvency Law does not leave much room for creditor's initiatives;
iii) The Dutch insolvency act does not provide a sufficient legal basis for court "approval" of a protocol; and
iv) It also appears from Dutch case law that 'territoriality' will not allow interference with the Dutch legal system.

But that is based on the assumption that a protocol would have to be viewed as an insolvency composition ("akkoord") by Dutch insolvency law.[124] However if the protocol is viewed as a concretization of article 31 of the European Insolvency Regulation[125] it need not be viewed as an insolvency composition ("akkoord"). I believe Wessels realized this, because he also commented that article 31 of the European Insolvency Regulation might change the Dutch status quo in the future, and provide for sufficient legal basis for court approval of protocols.[126]

And perhaps it has, because in the recent insolvency matter of Lehman Brothers, a multi party protocol was signed by various administrators of different countries in the months of May and June 2009, including by the Dutch administrator.[127] The supervisory judge ("rechter-commissaris") gave approval ("toestemming") to the Dutch representative for signing the protocol.[128]

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[122] Working Group V 2009, Annex Case Summaries, para. 37.
[123] Wessels 2006a, para. 10118.
[124] See: *Dutch insolvency law*, subsection 6, articles 138-172a.
[125] See chapter 2.3.
[126] Wessels 2006a, para. 10118.
[127] The administrators in the US, Germany, Switzerland (PWC) Switzerland, Australia, Hong Kong, Singapore, the Netherlands and the Netherlands Antilles expressed themselves in favour of this non-binding, directional Protocol; see: Schimmelpenninck 2009, p. 26.
[128] The Protocol has been signed by the official representatives of Lehman Brothers Group in the U.S. (Lehman Brothers Inc. and LBHI), Germany, Hong Kong, Singapore, The Netherlands and the Netherlands Antilles. The representatives of Luxembourg and Japan are still considering joining the protocol. Only the administrators of a number of UK based companies such as LBIE and LBL did not sign the protocol. They argued that they were in favor of cooperation, but were required by UK law to treat each insolvent entity as a separate one. See: *"3e openbaar verslag LBT"*, 22 July 2009, p. 8, available at the website

Although in this specific matter it concerns a non-binding merely directional protocol[129] and the Lehman Brother's case still has a long way to go, it does show that Dutch supervisory judges may have developed a more open attitude towards the use of protocols and this bodes well for the future use of protocols in the Netherlands.

ii) Germany

From a German perspective the author Christoph Paulus already submitted in 1998 that 'approval' of a protocol by a German court would be possible. The basis therefore comes forth from paragraph 21 of the German insolvency law, which gives the German court the authority to take any measures needed to prevent a negative chance in the value of the estate.[130] He did however express a preference for incorporation of a provision in the German insolvency law that would explicitly authorize German bankruptcy judges and administrators to make use of protocols. But to this date no such provision has yet materialized in the German law[131].

But other (more recent) German authors take the standpoint that the protocol could be used under German law, when it is seen as an administration contract entered into by the representative and express strong reservations to the inclusion of judges in protocols.[132] And indeed the protocol used in the insolvency case of ISA-Daisytek specified that, according to German law, in order to be effective the protocol was subject to approval by the German creditors, not the court.[133] It further stipulated that the insolvency representative would merely report the terms of the agreement to the responsible German court, after the creditor's approval.

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http://www.houthoff.com/_files-cms/file/3e%20openbaar%20verslag%20LBT%2022%20juli%202009.pdf [Last visited: October 20, 2009]; Schimmelpenninck 2009, p. 26.

[129] The term 'directional' is used by Schimmelpenninck, but I am uncertain as to what this might imply. My own assumption when regarding the Lehman Brothers Protocol is that the term 'directional' is probably used as an opposite to the protocol being 'binding', indicating that the protocol provides a set of guidelines, entailing that national law prevails and perhaps leaving discretion to the representatives. See: Schimmelpenninck 2009, p. 26.

[130] Paulus 1998, para. IV.2.2.

[131] Paulus 1998, para. IV.3.; Wessels 2006a, para. 10118.

[132] See previous chapter 2.1.; Eidenmüller 2001, p. 16; Hortig 2008, p. 231; Paulus 2006, Annex C available at: (see footnote 63).

[133] Working Group V 2009, p. 27, III.A.8, paragraph 28.

German administrators also signed the Lehman Brothers protocol,[134] but because of the way "approval" is formulated in the protocol[135] it is unclear to this author at the time of writing, whether the protocol was approved by a German court or the creditors (if approved at all).

3.5. Conclusion

In the end it becomes apparent that what judicial authority a civil law judge may have concerning the use of protocols in international insolvency cases, is always subject to the national law of the country concerned and may therefore differ from state to state. For instance: in the bankruptcy matter of Swissair, the protocol had to be confirmed by the English court, but not by the Swiss courts. And the ISA-Daisytek protocol, which was subject to approval of the English court to be effective there, was subject to approval of the German creditors, not the court, in order to be effective in Germany.[136]

So sometimes deviating from the path of court approval set by common law countries, and choosing a "road less traveled by" can make all the difference when attempting to make use of a protocol in a civil law country. For as mentioned above, sometimes no court approval will be required (Switzerland), sometimes the creditors approval will be required (Germany), and perhaps another civil law country will require an even different approach. Whatever the case may be: flexibility on the method of applying a protocol is the key to success, because if what party has the authority to approve of a protocol and based on what law can differ greatly from one civil law country to another. Obviously this does not always make the use of protocols an easy undertaking in civil Law countries, but the past has shown us that civil law judges and administrators need not necessarily be disapproving of the use of protocols. They will likely have a positive attitude towards the use of one, and when necessary, a way to implement a protocol (in one form or another) is often found.

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[134] Schimmelpenninck 2009, p. 26.
[135] "This Protocol shall be deemed effective with respect to each Official Representative and the estate administered thereby upon execution by all Official Representatives whose signature blocks appear below, and its approval by the Tribunal with jurisdiction over such estates or the relevant committee (or similar body), where such approval is required under applicable law", *Lehman Brothers protocol*, para. 14.6.
[136] Working Group V 2009, p. 27, III.A.8, paragraph 28.

Unfortunately the Model Protocol, as it stands, does not seem to provide a solution for this difficult matter of judicial authority in civil law countries. In paragraph 7.1 it states that the Model Protocol shall become effective "upon its approval by both courts". And although the Model Protocol can be adjusted to fit the circumstances of the specific insolvency case,[137] a recent protocol (i.e. The Lehman Brothers Protocol) provides an approach for this matter that could be regarded as more "civil law-friendly". This approach has already boasted success, seeing as how many administrators in civil law countries have expressed themselves in favour of the protocol.[138] The Lehman Brothers protocol declares that:

"This Protocol shall be deemed effective with respect to each Official Representative and the estate administered thereby upon execution by all Official Representatives whose signature blocks appear below, and its approval by the Tribunal with jurisdiction over such estates or the relevant committee (or similar body), where such approval is required under applicable law."[139]

thereby leaving ample room for a civil law country (like Germany) that might not require court approval under its law to implement the protocol, whilst at the same time ensuring that where court approval is required by law (as in most common law countries), that such approval is necessary for the protocol to become effective. In order for the Model Protocol to be globally accepted I would therefore advise the authors to seek a connection with this approach, for it provides a manner of implementation and flexibility therein, that I expect will proof a great deal more acceptable in many civil Law countries than the mere requisite of "court approval".

[137] Annex A, introduction.
[138] Schimmelpenninck 2009, p. 26.
[139] *Lehman Brothers*, para. 14.6.

Chapter 4: Territoriality vs. Universalism

At the heart of the international insolvency debate there is a theoretical rift that divides judicial insolvency scholars around the world. The essence of this disagreement revolves around the two competing theories of "territoriality" and "universalism" as the preferred model for resolving international insolvencies.[140]

On one hand, the theory of territoriality can be considered the traditional approach. It is centred on the concept of national sovereignty and the belief that a court's power is limited to its own country's jurisdiction and insolvency law. In a cross-border insolvency matter, this approach allows a domestic court to shield local creditors from foreign courts and law.[141]

The theory of universalism on the other hand hinges upon the cooperation among all countries affected by the administration of a multinational debtor's estate. Under this theory, in countries where the debtor has assets, all foreign courts apply the procedural and substantive law of the country hosting the main insolvency proceeding.[142]

The use and content of protocols was often regarded in the past as being an example of a distinctly territorial approach to international insolvencies, to which some authors have expressed their concerns.[143] Which is why in this chapter I will examine if they can indeed be regarded as territorial or not. To this end I will focus on two aspects of protocols: choice-of-law and comity.

[140] Pottow 2005, p. 936-937; see generally: Wessels 2006a, p. 5-20; Mason 2008, p. 41-54; Rasmussen 2000 (all discussing difficulties with the two theories).
[141] Salafia 2005, p. 299-301; Lowell 2008, p. 114-115.
[142] Lowell 2008, p. 115.
[143] Takeuchi 1994, p. 648.

4.1. A missed opportunity for universalism?

In 1994 Takeuchi voiced the concern that a great opportunity for progress in international insolvency law was missed by using a protocol in the Maxwell case. He accused the insolvency proceedings of the Maxwell case of being a result of conservative thinking by not running the risk of applying a universalistic theory of jurisdiction and having each court merely concern itself with the existence of a local jurisdictional basis for the proceedings. The question whether to recognize the foreign insolvency adjudication could be avoided, because each country needed only to focus on its own adjudication.[144] Other authors have also submitted that protocols are only aimed at maximizing return to creditors,[145] or that they merely place an emphasis on procedural, administrative and practical matters,[146] and that the solutions that protocols provide do not address the inherent complexities caused by differing international laws. [147]

But not all are agreed on this matter. For instance Buxbaum, interestingly enough, submitted that in her view the Maxwell protocol actually did provided a framework to harmonize inconsistent provisions of domestic and foreign bankruptcy law, but she did express a concern that the use of protocols would only lead to an ad-hoc harmonization, rather than to a systematic choice-of-law analysis.[148] And Flaschen and Silverman seem to be less concerned with the lack of a choice-of-law in protocols altogether. They put forth the argument that only where the relevant courts have common legal traditions, protocols could perhaps be more specific and detailed about the substantive rules that govern the proceedings than they often are. But where it concerns protocols applied in a case where the relevant fora utilize substantially different legal systems (as might be the case in a multinational proceeding concerning both common and civil law jurisdictions), they even advise that protocols may need to focus more on the process, serving as a framework for communication and cooperation, and to leave more substantive issues such as choice-of-law to be addressed in a later stage or in corollary instruments.[149]

[144] Takeuchi 1994, p. 648.
[145] Mason 2008, p. 36.
[146] Wessels 2008a, para. 35.
[147] Mason 2008, p. 36.
[148] Buxbaum 2000, p.36.
[149] Flaschen 1998, p. 599.

Indeed there have been insolvency cases in the past where several agreements were used, instead of just one. Corresponding with the aforementioned advice by Flaschen and Silverman, in those cases the protocol took the form of a preliminary agreement used to impose a separate obligation on the parties to reach an agreement on the applicable governing law of given subject, for instance on the treatment of claims.[150] More recently, the researchers of UNCITRAL's working group V claim that many protocols actually do address applicable law issues, mainly with respect to questions of: the treatment of claims; right to set-off and security; application of avoidance provisions; use and disposal of assets; distribution of proceeds from the sale of the debtor's assets; and so forth.[151] In those cases, a number of different approaches have been taken to determine the law applicable in those issues according to Working Group V[152], which are:

i) To apply the law of the forum, unless considerations of comity require application of another law;

ii) To decide by making an analysis based upon conflict-of-laws rules applicable in the deciding forum;[153]

iii) To decide by making an analysis in accordance with the law governing the underlying obligation (to which might be added that if that law is unclear, the conflict-of-laws rules of one of the relevant states should be applied); or

iv) To decide by applying the conflict-of-laws rules of a third country.

But when looking at the protocols used in the past, it seems to this author that protocols that do address applicable law issues can be regarded as the exceptions and that in general no substantial decision concerning applicable law is made. For instance, none of the protocols of the past year (e.g. Nortel Networks, Smurfit-Stone, Masonite, Madoff and Lehman Brothers) address the issue of applicable law in general, nor in any of the ways described by Working Group V as far as I have been able to ascertain. So from this point-of-view I conclude that yes, they could be considered territorial.

[150] See for examples of this method: *Re Calpine*, para. 19 and *Re* Quebecor para. 18; See also: Working Group V 2009, p. 27, III.B.4, paragraph 22 and 101.
[151] Working Group V 2009, p. 27, III.B.4, paragraph 98.
[152] Working Group V 2009, p. 27, III.B.4, paragraph 98-100.
[153] See for example: Annex B, principle 8A.

4.2. Comity & honouring Court Independence

However on the other hand, not having to make any substantial choice-of-law decisions could also be considered as one of the primary reasons for the use of protocols. One could argue that protocols by their very nature are territorial and intended to protect the creditors from being affected by the applicable law of another country. As the Ontario Superior Court of Justice Judge Robert A. Blair observed in Menegon v. Philip Services Corp:

"The effect of the Protocol (…) is to provide some protection to claimants on either side of the border from being swept into the rigours of the other countries regimes where to do so might prevent them from asserting their substantive rights under the applicable laws of their own jurisdiction."[154]

Rather than making substantial choice-of-law decisions many protocols emphasize the importance of comity and the independence of courts, specifying that the last is not diminished in any way by the approval and implementation of the protocol.[155] The norm of 'comity' is used in international insolvency cases because the U.S. is not a party to any international insolvency treaty and applied in cases with the aim of determining whether a foreign representative can get a hold of parts of the estate, located in the U.S., but subject to a foreign proceeding.[156] But it is also known in other common law and civil law countries. But where common law countries practice comity as discretion, civil law countries are inclined to refute that notion by arguing that exercising such discretion would be an abuse of judicial power. However civil law countries may reach similar results as common law countries when it comes to comity, by viewing the principles of comity as binding principles of international law.[157]

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[154] Menegon v. Philip Services Corp., (1999) 11 C.B.R. (4th) 262, Ontario Supreme Court, recital 46 (<<www.canliii.org>>); Sarra 2008, p. 87.
[155] Working Group V 2009, p. 27, III.B.3.(a), paragraph 53; see *Re Calpine Corporation,* para. 8; *Re Systech Retail Systems Corporation*, para. 6; *Re Mosaic Group Inc.*, para. 5; *Re Pioneer Companies*, para. 5; *360Networks Inc.*, para. 6; *Re Laidlaw Inc.*, para. 5; *PSINet Inc. et al.*, para. 7; *Re Matlack Inc.*, para. 5; *Re Philip Services Corporation*, para. 6; *Re Loewen Group*, para. 5; *Re Pope & Talbot Ltd.*, para. 5; *Re Quebecor World (USA) Inc.*, para. 5; *Re Financial Asset Management Foundation*, para. 7; *Re Progressive Moulded Products Ltd.*, para. 6; *Re Smurfit-Stone Container* para 4; *Re Nortel Networks* para 6; *Re SemCanada Crude* para 8; *Re Masonite International* para 5.
[156] Wessels 2005, p. 353.
[157] Worster 2008, p. 122.

And as if that does not complicate matters enough, the concept of comity by itself is also a complex one: it does not imply an absolute obligation, but requires deference to foreign interests.[158] Comity is the recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation, while balancing its international duty and its duty to protect the rights of its own citizens or those protected under its laws.[159] Consequently, comity encompasses both aspects of universalism (recognition of foreign legislative, executive or judicial acts) as well as territorialism (protect the rights of its own citizens under its national laws), and in the past this has resulted in a degree of inconsistency in its application by courts.[160] Comity has been regarded as somewhat of a wild card in the past[161] and defining the specific meaning of 'comity' has sometimes led to lengthy and costly proceedings in the past. For instance in the case of Remington Rand vs. BSI (established in the Netherlands) in which cases 'comity' brought about a certain resolution after twelve years of litigation.[162]

The inconsistent application of the term comity can also be seen in various protocols used over the years. Some protocols, like the ones used in Masonite, Calpine and Nortel Networks all stipulate their goals in a similar way to the Model Protocol, having one object being to "honour court independence and integrity" and another to "promote international cooperation and respect for comity", separating the two, possibly to underline the universalistic aspect of comity.[163] Whereas the two protocols used in the most recent cases, Madoff Securities and Lehman Brothers both state as one of their goals being: "Comity – To maintain the independent jurisdiction, sovereignty, and authority of all tribunals", and thus apparently maintaining a strictly territorial interpretation of the concept of comity.[164] In fact, in the eyes of this author, the

[158]. See: Takahashi 2008, p. 78.
[159] In 1895, the U.S. court defined 'comity' as:"(…) neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other, but the recognition which one State accord within its territory to the legislative, executive or judicial acts of another State, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of the law.", which same definition was also used by the Canadian Supreme Court in 1990 and is applied to this day by both jurisdictions; see: Hilton v. Guyot, 159 U.S. 113 (1895), as mentioned in: UNCITRAl, *"Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings"*, May 2009, p. 27, III.B.3.(a), paragraph 53; Morguard Investments Ltd. v. De Savoye, *Supreme Court of Canada* 1990, 3 S.C.R. 1077 at 1096, as mentioned in: Weisz 2006, p. 106
[160] Israël 2005, p. 47-48.
[161] Homan 2001.
[162] Wessels 2005, p. 353; Boshkoff 1994.
[163] See *Re Masonite*, para. 5; *Re Calpine Corporation*, para. 8; Re *Nortel Networks*, para. 6.
[164] See *Re Madoff Investment Securities*, para. 1.2.6.; *Re Lehman Brothers*, para. 14.7.

two concepts of comity and honouring court independence, often both applied in protocols, might even be considered contradictory. Because, as stated, comity (at least to an extent) implies a certain degree of a universalism, whereas honouring court independence can only be considered territorial.

4.3. Cooperative Territoriality

Because of this seemingly contradictory nature of protocols, their application could be regarded as neither truly universalistic nor territorial. According to LoPucki the use of protocols forms part of an approach in the field of international insolvency which he defines as "Cooperative Territoriality".[165] This approach starts with a territorial structure: in the case of a cross-border insolvency, each distressed entity files for bankruptcy in each country where it has significant assets.[166] But in a cooperative territorial regime, every court would also appoint its own administrator and where international cooperation would be required, such would occur via an agreement (i.e. a protocol) among the administrators involved.[167]

[165] LoPucki 2005, p. 162
[166] Adams 2008, p. 56.
[167] LoPucki 2005, p. 162

4.4. Conclusion

Though authors have diverging opinions on the subject of where to exactly place the usage of cross-border insolvency protocols in the insolvency debate of universalism and territoriality, at least most of them seem to agree that their application can not be placed at either end of the spectrum. However their attempt to promote comity (in all its ambiguity) and to honour court independence at the same time, puts them in an awkward split between territoriality and universalism. Furthermore, their approach on choice-of-law issues can also differ greatly, making it even harder to generally define them as either universalistic or territorial. Some protocols make more substantial choice-of-law decisions than others, some of them are merely a preliminary agreement from which subsequent agreements regarding choice-of-law on specific subjects may be concluded, and again others stay far from the matter of choice-of-law altogether.

But I do concur with Flaschen and Silverman that in cross-border insolvencies concerning both civil law and common law jurisdictions, it will be more difficult to obtain a consensus on choice-of-law issues and that consequently in such cases it is simply more realistic for a protocol to just, as they put it, "focus more on the process, serving as a framework for communication and cooperation". The protocols used in the past year seem to be in line with this assumption and so does the Model Protocol as well. None of them make any substantial choice-of-law decisions. On the spectrum of universalism and territoriality, this does put protocols more at the end of territoriality, but that does not imply that they will stand in the way of universalism in the field of international insolvency as Takeuchi claimed. On the contrary: various universalistic initiatives of the past decades, such as the UNCITRAL Model Law, the Transnational Insolvency Project and the CoCo Guidelines all promote the usage of protocols[168]. Surely they can not be regarded as having slowed down the process of universalism in international insolvency matters.

But Perhaps the terms universalism and territoriality are quite simply inadequate to define the usage of protocols in the modern-day field of international insolvencies and they should be regarded as an autonomous law in their own right connected with the sovereignty of the countries involved. This would be consistent with the idea that protocols are becoming a form of customary international law (see chapter 2.5).

[168] See chapter 1.6.

Chapter 5: Three practical concerns against protocols

Lastly, in this chapter I will discuss a few concerns expressed by legal authors in the past concerning the use of cross-border insolvency protocols that I have not yet had the chance to discuss in the previous chapters, all of which are reservations of a more practical nature.

5.1. More than three different jurisdictions.

The first of which, is that some authors have expressed reservations when it comes to the use of protocols when the debtor has assets in a large number of countries. Typically, protocols are used between two (or sometimes three) jurisdictions, but when a large multinational is involved its assets might be spread over more than a hundred different countries. A successful negotiation concerning a protocol between two (or three) countries is certainly feasible, the argument goes, but if a protocol has to be negotiated between dozens of different countries with dozens of different national laws, this can no longer be considered a realistic scenario.[169]

But the Lehman Brothers case has shown that this hurdle can be overcome and need not necessarily stand in the way of the practical application of protocols. In the Lehman Brothers matter (described as the largest bankruptcy in history with over $613 billion in liabilities)[170] a non-binding protocol between sixteen insolvency holders, courts in over seventy different proceedings in over forty countries in the world has been proposed[171] and at the time of this writing, the administrators in the U.S., Germany, Switzerland, Australia, Hong Kong, Singapore, the Netherlands and the Netherlands Antilles have already expressed themselves in favour of and signed this protocol. The administrators in Japan and Luxemburg are still considering joining the protocol, and only the U.K. administrators have chosen not to sign the protocol.[172]

Notwithstanding the fact that the more countries there are involved in the insolvency matter, the more difficult reaching a consent on the content of a protocol with which all parties can agree

[169] Flaschen 2001, p. 14; Wessels 2008a, para. 35.
170 Leonard 2009, available at: (<http://www.casselsbrock.com/CBNewsletter/Business_Reorganization_Group_e_COMMUNIQU_Eacute____June_2009#art26644>)) [last viewed: November 25, 2009].
[171] Wessels 2009a, available at: (<http://ojs.ubvu.vu.nl/alf/article/view/81/144>) [last viewed: November 25, 2009].
[172] Schimmelpenninck 2009, p. 26.

will be, the Lehman Brothers case does show that reaching a consensus on a protocol in such a large insolvency matter need not be an impossibility as Flaschen et al. have argued in the past.

5.2. The use of protocols is inefficient

A second practical objection was submitted by the Dutch author Berends who argues that the amount of effort necessary to reach an agreement will outweigh the possible advantages of using a protocol, and that their use is limited to large international insolvencies where the balance between these two will shift in favour of using a protocol. In small cases however, reaching an agreement on the use and content of a protocol would be too cumbersome and comparatively too costly according to Berends.[173] Takeuchi voiced a similar concern, stating that using a protocol leads to multiple parallel proceedings and that it is generally assumed that these concurrent administrations are costly (although at the time, there was no data to verify that assumption). Therefore he questions the cost-efficiency of such concurrent proceedings involving the use of protocols and expressed himself in favour of a more universal choice-of-law approach.[174]

But the research UNCITRAL's Working Group V has done shows that the usage of protocols does provide an increased efficiency in cross-border insolvency cases. They claim that protocols have enabled parties to focus on the conduct of the insolvency proceedings, rather than upon the resolution of conflicts regarding laws and other such disputes, and in doing so they have effectively reduced the cost of litigation.[175] For example: is has been estimated that in the Everfresh proceedings the enhancement of value through the use of a protocol, which involved the creditors and managed to restrain unsecured creditors from taking detrimental actions, was in the order of forty per cent.[176] Furthermore, over the past two decades numerous types of protocols have been developed in different insolvency cases, which provides small insolvencies with "off the rack clothes" that (with modest alterations) might easily be applied, thereby greatly reducing the amount of effort necessary to reach an agreement on the content of a protocol.[177]

[173] Berends 2005, p. 53.
[174] Takeuchi 1994, p. 649.
[175] Working Group V 2009, III.A.1, paragraph 7.
[176] Working Group V 2009, III.A.1, paragraph 7, footnote 19.
[177] An official central database of cross-border insolvency protocols seems absent at this time however, although the website of iiiglobal does provide an extensive collection.

5.3. Subsidiaries have to be treated as separate entities.

Lastly, Flaschen et al. also expressed concerns for the application of protocols when it came to multinational operating with a large number of subsidiaries. Most large international corporations operate locally via such subsidiaries, which is why most national laws treat subsidiaries as separate legal entities from their parent companies. Consequently the local court is by law obligated to act in the interests of the subsidiary, not of the international corporate group.[178]

This concern, so it turns out, also seems to have been unjustified. The research done by Working Group V showed that a complex debtor structure (such as an enterprise group with many subsidiaries) could actually be considered a motivational factor that supports the usage of a protocol in an insolvency matter.[179] And indeed, numerous cases over the past years have shown that a protocol can find an application in insolvency proceedings concerning a multinational corporation with a large number of subsidiaries. For instance: Nortel Networks, Olympia & York, Pioneer, Systech Retail and Calpine Corporation (the last one being described by Working Group V as: "the ultimate parent company") were all large multinational companies with many worldwide subsidiaries, and yet in all these insolvency cases a cross-border insolvency protocol has been successfully applied.[180]

So the fact of the matter is that the existence of subsidiaries has not proven an insurmountable problem in the insolvency practice of using protocols. This might be due to the fact that, although in theory in the event of an insolvent multinational corporation with subsidiaries each insolvent entity would require its own administrator, in practice, often one administrator is appointed in a jurisdiction who is responsible for different entities of that group.[181] This efficiency advantage, most likely contributes to the fact that the relevant parties are capable of coming to an agreement concerning a protocol even when a parent company with numerous subsidiaries is concerned.

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[178] Flaschen 2001, p. 14.
[179] Working Group V 2009, III.A.1, paragraph 10.
[180] Working Group V 2009, Annex, paragraph 4, 23, 24, 27, 35.
[181] Schimmelpenninck 2009, p. 26.

5.4. Conclusion

Based on the foregoing, my conclusion is that these three practical concerns expressed by authors in the past regarding the use of cross-border insolvency protocols, have been proven in practice to be mostly idle fears. The research done by UNCITRAL's Working Group V and the recent experiences in the Lehman Brothers case has shown that all three of these objections can be overcome. Experience has taught us this past decade that protocols can be considered an efficient instrument and that they can reduce the cost of litigation in international insolvency proceedings. Furthermore, I can also conclude that the presence of many subsidiaries need not stand in the way of using a protocol: in fact it only increases the need for a protocol according to Working Group V.

The only concern discussed in this chapter that I feel cannot be entirely disregarded, is if protocols can still find application when many jurisdictions are involved. Though the Lehman Brothers case has shown that this is possible, I also have to recognize that this protocol has achieved that result by being, in the words of Schimmelpenninck, "non-binding" and "directional".[182] It seems to me that indeed, the more jurisdictions are involved, the more difficult it will be to reach an agreement and that a protocol will probably have to sacrifice content to be acceptable by many jurisdictions at the same time.

[182] Schimmelpenninck 2009, p. 26.

Chapter 6: Conclusion

So this is where I come to my tentative conclusions concerning the future of cross-border insolvency protocols in civil law jurisdictions. From its early days in the form of the Maxwell protocol and the Concordat, to their application in the recent insolvency matters of Lehman Brothers and Bernard Madoff, protocols have proven to be a valuable legal instrument for international insolvency practitioners worldwide. And even though their use thus far has for a great deal been limited to cross-border insolvencies involving common law jurisdictions, I expect that the usage of protocols in international insolvencies of large corporate entities involving civil law jurisdictions will only increase in the coming decade, for the following reasons:

First, the fact that many (if not all) existing international insolvency instruments mention the use of protocols in one form or another, can only contribute to their application. Protocols, according to the UNCITRAL Model Law on Insolvency can be used to complement it. They are also referred to in the TIP Guidelines for Court-to-Court communications, and the CoCo guidelines regard cross-border insolvency protocols as the best means of achieving cross-border cooperation. Even though they represent a territorial approach to international insolvency, their practical effectiveness is recognized by many universal instruments.

Secondly, the past has shown us that protocols have found an implementation in many insolvency cases. Whether it involved a large international corporate entity with many subsidiaries, or both common law and civil law jurisdictions, insolvency practitioners have found protocols to be effective and efficient instruments. And even when a large number of different jurisdictions are involved, the Lehman Brothers protocol has demonstrated that it is still possible to come to an international consensus regarding the content of an insolvency protocol.[183]

But there are a few legal landmines to sidestep when a civil law jurisdiction is involved in the insolvency matter. It is important to emphasize that, from a civil law perspective the protocol in

[183] It is worth noting that the Re Lehman Brothers protocol is (for a great deal) based on the Re Everfresh protocol, as there were many references to the Everfresh protocol in the draft Lehman one. And the Everfresh protocol was the first protocol to use the Concordat, see Annex B.

its core must be a private agreement between the parties involved to be approved, because civil law courts simply do not possess the requisite authority to enter into a protocol themselves. Who then has the authority to approve of that protocol may differ from one civil law country to another. For instance in Germany, the creditors will most likely have to approve of the protocol, whereas in the Netherlands the judge will probably have to approve.

Furthermore, the legal status of the protocol and on what legal basis the insolvency representative will be able to enter into it, may differ to from civil law state to state as well. It seems that in Germany (for now) the representative will be able to enter into a protocol based on the concept of the administration contract ("insolvenzverwaltungsvertrag"). In the Netherlands it has been argued in the past that a protocol could be viewed as an insolvency composition ("akkoord"), but this approach is showing cracks in its armour and I expect that in the future, as their application increases, protocols will more and more receive the status of international customary law and consequently protocols will be seen as a concretization of the representative's duty to cooperate laid down in article 31 of the EU Insolvency Regulation in the Netherlands. It is important to comprehend what legal basis the protocol has in the specific civil law country involved however to ensure oneself what binding power the agreement will possess over the civil law party involved.

Lastly, I believe that the Model Protocol can play a valuable role in the standardization of the content of protocols, and thus hopefully increase their status as a form of international customary law. The only advice based on my research that I would like to give the authors of the Model Protocol, is to ensure that it will be a (very) flexible legal instrument for it to find application in civil law countries. Flexible enough at least to compensate for the differences between civil law jurisdictions when it comes to who can approve of their use and what legal status they possess. The application of the Model Protocol will be a learning experience for civil law countries and failure in attempting to apply the Model Protocol could be disastrous. Small incremental steps may assist in avoiding a bad result. Therefore I would recommend keeping a close look on the Lehman Brothers protocol as it develops over the coming year, for it will be the first protocol to have been approved by a great number of civil law jurisdictions at the same time.

But luckily it seems that one of the authors of the Model Protocol, Bruce Leonard, is already tracking this interesting development in the field of cross-border insolvency protocols. In a recent newsletter from Cassels Brock, he notes that:

"The protocols in *Lehman* and *Madoff* represent major steps forward in international cooperation in insolvency and restructuring cases. The adoption of the III/ALI *Guidelines*, particularly by the insolvency representatives in civil law jurisdictions in the *Lehman* proceedings, is another step forward in international cooperation.".[184]

So I expect the authors of the Model Protocol might already be scrutinizing the Lehman Brothers protocol, to adjust the Model Protocol to better cope with the difficulties that can arise in implementing a cross-border insolvency protocol, when a civil law jurisdiction is involved.

[184] Leonard 2009, available at: (see footnote 164).

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Re Smurfit-Stone Container Canada Inc.

Re Solv-Ex Canada Limited and Re Solv-Ex Corporation

Re Systech Retail Systems Corporation

Re Tee-Comm Electronics In

Annex A

INTERNATIONAL INSOLVENCY INSTITUTE

COMMITTEE ON INTERNATIONAL JURISDICTION AND COOPERATION

PROSPECTIVE MODEL INTERNATIONAL CROSS-BORDER INSOLVENCY PROTOCOL [ANNOTATED]

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INTERNATIONAL INSOLVENCY INSTITUTE

Prospective Model International Cross-Border Insolvency Protocol

Introduction

As cases involving financial difficulties have become increasingly globalized, there has been a growing recognition and acceptance that the interests of the stakeholders of an international corporate group that involves many different entities in many different countries are best served by having restructuring proceedings co-ordinated with each other through cooperation and communication among the Courts having jurisdiction over the enterprise.

Experience over the last fifteen years has shown that substantial values can be preserved and enhanced through the co-ordination of proceedings in different countries. Effective communications among Courts having jurisdiction over different aspects of the same corporate group are critical to effective cooperation. The basis for communication among Courts in multinational cases has been enhanced and improved through the example and the availability of the *Guidelines for Court-to-Court Communications in Cross-Border Cases* which were developed by the American Law Institute in its *Transnational Insolvency Project* and have been promulgated and approved by the International Insolvency Institute for use in its 65 Member countries. Experience has shown that the co-operation involved in adopting the *Guidelines* by Courts that are involved with different aspects of a common corporate group leads to cooperation in other issues that affect the business that is being reorganized or rehabilitated. Led by the example of the International Bar Association's *Cross-Border Insolvency Concordat*, Courts began to enter *Cross-Border Insolvency Protocols* to create the means of avoiding disputes over jurisdiction and enhancing coordination of efforts to restructure and reorganize businesses in financial difficulty.

With increased experience and judicial acceptance, Cross-Border Insolvency Protocols have become common and it has become more common for Cross-Border Insolvency Protocols to adopt and apply the *Guidelines for Court-to-Court Communications in Cross-Border Cases.*

Based on the authors' rough survey, approximately 25 Courts in almost a dozen countries have adopted and approved the use of Cross-Border Insolvency Protocols, including in cases in the Bahamas, Bermuda, the British Virgin Islands, Canada, Cayman Islands, France, Israel, Switzerland, the United Kingdom, and the United States of America. The majority of cases in which Cross-Border Insolvency Protocols have been approved continues to be in cross-border cases between Canada and the United States, with use of the protocols continually expanding with Courts in four Canadian Provinces and ten U.S. District and Bankruptcy Courts having adopted them in cases. Attached at Appendices C and D is a non-exhaustive listing of cases in which Cross-Border Insolvency Protocols have been approved.

The experience to date has shown that the use of Cross-Border Protocols can be an effective and, in many respects, an essential tool to ensure that complex insolvency cases are administered efficiently and effectively for the benefit of all stakeholders.

The draft form of Model International Cross-Border Insolvency Protocol that follows is an effort to create a standard form of Cross-Border Insolvency Protocol. The primary purpose of the Model Cross-Border Insolvency Protocol is to provide an internationally-approved example of an acceptable and effective way of coordinating multinational administrations for the benefit of all of the stakeholders involved in them. The Model Protocol is a guide based on provisions and experience from existing Protocols but an actual Cross-Border Insolvency Protocol can accommodate virtually any provision that is suitable for the purposes of the case and which is not inimical to domestic law and practice in the jurisdictions involved.

Similar to most recent existing Protocols, the Model Protocol addresses five broad substantive areas:

1. An articulation of the purpose and goals of the Protocol, which have developed into standard principles that are now seen in most, if not all, Cross-Border Protocols in major insolvency cases.

2. The manifestation of the fundamental principle underlying the Protocol that, notwithstanding the Protocol and the cooperation and coordination between the Courts provided in it, the independence and authority of each of the Courts is to be preserved.

3. The provisions detailing the manner and method of coordination and cooperation between the Courts.

4. The provisions dealing with the retention and compensation of estate representatives and professionals and other administrative or procedural aspects of the case, including rules for notice and appearances.

5. The provisions ensuring that the Protocol is effectively bilateral, but also preserving the substantive rights of parties to the insolvency case.

In addition, attached at Appendix A to the draft Model Protocol are model additional provisions for Cross-Border Protocols dealing with particular issues of cross-border cooperation and coordination. While some of these provisions (or the concepts that they embrace) have been used in certain cases, they are not commonly found in the majority of Cross-Border Protocols seen to date and require careful consideration as to the substantive implications of their use. In some respects, the additional provisions contemplate an expansion from the fundamental procedural principles of coordination and communication that underlie the Model Protocol and venture into issues of delegation of a Court's independent jurisdiction and authority on substantive issues in a case. Although Cross-Border Protocols have generally only addressed procedural matters, if the parties and the Courts agree an expansion into substantive issues could be justified and appropriate depending on the circumstances.

The authors have nevertheless included model additional provision dealing with the following points for purposes of discussion and consideration:

- Specific allocation of shared, joint or separate jurisdiction of the Courts.
- Coordination of filing creditor claims and recognition of claim determinations.
- Coordination and recognition of borrowing authority.
- Coordination and recognition of approval of asset sales.
- Coordination and recognition of distributions to creditors.
- Coordination and recognition of creditors' meetings and plan approval.

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June 17, 2009

Annex A

Prospective Model International Cross-Border Insolvency Protocol

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Annex A

Prospective Model International Cross-Border Insolvency Protocol[186]

This Cross-Border Insolvency Protocol (the **"Protocol"**), made as of **[insert date]** is intended to govern the conduct of the interested parties in the Insolvency Proceedings (as defined below).

The *Guidelines for Court-to-Court Communications in Cross-Border Cases* (the **"Guidelines"**) developed by the American Law Institute's Transnational Insolvency Project attached as Schedule "A" hereto are incorporated by reference and form part of this Protocol. Where there is any discrepancy between the terms of this Protocol and the terms of the *Guidelines*, the terms of this Protocol shall prevail.[187]

1. The Debtor and the Pending Proceedings

[Corporation name] (referred to as **"[A. Co.]"**) is a company affiliated with a multinational enterprise incorporated under the laws of [Country] with head office in [Country] that currently operates, through various subsidiaries and affiliates, in [list countries] ([*may define using short form that represents collective group*]). *[May include information re the corporation's business(es).]*

[Corporation name] and certain of its subsidiaries and affiliated companies (as set out in Paragraph 2.2 herein) (collectively, the **"[Country 1] Debtors"**), have commenced insolvency proceedings (collectively, the **"[Country 1] Cases"**) under [Country 1 legislation] in [court name and location] (the **"[Country 1] Court"**).

Certain of [A. Co.]'s other subsidiaries and affiliated companies (as set out in Paragraph 2.2 herein) (collectively, the **"[Country A] Debtors"**), have commenced

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[186] From a review of over 30 Cross-Border Insolvency Protocols, it appears that at least 14 Protocols contain substantial similarities, thereby creating a *de facto* Standard Protocol. The cases with similar Protocols are: *Re Calpine Corporation*, *Re Systech Retail Systems Corporation*, *Re Mosaic Group Inc.*, *Re Pioneer Companies*, *Re 360Networks Inc.*, *Re Laidlaw Inc.*, *PSINet Inc. et al.*, *Re Matlack Inc.*, *Re Philip Services Corporation*, *Re Loewen Group*, *Re Pope & Talbot Ltd.*, *Re Quebecor World (USA) Inc.*, *Re Financial Asset Management Foundation*, *Re Progressive Moulded Products Ltd.*, *Re Smurfit-Stone Container*, *Re Nortel Networks*, *Re SemCanada Crude*, *Re Masonite International*.
(Terms in this Model Protocol that are drawn from the "Standard Protocols" will be identified with a reference to "SP" in the relevant footnotes. We have also included references to specific paragraph numbers of prior Protocols where the same (or substantially similar) terms appear.

[187] SP. See *Re Calpine Corporation*; *Re Pope & Talbot Ltd.*; *Re Quebecor World (USA) Inc.*; *Re Progressive Moulded Products Ltd.*; *Re Masonite International Inc.*, *Re Nortel Networks*, *Re Madoff Securities* at para 5.1.

insolvency proceedings (collectively, the **"[Country A] Cases"**) under [Country A legislation] in [court name and location] (the **"[Country A] Court"**).

[Add details of relevant court orders made to date and estate representatives that have been appointed. Where voluminous, list on a Schedule.]

2. Parties to the Protocol and Definitions

2.1 Definitions

For convenience, the following definitions apply:

(i) The [Country 1] Debtors and the [Country A] Debtors are referred to collectively herein as the **"Debtors"** and references to a **"Debtor"** means either one of them.

(ii) The [Country 1] Cases and the [Country A] Cases are referred to herein collectively as the **"Insolvency Proceedings"**.

(iii) The [Country 1] Court and the [Country A] Court are referred to herein collectively as the **"Courts"**.

(iv) The [Country 1] [Monitor / Trustee / Administrator / Liquidator] and any other estate representatives appointed in the [Country 1] Cases, is referred to herein collectively as the **"[Country 1] Representatives"**.

(v) The [Country A] [Monitor / Trustee / Administrator / Liquidator] and any other estate representatives appointed in the [Country A] Cases, is referred to herein collectively as the **"[Country A] Representatives"**.

(vi) The [Country 1] Representatives and the [Country A] Representatives are referred to herein collectively as the **"Estate Representatives"** and **"Representatives"** means either [Country 1] Representatives or [Country A] Representatives, as the context requires.

(vii) *[Include where applicable]* A committee of creditors recognized by the [Country 1 and/or Country A] Court in the [Country 1 and/or 2] Cases shall be referred to herein as **"The Creditors' Committee"**.

(viii) A reference to a **"Country"** means [Country A], [Country 1] or both, as the context requires.

(ix) A reference to a **"Court"** means the [Country A] Court, the [Country 1] Court or both, as the context requires.

(x) In respect of each Country, the **"Service List"** is the list of interested parties that are given notice of a particular proceeding or step in a proceeding in accordance with the law and/or practice in such Country.

2.2 Parties

The Parties to this Protocol are:

(i) The [Country 1] Debtors:

(A) [List each of the corporations that is in the proceedings in Country 1.]

(ii) The [Country A] Debtors:

(B) [List each of the corporations that is in the proceedings in Country A.]

(iii) The [Country 1] Representatives and the [Country A] Representatives

(iv) *[Where applicable]* The Creditors' Committee

(v) [Other parties as may be agreed]

3. Purpose and Objects of the Protocol

While Insolvency Proceedings are pending in [Country 1] and [Country A], the implementation of basic administrative procedures is necessary to co-ordinate certain activities in the Insolvency Proceedings and ensure the maintenance of the Courts' independent jurisdiction and to give effect to the doctrine of comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in both the [Country 1] Cases and the [Country A] Cases, namely to

(i) harmonize, co-ordinate and minimize and avoid duplication of activities in the Insolvency Proceedings before the [Country 1] Court and the [Country A] Court;

(ii) promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

(iii) honour the independence and integrity of the Courts and other courts and tribunals of [Country 1] and [Country A];

(iv) promote international co-operation and respect for comity among the Courts, the Debtors, the Estate Representatives, *[where applicable]* the Creditors' Committee, the creditors and other interested parties in the Insolvency Proceedings;

(v) facilitate the fair, open and efficient administration of the Insolvency Proceedings; and

(vi) implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.[188]

4. The Role of the Courts

4.1 Independent Jurisdiction and Authority

(a) Independence

The approval and implementation of this Protocol shall not divest or diminish the independent jurisdiction of the Courts over the subject matter of the [Country 1] Cases and the [Country A] Cases. By approving and implementing this Protocol, the [Country 1] Court, the [Country A] Court, the Debtors, the creditors and other interested parties shall be deemed not to have approved or engaged in any infringement on the sovereignty of [Country 1] or [Country A].[189]

The [Country 1] Court shall have sole and exclusive jurisdiction and power over the conduct of the [Country 1] Cases and the hearing and determination of matters arising in the [Country 1] Cases. The [Country A] Court shall have sole and exclusive jurisdiction and power over the conduct of the [Country A] Cases and the hearing and determination of matters arising in the [Country A] Cases.[190]

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[188] SP. See *Re Calpine Corporation*, para. 8; *Re Systech Retail Systems Corporation*, para. 6; *Re Mosaic Group Inc.*, para. 5; *Re Pioneer Companies*, para. 5; *360Networks Inc.*, para. 6; *Re Laidlaw Inc.*, para. 5; *PSINet Inc. et al.*, para. 7; *Re Matlack Inc.*, para. 5; *Re Philip Services Corporation*, para. 6; *Re Loewen Group*, para. 5; *Re Pope & Talbot Ltd.*, para. 5; *Re Quebecor World (USA) Inc.*, para. 5; *Re Financial Asset Management Foundation*, para. 7; *Re Progressive Moulded Products Ltd.*, para. 6; *Re Smurfit-Stone Container* para 4; *Re Nortel Networks* para 6; *Re SemCanada Crude* para 8; *Re Masonite International* para 5.

[189] SP. See *Re Calpine Corporation*, para. 9; *Re Systech Retail Systems Corporation*, para. 7; *Re Mosaic Group Inc.*, para. 6; *Re Pioneer Companies*, para. 6; *360Networks Inc.*, para. 7; *Re Laidlaw Inc.*, para. 6; *PSINet Inc. et al.*, para. 23; *Re Matlack Inc.*, para. 6; *Re Philip Services Corporation*, para. 7; *Re Loewen Group*, para. 6; *Re Pope & Talbot Ltd.*, para. 6; *Re Quebecor World (USA) Inc.*, para. 6; *Re Financial Asset Management Foundation*, para. 8; *Re Progressive Moulded Products Ltd.*, para. 7.

[190] SP. See *Re Calpine Corporation*, para. 10; *Re Systech Retail Systems Corporation*, para. 8; *Re Mosaic Group Inc.*, para. 7; *Re Pioneer Companies*, para. 7; *360Networks Inc.*, para. 8; *Re Laidlaw Inc.*, para. 7; *PSINet Inc. et al.*, para. 24; *Re Matlack Inc.*, para. 7; *Re Philip Services Corporation*, para. 8; *Re Loewen Group*, para. 7; *Re Pope & Talbot Ltd.*, para. 7; *Re Quebecor World (USA) Inc.*, para. 7; *Re Financial Asset Management Foundation*, para. 9; *Re Progressive Moulded Products Ltd.*, para. 8.

In accordance with the principles of comity and independence established above, nothing contained in this Protocol shall be construed to:

(i) increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the [Country 1] Court, the [Country A] Court or any other court or tribunal in [Country 1] or [Country A], or to modify or affect the ability of any such Court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;

(ii) require the [Country 1] Court to take any action that is inconsistent with its obligations under the laws of [Country 1];

(iii) require the [Country A] Court to take any action that is inconsistent with its obligations under the laws of [Country A];

(iv) require the Debtors, the Estate Representatives, *[where applicable]* the Creditors' Committee, the creditors or other interested parties to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law;

(v) authorize any action that requires the specific approval of one or both of the Courts under [Country 1 legislation] or [Country A legislation] after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or

(vi) preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of [Country 1] or [Country A], including, without limitation, the rights of interested parties or affected persons to appeal from decisions taken by one or both of the Courts.[191]

(b) Application of Law of Other Jurisdiction

Where one Court has jurisdiction over a matter which requires the application of the law of the jurisdiction of the other Court in order to determine an issue before it, the Court with jurisdiction over such matter may, among other things, hear expert evidence

[191] SP. See *Re Calpine Corporation*, para. 11; *Re Systech Retail Systems Corporation*, para. 9; *Re Mosaic Group Inc.*, para. 8; *Re Pioneer Companies*, para. 8; *360Networks Inc.*, para. 9; *Re Laidlaw Inc.*, para. 8; *PSINet Inc. et al.*, para. 25; *Re Matlack Inc.*, para. 8; *Re Philip Services Corporation*, para. 9; *Re Loewen Group*, para. 8; *Re Pope & Talbot Ltd.*, para. 7; *Re Quebecor World (USA) Inc.*, para. 7; *Re Financial Asset Management Foundation*, para. 10; *Re Progressive Moulded Products Ltd.*, para. 8.

or seek the advice and direction of the other Court in respect of the foreign law to be applied, subject to Paragraph 4.3 herein.[192]

4.2 Mutual Recognition of Orders

Each Court hereby recognizes the validity of the stays of proceedings and actions against the Debtors, their directors [if applicable] and their assets in the other Country (the **"Other Country Stay"**). In recognition of the importance of the Other Country Stay to the successful completion of the Insolvency Proceedings for the benefit of the Debtors and their respective estates, each Court shall enforce the Other Country Stay to the same extent that such stay of proceedings and actions is applicable to prevent adverse actions against the assets, rights and holdings of the [Country A] Debtors in [Country 1] or the [Country 1] Debtors in [Country A], as the case may be. In implementing the terms of this Paragraph, each Court may consult with the other Court regarding (a) the interpretation and application of the Other Country Stay and any orders of the other Court modifying or granting relief from the Other Country Stay and (b) the enforcement of the one country's Stay in the other Country.[193]

Nothing contained herein shall affect or limit the rights of the Debtors or of any other interested parties' to assert the applicability or non-applicability of the Stay granted in either Country to any particular proceedings, property, asset, activity or other matter, wherever pending or located.[194]

Nothing contained herein shall affect or limit the ability of either Court to direct that any stay of proceedings affecting the parties before it shall not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate.[195]

4.3 Disputes Relating to Protocol Administration

Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either or both Courts upon notice in accordance with Paragraph 4.3 herein. In rendering a determination in any such dispute, the Court to which the issue is addressed: (i) shall consult with the other Court; and (ii) may, in its sole and exclusive discretion, either: (a) render a binding decision after such

[192] See *Re Calpine Corporation*, para. 15; *Re Pope & Talbot Ltd.*, para. 12; *Re Quebecor World (USA) Inc.*, para. 12 *Nortel Networks*, para 14; *Smurfit-Stone Container*, para 12; *SemCanada Crude*, para 16; *Masonite International*, para 12.
[193] See *SemCanada Crude*, para 27; *Smurtfit-Stone Container*, para 25; *Masonite International*, para 24.
[194] SP. See *Re Calpine Corporation*, para. 29; *Re Systech Retail Systems Corporation*, para. 23; *Re Mosaic Group Inc.*, para. 22; *Re Pioneer Companies*, para. 20; *360Networks Inc.*, para. 24; *Re Laidlaw Inc.*, para. 22; *Re Matlack Inc.*, para. 20; *Re Philip Services Corporation*, para. 23; *Re Loewen Group*, para. 24; *Re Pope & Talbot Ltd.*, para. 15; *Re Quebecor World (USA) Inc.*, para. 15; *Re Progressive Moulded Products Ltd.*, para. 16; *SemCanada Crude*, para 27; *Smurtfit-Stone Container*, para 25; *Masonite International*, para 24.
[195] See *Re Calpine Corporation*, para. 30; *SemCanada Crude*, para 27; *Masonite International*, para 24.

consultation; (b) defer to the determination of the other Court by transferring the matter, in whole or in part, to such other Court; or (c) seek a joint hearing of both Courts in accordance with paragraph 5.1(b) herein. Notwithstanding the foregoing, in making a determination under this paragraph, each Court shall give due consideration to the independence, comity and inherent jurisdiction of the other Court established under existing law.[196]

In implementing the terms of this Protocol, the [Country 1] Court and the [Country A] Court may, in their sole, respective discretion, provide advice or guidance to each other with respect to legal issues in accordance with the following procedures:

(a) the [Country 1] Court and the [Country A] Court, as applicable, may determine that such advice or guidance is appropriate under the circumstances;

(b) the Court issuing such advice or guidance shall provide it to the other Court in writing;

(c) copies of such written advice or guidance shall be served by the applicable Court in accordance with paragraph 6.3 herein; and

(d) the Courts may jointly decide to invite the Debtors, the Creditors Committee, the Estate Representatives and any other affected or interested party to make submissions to the appropriate Court in response to or in connection with any written advice or guidance received from the other Court.[197]

For clarity, the provisions of this paragraph shall not be construed to restrict the ability of the [Country 1] Court and the [Country A] Court to confer as provided in paragraph 5.1(a) whenever they deem it appropriate to do so.[198]

5. Harmonization and Co-ordination between Courts

5.1 Court to Court Communications

(a) Cooperation

[As appropriate:] To assist in the efficient administration of the Insolvency Proceedings and in recognizing that the any of the Debtors may be creditors of any of the other Debtors' estates, the Debtors and the Estate Representatives shall, where appropriate: (a) cooperate with each other in connection with actions taken in the

[196] *Nortel Networks*, para 25; *Smurfit-Stone Container*, para 25; *SemCanada Crude*, para 31; *Masonite International*, para 28.
[197] *Nortel Networks*, para 26; *Smurfit-Stone Container*, para 26; *SemCanada Crude*, para 32; *Masonite International*, para 29.
[198] *Smurfit-Stone Container*, para 26; *Masonite International*, para 29.

[Country 1] Court and the [Country A] Court and (b) take any other appropriate steps to coordinate the administration of the Insolvency Proceedings for the benefit of the Debtors' respective estates.[199]

(b) Communications

To harmonize and co-ordinate the administration of the Insolvency Proceedings, the [Country 1] Court and the [Country A] Court may coordinate activities with each other [and consider whether it is appropriate to defer to the judgment of the other Court][200]. In furtherance of the foregoing:

(i) The Courts may, but are not obliged to, co-ordinate activities in the Insolvency Proceedings so that the subject matter of any particular action, suit, request, application, contested matter or other proceeding may be determined in one Court only.

(ii) The Courts may communicate with one another, with or without counsel present, with respect to any [procedural or substantive] matter relating to the Insolvency Proceedings.

(iii) Where the issue of the proper jurisdiction or Court to determine an issue is raised by an interested party in either Insolvency Proceeding with respect to a motion or an application filed with either Court, the Court before which such motion or application was initially filed may contact the other Court and determine an appropriate process by which the issue of jurisdiction will be determined, which process shall be subject to submissions of the Debtors, the Estate Representatives and any interested party prior to any determination on the issue of jurisdiction being made by either Court.

(iv) The Courts may conduct joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of the [Country 1] Cases or the [Country A] Cases if both Courts determine and agree that such joint hearings are necessary or advisable to facilitate the proper and efficient conduct of the Insolvency Proceedings. With respect to any such joint hearing, unless otherwise ordered by both Courts, the following procedures shall be followed:

(A) a telephone or video link shall be established so that each Court shall be able to simultaneously hear the proceedings in the other Court;

[199] *Nortel Networks*, para 11; *Smurfit-Stone Container*, para 8; *SemCanada Crude*, para 13; *Masonite International*, para 9.
[200] **Note**: Consider inclusion and whether alternative formulation preferable.

(B) notices, submissions or applications by any party that are or become the subject of a joint hearing of the Courts (collectively, **"Pleadings"**) shall be made or filed initially only with the Court in which such party is appearing and seeking relief. Promptly after the scheduling of any joint hearing, the party submitting such Pleadings to one Court shall have copies filed with the other Court. In any event, Pleadings seeking relief from both Courts must be filed with both Courts;

(C) any party intending to rely on written evidentiary materials in support of a submission to the [Country 1] Court or the [Country A] Court in connection with any joint hearing or application (collectively **"Evidentiary Materials"**) shall ensure that such materials, which shall be identical insofar as possible and shall be consistent with the procedural and evidentiary rules and requirements of each Court, shall be filed in advance of the time of such hearing or the submission of such application;

(D) if a party has not previously appeared in or otherwise attorned to the jurisdiction of a Court, it shall be entitled to file Pleadings or Evidentiary Materials in connection with the joint hearing without being deemed to have attorned to the jurisdiction of the Court by the mere act of filing such Pleadings or Evidentiary Materials, provided that the party does not request any affirmative relief from such Court;

(E) the Judges or Justices of the Courts shall be entitled to communicate with each other in advance of any joint hearing, with or without counsel being present, for the purposes of (1) establishing guidelines for the orderly submission of Pleadings, Evidentiary Materials and other papers and the rendering of decisions by the Courts and (2) addressing any related procedural or administrative matters; and

(F) the Judges or Justices of the Courts shall be entitled to communicate with each other after any joint hearing, with or without counsel being present, for the purposes of (1) determining whether consistent rulings can be made by both Courts, (2) co-ordinating the terms of the Courts' respective rulings and (3) addressing any other procedural or administrative matters.[201]

[201] SP. See *Re Calpine Corporation*, para. 13; *Re Systech Retail Systems Corporation*, para. 12; *Re Mosaic Group Inc.*, para. 11; *Re Pioneer Companies*, para. 12; *360Networks Inc.*, para. 12; *Re Laidlaw Inc.*, para. 11; *PSINet Inc. et al.*, para. 13; *Re Matlack Inc.*, para. 11; *Re Philip Services Corporation*, para. 12; *Re*

Notwithstanding anything herein to the contrary, this Protocol recognizes that the Courts are independent courts. Accordingly, although the Court will seek to cooperate and coordinate with each other in good faith, each of the Courts shall be entitled at all times to exercise its independent jurisdiction and authority with respect to (a) matters presented to and properly before such Court and (b) the conduct of the parties appearing in such matter.[202]

6. Debtors, Estate Representatives and Other Parties

6.1 Authority to Act and Supervision by Court

The Debtors, the Estate Representatives, *[where applicable]* the Creditors' Committee, the creditors and their respective employees, members, agents and professionals shall respect and comply with the independent, non-delegable duties imposed upon them by the [Country 1 legislation], the [Country A legislation] and other applicable laws, regulation or orders of tribunals of competent jurisdiction.[203]

The Representatives in each Country and its respective employees, members, agents and professionals shall be subject to the sole and exclusive jurisdiction of the Court in such Country with respect to all matters including

(i) the tenure in office of that Country's Representatives;

(ii) the retention of that Country's Representatives;

(iii) the liability, if any, of that Country's Representatives to any person or entity, including that Country's Debtors and any third parties, in connection with the Insolvency Proceedings; and

(iv) the hearing and determination of any other matters relating to that Country's Representatives arising in the Cases under the legislation or other applicable law of that Country.[204]

Loewen Group, para. 11; *Re Pope & Talbot Ltd.*, para. 10; *Re Quebecor World (USA) Inc.*, para. 10; *Re Financial Asset Management Foundation*, para. 13; *Re Progressive Moulded Products Ltd.*, para. 11; *Nortel Networks*, para 12; *Smurfit-Stone Container*, para 10; *SemCanada Crude*, para 14; *Masonite International*, para 10. [**Note**: even among SPs these provisions vary as to the application to "procedural" and "substantive" matters]

[202] See *Nortel Networks*, para 13; *Smurfit-Stone Container*, para 11; *SemCanada Crude*, para 15; *Masonite International*, para 11.

[203] SP. See *Re Systech Retail Systems Corporation*, para. 10; *Re Mosaic Group Inc.*, para. 9; *Re Pioneer Companies*, para. 9; *360Networks Inc.*, para. 10; *Re Laidlaw Inc.*, para. 9; *PSINet Inc. et al.*, para. 26; *Re Matlack Inc.*, para. 9; *Re Philip Services Corporation*, para. 10; *Re Loewen Group*, para. 9; *Re Financial Asset Management Foundation*, para. 11; *Re Progressive Moulded Products Ltd.*, para. 9; *Re Smurfit-Stone Container* para 7; *Re Nortel Networks* para 10; *Re SemCanada Crude* para 12.

[204] SP. See *Re Calpine Corporation*, para. 20 and 23; *Re Systech Retail Systems Corporation*, para. 14 and 17; *Re Mosaic Group Inc.*, para. 13 and 16; *Re Pioneer Companies*, para. 14; *360Networks Inc.*, para. 14-15;

Except as otherwise provided herein, each Country's Representatives and their respective employees, members, agents and professionals shall not be required to seek approval of their retention in the Court of the other Country.[205]

6.2 Remuneration

Except as otherwise provided herein, each Country's Representatives and their respective employees, members, agents and professionals: (a) shall be compensated for their services solely in accordance with the legislation and other applicable laws of that Country or orders of that Country's Court and (b) shall not be required to seek approval of their compensation in the Court of the other Country.[206]

6.3 Debtors' Professionals

Any professionals retained by the [Country 1] Debtors, including without limitation counsel retained by the [Country 1] Debtors (the "[Country 1] Professionals") shall be subject to the sole and exclusive jurisdiction of the [Country 1] Court. Accordingly, the [Country 1] Professionals (a) shall be subject to the procedures and standards for retention and compensation under the applicable legislation and other applicable laws of that Country or orders of that Country's Court and (b) shall not be required to seek approval of their retention or compensation in the Court of the other Country with respect to services performed on behalf of the [Country 1] Debtors.

Any professionals retained by the [Country A] Debtors, including without limitation counsel retained by the [Country A] Debtors (the "[Country A] Professionals") shall be subject to the sole and exclusive jurisdiction of the [Country A] Court. Accordingly, the [Country A] Professionals (a) shall be subject to the procedures and standards for retention and compensation under the applicable legislation and other applicable laws of that Country or orders of that Country's Court and (b) shall not be required to seek approval of their retention or compensation in the Court of the other Country with respect to services performed on behalf of the [Country A] Debtors.[207]

Re Laidlaw Inc., para. 13 and 16; *PSINet Inc. et al.*, para. 15 and 18; *Re Matlack Inc.*, para. 13-14; *Re Philip Services Corporation*, para. 14 and 17; *Re Loewen Group*, para. 13 and 16; *Re Pope & Talbot Ltd.*, para. 17 and 20; *Re Quebecor World (USA) Inc.*, para. 17and 20; *Re Progressive Moulded Products Ltd.*, para. 19 and 22;

[205] SP. See *Re Calpine Corporation*, para. 20; *Re Systech Retail Systems Corporation*, para. 14; *Re Mosaic Group Inc.*, para. 13; *360Networks Inc.*, para. 14-15; *Re Laidlaw Inc.*, para. 13; *PSINet Inc. et al.*, para. 15; *Re Matlack Inc.*, para. 13; *Re Philip Services Corporation*, para. 14; *Re Loewen Group*, para. 13; *Re Pope & Talbot Ltd.*, para. 17; *Re Quebecor World (USA) Inc.*, para. 17; *Re Progressive Moulded Products Ltd.*, para. 19.

[206] SP. See *Re Calpine Corporation*, para. 20; *Re Systech Retail Systems Corporation*, para. 14; *Re Mosaic Group Inc.*, para. 13; *360Networks Inc.*, para. 14-15; *Re Laidlaw Inc.*, para. 13; *PSINet Inc. et al.*, para. 15; *Re Matlack Inc.*, para. 13; *Re Philip Services Corporation*, para. 14; *Re Loewen Group*, para. 13; *Re Pope & Talbot Ltd.*, para. 17; *Re Quebecor World (USA) Inc.*, para. 17; *Re Progressive Moulded Products Ltd.*, para. 19.

[207] *Nortel Networks*, para 18 and 19; *Smurfit-Stone Container*, para 20 and 21; *SemCanada Crude*, para 20 and 21; *Masonite International*, para 17 and 18.

6.4 Notice

Notice of any motion, application or hearing or the delivery of any Pleadings in one of the Insolvency Proceedings and notice of any related hearings or other proceedings mandated by applicable law in connection with the Insolvency Proceedings or the Protocol shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following:

(i) the Representatives and the Service List in the Country where the Pleadings are filed or the proceedings are to occur, in accordance with the practice in that jurisdiction; and

(ii) the Representatives and [if applicable] Creditors Committee in the other Country. Upon receiving notice, the Representatives in the other Country shall post such papers or other details of the proceeding on its website and shall also, if it deems it advisable, give notice of the proceedings to one or more interested parties in such Country.

When any cross-border issues or matters addressed by this Protocol are to be addressed by a Court, notice shall be provided in the manner and to the parties referred to in the preceding paragraph.

For greater certainty, the Representatives in each Country shall be placed on the Service List in the other Country, but such step shall not, by itself, constitute voluntary submission by the Representatives in one Country to the jurisdiction of the Court in the other Country.

In addition to the foregoing, the Debtors in each Country shall provide the Representatives in the other Country with copies of all orders, decisions, opinions or similar papers issued in the Insolvency Proceedings by the Court in the Debtors' Country for filing in the appropriate Court of the other Country or for service on anyone entitled to notice in the other Country.[208]

6.5 Sharing Publication of Information

In addition to other provisions of this Protocol addressing information sharing, the Representatives in one Country may, in response to reasonable requests for information, provide the Representatives in the other Country with information or documents relating to the Debtors (the "Requested Information"). The Estate

[208] SP. See *Re Calpine Corporation*, para. 25; *Re Systech Retail Systems Corporation*, para. 20; *Re Mosaic Group Inc.*, para. 19; *Re Pioneer Companies*, para. 17; *Re Laidlaw Inc.*, para. 19; *Re Pope & Talbot Ltd.*, para. 23; *Re Quebecor World (USA) Inc.*, para. 23. [**Note:** the last part of this Paragraph is a new addition: "for filing in the appropriate…"]

Representatives shall not have any responsibility or liability with respect to the Requested Information disseminated by them pursuant to this paragraph. However, where Representatives in one Country are asked to provide Requested Information that reasonably appears to be confidential or the disclosure of which would be prohibited, such Requested Information shall not be provided to the Representatives in the other Country except with the consent of the Debtors to which the Requested Information relates or upon order of the relevant Court.[209]

6.6 Right of Appearance

The Debtors, the Estate Representatives, *[where applicable]* the Creditors' Committee, the creditors and other interested parties in the Insolvency Proceedings shall have the right and standing to

(i) appear and be heard in either Court in the Insolvency Proceedings to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum; and

(ii) file notices of appearance or other papers with the clerk of the [Country 1] Court or the [Country A] Court in the Insolvency Proceedings.[210]

Subject to paragraph 6.7 herein, upon any appearance or filing as may be permitted or provided for by the rules of the applicable Court, the Debtors, their creditors and other interested parties in the Insolvency Proceedings, including the Creditors Committee and the Representatives, shall be subject to the personal jurisdiction of the [Country 1] Court or the [Country A] Court, as applicable, with respect to the particular matters as to which they appear before that Court.[211]

For greater certainty, if a creditor or interested party in one Country is compelled (whether by order of the Court in the other Country or otherwise) to file a claim in the other Country, such filing of a claim shall not, by itself, be deemed to constitute general attornment to the jurisdiction of the Court in the other Country and shall be deemed to constitute attornment solely for the purposes of the adjudication of such claim.[212]

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[209] See *Re Manhattan Investment Fund Ltd.*, para. 9. The wording of this paragraph has been substantially altered from what was contained in the *Manhattan* case.

[210] SP. See *Re Systech Retail Systems Corporation*, para. 24; *Re Mosaic Group Inc.*, para. 23; *Re Pioneer Companies*, para. 16; *360Networks Inc.*, para. 20; *PSINet Inc. et al.*, para. 27; *Re Matlack Inc.*, para. 16; *Re Loewen Group*, para. 20; *Re Pope & Talbot Ltd.*, para. 16; *Re Quebecor World (USA) Inc.*, para. 16; *Re Financial Asset Management Foundation*, para. 22; *Re Progressive Moulded Products Ltd.*, para. 18; *Smurfit-Stone Container*, para 16; *SemCanada Crude*, para 22. [**Note:** only the beginning of these Paragraphs have been included in this Protocol. The appearance provisions in recent protocols vary to a certain degree].

[211] See *Nortel Networks*, para 20; *Masonite International*, para 19.

[212] **Note**: This provision is not contained in the most recent formulations of protocols.

6.7 Submission by Representatives to the Courts of the Other Country

Neither of the following actions or steps by the Representatives in one Country shall constitute submission to the jurisdiction of the Courts of the other Country:

(a) the appearance in the Courts of the other Country for the purpose of challenging the jurisdiction of such courts; or

(b) the appearance in the Courts of the other Country for the purpose of opposing relief being sought in such courts as long as the Representatives are not themselves seeking affirmative relief.[213]

7. Effectiveness and Modification of Protocol

7.1 Approval and Entry into Force

This Protocol shall become effective upon its approval by both Courts but may be ordered to be provisionally effective by one Court pending approval by the other Court.[214]

7.2 Modification and Amendment

This Protocol may not be supplemented, modified, terminated or replaced in any manner except upon the approval of both Courts after notice and a hearing. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with Paragraph 6.3 herein.[215]

7.3 Preservation of Rights

Except as specifically provided herein, [neither] the terms of this Protocol [nor any actions taken under the terms of this Protocol] shall (a) prejudice or affect the powers, rights, claims, and defences of the Debtors and their estates, the Creditors Committee, the Estate Representatives, or any of the Debtors' creditors under applicable

[213] **Note**: This provision is not contained in the most recent formulations of protocols. In addition, consider whether to include standard mutual recognition and domestic application of statutory or Court ordered protections/immunities in favour of Representatives granted by other country.

[214] SP. See *Re Calpine Corporation*, para. 31; *Re Systech Retail Systems Corporation*, para. 25; *Re Mosaic Group Inc.*, para. 24; *Re Pioneer Companies*, para. 21; *360Networks Inc.*, para. 25; *Re Laidlaw Inc.*, para. 23; *PSINet Inc. et al.*, para. 29; *Re Matlack Inc.*, para. 21; *Re Philip Services Corporation*, para. 24; *Re Loewen Group*, para. 25; *Re Pope & Talbot Ltd.*, para. 25; *Re Quebecor World (USA) Inc.*, para. 25; *Re Progressive Moulded Products Ltd.*, para. 25; *Nortel Networks*, para 23; *Smurfit-Stone Container*, para 23; *SemCanada Crude*, para 29; *Masonite International*, para 26. [**Note:** the last part of this Paragraph dealing with provisional effectiveness is a new addition]. See also *Re Federal-Mogul Global Inc. et al.*, para. 11.1.

[215] SP. See *Re Calpine Corporation*, para. 32; *Re Systech Retail Systems Corporation*, para. 26; *Re Mosaic Group Inc.*, para. 25; *Re Pioneer Companies*, para. 22; *360Networks Inc.*, para. 26; *Re Laidlaw Inc.*, para. 24; *PSINet Inc. et al.*, para. 30; *Re Matlack Inc.*, para. 22; *Re Philip Services Corporation*, para. 25; *Re Loewen Group*, para. 26; *Re Pope & Talbot Ltd.*, para. 26; *Re Quebecor World (USA) Inc.*, para. 26; *Re Progressive Moulded Products Ltd.*, para. 26.

law, including the [Country 1 legislation applicable] and the [Country A applicable legislation] and the orders of the Courts; or (b) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of [Country 1] or [Country A].[216]

[216] See *Nortel Networks*, para 27; *Smurfit-Stone Container*, para 27; *SemCanada Crude*, para 33; *Masonite International*, para 30. **Note**: consider whether this provision undermines the principles and objects of the Protocol.

APPENDIX A

MODEL ADDITIONAL PROVISIONS

(*For consideration where circumstances require or the parties agree*)

7.4 Shared, Joint and Separate Jurisdiction and Authority

[Insert issues as necessary where clarity is desired.]

(a) Separate Jurisdiction

Notwithstanding Paragraph 4.1(a) herein, the Parties agree that the following issues shall be determined by the [Country 1] Court, subject to the directions of the [Country 1] Court as to the procedures by which such issues shall be determined, including directions as to pleadings, evidence and the manner of the trial of issues:

(i) ●

(ii) ●

Notwithstanding Paragraph 4.1(a) herein, the Parties agree that the following issues shall be determined by the [Country A] Court, subject to the directions of the [Country A] Court as to the procedure by which such issues shall be determined, including directions as to pleadings, evidence and the manner of the trial of issues:[217]

(i) ●

(ii) ●

(b) Shared/Joint Jurisdiction

The nature of the Debtors' business operations in [Country 1] and [Country A] and the interdependence of the lines of communications within the Debtors' global business operations, including those in [Country 1] and in [Country A], raise a number of cross-border insolvency and restructuring matters (the **"Cross-Border Matters"**) which will require the assistance of both Courts to resolve issues and disputes in a fair and efficient manner in accordance with comity and the principles established in this Protocol. The Cross-Border Matters will include *[Note: the following are typical examples]*:

(i) *The approval of a sale of all or a substantial part of the assets of the [Country 1] Debtors in accordance with bidding or other procedures established by both Courts.*

[217] See *Re Financial Asset Management Foundation*, para. 15-17. [**Note:** added in that this is "notwithstanding Paragraph 5.1.1 herein".]

(ii) *The allocation as between the [Country 1] Debtors and the [Country A] Debtors of the proceeds of sale of any assets of the [Country 1] Debtors carried out in conjunction with the sale of any assets of the [Country A] Debtors.*

(iii) *The allowance, priority and valuation of inter-company claims between the [Country 1] Debtors and the [Country A] Debtors.*

(iv) *The determination, priority and resolution of issues and claims in respect of personal property assets owned or leased by one of the Debtors where the assets are not physically located in the country of the Court having jurisdiction over the Debtor and the sale of such assets.*

(v) *The approval and implementation of any reorganization plan which may involve as parties both the [Country 1] Debtors and the [Country A] Debtors or which requires a Debtor in one jurisdiction to provide financial assistance to another Debtor in the other jurisdiction by way of a guarantee, subordination or otherwise.*

The Courts may conduct joint hearings in accordance with Paragraph 5.1(a) herein to determine and resolve Cross-Border Matters. With respect to the Insolvency Proceedings, the Courts will conduct joint hearings to determine and resolve the following Cross-Border Matters:[218]

(i) ●

(ii) ●

During the Insolvency Proceedings, the Courts may also jointly determine that other Cross-Border Matters that may arise in the [Country 1] Cases or the [Country A] Cases should be dealt with under and in accordance with the principles of this Protocol.[219]

[218] See *PSINet Inc. et al.*, beginning of para. 8 and para. 9. [**Note:** based only in part on para. 9].
[219] See *PSINet Inc. et al.*, end of para. 8.

8. Provisions for Major Proceedings in the Case

8.1 Filing Claims and Recognition of Claims

(a) Filing Claims

The Debtors and the Estate Representatives will endeavour to coordinate notice procedures and establish the same deadlines for the filing of claims against the Debtors in both the [Country 1] Court and the [Country A] Court, and all other matters regarding the filing, reviewing and objecting to claims.[220]

The [Country 1] Court shall have jurisdiction over all claims asserted against the Debtor governed principally by the laws of the [Country 1] unless, with respect to any particular claim, the [Country A] Court is a more appropriate forum in the circumstances. The [Country A] Court shall have jurisdiction over all claims asserted against the Debtor that are governed principally by the laws of [Country A] unless, with respect to any particular claim, the [Country 1] Court is a more appropriate forum in the circumstances.[221]

The adjudicating Court shall decide the amount, value, allowability, priority, classification and treatment of claims filed in any plan of reorganization *[or insert other equivalent term as desired]* and a creditor's rights to collateral and set-off based upon the choice of law principles applicable in that forum.[222]

(b) Recognition of Claims

Claims that have been finally allowed, settled, disallowed or determined in [Country 1] shall be recognized by the Debtors as having been likewise allowed, settled, disallowed or determined in [Country A] in the same amount, and the Debtors shall take all appropriate or necessary steps to obtain recognition of such claims in [Country A].[223] Likewise, claims that have been finally allowed, settled, disallowed or determined in [Country A] shall be recognized by the Debtors as having been likewise allowed, settled, disallowed or determined in [Country 1] in the same amount, and the Debtors shall take all appropriate or necessary steps to obtain recognition of such claims in [Country 1].

8.2 Borrowing and Security

Borrowing and giving of security by the [Country 1] Debtors will be subject to the authority of the [Country 1] Court, provided that notice be provided to the [Country A] Representatives and all interested parties in [Country 1] and [Country A]. Likewise,

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[220] See *Re Livent Inc.*, end of para. 8; *Re Everfresh Beverages Inc.*, end of para. 7.
[221] See *Re Livent Inc.*, beginning of para. 10.
[222] See *Re Livent Inc.*, middle of para. 10.
[223] See *Re AgriBio Tech Inc.*, s. 4.02. [**Note:** changed wording slightly to keep consistent with Protocol wording and made reciprocal].

borrowing and giving of security by the [Country A] Debtors will be subject to the authority of the [Country A] Court, provided that notice be provided to the [Country 1] Representatives and all interested parties in [Country 1] and [Country A]. Notice shall be given in accordance with Paragraph 6.4 herein.

8.3 Sales of Assets

Sales of assets by the [Country 1] Debtors will be subject to the authority of the [Country 1] Court, provided that notice be provided to the [Country A] Representatives and all interested parties in [Country 1] and [Country A]. Likewise, sales of assets by the [Country A] Debtors will be subject to the authority of the [Country A] Court, provided that notice be provided to the [Country A] Representatives and all interested parties in [Country 1] and [Country A]. Notice shall be given in accordance with Paragraph 6.4 herein.[224]

8.4 Distributions to Creditors

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in the [Country 1] Cases may not receive a payment for the same claim in the [Country A] Cases regarding the same Debtors, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.[225] [Country 1] Debtors shall have the priority treatment accorded to such claims determined by the [Country 1] Court which shall apply [Country A legislation] if required in determining priority.

Likewise, without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in the [Country A] Cases may not receive a payment for the same claim in the [Country 1] Cases regarding the same Debtors, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.[226] [Country A] Debtors shall have the priority treatment accorded to such claims determined by the [Country A] Court which shall apply [Country 1 legislation] if required in determining priority.

8.5 Creditors Meetings, Voting and Plan Approval in Reorganizations

(a) Co-ordination

To the extent permitted by the laws of [Country 1] and [Country A], and to the extent practicable, the Debtors shall submit plans of reorganization *[or insert other equivalent term as desired]* in [Country 1] and [Country A] that are substantially similar to each other. The Debtors shall to the extent practicable co-ordinate all procedures in

[224] *Re Pope & Talbot Ltd.*, para. 22 and *Re Quebecor World (USA) Inc.*, para. 22 are provisions that are substantially similar to Paragraph 7.3 herein.
[225] See Model Law (Chapter 15) Art. 32.
[226] See Model Law (Chapter 15) Art. 32.

connection therewith, including, without limitation, all solicitation proceedings relating thereto, and all procedures regarding voting, the treatment of creditors, classification of claims, and the like, and to the extent not provided for in this Protocol all such procedures will either be established by applicable law or further orders of both the [Country 1] Court and the [Country A] Court.[227]

(b) Recognition in Both Jurisdictions

Plans of reorganization *[or insert other equivalent term as desired]* accepted and approved by the [Country 1] Court shall be recognized by the [Country A] Court, notwithstanding whether a claimant has filed a proof of claim or otherwise attorned to the jurisdiction. Likewise, plans of reorganization *[or insert other equivalent term as desired]* accepted and approved by the [Country A] Court shall be recognized by the [Country 1] Court, notwithstanding whether a claimant has filed a proof of claim or otherwise attorned to the jurisdiction. [228]

[227] See *Re AgriBio Tech Inc.*, s. 5.01; *Re Livent Inc.*, para. 17.
[228] See *Re AgriBio Tech Inc.*, s. 5.04. [**Note:** changed wording slightly to keep consistent with Protocol wording and made reciprocal].

APPENDIX B

GUIDELINES FOR COURT-TO-COURT COMMUNICATIONS IN CROSS-BORDER CASES

THE AMERICAN LAW INSTITUTE

in association with

THE INTERNATIONAL INSOLVENCY INSTITUTE

Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

As Adopted and Promulgated in Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries

BY
THE AMERICAN LAW INSTITUTE
At Washington, D.C., May, 2000

And as Adopted by

THE INTERNATIONAL INSOLVENCY INSTITUTE
At New York, June, 2001

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Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

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And as Adopted by

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At New York, June, 2001

The *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* were developed by The American Law Institute during and as part of its Transnational Insolvency Project and the use of the *Guidelines* in cross-border cases is specifically permitted and encouraged.

The text of the *Guidelines* is available in English and several other languages including Chinese, French, German, Italian, Japanese, Korean, Portuguese, Russian, Swedish, and Spanish on the website of the International Insolvency Institute at http://www.iiiglobal.org/international/guidelines.html.

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Foreword by the Director of The American Law Institute

In May of 2000 The American Law Institute gave its final approval to the work of the ALI's Transnational Insolvency Project. This consisted of the four volumes eventually published, after a period of delay required by the need to take into account a newly enacted Mexican Bankruptcy Code, in 2003 under the title of *Transnational Insolvency: Cooperation Among the NAFTA Countries*. These volumes included both the first phase of the project, separate Statements of the bankruptcy laws of Canada, Mexico, and the United States, and the project's culminating phase, a volume comprising *Principles of Cooperation Among the NAFTA Countries.* All reflected the joint input of teams of Reporters and Advisers from each of the three NAFTA countries and a fully transnational perspective. Published by Juris Publishing, Inc., they can be ordered on the ALI website (www.ali.org).

A byproduct of our work on the Principles volume, these *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* appeared originally as Appendix B of that volume and were approved by the ALI in 2000 along with the rest of the volume. But the *Guidelines* have played a vital and influential role apart from the *Principles*, having been widely translated and distributed, cited and applied by courts, and independently approved by both the International Insolvency Institute and the Insolvency Institute of Canada. Although they were initially developed in the context of a project arrived at improving cooperation among bankruptcy courts within the NAFTA countries, their acceptance by the III, whose members include leaders of the insolvency bar from more than 40 countries, suggests a pertinence and applicability that extends far beyond the ambit of NAFTA. Indeed, there appears to be no reason to restrict the *Guidelines* to insolvency cases; they should prove useful whenever sensible and coherent standards for cooperation among courts involved in overlapping litigation are called for. See, e.g., American Law Institute, International Jurisdiction and Judgments Project §12(e) (Tentative Draft No. 2, 2004).

The American Law Institute expresses its gratitude to the International Insolvency Institute for its continuing efforts to publicize the *Guidelines* and to make them more widely known to judges and lawyers around the world; to III Chair E. Bruce Leonard of Toronto, who as Canadian Co-Reporter for the Transnational Insolvency Project was the principal drafter of the Guidelines in English and has been primarily responsible for arranging and overseeing their translation into the various other languages in which they now appear; and to the translators themselves, whose work will make the *Guidelines* much more universally accessible. We hope that this greater availability, in these new English and bilingual editions, will help to foster better communication, and thus better understanding, among the diverse courts and legal systems throughout our increasingly globalized world.

LANCE LIEBMAN
Director
The American Law Institute

January 30, 2004

Foreword by the Chair of the International Insolvency Institute

The International Insolvency Institute, a world-wide association of leading insolvency professionals, judges, academics, and regulators, is please to recommend the adoption and the application in cross-border and multinational cases of the American Law Institute's *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*. The *Guidelines* were reviewed and studies by a Committee of the III and were unanimously approved but its membership at the III's Annual General Meeting and Conference in New York in June 2001.

Since their approval by the III, the *Guidelines* have been applied in several cross-border cases with considerable success in achieving the coordination that is so necessary to preserve values for all of the creditors that are involved in international cases. The III recommends without qualification that insolvency professionals and judges adopt the *Guidelines* at the earliest possible stage of a cross-border case so that they will be in place whenever there is a need for the courts involved to communicate with each other, e.g., whenever the actions of one court could impact on issues that are before the other court.

Although the *Guidelines* were developed in an insolvency context, it has been noted by litigation professionals and judges that the *Guidelines* would be equally valuable and constructive in any international case where two or more courts are involved. In fact, in multijurisdictional litigation, the positive effect of the *Guidelines* would be even greater in cases where several courts are involved. It is important to appreciate that the *Guidelines* require that all domestic practices and procedures be complied with and that the *Guidelines* do not alter or affect the substantive rights of the parties or give any advantage to any party over any other party.

The International Insolvency Institute expresses appreciation to its members who have arranged for the translation of the *Guidelines* into French, German, Italian, Korean, Japanese, Chinese, Portuguese, Russian, and Swedish and extends its appreciation to The American Law Institute for the translation into Spanish. The III also expresses its appreciation to The American Law Institute, the American College of Bankruptcy, and the Ontario Superior Court of Justice Commercial List Committee for their kind and generous financial support in enabling the publication and dissemination of the *Guidelines* in bilingual versions in major countries around the world

Readers who become aware of cases in which the *Guidelines* have been applied are highly encourages to provide the details of those cases to the III (fax: 416-360-8877; email: info@iiiglobal.org) so that everyone can benefit from the experience and positive results that flow from the adoption and application of the *Guidelines.* The continuing progress of the *Guidelines* and the cases in which the *Guidelines* have been applied will be maintained on the III's website at www.iiiglobal.org.

The III and all of its members are very pleased to have been a part of the development and success of the *Guidelines* and commend The American Law Institute for its vision in developing the *Guidelines* and in supporting their worldwide circulation to insolvency professionals, judges, academics, and regulators. The use of the *Guidelines* in international cases will change international insolvencies and reorganizations for the better forever, and the insolvency community owes a considerable debt to The American Law Institute for the inspiration and vision that has made this possible.

E. Bruce Leonard
Chairman
The International Insolvency Institute

Toronto, Ontario
March 2004

Judicial Preface

We believe that the advantages of co-operation and co-ordination between Courts is clearly advantageous to all of the stakeholders who are involved in insolvency and reorganization cases that extend beyond the boundaries of one country. The benefit of communications between Courts in international proceedings has been recognized by the United Nations through the *Model Law on Cross-Border Insolvency* developed by the United Nations Commission on International Trade Law and approved by the General Assembly of the United Nations in 1997. The advantages of communications have also been recognized in the European Union Regulation on Insolvency Proceedings which became effective for the Member States of the European Union in 2002.

The *Guidelines for Court-to-Court Communications in Cross-Border Cases* were developed in the American Law Institute's Transnational Insolvency Project involving the NAFTA countries of Mexico, the United States and Canada. The *Guidelines* have been approved by the membership of the ALI and by the International Insolvency Institute whose membership covers over 40 countries from around the world. We appreciate that every country is unique and distinctive and that every country has its own proud legal traditions and concepts. The *Guidelines* are not intended to alter or change the domestic rules or procedures that are applicable in any country and are not intended to affect or curtail the substantive rights of any party in proceedings before the Courts. The *Guidelines* are intended to encourage and facilitate co-operation in international cases while observing all applicable rules and procedures of the Courts that are respectively involved.

The *Guidelines* may be modified to meet either the procedural law of the jurisdiction in question or the particular circumstances in individual cases so as to achieve the greatest level of co-operation possible between the Courts in dealing with a multinational insolvency or liquidation. The *Guidelines*, however, are not restricted to insolvency cases and may be of assistance in dealing with non-insolvency cases that involve more than one country. Several of us have already used the *Guidelines* in cross-border cases and would encourage stakeholders and counsel in international cases to consider the advantages that could be achieved in their cases from the application and implementation of the *Guidelines.*

Mr. Justice David Baragwanath
High Court of New Zealand
Auckland, New Zealand

Chief Justice Donald I. Brenner
Supreme Court of British Columbia
Vancouver

Hon. Sidney B. Brooks
United States Bankruptcy Court
District of Colorado
Denver

Hon. Charles G. Case, II
United States Bankruptcy Court
District of Arizona
Phoenix

Mr. Justice Miodrag Dordević
Supreme Court of Slovenia
Ljubljana

Mr. Justice J.M. Farley
Ontario Superior Court of Justice
Toronto

Hon. James L. Garrity, Jr.
United States Bankruptcy Court
Southern District of New York (Ret'd)
Shearman & Sterling
New York

Hon. Allan L. Gropper
Southern District of New York
United States Bankruptcy Court
New York

Mr. Justice Paul R. Heath
High Court of New Zealand
Auckland, New Zealand

Hon. Hyungdu Kim
Supreme Court of Korea
Seoul

Chief Judge Burton R. Lifland
United States Bankruptcy Appellate
Panel for the Second Circuit
New York

Mr. Justice Gavin Lightman
Royal Courts of Justice
London

Hon. George Paine II
United States Bankruptcy Court
District of Tennessee
Nashville

Hon. Chiyong Rim
District Court
Western District of Seoul
Seoul, Korea

Mr. Justice Adolfo A.N. Rouillon
Court of Appeal
Rosario, Argentina

Hon. Shinjiro Takagi
Supreme Court of Japan (Ret'd)
Industrial Revitalization Corporation of Japan
Tokyo

Mr. Justice Wisit Wisitsora – At
Business Reorganization Office
Government of Thailand
Bangkok

Mr. Justice R.H. Zulman
Supreme Court of Appeal of South Africa
Parklands

Guidelines
Applicable to Court-to-Court Communications
in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are

to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the

communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the

communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

APPENDIX C

TABLE OF CASES (ALPHABETICAL)

Cross-Border Insolvency Protocol in ***Re AgriBio Tech Inc.*** between Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley), Case No. 31-OR-371448, (June 16, 2000) and United States Bankruptcy Court for the District of Nevada (Hon. Linda B. Riegle), Case No. 500-10534 LBR, (June 28, 2000) providing for Court-to-Court Communications.

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Cross-Border Insolvency Protocol in ***Re Philip Services Corporation*** between United States Bankruptcy Court for the District of Delaware (Hon. Mary Walrath), Case No. 99-

B-02385, (June 28, 1999) and Ontario Superior Court of Justice, Toronto (Mr. Justice Robert A. Blair), Case No. 99-CL-3442, (June 25, 1999).

Cross-Border Insolvency Protocol in ***Re Pioneer Companies*** between the Quebec Superior Court, (Re PCI Chemicals Canada Inc.,) (Madam Justice Danielle Mayrand), Case No. 5000-05-066677-012, (August 1, 2001) and United States Bankruptcy Court for the Southern District of Texas, (Re Pioneer Companies Inc.) Case No. 01-38259, (August 1, 2001): providing for Court-to-Court communications consistent with The American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

Cross-Border Insolvency Protocol in ***Re Pope & Talbot Ltd.*** between the British Columbia Supreme Court, Vancouver (Chief Justice Donald I. Brenner), Case No. SO77839, (December 14, 2007) and the United States Bankruptcy Court for the District of Delaware, including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

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APPENDIX D

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IBA Cross-Border Insolvency Concordat
(Adopted 1995)

Introduction

The Council of the International Bar Association

Recalling

1 that at the meeting of the Council in Paris on 19 September 1995, it was resolved to give interim approval to the Work of Committee J in establishing the general principles contained in the Section on Business Law's Cross-Border Insolvency Concordat as applicable for consideration in cross-border insolvencies matters,

2 that the Concordat in draft form has recently been judicially approved in the case of In re Hackett in the United States, in the matter of the Proposal of Everfresh Beverages Inc of the regional municipality of Peel of the Province of Ontario, Canada and in an Order approving the stipulation regarding the cross-border insolvency protocol in Re Everfresh Beverages Inc and Sundance Beverages Inc in the United States Bankruptcy Court Sub-District of New York and

3 the need for the International Bar Association to give full and final approval to the cross-border Insolvency Concordat attached to this Resolution.

Resolves

That the IBA Cross-border Insolvency Concordat annexed to this Resolution be hereby approved and adopted.

Preamble

Flexibility in the rules appears to be indispensable in international bankruptcy. The situations which arise are so varied that any one rigid rule cannot solve all of them satisfactorily. Neither the theory of territoriality nor the theory of ubiquity can cope adequately with the divergent situations.

Professor Kurt H Nadelmann[1]

This Cross-Border Insolvency Concordat is a framework for harmonising cross-border insolvency proceedings. There exists today no uniform statute or treaty adopted by commercial nations dealing with the policy and commercial problems that arise in cross-border insolvencies. Yet cross-border insolvencies are increasing both in number and size, as well as in complexity. The Concordat attempts to aid in filling this gap in international law.

International commerce will be encouraged if the insolvency bench and bar develop a set of general guidelines, a 'concordat', which may be used in developing solutions to individual cross-border insolvencies. The purpose of this Concordat is to suggest generalised principles, which the participants or courts could tailor to fit the particular circumstances and then adopt as a practical approach towards dealing with the process.

To be supportive of international commerce, any insolvency regime must be reasonably predictable, fair and convenient. Supporting international commerce is a worthy goal, because, as some have noted, countries which trade together rarely make war upon one another. International commerce will be furthered by an understanding in the international business community that general principles exist which, in the event of business crisis, are recognised as an under pinning to harmonise insolvency proceedings.

These principles should reflect respect for the legitimate private expectations of the parties transacting business with the debtor, including their reasonable reliance upon laws of particular jurisdictions. However, legislation reflecting a particular jurisdiction's policies regarding such matters as priorities among claims must be given due weight where jurisdictionally appropriate, as should regulatory laws governing businesses such as banking or insurance.

This Concordat has been prepared as an initial effort to provide a framework of general principles for addressing cross-border insolvencies. The Concordat deals with some of the important conceptual issues that arise in cross-border insolvencies. Some principles have been framed in the alternative, reflecting among other things extensive comment from many countries. Refinements will be made in future editions of the Concordat, as appropriate.

[1] **Solomons v. Ross and International Bankruptcy Law, 9 Mod. L.R. 154, 167 – 68 (1946)**

It is important to note what the Concordat is not. The Concordat is not intended to be used as, or as a substitute for, a treaty or statute. The Concordat is not a rigid set of rules; indeed, it is expected to change as it is used. Rather, the Concordat is an interim measure until treaties and/or statutes are adopted by commercial nations. It is intended, in the absence of an applicable treaty or statute, to guide practitioners in harmonising
cross-border insolvencies. The Concordat, as modified by counsel to fit the circumstances of any particular cross-border insolvency, could be implemented by court orders or formal agreements between official representatives or informal arrangements, depending upon the rules and practices of the particular fora involved.

GLOSSARY OF TERMS

This Glossary of Terms is included for convenience and does not have independent significance. These terms may be tailored to conform to the applicable terms of those jurisdictions involved in any particular cross-border insolvency in which the Concordat is utilised.

Administrative Rules **The rules of insolvency law, excluding voiding rules, governing the conduct of a plenary proceeding.**

Common Claim **A claim which is neither a secured claim nor a privileged claim.**

Composition **A proceeding with the goal of rehabilitating the business of the entity or individual that is involved in insolvency proceedings, possibly with new owners, including arrangement, suspension of payment, reconstruction, reorganisation, or similar processes, with distributions to creditors and/or obligations of, or interest in, the rehabilitated business.**

Discharge **A court order or provision of an instrument effecting a composition releasing a debtor from all liabilities that were, or could have been, addressed in the insolvency proceeding, including contracts that were modified as part of a composition.**

Distribution **Allocation of estate property among creditors and/or shareholders or other equity interest.**

Insolvency Proceeding/Forum **Any proceeding over which a court or other official forum presides with respect to the insolvency of an entity or individual, which may be a plenary or limited proceeding.**

International Law **The laws governing relations among parties of diverse nationalities.**

Limited Proceeding **An insolvency proceeding that is not a plenary proceeding. Limited proceedings include secondary and ancillary proceedings.**

Liquidation **A proceeding with the goal of selling the debtor's business, either as a going concern or otherwise, with distribution of proceeds to creditors.**

Main Forum/Proceeding

Forum/proceeding **The exclusive or primary plenary**

Non-Local Creditors **Creditors who are neither nationals nor domiciliaries of the forum in question.**

Official Representative **A representative of the entity or individual that has commenced insolvency proceedings, or the estate created thereby, or its or his/her creditors, which may include an administrator, liquidator, trustee, supervisor or debtor-in-possession.**

Plenary Forum /Proceeding **A forum or insolvency proceeding which addresses, on a plenary basis, administrative matters, including, on the one hand, operation or liquidation of the debtor's business or assets, and, on the other hand, the filing, processing and allowance of claims and distribution to creditors.**

Privileged Claim **A claim that, pursuant to statutory or other law, or pursuant to ranking rules, is given a preference or priority over common claims, including a public law claim arising from the public law of a nation.**

Ranking Rules **The rules by which claims and equity interests are ranked.**

Secured Claim **A claim that is a valid charge upon or interest in collateral to the extent of the value of the collateral.**

Substantive Rules **Non-insolvency rules of law, other than procedural rules.**

Voiding Rules **Rules relating to voidness, voidability or unenforceability of claims or pre-insolvency transactions.**

IBA CROSS-BORDER INSOLVENCY CONCORDAT

PRINCIPLE 1

If an entity or individual with cross-border connections is the subject of an insolvency proceeding, a single administrative forum should have primary responsibility for co-ordinating all insolvency proceedings relating to such entity or individual.

PRINCIPLE 2

Where there is one main forum:

a) Administration and collection of assets should be co-ordinated by the main forum.

b) After payment of secured claims and privileged claims, as determined by local law, assets in any forum other than in the main forum shall be turned over to the main forum for distribution.

c) Common claims are filed in and distributions are made by the main forum. Common creditors not in the main forum must file claims in the main forum but (to the extent allowable under the procedural rules of the main forum) may file by mail, in their local language and with no formalities other than required under their local insolvency law.

d) The main forum may not discriminate against non-local creditors.

e) Filing a claim in the main forum does not subject a creditor to jurisdiction for any purpose, except for claims administration subject to the limitations of principle 8 and except for any offset (under voiding rules or otherwise) up to the amount of the creditor's claim.

f) A discharge granted by the main forum should be recognised in any forum.

PRINCIPLE 3

a) If there is more than one forum, the official representatives appointed by each forum shall receive notice of, and have the right to appear in, all proceedings in any fora. If required in a particular forum, an exequatur or similar proceeding may be utilised to implement recognition of the official representative. An official representative shall be subject to jurisdiction in all fora for any matter related to the insolvency proceedings, but appearing in a forum shall not subject him/her to jurisdiction for any other purpose in the forum state.

b) To the extent permitted by the procedural rules of a forum, *ex parte* and interim orders shall permit creditors of another jurisdiction and official representatives appointed by another jurisdiction the right, for a reasonable period of time, to request the court to reconsider the issues covered by such orders.

c) All creditors should have the right to appear in any forum to the same extent as creditors of the forum state, regardless or whether they have filed claims in that particular forum, without subjecting themselves to jurisdiction in that forum (including with respect to recovery against a creditor under voiding rules or otherwise in excess of a creditor's claim).

d) Information publicly available in any forum shall be publicly available in all fora. to the extent permitted, non-public information available to an official representative shall be shared with other official representatives.

PRINCIPLE 4

Where there is more than one plenary forum and there is no main forum:

a) Each forum should co-ordinate with each other, subject in appropriate cases to a governance protocol.

b) Each forum should administer the assets within its jurisdiction, subject to principle 4 (f).

c) A claim should be filed in one, and only one, plenary forum, at the election of the holder of the claim. If a claim is filed in more than one plenary forum, distribution must be adjusted so that recovery is not greater than if the claim were filed in only one forum.

d) Each plenary forum should apply its own ranking rules for classification of an distribution to secured and privileged claims.

e) Classification of common claims should be co-ordinated among plenary fora. Distributions to common claims should be *pro-rata* regardless of the forum from which a claim receives a distribution.

f) Estate property should be allocated (after payment of secured and privileged claims) among, or distributions should be made by, plenary fora based upon a *pro-rata* weighing of claims filed in each forum. Proceeds of voiding rules not available in every plenary forum should be

Alt A: Allocated *pro-rata* among all plenary fora for distribution.

Alt B: Allocated for distribution by the forum which ordered voiding.

g) If the estate is subject to local regulation that involves an important public policy (such as a banking or insurance business), local assets should be used first to satisfy local creditors that are protected by that regulatory scheme (such as bank depositors and insurance policy holders) to the extent provided by that regulatory scheme.

PRINCIPLE 5

A limited proceeding shall, after paying secured and privileged claims, as determined by local law, transfer any surplus to the main forum or another appropriate plenary forum.

PRINCIPLE 6

Subject to principle 8, the official representatives may employ the administrative rules of any plenary forum in which an insolvency proceeding is pending, even though similar rules are not available in the forum appointing the official representative.

PRINCIPLE 7

Subject to principle 8, the official representatives may exercise voiding rules of any forum.

PRINCIPLE 8

a) Each forum should decide the value and allowability of claims filed before it using a choice of law analysis based upon principles of international law. A creditor's rights to collateral and set-off should also be determined under principles of international law.

b) Parties are not subject to a forum's substantive rules unless under applicable principles of international law such parties would be subject to the forum's substantive laws in a lawsuit on the same transaction in a non-insolvency proceeding. The substantive and voiding laws of the forum have no greater applicability than the laws of any other nation.

c) Even if the parties are subject to the jurisdiction of the plenary forum, the plenary forum's voiding rules do not apply to transactions that have no significant relationship with the plenary forum.

PRINCIPLE 9

A composition is not barred because not all plenary fora have laws which provide for a composition as opposed to a liquidation, or a composition cannot be accomplished in all plenary fora, as long as the composition can be effected in a non-discriminatory manner.

PRINCIPLE 10

To the extent permitted by the substantive law of a forum, courts of that forum will not give effect to acts of state of another jurisdiction used to invalidate otherwise valid pre-insolvency transactions.

IBA CROSS-BORDER INSOLVENCY CONCORDAT AND RATIONALES

PRINCIPLE 1

If an entity or individual with cross-border connections is the subject of an insolvency proceeding, a single administrative forum should have primary responsibility for co-ordinating all insolvency proceedings relating to such entity or individual.

Rationale: **In most cases, an enterprise will have its nerve centre and many of its assets in one country. In the usual circumstance that country is the most appropriate forum for the administrative centre of its insolvency. Having a primary administrative forum presents the possibility of many benefits enhancing control of assets, increasing business values, and ensuring fair treatment of creditors. Predictability of the 'natural' administrative forum will also be most supportive of international commerce.**

As Professor Nadelmann counselled nearly a half century ago, flexibility is the key. Circumstances may exist in any insolvency which do require more than one forum. Compelling circumstances which may influence the decision may include the presence of a large workforce or extensive property holdings in another country. One forum, however, should have the primary responsibility for co-ordinating the proceedings. The forum should usually be the jurisdiction in which the entity subject to insolvency proceedings has its 'nerve centre', as evidenced by the presence of its board of directors or senior management, or any jurisdiction the laws of which its creditors would reasonably have expected to govern their relationships with the entity.

The Council of Europe's Convention on Certain International Aspects of Bankruptcy (the 'Council of Europe Convention') and the European Union's Draft EEC Bankruptcy Convention (April 1995 draft version) (the 'draft EU Convention') do not directly use this 'nerve centre' analysis. Rather these Conventions contain a presumption that the country in which a company or a legal person has its registered office is also the centre of the company's or legal person's main interests. The Explanatory Report accompanying the Council of Europe Convention clearly states that this presumption may be refuted, in particular in those cases where it can be shown that the entity's management decisions are taken elsewhere. Thus, while some countries may have different starting points in determining which single administrative forum has primary responsibility for co-ordinating insolvency proceedings, these starting points are sufficiently flexible and may be altered depending on the facts of a particular case.

The Concordat is designed to provide principles useful where any of several procedural situations occurs. While in most cases the establishment of a single main proceeding will be the best way to achieve the common goals of most national insolvency regimes, there may well be circumstances in which more than one plenary case is maintained. For example, plenary proceedings might proceed in two jurisdictions, with or without an administrative protocol,

and with or without limited proceedings in yet other jurisdictions. In all of these circumstances the Concordat provides principles intended to assist in coordination. The Concordat also provides principles applicable in any forum whether one, or several, plenary or limited proceedings are pending. These include the analysis of appropriate choice of law in litigated matters such as claim resolution and voiding rules.

PRINCIPLE 2

Where there is one main forum:

a) Administration and collection of assets should be coordinated by the main forum.

b) After payment of secured claims and privileged claims, as determined by local law, assets in any forum other than in the main forum shall be turned over to the main forum for distribution.

c) Common claims are filed in and distributions are made by the main forum. Common creditors not in the main forum must file claims in the main forum but (to the extent allowable under the procedural rules of the main forum) may file by mail, in their local language and with no formalities other than required under their local insolvency law.

d) The main forum may not discriminate against non-local creditors.

e) Filing a claim in the main forum does not subject a creditor to jurisdiction for any purpose, except for claims administration subject to the limitations of principle 8 and except for any offset (under voiding rules or otherwise) up to the amount of the creditor's claim).

f) A discharge granted by the main forum should be recognised in any forum.

Rationale: **The main forum should coordinate the administration and collection of assets. The value of any asset (after payment of secured and privileged claims) will ultimately be subject to distribution by or at the direction of the main forum. The centralisation in a main forum should extend to the claims allowance and distribution process. All claims against the enterprise arising from pre-insolvency transactions should be filed in the main forum, and in most circumstances should be heard in the main forum. In some cases, notably under the Council of Europe Convention, claims in the jurisdiction of a limited or secondary proceeding may be filed in the limited proceeding. However, the Convention requires that these claims shall also be notified to the liquidator or the competent authority in the main forum. When such claims are notified to the main forum, they are considered validly lodged in the main forum. Centralisation of the process of claims administration preserves the assets of the estate, allows for protection of the insolvency process, and promotes fair treatment of creditors. We have been advised that in some jurisdictions centralisation of the claims process will be difficult to achieve and in some countries a translation of the claim may be required. We advocate that by ordinance, delegation or comity, some process to permit central claims**

handling be created. Notification of the claims-filing process should normally be made in all countries where there are assets or known creditors.

International commerce is encouraged to the extent that participants may rely upon the expectation that if they engage in transactions with a multinational enterprise, and an insolvency proceeding is commenced in any nation with which the enterprise has a connection, that participant will not suffer discriminatory treatment based solely upon nationality or domicile. While a creditor may be subject to the inconvenience of an insolvency proceeding in another country, that risk is part of engaging in business with a multinational enterprise. But the risk of discriminatory treatment should not be a risk of engaging in such business. Nor should the risk that the evaluation of a creditor's pre-insolvency claim will be based upon the law of an unanticipated jurisdiction, unilaterally chosen by the entity or individual commencing insolvency proceedings, be a risk of doing such business.

This concern does not require that each creditor's rights be governed by the distribution laws of its domicile. On the contrary, estate assets will be assembled in or controlled by the main forum. However, the amount and validity of any particular claim is decided under international law.

If a creditor files a claim in a particular jurisdiction, it is not unexpected, however, that the jurisdiction will net out any claims against the creditor. For example, if a creditor of Country A files a claim of $100 in Country B and if there exists a valid claim of $140 against the creditor under Country B's voiding rules, Country B may be expected to offset those amounts. Reference to Principle 8 would determine whether Country B should grant an affirmative $40 judgement against the creditors.

To promote economy, and in light of modern communications technology, the main forum should have the ability to serve process worldwide, but a defendant should be permitted to object to jurisdiction of the main forum without submitting to jurisdiction, and to raise other objections to the forum. Similarly, the filing of a claim in a particular jurisdiction subjects the creditor to insolvency jurisdiction, but only as exercised by the court ultimately found appropriate to hear a matter, which may not be the main forum, and only with respect to its claim and offsets.

PRINCIPLE 3

a) If there is more than one forum, the official representatives appointed by each forum shall receive notice of, and have the right to appear in, all proceedings in any fora. If required in a particular forum, an exequatur or similar proceeding may be utilised to implement recognition of the official representative. An official representative shall be subject to jurisdiction in all fora for any matter related to the insolvency proceedings, but appearing in a forum shall not subject him/her to jurisdiction for any other purpose in the forum state.

b) To the extent permitted by the procedural rules of a forum, *ex parte* and interim orders shall permit creditors of another jurisdiction and official representatives appointed by another jurisdiction the right, for a reasonable period of time, to request the court to reconsider the issues covered by such orders.

c) All creditors should have the right to appear in any forum to the same extent as creditors of the forum state, regardless of whether they have filed claims in that particular forum, without subjecting themselves to jurisdiction in that forum (including with respect to recovery against a creditor under voiding rules or otherwise in excess of a creditor's claim).

d) Information publicly available in any forum shall be publicly available in all fora. To the extent permitted, non-public information available to an official representative shall be shared with other official representatives.

Rationale: **If more than one plenary forum is presiding over insolvency proceedings of a multi-national entity or individual, co-ordination of both the administration and claims processing is essential. The goals of Principle 1 are still important, and they can be achieved only if the Official Representatives are in constant communication, work together to co-ordinate the process, and have the respect of all relevant jurisdictions. All should be aware of proceedings in all courts, and where necessary should be heard if judicial resolution of a matter is required.**[2]

Where more than one plenary forum exists, it appears to be an equitable corollary that any Official Representatives should be subject to plenary jurisdiction in every such forum. If creditors must respond in that forum, the Official Representatives must surely be required to respond in that forum. However, the Official Representatives should not be subject to jurisdiction for any purpose unrelated to representation of the estate.

Interim orders must often be made on short notice, especially in the first stages of insolvency proceedings. Because of the greater complexity of cross-border proceedings, such orders should be made subject to 'come-back' procedures, so that any affected party may request the court to reconsider the matter when the situation has stabilised and the facts are clearer. In that way, courts will be given sufficient time and sufficient input to consider carefully the consequences of orders having cross-border ramifications. In addition, parties who are uncertain of the court's intentions regarding the cross-border reach of their orders, and who are not otherwise subject to the jurisdiction of the court, should be free to obtain clarification of such issues without being subjected to jurisdiction for other purposes.

Because the guiding principle of this Concordat is that all common creditors should be treated as creditors of a single world-wide estate, even though the estate is administered

[2] **Official Representatives will most often seek to appear to press claims of the creditors in their country, or to assert an interest in assets. However, Official Representatives should be heard on any matter of interest to their position.**

by more than one forum, as a matter of fairness all creditors should have a right to be heard (where a forum permits creditors to speak) on administrative matters in which they have an interest without submission to jurisdiction of the administrative forum for any purpose other than administrative matters and claims administration. No creditor not otherwise found in the administrative forum state, or whose claim is not connected to the forum state, should, as a result of administrative participation, lose its rights to jurisdictional and other international law arguments with respect to an adversary proceeding against the creditor.

The exchange of information is an important element in co-ordination. Both the Council of Europe Convention and the draft EU Convention recognise the importance of ongoing exchanges of information between Official Representatives in the main and limited or secondary proceedings. The representatives are under a duty to communicate and to cooperate with one another. Some jurisdictions are more restrictive than others about some types of information, including bank records. Any forum must respect the laws of the forum in which such information is found, but the Concordat supports the free flow of, and equal access to, information relevant to a cross-border case.

PRINCIPLE 4

Where there is more than one plenary forum and there is no main forum:

a) Each forum should co-ordinate with each other, subject in appropriate cases to a governance protocol.

b) Each forum should administer the assets within its jurisdiction, subject to principle 4 (F).

c) A claim should be filed in one, and only one, plenary forum, at the election of the holder of the claim. If a claim is filed in more than one plenary forum, distribution must be adjusted so that recovery is not greater than if the claim were filed in only one forum.[3]

d) Each plenary forum should apply its own ranking rules for classification of and distribution to secured and privileged claims.

e) Classification of common claims should be coordinated among plenary fora. Distributions to common claims should be *pro-rata* regardless of the forum from which a claim receives a distribution.

f) Estate property should be allocated (after payment of secured and privileged claims) among, or distributions should be made by, plenary fora based upon a *pro-rata* weighing of claims filed in each forum. Proceeds of voiding rules not available in every plenary forum should be:

ALT A: Allocated pro-rata among all plenary fora for distribution.

ALT B: Allocated for distribution by the forum which ordered voiding.

[3] Note the innovative solution proposed by the Japan Country Team to the difficulties posed by territorial restrictions. See Rationale below. The solution requires filing in all jurisdictions as the key to equalising recoveries.

g) If the estate is subject to local regulation that involves an important public policy (such as a banking or insurance business), local assets should be used first to satisfy local creditors that are protected by that regulatory scheme (such as bank depositors and insurance policy holders) to the extent provided by that regulatory scheme.

Rationale: **As suggested with respect to Principle 1, estate assets and business values are more likely to be preserved and enhanced if administration is centred in a single forum. If there are multiple insolvency proceedings and no main forum and if assets are located in several plenary fora or outside of any plenary forum, the same objectives may be met if the relevant fora agree upon a governance protocol.**

Such a protocol was entered into in the Maxwell Communication Corporation plc ('MCC') insolvency. In that somewhat anomalous situation, most of MCC's assets were in the US while its corporate centre, and most of its creditors, were in England. Insolvency proceedings were begun within twenty-four hours in both countries. The protocol basically established that the English administrators would exercise the role of corporate governance of MCC, but that a US examiner would represent the interests of US creditors. Thus, the English administrators were empowered to exercise day-to-day supervision of estate assets, on an ordinary course basis, without further consultation. But decisions of larger import, including the sale of a major asset or fundamental decisions about the direction of the case, were made subject to consultation with, and the concurrence of, the US examiner. Judicial intervention was available in the event of a conflict.

Where more than one plenary proceeding exists, creditors should have the ability to choose the forum most advantageous or convenient for the creditor. If all creditors have the choice, all are provided equal treatment. Therefore, the holder of a claim should be permitted to file it in any plenary forum.

The choice of law applicable to the underlying validity of the claim is not affected by the choice of where it is filed -- under this concordat the same choice of law rules will apply in every forum. However, the creditor may feel that one forum is more hospitable than another, and a privileged creditor may fare better under one distribution system rather than another.

A creditor should only be permitted to file claims in a single jurisdiction, however. Common claims should receive pro-rata distributions regardless of which plenary forum makes the distribution.

Where a vote is solicited on a matter affecting the administration of an estate, all creditors should be permitted to vote because all should be treated as if they are creditors of a single estate.

Privileged claims, which reflect national policy choices, should be recognised by permitting distributions to those claims in each forum to be made according to its rules. Where a particular country has no assets for distribution and is

allocated a portion of estate assets for distribution to privileged creditors, the country may distribute such assets to privileged creditors first.

Certain industries, such as banking and insurance, involve regulation that implements important public policies. Under the Concordat, these are respected.[4]

To promote fairness, which in turn promotes commerce, distribution of estate assets, domestic or multi-national, should generally be made pro-rata among creditors of the same class, wherever located. However, where more than one plenary forum has been found appropriate, each should be permitted to make distributions pursuant to its own procedural law. Therefore, each must be allocated an appropriate portion of estate property.

Estate property should be allocated (after satisfaction of secured claims and payment of privileged claims in any jurisdiction in which estate property is located) such that it is distributed on a pro-rata basis among plenary fora based upon claims filed. Claims in comparable classes in each jurisdiction should be valued on a comparative basis, and then the assets, or their proceeds, should be allocated among each jurisdiction based upon claims filed. For example, if in Forum A there are three secured claims of £50 each, and one unsecured claim of £100, and in Forum B one secured claim of $100, and six unsecured claims of $50 each; and if secured claims are payable in full and unsecured at fifty per cent; and if the exchange rate at the time of distribution if £1 =$2, then Forum A must pay £200 in claims[5] and Forum B claims of $250.[6] The ratio by which value should be allocated between fora in this case is 4 (Forum A) to 2.5 (Forum B).[7]

It may be argued that only creditors residing in a particular forum should benefit from voiding rules applicable to transactions in that forum. If creditors may choose where to file claims, and if discrimination in distribution based upon nationality or domicile is otherwise inappropriate, some may question whether this exception to the general principle is proper.

The Japan Country Team Solution

We are advised that some jurisdictions, such as Japan, may have difficulty with the concept that jurisdiction be exercised over assets outside of Japan. We applaud the creative solution proposed by the Japanese Country Team,

[4] **See, In re Norske Lloyd Ins. Co., 242 N.Y. 148 (1926); In re Ocana, 151 B.R. 670 (S.D.N.Y. 1993); see also Art. 1(1) of the Council of Europe Convention and Art. 1(2) of the draft EU Convention.**

[5] **3 x £50 = £150 at 100% = £150**
1 x £100 = £100 at 50% = £ 50
£200

[6] **1 x $100 = $100 at 100% = $100**
6 x $ 50 = $300 at 50% = $150
$250

[7] **Forum A : £200 x 2 = 400**
Forum B : $250 x 1 = 250

set forth graphically below, which reaches an equitable result consistent with the principles of the Concordat on a world-wide basis.

Assumptions:

Total Common Claims: $10,000
Assets in Administrative Forum A: $ 1,000
Assets in Administrative Forum B: $ 2,000
Assets in Administrative Forum C: $ 1,500
$ 4,500

Case I

Basic application of Principle 4. All creditors file claims in one jurisdiction; property ($4,500) allocated based on claims ($10,000). Forum	**Claims**	**Allocation**	**Distribution**
Forum A	**$8,000 (80%)**	**$3,600**	**$0.45/$**
Forum B	**$1,000 (10%)**	**$ 450**	**$0.45/$**
Forum C	**$1,000 (10%)**	**$ 450**	**$0.45/$**