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Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings

Note by the Secretariat*

1. These Notes have been prepared by the Secretariat in response to a proposal made to the thirty-eighth session of the Commission (2005) that further work should be undertaken on coordination and cooperation in cross-border insolvency cases, particularly with regard to the use and negotiation of cross-border insolvency agreements, noting that that topic was closely related and complementary to the promotion and use of the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law) and, in particular, implementation of article 27 (c).

2. At its thirty-ninth session (2006) the Commission agreed that initial work to compile information on practical experience with negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007.[1]

3. At the first part of its fortieth session (2007) the Commission considered a preliminary report reflecting experience with respect to negotiating and using cross-border insolvency protocols (A/CN.9/629) and expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency agreements and reaffirmed that that

* This note is submitted late to enable finalization of consultations.

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), subpara. 209 (c).

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work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.[2]

4. At its forty-first session, the Commission had before it a note by the Secretariat reporting on further progress with respect to that work (A/CN.9/654). The Commission noted that further consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission (A/CN.9/629), had been prepared by the Secretariat. The Commission decided that the compilation should be presented as a working paper to Working Group V (Insolvency Law) at its thirty-fifth session (Vienna, 17-21 November 2008) for an initial discussion. Working Group V could then decide to continue discussing the compilation at its thirty-sixth session in April and May of 2009 and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in searching for solutions in the international treatment of enterprise groups in insolvency. The Commission decided to plan the work at its forty-second session, in 2009, to allow it to devote, if necessary, time to discussing recommendations of Working Group V.[3]

5. The compilation of practice is set forth below as the draft UNCITRAL Notes on cooperation, coordination and communication in cross-border insolvency proceedings. The introduction to the Notes explains the scope of the Notes, the content of each part and the manner in which the text is organized.

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[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), Part I, paras. 190 and 191.

[3] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 321.

UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings

Contents

Introduction

A. Organization and scope of the Notes

1. The purpose of these Notes is to provide guidance for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases, i.e. cases where the insolvent debtor has assets in more than one State or where some of the debtor's creditors are not from the State in which the insolvency proceedings have commenced. Such cases might involve individual debtors, but typically they involve enterprise groups with offices, business activities and assets in multiple States. The guidance is based upon collected experience and practice and focuses upon the use and negotiation of cross-border agreements, providing an analysis of a number of those agreements, ranging from written agreements approved by courts to oral arrangements between parties to the insolvency proceedings that have been entered into in cross-border insolvency cases over the last decade. A number of the insolvency cases to which these agreements relate are summarized in the annex to the Notes.

2. Part I of the Notes discusses the increasing importance of coordination and cooperation in cross-border insolvency cases and provides an introduction to the various international texts relating to cross-border insolvency that have been developed in recent years. These texts address various aspects of cross-border insolvency, from elaborating a legislative framework to facilitate cooperation and coordination in cross-border insolvency to providing guidance on issues that could be included in cross-border agreements or adopted by courts to guide cross-border communication.

3. Part II amplifies article 27 of the UNCITRAL Model Law on Cross-Border Insolvency, discussing various ways in which cooperation in cross-border cases might be achieved.

4. Part III examines in detail the issues addressed by cross-border agreements entered into to date. This part includes a number of what are termed "sample clauses", which are based to varying degrees upon provisions found in different cross-border agreements, notably those mentioned in the annex. These clauses are included to illustrate how different issues have been addressed or might be addressed, but are not intended to serve as model provisions for direct incorporation into protocols.

B. Glossary

1. Notes on terminology

5. The following terms are intended to provide orientation to the reader of the Notes. Since many terms have fundamentally different meanings in different jurisdictions, an explanation of the use of the term in the Notes may assist in ensuring that the concepts discussed are clear and widely understood. These Notes use terminology common to the UNCITRAL Model Law on Cross-Border Insolvency and the UNCITRAL Legislative Guide on Insolvency Law (the UNCITRAL Legislative Guide), where relevant. For ease of reference, these terms are repeated below.

(a) References in the Notes to "court"

6. The Legislative Guide assumes that there is reliance on court supervision throughout the insolvency proceedings, which may include the power to commence insolvency proceedings, to appoint the insolvency representative, to supervise its activities and to take decisions in the course of the proceedings. Although this reliance may be appropriate as a general principle, alternatives may be considered where, for example, the courts are unable to handle insolvency work (whether for reasons of lack of resources or lack of requisite experience) or supervision by some other authority is preferred (see part one, chap. III, Institutional framework).

7. For purposes of simplicity, the Guide uses the word "court" in the same way as article 2, subparagraph (e), of the UNCITRAL Model Law on Cross-Border Insolvency to refer to a judicial or other authority competent to control or supervise insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Guide.

(b) Rules of interpretation

8. Use of the singular also includes the plural; "include" and "including" are not intended to indicate an exhaustive list; "such as" and "for example" are to be interpreted in the same manner as "include" or "including".

9. "Creditors" should be interpreted as including both the creditors in the forum State and foreign creditors, unless otherwise specified.

10. References to "person" should be interpreted as including both natural and legal persons, unless otherwise specified.

(c) References to texts

11. These Notes include references, where relevant, to several international texts that address various aspects of coordination of cross-border insolvency cases, including:

(i) "Court-to-Court Guidelines": Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001);

(ii) "EC Regulation": European Council Regulation (EC) No. 1346/2000 of May 2000 on insolvency proceedings;

(iii) "CoCo Guidelines": European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe, Academic Wing (2007);

(iv) "Concordat": Cross-Border Insolvency Concordat adopted by the Council of the International Bar Association Section on Business Law (Paris, 17 September 1995) and by the Council of the International Bar Association (Madrid, 31 May 1996);

(v) "UNCITRAL Model Law": UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997);

(vi) “UNCITRAL Legislative Guide”: UNCITRAL Legislative Guide on Insolvency Law (2004).

2. Terms and explanations

12. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the Notes:

(a) “Assets of the debtor”: property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor’s interests in encumbered assets or in third-party-owned assets;

(b) “Avoidance provisions”: provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors;

(c) “Centre of main interests”: the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties;

(d) “Claim”: a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent;

(e) “Commencement of proceedings”: the effective date of insolvency proceedings whether established by statute or a judicial decision;

(f) “Creditor”: a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings;

(g) “Creditor committee”: representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law;

(h) “Cross-border agreement”: an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest;

(i) “Debtor in possession”: a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative;

(j) “Deferral”: when one court accepts the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain claims and issue certain orders, in favour of another court;

(k) “Encumbered asset”: an asset in respect of which a creditor has a security interest;

(l) “Establishment”: any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;

(m) “Insolvency”: when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets;

(n) “Insolvency estate”: assets of the debtor that are subject to the insolvency proceedings;

(o) “Insolvency proceedings”: collective proceedings, subject to court supervision, either for reorganization or liquidation;

(p) “Insolvency representative”: a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(q) “Main proceeding”: an insolvency proceeding taking place in the State where the debtor has the centre of its main interests;

(r) “Non-main proceeding”: an insolvency proceeding, other than a main proceeding, taking place in a State where the debtor has an establishment. Non-main proceedings conducted in European Union Member States under the EC Regulation are referred to as “secondary proceedings”;

(s) “Ordinary course of business”: transactions consistent with both:

(i) the operation of the debtor’s business prior to insolvency proceedings; and

(ii) ordinary business terms;

(t) “Party in interest”: any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest;

(u) “Priority”: the right of a claim to rank ahead of another claim where that right arises by operation of law;

(v) “Reorganization”: the process by which the financial well-being and viability of a debtor’s business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern;

(w) “Reorganization plan”: a plan by which the financial well-being and viability of the debtor’s business can be restored;

(x) “Secondary proceedings”: non-main proceedings conducted in European Union Member States under the EC Regulation;

(y) “Stay of proceedings”: a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor’s assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate.

I. Background

A. The legislative framework for cross-border insolvency

1. Although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvencies, but also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities in and conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law that will be applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is involved.

2. In addition to the inadequacy of existing laws, the absence of predictability as to how they will be implemented and the potential cost and delay of implementation has added a further layer of uncertainty that can impact upon capital flows and cross-border investment. Acceptance of different types of proceedings, understanding of key concepts and the treatment accorded to parties with an interest in insolvency proceedings differs. Reorganization or rescue procedures, for example, were more prevalent in some countries than others. The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varied widely. Different countries also recognized different types of proceedings with different effects. An example in the context of reorganization proceedings has been the case in which the law of one State envisages a debtor in possession continuing to exercise management functions, while under the law of another State in which contemporaneous insolvency proceedings are being conducted with respect to the same debtor, existing management will be displaced or the debtor's business liquidated. Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws did not accord recognition to universality claimed by foreign insolvency proceedings. In addition to differences between key concepts and treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, regarded as a key element of many laws, could not be applied effectively across borders.

3. In addition to the lack of national law reform efforts, there has also been a lack of multilateral treaty arrangements with global effect. A few treaties have been negotiated at a regional level, but those arrangements are generally only possible (and suitable) for countries of the particular region whose insolvency law regimes and general commercial laws are similar (see para. 19 below). Experience has

shown that despite the potential of international treaties to provide a vehicle for widespread harmonization, the effort in negotiating such agreements is generally substantial and, as one commentator has noted, the greater the degree of practical utility that is pursued by means of a treaty, the greater the difficulty in bringing it to fruition and the greater the risk of ultimate failure. The search for comity in insolvency in Europe provides a good example. From 1960 the intention was to develop a bankruptcy convention that would parallel the 1968 Convention on Jurisdiction and Enforcement of Judgements and Civil Commercial Matters. These efforts led to the 1990 European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention). Following only one ratification (Cyprus), the Convention was superseded by a draft European Union convention on insolvency proceedings. Although European member States came close to adopting such a Convention in November 1995, implementation ultimately proved impossible. The Convention was revived in the form of a regulation in May 1999, which was adopted by the Council on 29 May 2000 and came into effect on 31 May 2002 (see para. 20 below).

4. To address the lack of national law reform efforts, several international initiatives were launched by certain non-governmental organizations to provide a legal framework for harmonization of cross-border insolvency proceedings. One such project was the Model International Insolvency Cooperation Act (MIICA) developed under the auspices of Committee J of the Section on Business Law of the International Bar Association in the 1980s. Although failing to gain wide and active acceptance from governments and legislators, the MIICA ensured that the model law concept came to be perceived as a viable way of solving the impasse caused by persistent failure to successfully conclude a global treaty in the area of insolvency. Experience with MIICA also indicated the importance to the success of a project of involving Governments in the negotiation process (a key element of the UNCITRAL process), particularly where the text being developed required action by governments for its adoption, whether legislative or otherwise.

B. International initiatives

1. UNCITRAL Model Law on Cross-Border Insolvency

5. The UNCITRAL Model Law was adopted by UNCITRAL in 1997. It focuses on the legislative framework needed to facilitate cooperation and coordination in cross-border cases, with a view to promoting the general objectives of:

(a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

6. These principles raise a number of issues that relate to the extent to which courts, in exercising their powers with respect to administration of the cases before them, are permitted or authorized to interact with or relate to foreign courts that might be administering a related case involving the same debtor. Are courts able, for example, to treat common stakeholders equitably, give foreign stakeholders access to their courts on the same basis as domestic stakeholders or permit another jurisdiction to take principal charge of administering reorganization? Experience has shown, for example, that some courts are often reluctant or unable to defer to a foreign court and may therefore prefer parallel insolvency proceedings or treat primary and secondary proceedings as if they were concurrent or parallel proceedings. Such a preference may be based upon applicable law or a desire to protect the interests of domestic creditors.

7. In its resolution of 1997[4] recommending that States adopt the UNCITRAL Model Law, the United Nations General Assembly provided a compelling statement of the need for the text, its timeliness and its fundamental purpose. Specifically, the General Assembly noted that increased cross-border trade and investment led to a greater incidence of cases where enterprises and individuals had assets in more than one State and there was often an urgent need for cross-border cooperation and coordination to facilitate the supervision and administration of the insolvent debtor's assets and affairs. Inadequate coordination and cooperation in those cases not only reduces the possibility of rescuing financially troubled but viable businesses, but also impedes a fair and efficient administration of cross-border insolvencies, making it more likely that the debtor's assets would be concealed or dissipated, and hinders reorganization or liquidation of debtor's assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtor and the debtor's employees.

8. The General Assembly went on to note that many States lacked a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation. It made clear its conviction that fair and internationally harmonized legislation on cross-border insolvency that respected the national procedural and judicial systems and was acceptable to States with different legal, social and economic systems would not only contribute to the development of international trade and investment, but would also assist States in modernizing their legislation on cross-border insolvency.

9. An intergovernmental working group, including representatives of 72 States, seven intergovernmental organizations and ten non-governmental organizations, negotiated the UNCITRAL Model Law between 1995 and 1997. As a model law, it requires enactment into domestic law to provide a unilateral legislative framework for cross-border insolvency. The UNCITRAL Model Law focuses upon what is required to facilitate the administration of cross-border insolvency cases and provide an interface between jurisdictions and as such respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law (substantive insolvency law is addressed in the UNCITRAL Legislative Guide).

10. The text of the UNCITRAL Model Law offers solutions that help in several modest but significant ways, organized around four key elements: (a) Access to

[4] General Assembly resolution 52/158 of 15 December 1997.

local courts for representatives of foreign insolvency proceedings and for creditors; (b) According recognition to certain orders issues by foreign courts; (c) Providing relief to assist foreign proceedings; and (d) Facilitating cooperation among the courts of States where the debtor's assets are located.

11. The solutions offered by the UNCITRAL Model Law include the following:

(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

(c) Establishing simplified procedures for recognition;

(d) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(e) Permitting courts and insolvency representatives in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(f) Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

(g) Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State; and

(h) Establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

12. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvencies derives from a lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts. As noted above, the UNCITRAL Model Law is designed to assist States to equip their insolvency laws with that modern, harmonized legislative framework.

13. The Guide to Enactment of the UNCITRAL Model Law emphasizes the centrality of cooperation to cross-border insolvency cases, in order to achieve efficient conduct of those proceedings and optimal results. A key element is cooperation between the courts involved in the various proceedings of the case (article 25) and between those courts and the insolvency representatives appointed in the different proceedings (article 26). An essential element of cooperation may be establishing communication among the administering authorities of the States involved. While the UNCITRAL Model Law provides the authorization for cross-border cooperation and communication between judges, it does not specify how that cooperation and communication might be achieved, leaving it up to each jurisdiction to determine or apply its own rules. It does note, however, that the ability of courts, with the appropriate involvement of the parties, to communicate "directly" and to

request information and assistance "directly" from foreign court or foreign representatives, is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when courts consider that they should act with urgency.[5]

14. As at August 2008, legislation based upon the UNCITRAL Model Law has been enacted in: Australia (2008); British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005); Colombia (2006); Eritrea (1998); Great Britain (2006); Japan (2000); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2003); Serbia (2004); South Africa (2000); and United States of America (2005).[6]

2. International Bar Association Cross-Border Insolvency Concordat

15. A different initiative was that of Committee J of the International Bar Association, which in the early 1990s developed a Cross-Border Insolvency Concordat based on rules of private international law. The purpose of the Concordat was to suggest guidelines for cross-border insolvencies and reorganizations that participants or courts could adopt as practical solutions to a variety of issues. These include: designation of the administrative forum; application of that forum's priority rules; rules for cases involving more than one administrative forum; and designation of applicable rules for avoidance of certain specified pre-insolvency transactions. The initial application of the Concordat was in cases that involved Canada and the United States, by some of the judges who had been instrumental in developing the Concordat. Cross-border insolvency protocols based on the Concordat model have been entered into between the United States and Canada on a number of occasions, as well as between the United States and Israel, the Bahamas, the Cayman Islands, England, Bermuda and Switzerland.

16. This form of cooperation has emerged as a common practice, at least in certain States. The absence of formal treaties or domestic legislation to address the problems arising from international insolvencies has encouraged insolvency practitioners to develop, on a case-by-case basis, strategies and techniques for resolving the conflicts that arise when the courts of different States attempt to apply different laws and enforce different requirements upon the same set of parties. The terms and duration of protocols vary, and amendment or modification in the course of the proceedings takes account of the changing dynamics of a multinational insolvency to facilitate solutions for unique problems that arise in the course of the proceedings.

17. The first time a protocol was used was in 1992 in the insolvency of the Maxwell Communication Corporation,[7] which was placed into administration in England and contemporaneously into Chapter 11 proceedings in New York, with administrators and an examiner appointed respectively. A protocol may not be the appropriate solution for all cases, being case specific as to its content and requiring time for it to be negotiated, a sufficient asset base to justify negotiation and

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[5] UNCITRAL Model Law, Guide to Enactment, para. 179.

[6] This information is regularly updated on the UNCITRAL website at http://www.uncitral.org under Status of Conventions.

[7] All case names referred to in the text are listed in the annex, where cases are not listed in the annex, full citation is provided in a footnote.

cooperation between the two courts and between the insolvency practitioners in each jurisdiction. Nevertheless, the cases in which cross-border protocols have been used provide examples of how cooperation and coordination between the judges, courts and the insolvency profession can improve the international regime for insolvency in the absence of comprehensive national, regional or international law reform solutions. The protocols developed have often provided innovative solutions to cross-border issues and have enabled courts to address the specific facts of individual cases. Although there are limitations on the extent to which they can be used to achieve more widespread harmonization of international insolvency law and practice, protocols are being increasingly used and information about them more and more widely disseminated.

3. Regional arrangements

18. While a few treaties have been negotiated at a regional level, these arrangements are generally only possible (and suitable) for countries of the particular region whose insolvency law regimes and general commercial laws are similar. Of necessity, their application is limited to the regional group of contracting States.

19. Regional multilateral treaties include: in Latin America, the Montevideo Treaties of 1889 and 1940 and in the Nordic region, the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding Bankruptcy (concluded in 1933, amended in 1977 and 1982). While no doubt improving the situation between those contracting States, the increasing globalization of business and investment and the consequent spread of international insolvencies is likely to include non-participating States, underlining the limitations inherent in any regional treaty regime. Nevertheless, regional arrangements may prove to be a useful starting point for broader cooperation.

20. As noted above, the EC Regulation regulates the complex problems of cross-border insolvency by creating a binding framework within which insolvency proceedings taking place in any Member State of the EU could be recognized and enforced throughout the rest of the Union. The EC Regulation recognizes that the proper functioning of its internal market requires the efficient and effective operation of cross-border insolvency proceedings. One impediment to that proper functioning, which the Regulation tries to prevent, is “forum shopping”, where parties transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position.[8] The EC Regulation imposes a mandatory regime for the exercise of jurisdiction to open insolvency proceedings and choice of law rules, which determine the law that will govern each relevant aspect of insolvency proceedings to which the Regulation applies and recognizes the importance of cooperation between the proceedings. Article 31 establishes the duty of insolvency representatives of the different concurrent insolvency proceedings to cooperate and communicate information, but does not provide much guidance on the detail of that communication and cooperation. That is addressed by the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines), developed under the aegis of the Academic Wing of INSOL Europe,

[8] Preamble of the EC Regulation, recitals (2) and (4).

which constitute a set of standards for communication and cooperation by insolvency representatives in cross-border insolvency cases.

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

21. In 2000, the American Law Institute (ALI) developed the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the Court-to-Court Guidelines) as part of its work on transnational insolvency in the countries of the North American Free Trade Agreement (NAFTA). The Court-to-Court Guidelines are intended encourage and facilitate cooperation in international cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any country, nor to affect or curtail the substantive rights of any party in proceedings before the courts.

II. UNCITRAL Model Law on Cross-Border Insolvency: possible forms of cooperation under article 27

1. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvencies derives from a lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts. As noted above, the UNCITRAL Model Law provides that legislative framework authorizing cross-border cooperation and communication between courts. It does not, however, specify how that cooperation and communication might be achieved. To assist those States that might have a limited tradition of direct cross-border judicial cooperation and States where judicial discretion has traditionally been constrained, article 27 of the UNCITRAL Model Law lists possible forms of cooperation that might be used to coordinate cross-border insolvency cases.

A. Article 27 (a): Appointment of a person to act at the direction of the court

2. Such a person may be appointed by a court to facilitate coordination of insolvency proceedings taking place in different jurisdictions concerning the same debtor. The person may have a variety of possible functions including: acting as a go-between for the courts involved, especially where issues of language are raised; developing a protocol; and promoting consensual resolution of issues between the parties. Where the court appoints such a person, typically the court order will indicate the terms of the appointment and the powers of the appointee. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

3. In the *Maxwell* case, for example, the United States court appointed an examiner with expanded powers under chapter 11 of the United States Bankruptcy Code and directed them to work to facilitate coordination of the different proceedings. In the *Nakash* case, an examiner was also appointed by the United States court to, inter alia, attempt to develop a protocol for harmonizing and coordinating the United States chapter 11 proceedings with certain proceedings taking place in Israel and ultimately facilitate a consensual resolution of the United States chapter 11 case. In the *Matlack* case, cross-border agreement provided for the intermediary to periodically or upon request deliver to the court reports summarizing the status of the foreign insolvency proceedings and such other information as the court might order.

B. Article 27 (b): Communication of information as considered appropriate by the court

4. An essential element of cooperation may be establishing communication between the administering authorities of the States involved. Articles 25 and 26 of the UNCITRAL Model Law authorize direct communication between courts, between courts and insolvency representatives and between insolvency representatives. Where the UNCITRAL Model Law has been adopted, these

provisions establish the necessary legislative authorization for that communication, but they do not specify in any detail how that communication should take place beyond suggesting, in article 27, that it may be implemented by, for example, communicating information by any means considered appropriate by the court. The UNCITRAL Model Law envisages that communication as authorized would be subject to any mandatory rules applicable in an enacting State, such as rules restricting the communication of information for reasons, inter alia, of protection of privacy or confidentiality.[9] The ability of courts to communicate "directly" and to request information and assistance "directly" from foreign court or foreign representatives, avoiding the use of time-consuming procedures traditionally in use, such as letters rogatory, may be critical when courts consider that they should act with urgency.[10]

5. Establishing communication in cross-border cases may assist cross-border proceedings in many ways. It may assist parties to better understand the implications or application of foreign law, particularly the differences or overlaps that may otherwise lead to litigation; facilitate resolution of issues through a negotiated result acceptable to all; provoke more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions. It may also serve international interests by facilitating better understanding that will assist in encouraging international business and preserving value that would otherwise be lost through fragmented judicial action. Some of the potential benefits may be hard to identify at the outset, but may become apparent once the parties have communicated. Cross-border communication may reveal, for example, some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

6. Communication of information may take place by exchange of documents (e.g. copies of formal orders, judgements, opinions, reasons for decisions, transcripts of proceedings, affidavits and other evidence) or orally. The means of communication may be by post, fax or e-mail, or by telephone or videoconference. Copies of written communications may also be provided to the parties in accordance with applicable notice provisions. Communication may be affected directly between judges or between or through court officials (or a court appointed intermediary, as noted above) or insolvency representatives, subject to local rules. The development of new communication technologies supports various aspects of cooperation and coordination, with the potential to reduce delays and, as appropriate, facilitate face-to-face contact. As global litigation multiplies, these methods of direct communication are increasingly being used.

7. Communication of information between judges or other interested parties raises a number of issues that need to be considered to ensure any communication is open, effective and credible and that proper procedures are followed. At a general level, it might be appropriate to consider whether communication should be treated as a matter of course in cross-border proceedings or resorted to only where determined to be strictly necessary; whether it should cover only issues of procedure or may also deal with substantive matters; whether a judge may advocate that a

[9] UNCITRAL Model Law, Guide to Enactment, para. 182.

[10] Ibid., para. 179.

particular course of action be taken; and, with respect to safeguards, such as those mentioned below (see part III, paras. 30-32, 185-188 below), whether they should apply in all cases or whether there might be exceptions.

8. In any particular case it will be necessary to determine, as appropriate to a particular jurisdiction: the correct procedures to be followed, including the persons who are to be party to the communication and any limitations that will apply; the questions to be considered; whether the parties share the same intentions or understanding with respect to communication; any safeguards that will apply to protect the substantive and procedural rights of the parties; the language of the communication and any consequent need for translation of written documents or interpretation of oral communications; and acceptable methods of communication. Safeguards might provide that parties are entitled to be notified of any proposed communication (e.g. all parties and their representatives or counsel), object to the proposed communication, be present when the communication takes place and to participate and that a record of the communication should be made, becoming part of the records of the proceedings and available to counsel in both courts subject to any measure to protect confidentiality the courts may deem appropriate.

9. Where the UNCITRAL Model Law has not been enacted, the legislative authorization for communication in cross-border proceedings might be lacking. The different approaches taken to communication between the courts and parties serve to illustrate some of the problems that might be encountered. In addition to the absence of specific authorization, there is very often hesitance or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitance or reluctance may be based upon ethical considerations; legal culture; language; or lack of familiarity with foreign laws and their implementation. Some States have a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or indeed with other judges. In some States, ex parte communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable.[11] Within States, judges and lawyers may have quite different views about the propriety of contacts between judges without the knowledge or participation of the attorneys for the parties. Some judges, for example, accept that there is no difficulty with private contact amongst themselves, while some lawyers would strongly disagree with that practice. Courts typically focus on the matters before them and may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or foreign operations.

10. Courts may adopt guidelines, such as the Court-to-Court Guidelines, to coordinate their activities, foster efficiency and ensure stakeholders in each State are treated consistently. Such guidelines typically 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

[11] For example, in the NAFTA countries, ex parte communications with the judge are accepted in Mexico, while in Canada and the United States they are not. See The American Law Institute's Principles of Cooperation Among the NAFTA Countries, Procedural Principle 10, Topic IV.B., Comment, pp. 57-58.

courts. Rather, they are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate with one another and may be adopted by court for general use or incorporated into specific cross-border agreements.

C. Article 27 (c): Coordination of administration and supervision of the debtor's assets

11. The conduct of cross-border insolvency proceedings will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings. Coordination of such use, realization and disposal will help to avoid disputes and ensure that the benefit of all parties in interest is the key focus, particularly in reorganization. Some of the issues to be considered in facilitating coordination will include: the location of the various assets; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of (e.g. the insolvency representative, the courts or in some cases the debtor), including the approvals required; the extent to which responsibility for those assets can be shared among or allocated to those different parties in different States; and how information can be shared to ensure coordination and cooperation. Coordination may also be relevant to investigating the debtor's assets and considering possible avoidance actions.

D. Article 27 (d): Approval or implementation of agreements concerning coordination of proceedings

12. As noted above, the insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border agreements to address the potential procedural and substantive conflicts arising in those cross-border cases, facilitating their resolution through cooperation between the courts, the debtor and other stakeholders across jurisdictional lines to work efficiently and increase realizations for stakeholders in potentially competing jurisdictions.

13. These cross-border agreements do not replace enactment of the UNCITRAL Model Law as a means of facilitating cross-border cooperation and coordination, but may be used in conjunction with enactment of the Model Law and, in fact, complement its enactment. They are discussed in detail in Part III below.

E. Article 27 (e): Coordination of concurrent proceedings

14. When there are concurrent cross-border proceedings with respect to the same debtor, the UNCITRAL Model Law aims to foster decisions that would best achieve the objectives of both proceedings. Article 29 provides guidance to a court that is dealing with cases where the debtor is subject to both foreign and local proceedings, addressing ways in which those proceedings should be coordinated, particularly with respect to the provision of relief, to ensure steps required in the different proceedings can proceed without being unnecessarily suspended by the operation of

a stay. For example, investigation of the debtor's assets may involve assets located in a number of different jurisdictions and such investigation may be hampered by the operation of a stay in one or more of those jurisdictions. In order to proceed with the investigation, relief from the stay might be required. Similarly, proceedings commenced in one State might be assisted by the application of a stay in another State where no insolvency proceedings have commenced with respect to the debtor, but where the debtor has assets. Recognition of the stay in that second State would assist in protecting the assets for the benefit of all creditors. In recognizing and implementing a stay ordered by another court, a court might consult with the issuing court regarding (a) the interpretation and application of the stay and possible modification of the stay or relief from the stay, and (b) the enforcement of the stay.

15. Concurrent proceedings may also be coordinated by way of joint hearings (see part III, paras. 145-150 below) and in the case of reorganization, by coordinating reorganization plans, particularly where the same or a similar plan is required in each State involved in the insolvency. Coordination may be relevant to preparation of the plan; negotiation with creditors; procedures for approval; the role to be played by the courts, particularly with respect to approval of the plan and its implementation.

16. Chapter V of the UNCITRAL Model Law (articles 28-32) addresses certain specific aspects of coordination of concurrent proceedings, namely commencement of local proceedings after recognition of foreign main proceedings; coordination of relief; coordination of multiple proceedings; the application of a presumption of insolvency; and rules of payment in concurrent proceedings.

F. Article 27 (f): Other forms of cooperation

17. Forms of cooperation not specifically mentioned in article 27 might include the following.

(a) Questions of jurisdiction and allocation of disputes among cooperating courts for resolution

18. Reaching an appropriate level of cooperation may require courts in the States in which insolvency proceedings have commenced to coordinate their efforts and avoid the sorts of conflict that might arise from the traditional approaches of reciprocity and the first-to-judgement rule (which permits parallel litigation involving the same parties and issues to proceed in two countries, with the result governed by the first court past the post). In some countries the anti-suit injunction, restraining a party from commencing or continuing proceedings in another jurisdiction, may also be relevant. Cooperation may involve, for example, identifying different matters to be brought before respective courts (which might be agreed at the level of the parties and not involve a decision by the courts); courts deferring to the jurisdiction or to decisions of other courts; and to the extent permitted, allocating responsibility for various matters between the courts to facilitate coordination and avoid duplication of effort. Amongst some States, there is a trend of some courts in multinational cases attempting to determine the optimal forum for each case rather than relying on the traditional rules. This solution has

been used most frequently in insolvency cases because of the universal jurisdiction characteristic of insolvency.

19. Determining the most appropriate forum may involve one court deferring to another. This might involve dismissing a legal action commenced in one court to allow a decision in the other court in which a parallel action has been commenced.[12] It might also involve one court giving jurisdiction to another court where, for example, an action may be possible in the second court, but not in the first. In the *Maxwell* case, for example, a creditor would have been subject to an avoidance action in the United States, but not in the United Kingdom; the United Kingdom court gave jurisdiction to the United States court, all parties agreeing that the use of the United States law in this case would be territorial. After considering the matter, however, the United States court concluded that the law of the jurisdiction having the greatest interest in the outcome of the controversy, in this case English law, should govern. The United States court acknowledged, "in an age of multinational corporations, it may be that two or more countries have equal claim to be the home country of the debtor". The approach of determining which substantive law of the different jurisdictions involved in a cross-border case should apply, based on greatest interest, has been followed in other cases.[13]

20. Deferring to another court might not be possible in all cases, as courts are often obligated to exercise jurisdiction or exclusive control over some matters. Some legal systems also have procedural rules that limit their ability to defer to another court. In particular, civil law jurisdictions may lack the ability to defer to a foreign court. However the insolvency representative may have discretion to simply not pursue a given action in his home court, electing to let the representative of a related proceeding in another country pursue the action there.

(b) Coordination of the filing, determination and priority of claims

21. Coordinating the procedures for verification and admission of claims may assist the administration of multiple cross-border insolvency proceedings involving large number of creditors in different States. Various measures could be adopted, for example: determining a single jurisdiction for the submission, verification and admission of claims and allocating responsibility for that process to the court or the insolvency representative; coordinating that process where claims are to be submitted in more than one proceeding, including requiring insolvency representatives to share lists of creditors and claims admitted, and aligning submission deadlines and procedures; providing for recognition of claims verified and admitted in one State in other States; establishing priorities of claims; and so forth. Coordination of treatment of claims is on of the issue commonly addressed in cross-border agreements (see part III, paras. 120-131 below).

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[12] Two examples: Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987), in which a United States court approved dismissal of a claim against a debtor in a Swedish insolvency proceeding in deference to that proceeding; Cunard Steamship Co. v. Salen Reefer Serv. A. B., 773 F.2d 452 (2d Cir. 1985), which involved a similar dismissal of an arbitration in favour of an insolvency proceeding.

[13] See In re Lernout & Hauspie Speech Products N.V., 301 B.R. 651, (Bankr. D. Del., 2003), affirmed 308 B.R. 672 (U.S. D. Del. (2004)).

III. Cross-border agreements used to facilitate multiple cross-border insolvencies

A. Preliminary issues

1. As noted above, one tool for facilitating the management of multiple cross-border insolvencies are *cross-border agreements*.

2. As noted above, some of the international projects targeting the facilitation of cross-border insolvency proceedings touch more or less explicitly on issues of these agreements, referring in particular to cross-border protocols, and in some cases recommending their use. Some, for example, have developed principles to assist with the negotiation of protocols, including in particular, the Concordat. The CoCo Guidelines recommend the use of a protocol as the best means of achieving cooperation, while the Court-to-Court Guidelines make reference to the use of a protocol in the context of joint hearings. As discussed below, some agreements incorporate the terms of these instruments by reference; others model specific provisions upon the drafting used in these texts.

3. Drawing upon practical experience, the following part examines what cross-border agreements are, describes their use, outlines some of the conditions supporting the use of cross-border agreements and identifies the range of issues included in existing cross-border agreements, reflecting on the manner in which they have been treated in different cases.

1. What is a cross-border agreement?

4. Cross-border agreements are generally agreements entered into for the purpose of facilitating cross-border cooperation and coordination of multiple insolvency proceedings in different States concerning the same debtor. Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonization of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may be addressed). They vary in form (written versus oral) and scope (generic to specific) and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings and are approved by the courts involved. They may reflect agreement between the parties to take certain steps or actions, as well as agreement to refrain from taking certain steps or actions.

5. Though differing in form, these agreements are nearly always intended to be binding on the parties that enter into them and regulate a similar range of issues. They are most commonly referred to as “protocols”, although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. Since the use of the term “protocol” does not necessarily reflect the diverse nature of the agreements being used in practice, these Notes use the more general term “cross-border agreement”.

6. Cross-border agreements have been successfully used in insolvency proceedings concerning both reorganization or liquidation and in a variety of situations, including cases involving: multiple plenary proceedings; ancillary proceedings commenced in different States affecting the same parties; main and non-main proceedings; and insolvency proceedings in one State and non-insolvency proceedings against the same debtor in another State. They have also been used in cases involving States with different legal traditions, that is, both common law and civil law.

7. In addition to promoting the efficient worldwide coordination and resolution of multiple proceedings against a debtor, they are also intended to protect the fundamental local rights of each of the parties involved in those proceedings. As such, they are considered by many practitioners who have been involved with their use as the key to developing appropriate solutions for particular cases, without which a successful conclusion to the proceedings would have been very unlikely. Their increasing use suggests that in time they may become the norm in cases with a significant international element, although their use is not ubiquitous, currently being limited to a handful of States.

8. Typically, cross-border agreements are tailored to address the specific issues of a case and the needs of the parties involved. They may be used:

(a) To promote certainty and efficiency with respect to management and administration of the proceedings;

(b) To help clarify the expectations of parties;

(c) To reduce disputes and promote their effective resolution where they do occur;

(d) To assist in preventing jurisdictional conflict. The agreement in the Maxwell proceedings, for example, resulted in the English and United States insolvency representatives performing in such a way that no conflict requiring judicial resolution arose;

(e) To facilitate restructuring;

(f) To assist in achieving cost savings by avoiding duplication of effort and competition for assets and avoiding unnecessary delay;

(g) To promote mutual respect for the independence and integrity of the courts and avoid jurisdictional conflicts;

(h) To promote international cooperation and understanding between judges and insolvency representatives;

(i) To facilitate the development of a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings; and

(j) To contribute to the maximization of value of the estate. In the Everfresh proceedings, for example, it has been estimated that enhancement of value through the agreement, which involved the creditors and managed to restrain unsecured creditors from taking detrimental actions, was in the order of 40 per cent.

9. Unfamiliarity with the use of such agreements has led to some misapprehension that they are used to enable a party to circumvent its legal obligations, duties or limitations or to defer or impose them on the parties in another jurisdiction in a way not permitted under the domestic law of either party. However, a cross-border agreement is not a tool for circumventing legal obligations, but rather a tool for working out the best possible means of coordinating the proceedings in the States involved, within the limitations of the legal regime of those States. This principle applies to all parties, including the courts, which must abide by the provision of their domestic laws. The extent to which courts might interpret that law to facilitate cross-border cooperation is a different issue.

2. Circumstances that might support use of a cross-border agreement

10. Despite the case-specificity of cross-border agreements, the existence of certain circumstances in a particular case might be regarded as supporting the use of an agreement to facilitate cross-border cooperation and coordination. These should not be regarded as an inclusive or determinative checklist, but rather as signs that an agreement might be helpful; notwithstanding the existence of a number of these factors in a particular case, might be decided that for other reasons a cross-border agreement is not required or desirable. The circumstances supporting an agreement might include:

(a) Cross-border insolvency proceedings with a considerable number of international elements;

(b) Complex debtor structure (for example, an enterprise group with numerous subsidiaries);

(c) Different types of insolvency procedures in the States involved, for example, reorganization with replacement of the management by insolvency representatives in one forum and the debtor in possession in the other;

(d) Assets are sufficient to cover the costs of drafting the agreement;

(e) Time for the negotiations is available. Cross-border agreements may not always be an option as they require time for negotiation. This might be problematic where urgent action is required;

(f) Substantive insolvency laws are similar;

(g) Contradictory stays have been ordered in the different proceedings; and

(h) Insolvency representatives appointed to the different proceedings are employed by the same international company. This has occurred between jurisdictions with very similar insolvency laws, for example the Hong Kong Special Administrative Region of China (the Hong Kong SAR) and the British Virgin Islands or the Hong Kong SAR and Bermuda.[14]

3. Timing of negotiation

11. An agreement may be negotiated at the beginning of a case or during the case as issues arise and more than one agreement may be negotiated to cover different issues. Although there are some examples of protocols negotiated in the course of

[14] See, for example, GBFE, Peregrine.

proceedings, for example, in the *Maxwell* case, most cross-border agreements are negotiated prior to proceedings being commenced, in order to prevent potential disputes from the outset. The timing of negotiation depends on how much time is available prior to the commencement of the proceedings or for the resolution of disputes in proceedings already commenced. For example, in the *Federal Mogul* case, the parties had six months to negotiate the cross-border agreement, with the commencement of formal proceedings always available as an alternative. The time available for negotiation, reflected in the level of detail evident in the agreement, enabled the parties to negotiate some complex and sensitive issues, such as the extent to which the insolvency representative could delegate its powers to another insolvency representative or party. In the case of *Collins and Aikman*,[15] a protocol could not be negotiated because the parties only had four days prior to commencement of the proceedings. In other cases, proceedings such as non-main proceedings may be commenced on the application of the insolvency representative of the main proceeding with the sole purpose of assisting that main proceeding.[16] The insolvency representative of the main proceeding may have a clear idea of what cooperation and coordination is required before applying for commencement of the non-main proceeding and negotiation of a cross-border agreement may be relatively quick and uncontroversial.

12. The time required for negotiation of an agreement varies from case to case and depends on a number of factors such as the knowledge of the parties of the key features of the debtor and of the potential conflicts that are likely to be encountered in the course of the proceedings. In simple cases, obtaining this degree of knowledge and the ensuing negotiation may be possible within a few days, but typically, the time frame would be longer.

4. Parties to a cross-border agreement

13. Very often the negotiation of cross-border agreements is initiated by the parties to the proceedings, including the insolvency practitioners or insolvency representatives and in some cases the debtor (including a debtor in possession), or at the suggestion or with the encouragement of the court; some courts have explicitly encouraged the parties to negotiate an agreement and seek the courts' approval.[17] The early involvement of the courts may, in some cases, be a key factor in the success of the agreement.

14. Typically, the parties that enter into a cross-border agreement vary depending upon the applicable law and what is permitted, for example, with respect to the powers of the insolvency representatives, the courts and other interested parties. Frequently, they are entered into by the insolvency representatives, sometimes by the debtor (usually a debtor in possession), and may involve the creditor committee. (For further detail, see Part B comparing the contents of different cross-border agreements). It is rarely that case that a cross-border agreement is entered into between the courts, although in some jurisdictions this might be possible. However, negotiations between parties in cross-border cases are frequently assisted by the courts and courts may provide the impetus for reaching an agreement.

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[15] Proper citation to be provided later.
[16] See, for example, SENDO, EMTEC.
[17] See, for example, Solv-Ex, Nakash.

15. Some written arrangements are signed by the parties who conclude them; others are not. Although the signature reflects the agreement reached between the parties, in practice many agreements in writing are rendered effective by court approval constituting consent orders. Some agreements address the issue of signature of counterpart copies, each of which should be deemed an original and equally authentic and the manner in which it can be signed, including by facsimile signature, which may be deemed to constitute an original.[18] Identifying the parties required to sign an agreement or to be bound by it will be determined by the effect of the agreement, both substantively and procedurally. For that reason, creditors generally are not parties to an agreement, although there are some examples involving creditors or the creditor committee. As they are often unfamiliar with the insolvency law of other States, including its aims, creditors can affect the success of global reorganization, and close cooperation, as exemplified in the *Singer*[19] case, with the creditor committee and creditors in general, will be desirable. Additional parties may join an agreement over time, but it is desirable that the agreement not be varied by the addition of those parties and that they do not seek to vary what has previously been agreed.

5. Capacity to enter into a cross-border agreement

16. For an agreement to be effective, the parties negotiating it should have the requisite authority or capacity to do so and to commit to what they agree. That capacity will depend on what those parties are permitted to do under applicable law, which may differ from State to State. In some States, for example, the insolvency representative's authority to negotiate and enter into an agreement will fall within its powers under the insolvency law; in other States, the insolvency representative may require the consent of creditors or authorization by the court.[20]

17. An agreement requiring approval by a court in a civil law jurisdiction may require the court to find appropriate statutory authorization for such approval, as it may not be covered by the court's "general equitable or inherent powers". Some commentators are sceptical of the feasibility of such agreements being approved by civil law courts because of the lack, in the absence of enactment of the UNCITRAL Model Law, of available judicial discretion comparable to that under the common law. Other commentators express the view that certain types of cross-border agreements, such as those dealing only with administrative issues, could be entered into by insolvency representatives or even the courts themselves. The underlying rationale is that these agreements would fall within the statutory competence of insolvency representatives, being part of their legal responsibility to protect and maximize the value of the estate, provided these responsibilities do not constitute personal, legal obligations. Some commentators take the view that the insolvency representative's responsibility to the insolvency estate could constitute a duty to enter into such an agreement.

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[18] See, for example, Inverworld, Federal Mogul.

[19] See In re The Singer Company N.V., No. 99-10578 (Bankr. S.D.N.Y., filed 13 Sept. 13, 1999).

[20] See, for example, the Decision authorizing the insolvency representatives in AKAI Holdings Limited to enter and implement a protocol, in the Matter of AKAI Holdings Limited, High Court of the Hong Kong Special Administrative Region, Court of First Instance, Companies (Winding-up) No. 49 of 2000.

18. It has also been suggested that a civil law judge could enter into a cross-border agreement with a foreign court on the basis of its statutory obligation to prevent actions detrimental to the estate. As noted above with respect to insolvency representatives, one obstacle for the courts in some civil law jurisdictions may be that judges can be held personally liable for malpractice. Although such a finding might be unlikely when the purpose of the cross-border agreement was to enhance the value of the estate within the terms of the applicable law, the existence of such provisions might help to explain a reluctance to enter into cross-border agreements in some civil law jurisdictions. Another reason may be a lack familiarity with cross-border agreements and the judicial discretion to enter into them.

19. Practice has shown that these agreements are possible between civil and common law jurisdiction. In the *Nakash* case, for example, the Israeli court found statutory authorization for such agreement. In the *AIOC* case, an agreement was reached between the United States and the Swiss insolvency representatives, with the explicit endorsement of the responsible Swiss insolvency authority. The agreements in the *ISA-Daisytek* and *SENDO* proceedings are further examples of agreements between civil and common law jurisdictions, involving the United Kingdom and Germany and France. There have also been agreements involving only civil law jurisdiction, for example in the *EMTEC* proceedings, involving France and Germany.

20. One factor key to the use of such agreements between civil and common law jurisdictions is the willingness of the courts and insolvency representatives to work to overcome potential jurisdictional obstacles. In the *Nakash* proceedings, for example, the Israeli court called upon the insolvency representatives to work out such an agreement, expressing 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".[21] Many of the impediments that appeared to result from the differences between the insolvency laws of the fora involved were resolved by focussing on the goal common to both laws of maximizing value for the parties. Nevertheless, in practice agreements occur more frequently between common law jurisdictions, where courts have a wider discretion than in other jurisdictions, in which statutory authorization for entering into such arrangements is needed, such as would be provided by enactment of the UNCITRAL Model Law. However, commentators of civil law countries are generally of the view that cross-border agreements will become more common in the future due to their successful use in cross-border insolvency proceedings.

6. Format

21. As noted above, there is no prescribed format for these agreements and both oral and written agreements are used in practice, although some laws may include writing requirements for validity and enforceability. Each arrangement is individual to a particular case, identifying and facilitating solutions to the issues that are or are likely to become important in that case before the courts under the laws of the

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[21] See further the case of SunResorts [proper citation to be provided later] involving a United States and a Netherlands Antilles court, in which the latter court reacted positively to concerns expressed by the United States court and tightened custodial control to an unusual degree under Netherlands-Antilles law. This positive reaction has been associated with the Netherlands Antilles' court knowledge of the UNCITRAL Model Law and the Concordat.

jurisdictions involved. Oral agreements may limit the parties to proceeding on a step-by-step basis, rather than being able to rely on a general framework of the sort provided by a written agreement and generally rely for their observance and implementation on the trust and confidence of the parties. Oral agreements are likely to prove harder to enforce than written ones and it may be difficult to bind parties to an oral agreement made in a cross-border context. The enforceability of written cross-border agreements depends on their legal nature. When approved by the courts, they would generally constitute an order of the court and be enforceable as such. If they are not approved by the courts, they have been considered as ordinary (procedural) agreements, i.e. contracts, between the parties and should be enforceable as such.

22. A given case may be subject to a single agreement or a series of agreements addressing different issues that arise, as noted above, as the case progresses. In the *Maxwell* case, for example, an operating protocol was agreed at the start of the case to address issues of stabilization and asset preservation and a second at the end to address distribution to creditors and closure of the proceedings.

23. Reaching agreement on the content of a protocol may be the most important step in facilitating cooperation and coordination, as the process of negotiation often helps to manage the parties' expectations and facilitate the successful conclusion of the insolvency proceedings. Once negotiated, a protocol might simply form the backdrop to administration of the case and not be referred to again. It may also be possible to resolve matters in the protocol in such a way that the courts have minimal ongoing involvement, with the judges not required to communicate with each other on a continuing basis as the case progresses.[22]

7. Provisions commonly included in cross-border agreements

24. Cross-border agreements may include only general principles on how the cooperation and coordination should be handled, or also address specific issues such as court deferral, claims resolution procedures, procedures for communication between the courts, and so forth depending upon the needs of the particular case and the issues to be resolved. The issues discussed below in section B are illustrative of the issues that can be addressed in a cross-border agreement. Since cross-border agreements are very case specific, all of the issues discussed below do not necessarily need to be addressed in every cross-border agreement.

25. A survey of the agreements entered into to date indicates that the issues typically addressed include the following: allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives; availability and coordination of relief; coordination of recovery of assets for the benefit of creditors generally; submission and treatment of claims; use and disposal of assets; methods of communication, including language, frequency, and means; provision of notice; coordination and harmonization of reorganization plans; and issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution; administration of proceedings, in particular with respect to stays of proceedings or agreement between

[22] See, for example, Maxwell.

the parties not to take certain legal actions, choice of applicable law; the allocation of responsibilities between the parties to the agreement; costs and fees; and safeguards. Agreements may also address issues such as the composition of the board of directors, the actions the board may take and the procedures to be followed, shareholder/management and shareholder/board relations and management of information flows.[23]

26. The choice of issues to be addressed by the agreement may be influenced by the similarities or dissimilarities between the laws and procedures of the States involved in the particular cross-border case. Where the courts involved share the same legal tradition, for example, the agreement may focus on providing more specific detail about substantive issues. Where legal traditions are different, the agreement may focus more on process and procedure, providing a framework for communication and cooperation. An agreement may require the laws of the relevant States to be analysed in order to determine whether and how a specific result can be achieved without causing insolvency representatives or other parties to breach their duties under those laws. The issues to be addressed may also require allocation of responsibility for their resolution between different courts, depending upon which substantive law should apply to a particular issue. Such a determination of substantive law might depend upon which State has the greatest interest in the outcome of a particular issue and may involve one court deferring to the jurisdiction of another, provided such deference does not deprive local creditors of due process or other fundamental rights (see part II, paras. 18-20 above; part III, paras. 71-74 below) or a particular action being pursued in one court as opposed to another. Agreements that are approved by the courts typically include provisions emphasizing the independence of the courts and the principle of comity; detailing the allocation of responsibilities between courts, in particular the right of parties in interest to appear and be heard in the respective proceedings.

8. Legal effect of cross-border agreements

27. Cross-border agreements may include a variety of different types of provisions, some of which may be intended to have legal effect and bind the parties and some of which may be simply statements of good faith or intent. Statements of good faith or intent, for example, may include provisions on the aim of the agreement, while provisions on the responsibilities of the insolvency representatives, on the costs or on stipulating the procedure required to render the protocol effective (e.g. through court approval) are generally intended to have legal effect.

28. To be effective, a cross-border agreement requires the consent of those parties to be covered by it and some agreements include an express stipulation that it is binding on the parties to the agreement and their respective successors, assigns, representatives, heirs, executors and insolvency representatives.[24] Some agreements expressly authorize the parties to take such actions and execute such documents as may be necessary and appropriate for it to be rendered effective and implemented or include a statement to the effect that the parties have agreed to take the appropriate actions to render it effective. In some jurisdictions, it may be sufficient for the

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[23] See, for example, Olympia & York.

[24] See, for example, Everfresh, Federal Mogul.

insolvency representatives to enter into a cross-border agreement pursuant to their inherent powers, without the need for subsequent court approval. It should be noted that court approval for such arrangement does not always exist under applicable law. Some jurisdictions, in particular civil law jurisdictions, might require the approval of the debtor's creditors, for the agreement to be effective. The agreement in the *ISA-Daisytek* proceedings, for example, provided that its effectiveness was subject to the approval of the debtor's creditors pursuant to German law. The agreement further stipulated that the insolvency representative would report the terms of the agreement to the responsible court after the creditors' approval.

29. The agreement may require approval of each of the courts involved in the insolvency proceedings in accordance with the local law and practice of each State concerned. It is not uncommon for an agreement to include a provision that it should have no binding or enforceable legal effect until approved by specified courts, with notice being given in proper form to the parties involved so as to minimize the likelihood of challenges. Once approved, such arrangement would generally have the effect of a court order and bind the parties specified. One of the advantages of court approval of an agreement is that it removes the possibility for dissenting creditors or parties to litigate matters in a way that might otherwise undermine it.

9. Safeguards

30. The safeguards to be included in a cross-border agreement may be divided into those that should always be included and others that may be included as required.

31. Provisions that should be included might relate to ensuring that there is no derogation from court authority and public policy.

32. Provisions that may be included concern disclosure to interested parties; protection of rights of non-signatory third parties; and the ability to revert to the court in cases of dispute. The parties entering into a cross-border agreement want to be able to rely on the capacity of their counterparts to enter into such agreement, without undertaking costly and lengthy research of the applicable law in the other forum. Consequently, an agreement may include as a safeguard a provision warranting that the parties agreeing to it have the relevant capacity or, in cases where the insolvency representative needs court authorization to enter into the agreement, acknowledging this condition for its obligation under the agreement.[25] Similarly, agreements often explicitly provide that certain actions or divisions of power are permitted or limited to the extent provided by applicable law or that specified parties should respect and comply with the duties imposed upon them by applicable national laws.

10. Possible problems and means of resolution

33. Insolvency proceedings are ongoing proceedings and unforeseen events may occur, changing the course of the case. Therefore, a cross-border agreement needs to be flexible, allowing revision to accommodate changing circumstances as a case progresses. In addition to revising existing agreements, parties may recognize the need for additional agreements to cover issues not foreseen.

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[25] See, for example, Financial Asset Management.

34. Conflicts may also arise in the course of implementation of the agreement. Conflicts can be manifold, relating to the terms of the agreements and their interpretation; the realization of its provisions and so forth. It is therefore important that the agreement include appropriate procedures for the resolution of disputes, to preserve what had been achieved at the time the conflict arose and to prevent further detriment. Those provisions may include specification of the courts competent to resolve certain issues or the use of other dispute resolution mechanisms.

B. Comparison of cross-border insolvency agreements

35. The purpose of this section is to provide an overview of the content and structure of a number of agreements used in recent cross-border cases. It identifies issues included in different agreements and discusses how they were treated. As noted above, because of the case-specific nature of these agreements, there is no standard or single format for cross-border agreements that could be presented here as a template. Nevertheless, although some of the issues discussed below are included in only a few agreements, others are common to most of the agreements considered. The comparison of the contents of various agreements is intended to enhance the understanding of these tools for cross-border cooperation, communication and coordination, as they have been used and to guide future drafters in designing such an agreement in a specific case, so that the negotiating time to develop the agreement might be considerably shortened. The foundation of the comparison is largely written agreements (generally referred to as protocols) as they are the most widely and readily available, but where possible reference is made to other agreements.

1. Recitals

36. Recitals generally introduce the operative part of an agreement, giving details of the events leading up to the negotiation of the agreement, the reasons for the agreement, identifying the parties and so forth. While recitals differ from agreement to agreement, they typically address some or all of the following issues.

(a) Parties

37. Most agreements introduce the parties to the proceedings with varying levels of detail, including, for example, the name and nature of their business, the place of incorporation, the place of business and, where relevant, their position in relation to other members of an enterprise group.[26] Some agreements do not refer to the parties to the agreement as such, but specify that the agreement should govern the conduct of all parties in interest in the insolvency proceeding, naming the debtors, the insolvency representatives and the creditor committee.[27]

38. Different stakeholders to the proceedings may be parties to the agreement, depending upon the issues covered by it and the parties to be bound. However, as a general rule, it can be said that the parties are those whose obligations are concerned, and whose consent is needed. Some agreements indicate the agreement

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[26] See, for example, Solv-Ex, Quebecor.

[27] See, for example, Laidlaw, Matlack.

of the insolvency representatives[28] while others involve a wider range of parties in interest, including the creditor committee, a secured lender of the debtor and the debtor itself.[29]

39. The case specificity of agreements can be seen from the *Commodore* agreement – the creditor committee applied for commencement of insolvency proceedings in the United States, in response to which the Bahamian insolvency representatives requested the court to abstain from hearing the case and to order relief ancillary to foreign proceedings. Subsequently, the Bahamian insolvency representatives and the creditor committee entered into an agreement to resolve the contemplated litigation and establish a framework for the efficient and effective administration of the insolvency proceedings in the two jurisdictions. While involvement of the creditor committee may strengthen the legitimacy of those agreements in which the creditor committee or creditors are directly involved, it will not be required in every case.

(b) Background/insolvency history

40. An introduction to the case, setting out the insolvency history of the case, might enhance the clarity and comprehensibility of the agreement. In many agreements, the introduction of the parties is followed by a summary of the different insolvency proceedings concerning the parties, either already commenced or imminent. Again varying degrees of detail are included, some agreements specifying the dates and places of filing, court orders made and so forth.

41. In the context of multinational enterprises, there might be two different situations in which insolvency proceedings take place in different States: in one, the debtor is the same in both proceedings; in the other the proceedings concern different group members. In the latter situation, the debtors are separate and distinct in each proceeding. However, the cooperation between these proceedings might nevertheless be important because of the linkages between the group members, even though they are legally separate and distinct entities. In particular, in reorganization cases, the resale value might be enhanced through such cooperation. The agreement might explain these different situations.

(c) Scope

42. Cross-border agreements typically address the question of scope, although different approaches are taken. Some agreements commence with a general statement to the effect that it should govern the conduct of all parties in interest in the insolvency proceedings. Others describe the scope more specifically. For example, the scope may be to establish a general framework of agreed principles to address a range of different issues that may include: the recovery and disposal or other realization of the debtor's assets, including sale to a specific person;[30] the admission, verification and classification of claims, including priority; coordination of preparation, approval, confirmation and implementation of a plan of

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[28] See, for example, AIOC, Inverworld, Maxwell. If the insolvency representatives agree to enter into a protocol, the objection of the debtor to the protocol may be disregarded, see for example, Nakash.

[29] See, for example, Commodore, 360Networks.

[30] See, for example, Solv-Ex.

reorganization or other similar arrangement; a litigation strategy with respect to any matter which could not be resolved through good faith efforts in the first instance; distribution of the proceeds; and general administrative matters. The scope provisions may also be directed to facilitating coordination by, for example, establishing coordinated procedures for addressing the matters listed above. The scope of an agreement often overlaps with its intent or purpose; by indicating what the agreement intends to regulate, it also defines its scope.

(d) Purpose

43. A provision on the parties' intent in drafting an agreement and, in particular, the objectives to be achieved, can encapsulate the common understanding of the parties with respect to the agreement, and provide assurance as to that understanding to a court from which approval might be sought.

44. Many agreements share several general goals and objectives, which include:[31]

(a) Harmonization and coordination of activities before the courts in which the different insolvency proceedings are pending;

(b) Promotion of fair, open, orderly and efficient administration of the insolvency proceedings for the benefit of all the debtors, their creditors and other interested parties, wherever located, to reduce cost and avoid duplication of effort;

(c) Protection of the rights and interests of all parties;

(d) Promotion of international cooperation and respect for judicial independence and comity; and

(e) Implementation of a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings.

45. Other examples of goals include: facilitating reorganization of the debtor's business as a global enterprise; protecting the integrity of the process of administration; consulting with and providing information to creditors concerning developments; ensuring that appropriate matters are brought before the relevant courts and that such actions shall take place in a timely and efficient manner; coordinating the activities between and among joint insolvency representatives, in order to minimize the costs and to avoid duplication of effort; recording various mutual agreements, including with respect to coordination of relief, to respect the obligations imposed by the laws of the respective countries or to act in conformity with certain principles, such as mutual trust, adherence to the duty to communicate information and to cooperate.[32]

46. Some agreements also clarify what the agreement is not intended to achieve, i.e. to create a binding precedent or to establish an agreement that could be considered appropriate for all of the non-main proceedings involved in a particular case, although acknowledging that it might be regarded as indicative of good

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[31] The CoCo Guidelines contain similar provisions relating to overriding objectives and aims (Guidelines 1 and 2).

[32] These principles are defined by Article 31 of the EC Regulation.

practice.[33] Such a provision is responsive to the mistrust of parties with respect to the scope and admissibility of such agreements under domestic law and might, thus, facilitate parties agreeing to such an arrangement.

(e) Language of the agreement and of communication

47. Since cross-border insolvency proceedings often involve States that do not share a common language, a provision on the language to be used in the agreement and for communication between the parties could be included, though many examples concluded to date have been drafted in English or exist in two different language versions, without making any reference to the language as such.[34] This may be because the majority of agreements entered into to date have involved English-speaking States, but a provision on choice of language would be desirable where the States involved speak different languages.

Sample clauses

Parties

(1) Between

The office of the insolvency representative of State A, represented by the insolvency representative [name and address], acting in her capacity as insolvency representative under the main insolvency proceeding of the debtor, [address] in State A, appointed by decisions of the court of State A dated […], (the "Main Insolvency Representative"),

on the one hand

AND

The office of the insolvency representative of State B, represented by the insolvency representative [name and address], acting in his capacity as insolvency representative under the non-main insolvency proceeding of the debtor, [address] in State B, appointed by decisions of the court of State B dated […], (the "Non-Main Insolvency Representative"),

on the other hand

Herein referred to as the "Insolvency Representatives".

Background/insolvency history

(2A) X, a company [incorporated/with registered office] in State A, is the ultimate parent company of a multinational enterprise that operates, through its various subsidiaries and affiliates in States A, B, C and D.

X and certain of its direct and indirect subsidiaries and affiliates in State A have commenced insolvency proceedings by applying to the State A court under the insolvency law of State A and those cases have been procedurally coordinated under Case No. [...]. The State A debtors are continuing in possession of their respective properties and are operating and managing their businesses, pursuant to the

[33] See, for example, SENDO.

[34] See, for example, SENDO; the CoCo Guidelines also address the question of language (Guidelines 10.1 and 10.2).

insolvency law of State A. Committees of unsecured creditors (the "creditor committee") have been appointed in the State A proceedings.

Y (an indirect subsidiary of X in State B) and certain of its direct and indirect subsidiaries and affiliates in State B have commenced insolvency proceedings by applying to the State B court under the insolvency law of State B. Orders have been granted under which (a) State B debtors are entitled to relief under the insolvency law of State B, (b) Z was appointed as insolvency representative of the State B debtors, with the rights, powers, duties and limitations upon liabilities set forth in the insolvency law of State B and the order of the State B court.

The proceedings in States A and B are separate and distinct. Neither the State A debtors nor the State B debtors have sought recognition of their proceedings in the other jurisdiction. Neither the State A debtors nor the State B debtors are debtors in the other proceedings, although they have appeared before and submitted claims as creditors in the other proceedings.

(2B) X, a State A corporation, is the parent company of a business in State B that operates, through various State A and State B subsidiaries and affiliates, in States A and B. X and certain of its subsidiaries and affiliates (collectively, the "X Companies") are the largest independent provider of N services in the region, with approximately 90% of the X Companies' revenue being generated in State A.

The X Companies develop, integrate and support systems for N services. The X Companies provide N services to their clients using new software from leading computer manufacturers.

The X Companies have commenced insolvency proceedings under the insolvency law of State A in the State A court. The X Companies are continuing in possession of their respective properties and are operating and managing their businesses, pursuant to the insolvency law of State A. A committee of unsecured creditors has not been appointed, but is expected to be appointed in the State A proceedings (the "Creditor Committee").

Certain of the X Companies, including the parent company, X, have assets and carry on business in State B. X and five of its State B subsidiaries and affiliates (collectively, "the applicants") have commenced proceedings under the insolvency law of State B in the State B court. Upon request of the applicants, the State B ordered (a) that the State A proceedings are "foreign proceedings" for the purposes of the insolvency law of State B; and (b) a stay against actions against the applicants and their property.

The applicants are parties to the proceedings in States A and B.

Scope and purpose

While concurrent, parallel proceedings are pending in States A and B for the debtor, the implementation of basic administrative procedures is necessary to coordinate certain activities in the those two proceedings, protect the rights of the parties and

ensure the maintenance of the courts' independent jurisdiction, a framework of general principles should be agreed upon to address:

(a) Sale of the debtor's assets;

(b) The admissibility and priority of claims asserted against the debtor;

(c) Harmonization of the submission, approval, confirmation and implementation of a reorganization plan under the insolvency laws of States A and B; and

(d) General administrative matters.

(4) The following terms and provisions shall apply to the proceedings in States A and B: […]

(5) The main and the non-main insolvency representatives have mutually decided to execute this agreement, with the purpose of establishing practical terms for the distribution of the assets among the company's creditors. The objective of this agreement is to organize the cooperation between the insolvency representatives. It is intended in particular to organize the exchange of information between the insolvency representatives regarding the verification of claims and the distribution of assets.

Purpose and goals

(6) While the insolvency proceedings are pending in States A and B and elsewhere for the debtor, the implementation of basic administrative procedures is necessary to coordinate certain activities in the insolvency proceedings, protect the rights of parties and ensure maintenance of the court's independent jurisdiction and comity. Accordingly, this agreement has been developed to promote the following mutually desirable goals and objectives, in the proceedings in States A and B and, to any extent necessary, in other proceedings:

(a) Harmonizing and coordinating activities in the insolvency proceedings;

(b) Promoting the orderly and efficient administration of the insolvency proceedings to, among other things, maximize efficiency, reduce associated costs and avoid duplication of effort;

(c) Honouring the independence and integrity of the courts and other courts and tribunals of States A, B and others;

(d) Promoting international cooperation and respect for comity among the courts, the debtor, the creditor committee, the insolvency representatives and parties in interest in the insolvency proceedings;

(e) Facilitating the fair, open and efficient administration of the insolvency proceedings for the benefit of all of the creditors of the debtor and other parties in interest, wherever located; and

(f) Implementing a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings.

Language

(7) This agreement has been concluded in English and French (both texts are equally authentic). The language of communication between the parties shall be English.

2. Terminology and rules of interpretation

(a) Terminology

48. Insolvency laws rely on terminology and concepts that may have fundamentally different meanings in different States. Even where parties speak the same language, a term may be interpreted differently in different legal systems. To ensure a common understanding, many agreements define certain terms used, although methods of definition vary. Some arrangements include a comprehensive definition section, while others adopt an ad hoc approach to terminology, providing short explanations throughout the text as required.[35]

49. Terms often explained in arrangements include: applicable national laws; competent national courts; insolvency professionals; insolvency representatives; types of proceedings; the debtor; the parties; stays of proceedings; and involuntary proceedings.

(b) Rules of interpretation

50. General rules of interpretation are also often included, for example, that words importing the singular should be deemed to include the plural and vice versa; that headings are inserted for convenience only without any further meaning; that references to any party should, where relevant, be deemed to include, as appropriate, their respective successors or assigns; and that any use of the masculine gender should be deemed to include the feminine or neuter gender.[36]

51. Some agreements refer explicitly to the principles elaborated in the Concordat,[37] or to the Court-to-Court Guidelines,[38] incorporating them into the agreement to govern appropriate issues.

Sample clauses

Terminology

(8) In this agreement, unless the context requires otherwise, the following expressions have the following meanings: […]

Rules of interpretation

(9) (a) Whenever the context requires, words importing the singular shall be deemed to include the plural and vice versa. Any use of the masculine gender shall be deemed to include the feminine or neuter gender.
(b) The index to, and clause headings of this agreement are for convenience only and do not affect the construction of this agreement.

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[35] See, for example, GBFE, 360Networks; the Concordat contains a glossary of terms that includes the following: administrative rules, common claim, composition, discharge, distribution, insolvency proceeding, insolvency forum, international law, limited proceeding, liquidation, main forum/proceeding, non-local creditors, official representative, plenary forum/proceeding, privileged claim, ranking rules, secured claim, voiding rules; the CoCo Guidelines include a definition of an insolvency representative (Guideline 4).

[36] See, for example, GBFE.

[37] See, for example, AIOC, Everfresh.

[38] See, for example, Systech.

(c) References to clauses, paragraphs and recitals are to be construed as references to clauses, paragraphs and recitals of this agreement unless otherwise stated.
(d) References to any party shall, where relevant, be deemed to refer to or include, as appropriate, their respective successors or assigns.
(e) Save as otherwise expressly provided, references to this agreement or any other document include references to this agreement, its recitals and schedules or such other documents as each may be varied supplemented and/or replaced in any manner from time to time.
(f) In respect of any computation of periods of time from a specified date to a later specified date, the word "from" means "from and including" and each of the words "to" and "until" means "to but excluding".

3. Courts

52. Judicial cooperation is increasingly viewed as essential to the efficient and effective conduct of cross-border insolvency cases, increasing the predictability of the process, because debtors and creditors do not have to anticipate judicial reactions to foreign proceedings, and enhancing the equitable treatment of all parties. Cross-border agreements have adopted a variety of approaches to facilitating coordination and cooperation between the courts of the different States to ensure the proceedings are efficiently administered and disputes avoided.

(a) Comity and independence of courts

53. "*Comity*" in the legal sense, is 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 accords 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 its law. Many agreements emphasize the importance of comity and the independence of the courts, specifying that this independence is not to be negatively affected or diminished by the approval and implementation of the cross-border agreement. They also emphasize that each court is entitled to exercise its independent jurisdiction and authority at all times with respect to matters presented to it and the conduct of the parties appearing before it.[39] The purpose of including such a provision is to provide an assurance that each party to the agreement is acting in accordance with (and therefore within the limits of) applicable domestic law.

54. Agreements often address specifically what, in accordance with comity, the agreement should not be construed as doing, including:

(a) Altering the independence, sovereignty or jurisdiction of the courts;

(b) Requiring the debtors, the creditor committee or the insolvency representatives to breach any duties imposed on them by the national law under which they are constituted or appointed;

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[39] See Hilton v. Guyot, 159 U.S. 113 (1895), a United States court decision dealing with the recognition of a French judgment and providing an early definition of comity; see also 360Networks, Matlack.

(c) Authorizing any action that requires specific approval of one or both courts; or

(d) Precluding any creditor or other interested party from asserting its substantive rights under the applicable laws.[40]

(b) Allocation of responsibilities between courts

55. Where insolvency proceedings with respect to the same debtor are commenced in a number of different jurisdictions, there will often be questions of the issues to be addressed by the different courts. In some cases, a single court will have the responsibility for determining or resolving certain matters. In other cases, it will not be so clear and several courts may be equally responsible or they may share responsibility or be jointly responsible for making certain determinations.[41] Notwithstanding the independence and sovereignty of each court, cross-border agreements often "allocate" responsibility for different matters between the competent courts to ensure efficient coordination of the proceedings, and avoid overlap, disputes and duplication of effort. This may be achieved by the courts approving the cross-border agreement or informally, by the parties agreeing to pursue certain matters in certain courts. Responsibility may be allocated broadly, such as for use and disposal of the debtor's assets in general or more specifically, such as for the verification and admission of claims or approval of particular transactions with regard to the use and disposal of certain assets, including pledging or charging any assets.[42]

56. Even where certain matters are to be addressed by a specific court, the cross-border agreement may request that court, in addressing those matters, to seek and take into account the views of other courts and participants. For example, in a case involving both main and non-main proceedings, the cross-border agreement requested the court addressing assets in the context of non-main proceedings to take into account any proposals of the insolvency representatives in the main proceeding.[43] An agreement may also provide that the determination by only one court of any particular matter is desirable and should be achieved by cooperation between the courts.[44]

57. Some further examples illustrate how cross-border agreements may facilitate this coordination and cooperation between courts. In the *Inverworld* case, a cross-border agreement approved by the courts led to dismissal of the English insolvency proceeding, upon certain conditions relating to the treatment of claimants in those proceedings and the allocation of functions between the two remaining courts. The United States' court was to resolve the outstanding legal and factual issues relating

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[40] See, for example, AgriBioTech, Pioneer; the CoCo Guidelines include a similar statement (Guideline 3).

[41] The Concordat recommends that a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to one debtor (Principle 1). Where there is one main forum, the Concordat recommends that administration and collection of assets should be coordinated by the main forum (Principle 2A), where there is no main forum, it addresses the responsibilities of each court regarding the decision on value and admissibility of claims (Principle 8) and the administration of assets (Principle 4).

[42] See, for example, Maxwell, Pioneer.

[43] See, for example, SENDO.

[44] See, for example, Laidlaw.

to entitlements as among various classes of investors, while the Cayman Islands' court was to oversee the administration of the distribution of proceeds to claimants. Each court was to take the other court's actions as binding, thus avoiding parallel litigation. In the *Maxwell* case, an agreement approved by both the English and the United States' courts allocated functions between the courts and provided for cooperative administration. Inter alia, the agreement granted power to the English insolvency representative to administer all assets and operations of the debtor group's business, incur expenses, and so forth, subject to agreement by the United States' insolvency representative as to specific questions and to approval by the United States' court.

58. Some agreements specify the factors determining the competence of each court to act on certain matters. These factors may include the location of the debtor, its assets or creditors; the application of conflict-of-laws rules; agreement as to the governing law; or other connecting factors. For example, responsibility for conducting the insolvency proceedings may be exercised by the court of the State in which they are commenced; responsibility for approval of transactions may be allocated to the court of the State in which the assets, the subject of the transaction, are located; responsibility for distribution of the proceeds of assets and instructing the insolvency representatives regarding treatment of assets may be allocated to the court of the State in which the assets are located; responsibility for dealing with claims against the debtor may be allocated to the court of the State of which the debtor is a national, in which the claimants reside, are domiciled, or carry on business and have offices or in which the claims arise from the supply of goods and/or services to the debtor, or according to the type of contract and the nationality of the contractual partner.[45]

59. Some agreements provide that the courts should have joint responsibility for certain transactions, such as disposal of the debtor's assets or more specifically, the sale of the debtor's assets. An agreement may also provide that joint hearings should be held to determine and resolve particular matters, including the use and disposal of assets and allocation of the proceeds, where those assets are located in both States or in a third State.[46] Because of the nature of the business of the debtor and in particular, the interconnectivity and interdependence of the lines of communications of its global business and internet operations, one agreement adopted the approach of identifying those matters to be resolved with the assistance of the different courts. The courts could conduct joint hearings to determine and resolve these issues and were able to jointly determine additional issues that should be included as the insolvency proceedings progressed.[47] The agreement further provided that certain specified matters (such the allocation of proceeds of sale solely between the debtors of one jurisdiction) that were not resolved by a joint hearing of both courts would be determined and resolved by one court only.

60. As a practical means of resolving issues raised by differences between legal systems, it may be possible for courts to make orders on a reciprocal basis, conditioned upon the issuance of appropriate orders in the other jurisdiction. This approach was taken in the *360Networks* case, in which contractors had been

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[45] See, for example, AgriBioTech, Everfresh.
[46] See, for example, Inverworld, PSINET.
[47] See, for example, PSINet.

reluctant to renegotiate contracts without a formal decision by the debtor that such contracts would not subsequently be terminated in the United States' proceedings, permissible under United States' law, detrimentally affecting their rights. Such arrangements would require court approval.

(i) Treatment of claims

61. Treatment of claims might include the verification, admission and classification of claims and the manner in which they are to be addressed in any reorganization plan. An agreement may provide that each individual claim should be dealt with by only one of the courts concerned unless the claims have a substantial connection, under conflict-of-law rules, to another State or relate to a security or priority claimed pursuant to the laws of another State or it has been specifically agreed that the claim would be governed by the laws of another State.[48]

62. Where a claim is submitted in one proceeding, some agreements provide that the creditor is deemed to have elected to have the verification and admissibility of that claim determined by the court administering that proceeding. If submitted in more than one proceeding, the agreement may nominate which court should be responsible for the verification and admission of those claims.[49] Courts may also agree to develop rules on how certain aspects of the proceedings, such as the proof of claims, will be treated.[50] The parties to the proceedings may also adopt the approach of deferring those issues for future consideration and development of a claim resolution procedure generally or to address certain types of claims (e.g. inter-company claims in an enterprise group context).[51]

(ii) Avoidance proceedings

63. Some agreements include provisions on the responsibility for investigation and pursuit of assets allegedly belonging to the debtor's estate within the jurisdiction of the court.[52] Allocation of responsibility for investigation and commencement of proceedings may depend upon the relevant provisions of applicable law, including conflict-of-laws provisions.

(iii) Insolvency representatives

64. Agreements often refer to the powers of each court with respect to the insolvency representative appointed in proceedings before it. Those powers may relate to appointment, conduct and compensation, as well as the hearing and determination of any matters relating to those issues arising in the insolvency proceedings before that court.[53] In some cases they may also relate to the insolvency representative appointed to other proceedings. In one case without a written cross-border agreement, for example, one court was involved in approving the compensation of the insolvency representative in the other forum.[54]

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[48] See, for example, Solv-Ex.
[49] See, for example, Pioneer.
[50] See, for example, Philip.
[51] See, for example, Quebecor.
[52] See, for example, Nakash.
[53] See, for example, Commodore, Mosaic.
[54] See United Pan-Europe.

(iv) Resolution of disputes

65. In order to ensure continuing cooperation between the proceedings and uphold the framework established by the agreement, the agreement may specify how disputes arising under it are to be resolved.[55] Disputes may arise with respect to the intent, interpretation or implementation of the agreement or with respect to administration of the proceedings or of the debtor's estate.

66. Cross-border agreements adopt different approaches to such dispute resolution. One approach may be to require the parties to make all reasonable attempts to reach an agreement before referring the matter to a court. If agreement cannot be reached, the dispute might be referred to the court specified in the agreement as having responsibility for enforcing the terms of the agreement or for resolving certain disputes, such as any act or decision of the insolvency representative. Another approach may be to provide that a dispute relating to a matter arising with respect to the proceedings commenced in one State should be referred to the responsible court of that State or where the dispute affects all proceedings covered by an agreement, the dispute should be resolved by the court best suited to do so.[56]

67. Responsibility for resolution of disputes may also be shared by the courts and, where appropriate, resolved by way of joint hearing. If, notwithstanding such a provision, the dispute were to be raised with only one of the courts, the agreement may further provide that the court could either (i) render a binding decision after consultation with the other court; (ii) defer to the other court by transferring the matter, in whole or in part, to the other court; or (iii) seek a joint hearing of both courts.[57]

68. A further approach may be to appoint a third-party to resolve disputes. The agreement can particularize the mediation procedure to be followed, addressing issues such as commencement; opting-out; timetable; choice and appointment of the mediator; compensation; and immunity, as well as the confidentiality of the process.[58]

69. In addition to the details above, some agreements suggest that the courts might provide each other with advice or guidance and specify the applicable procedure. To enhance transparency, the notice procedures of the agreement would generally apply and the debtor, the creditor committee or the insolvency representatives might make submissions to the appropriate court in response to or in connection with written advice or guidance received from the other court.[59]

70. An agreement may also indicate the parties that may raise an issue with respect to the agreement, such as the insolvency representatives[60] or other parties in interest.

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[55] See, for example, Solv-Ex; the CoCo Guidelines advise courts to operate in a cooperative manner to resolve any dispute relating to the intent or application of the terms of any cooperation agreement or protocol (Guideline 16.2).

[56] See, for example, GBFE, ISA-Daisytek.

[57] See, for example, Inverworld, Laidlaw.

[58] See, for example, Manhatinv.

[59] See, for example, Mosaic.

[60] See, for example, GBFE, Peregrine Investment.

(c) Deferral

71. Deferral consists of one court accepting the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain claims and issue certain orders, in favour of another court. Where it is available, deferral may be used to avoid conflicting rulings between the jurisdictions involved. Deferral is a sensitive issue, touching on issues of sovereignty and independence. It can only occur where the courts involved agree and may often occur on a reciprocal basis, where the court in the one jurisdiction agrees to defer on certain issues or to enforce the decisions of the other courts involved in response to similar agreement by the other court. A factor often supporting deferral is the recognition by courts that the proceedings would otherwise not be able to move forward and there would be loss of value to the detriment of the creditors. Cross-border agreements making provision for deferral would generally only be effective where the agreement was approved by the respective courts.

72. Deferring to another court might not be possible in all cases, as courts are often obligated to exercise jurisdiction or exclusive control over some matters. Some legal systems also have procedural rules that limit their ability to defer to another court. In particular, civil law jurisdictions may lack the ability to defer to a foreign court. However the insolvency representative may have discretion to simply not pursue a given action in his home court, electing to let the representative of a related proceeding in another country pursue the action there.

73. Cross-border agreements may address deferral with respect to very specific issues, identifying matters on which one court should defer to decisions of another, for example, the resolution of disputes arising under the agreement or stays of proceedings or issues of foreign law. They may also be general in scope, providing that one court should defer to the judgment of the other where appropriate or feasible.[61] In the *Inverworld* case noted above, a consequence of the agreement reached was that one of the three courts involved deferred to the other courts by dismissing the proceedings before it on certain conditions relating to the treatment of claimants and the allocation of functions among the two remaining courts.

74. Examples of deferral provisions include: an acknowledgment that it is in the interest of the debtors and their stakeholders for one of the courts to take charge of the principal administration of the reorganization;[62] a decision that appeals against rejection of a claim should be heard by the court of the jurisdiction whose laws governed the claim; an agreement that, if an appeal was presented to a different court, the matter would be referred to the competent court;[63] and an agreement that in certain cases the approval of the court of the forum involved would might be deemed to have been granted.[64]

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[61] See, for example, Olympia & York, PSINet.
[62] See, for example, Pioneer.
[63] See, for example, GBFE.
[64] See, for example, GBFE.

(d) Right to appear and be heard

(i) Who has the right

75. Article 9 of the UNCITRAL Model Law on Cross-Border Insolvency provides that a foreign representative is entitled to direct access to the courts of the recognizing State to avoid that the representative has to satisfy formal requirements such as licences or consular action. Those requirements are typically lengthy and complicated, hindering the quick action that is often required in insolvency proceedings, whether domestic or cross-border. In States that have not adopted the Model Law, that right of direct access might be limited by formal requirements or by domestic law.

76. Agreements that address the issue of direct access do so to varying degrees and with respect to different parties in interest.[65] Some agreements address the issue explicitly, establishing the right to appear and be heard in each State involved in the agreement, to the same extent as the counterparts domiciled in those States have those rights. Such access might be granted to the insolvency representatives or to other interested parties, including the creditors, the debtor, the creditor committee and the post-petition lenders. Where the question is one of access for creditors, many agreements confer the right to appear regardless of whether the party has filed any claims in the particular proceedings. Another approach refers to the principles of the *Concordat* that give each party, creditor and the creditor committee the right, but not the obligation, to appear in proceedings in the different forums.[66]

77. A different approach notes the agreement of the insolvency representatives of one State to their foreign counterparts having standing in the local insolvency proceedings or provides that the insolvency representatives of one State will support a request by the insolvency representative of another State to appear in local proceedings.[67] The effect of agreements between the insolvency representatives on direct access to the court depends on the applicable law and might constitute no more than a good will provision or an assurance that one insolvency representative would not oppose the appearance of the other in their forum.

78. Some agreements also provide details such as where to file a notice of appearance, providing the exact address of the court.[68]

(ii) Submission to jurisdiction

79. Article 10 of the Model Law constitutes a “safe conduct” rule aimed at ensuring that the court in a State enacting the Model Law would not assume jurisdiction over all the assets of the debtor or the foreign representative on the sole ground that the foreign representative had made an application for recognition of a foreign proceeding. Where the Model Law has not been enacted, an insolvency representative or other party appearing before the courts of another jurisdiction, would be subject to the rules of that jurisdiction on this issue. An agreement that deals with the right to appear in the various States covered by it could address the

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[65] The CoCo Guidelines recommend direct access for a foreign insolvency representative (Guideline 5).

[66] See, for example, Nakash, Quebecor; see also Concordat, Principles 3A, 3C and 3D.

[67] See, for example, Manhatinv, Federal Mogul.

[68] See, for example, Everfresh.

question of submission to jurisdiction to the extent permitted by applicable domestic law in order to avoid potential conflict if the forum State had not enacted the Model Law. An agreement containing such a provision generally would need court approval to be effective.

80. Agreements differ in the manner in which they address this question. Some provide that an appearance before the court of a State or the filing of an application in that State might subject an interested party to the jurisdiction of that State for the purpose of those proceedings.[69] Other agreements provide that a party would be subject to the jurisdiction of another State only when they have submitted a claim in proceedings commenced in that other State.[70] If a party has not previously appeared in, or does not wish to appear in, a foreign court, an agreement may provide that the party is entitled to file written evidentiary materials in support of a submission without being deemed to have appeared in the foreign court in which such material is filed, provided that court is not requested to order affirmative relief.

81. Some agreements provide that the insolvency representatives are exempt from submission to the foreign jurisdiction generally,[71] whereas others provide that the court will have jurisdiction over the insolvency representative, but only with respect to the particular matters in which they appear before that court.[72] Such a provision can address the reluctance of an insolvency representative to subject itself to personal jurisdiction of a foreign State. Such reluctance might arise from unfamiliarity with the law of the foreign State, as well as from the desire to avoid doing anything in a foreign jurisdiction that might render them in violation of their domestic duties or to be in violation of the law of the foreign State because of an inability to take any action that might conflict with their domestic duties.

82. Some agreements extend the immunity from submission to jurisdiction to the creditor committee, providing that an appearance in the other forum should not form a basis for personal jurisdiction over the individual members of the committee.[73]

83. As a safeguard, some agreements provide that no person will be subject to a forum's substantive rules unless, under the forum's conflict-of-laws rules, they would be subject to those laws in a lawsuit on the same transaction in a non-insolvency proceeding.[74]

(e) Future proceedings

84. Agreements may address the issues likely to arise where additional insolvency proceedings are commenced with respect to the debtor (for example, in additional jurisdictions or, in the case of an enterprise group, with respect to an additional member of the group). An agreement may address the question of its relationship to potential, future insolvency proceedings that are not specifically covered by the agreement, providing that if foreign proceedings are initiated, the procedures and

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[69] See, for example, Loewen, Matlack.

[70] See, for example, Inverworld.

[71] See, for example, Manhatinv; this approach is shared by the Court-to-Court Guidelines which provide that the appearance of an insolvency representative in a foreign proceeding would not subject it to the jurisdiction of the foreign court (Guideline 13).

[72] See, for example, 360Networks, Livent.

[73] See, for example, Pioneer, Systech; see also the Concordat, principles 3A and 3C.

[74] See, for example, Solv-Ex.

policies of the agreement should extend to dealings related to those foreign proceedings, provided that all creditors of the foreign proceedings are treated equally irrespective of their place of domicile. An agreement may also address the situation in which one court later approves an additional agreement with a court of a different jurisdiction, requiring the court involved in only the initial agreement to honour the additional one to the extent permitted by its laws and consistent with the principles of comity and cooperation.[75]

85. A more general provision extends the obligation of the insolvency representatives of a non-main proceeding to send information as to value of claims lodged with them to the insolvency representatives of the main proceeding to any other non-main proceedings filed against the debtor in the future.[76] The purpose of such provision is merely to emphasize that the agreement does not contradict such obligation under existing law.

Sample clauses

Comity and independence of courts

(10) The approval and implementation of this agreement shall not divest or diminish the independent jurisdiction of the courts of States A and B. By approving and implementing this agreement, neither courts of States A or B, the debtor nor any creditors or parties in interest shall be deemed to have approved or engaged in any infringement of the sovereignty of States A or B.

In accordance with the principles of comity and independence established in paragraph 1 above, nothing in this agreement shall be construed to:

(i) Increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the courts of States A or B or of any other court or tribunal in States A or B, including the ability of any such court or tribunal to provide appropriate relief under applicable law;

(ii) Require the court of State A to take any action that is inconsistent with its obligations under the laws of State A;

(iii) Require the court of State B to take any action that is inconsistent with its obligations under the laws of State B;

(iv) Require the debtor, the creditor committee, or the insolvency representatives 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; or

(v) Authorize any action that requires the specific approval of one or both of the courts under the insolvency laws of States A or B after appropriate notice and a hearing (except to the extent that such action is specifically described in this agreement).

The debtor, the creditor committee, the insolvency representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the laws of States A and B and other applicable laws, regulations or orders of tribunals of competent jurisdiction.

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[75] See, for example, 360Networks.

[76] See, for example, SENDO.

Allocation of responsibilities between courts

(11) The court of State A shall have sole and exclusive jurisdiction and power over the conduct and hearing of the State A proceeding. [*Repeat this clause for the State B court*.]

Allocation of responsibilities between courts: treatment of claims

(12) In order to coordinate the restructuring of the debtor's business and avoid any unnecessary duplication of effort and expense or inconsistent rulings by the courts, the following principles are applicable in connection with establishing the validity, amount and treatment of any claims against the debtors:

(a) Any claims against any of the debtors arising under or in connection with any guarantees granted by the State A debtor with respect to the obligations of the State B debtor under the law of State B or by the State B debtor with respect to the obligations of the State A debtor under the law of State A shall be determined by the State A court in the State A proceeding;

(b) All claims against the State A debtor shall be determined by the State A court in the State A proceeding;

(c) All claims against the State B debtor (with the exception of the claims described in paragraph (a) above) shall be determined in accordance with the following principles:

(i) Any person submitting a claim against the State B debtor in the State A proceeding shall be deemed to have elected to have the validity, amount and treatment of that claim determined by the State A court;

(ii) Any person submitting a claim against the State B debtor in the State B proceeding shall be deemed to have elected to have the validity, amount and treatment of such claim determined by the State B court;

(iii) Any person submitting a claim against the State B debtor in both the State A and State B proceedings shall be deemed to have elected to have the validity, amount and treatment of such claim determined by the State A court.

Avoidance proceedings

(13) The insolvency law of State A shall be the substantive law governing all transfers made to entities located in State A. [*Repeat this clause for State B*.]

Insolvency representatives

(14) The State A insolvency representative and professionals appointed in the State A proceeding shall be subject to the sole and exclusive jurisdiction of the State A court with respect to all matters, including:

(a) Their tenure in office;

(b) Their compensation;

(c) Their liability, if any, to any person or entity, including the debtor and any third parties, in connection with the insolvency proceeding; and

(d) The hearing and determination of any matters relating to those matters arising in the State A proceeding.

The State A insolvency representative and appointed professionals shall not be required to seek approval of their retention in the State B court. Additionally, the State A insolvency representative and professionals:

(a) Shall be compensated for their services solely in accordance with the insolvency law of State A and other applicable State A law or orders of the State A court; and

(b) Shall not be required to seek approval of their compensation in the State B court.

[*Repeat these 2 clauses for State B.*]

Resolution of disputes

(15A) Disputes relating to the terms, intent or application of this agreement shall be addressed by the parties to either the State A court, the State B court or both courts, upon notice in accordance with paragraph x above. Where an issue is addressed to only one court, that court, in rendering a determination in any such dispute:

(a) May consult with the other court; and

(b) May, in its sole discretion, either:

(i) Render a binding decision after such consultation;

(ii) Defer to the determination of the other court by transferring the matter, in whole or in part, to the other court; or

(iii) Seek a joint hearing of both courts.

Notwithstanding the foregoing, each court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other court established under existing law.

(15B) This agreement is governed exclusively by State A law. Any dispute concerning the validity, interpretation, performance or non-performance of this agreement will be subject to the exclusive jurisdiction of the State A court.

(15C) Disputes relating to the terms, intent or application of this agreement may be addressed by parties in interest to the courts of both States A and B upon notice.

Deferral

(16) To harmonize and coordinate the administration of the insolvency proceedings, the courts of States A and B each shall use their best efforts to coordinate activities with and defer to the judgment of the other court, where appropriate and feasible. The courts shall use their best efforts to coordinate activities in the insolvency proceedings, so that the subject matter of any particular matter may be determined in one court only.

Right to appear and be heard

(17) The debtor, its creditors and other parties in interest in the insolvency proceedings, including the creditor committee and the insolvency representatives, shall have the right and standing to (a) appear and be heard in insolvency proceedings before either the States A or B court to the same extent as creditors and other parties in interest domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other processes with the court of State A or B, provided however, that any appearance or filing may subject a creditor or an interested party

to the jurisdiction of the court in which the appearance or filing occurs. Appearance by the creditor committee in the State B proceeding shall not form the basis for personal jurisdiction in State B over the members of the creditor committee. Notwithstanding the foregoing, and in accordance with the policies set forth in paragraph x above [*on court's responsibility for retention and compensation of the insolvency representatives*], (a) the State B court shall have jurisdiction over the State A insolvency representative solely with respect to the particular matters on which the State A insolvency representative appears before the State B court; and (b) [*Repeat (a) for the State A court*.]

Future proceedings

(18) To the extent that a foreign proceeding is initiated, all persons affected by this agreement shall, to the greatest extent possible, and provided that all creditors in such foreign proceeding are treated equally irrespective of their place of domicile, implement the procedures contemplated by this agreement in any foreign proceeding and be governed by the purpose and policies of this agreement in dealings related to the foreign proceeding.

If the State A court enters an order approving an agreement with the courts of a jurisdiction other than the State B court, the State B court shall honour such agreement to the extent permitted by the laws and treaties of State B and consistent with the principles of comity and cooperation. [*Repeat for the State B court*.]

4. Administration of the proceedings

86. The manner in which some procedural issues that arise in cross-border insolvency proceedings, including priority of proceedings, stays of proceedings and applicable law, are handled in practice may be a determining factor for the success of cross-border insolvency proceedings. For example, if a stay concerning the insolvency proceedings in one State is not upheld and respected in other States in which, for example, the debtor has assets, it can lead to a "race to the courthouse", damaging the value of the insolvency estate and the creditors' interests. These issues therefore lend themselves to being considered and addressed in an agreement.

(a) Priority of proceedings

87. As noted above, experience has shown that courts are often reluctant or unable to defer to a foreign court and may therefore prefer parallel insolvency proceedings or treat primary and secondary proceedings as if they were concurrent or parallel proceedings. Such a preference may be based upon applicable law or a desire to protect the interests of domestic creditors. To provide certainty, avoid potential conflict and simplify issues of coordination, an agreement can allocate responsibility for different matters between the courts or determine the priority between different proceedings. For example, the parties may agree which is the main proceeding and therefore has precedence over the other, non-main proceedings.[77]

[77] See, for example, GBFE, Peregrine.

88. Sometimes, the insolvency representatives appointed in one State may request commencement of insolvency proceedings in a foreign jurisdiction in order to avoid jurisdictional conflicts and any risk of the debtor's assets being dissipated to the detriment of creditors.[78] Since it may not be possible for the insolvency representative requesting commencement of those proceedings to be appointed in the other jurisdiction, it may be important for the foreign insolvency representative to reach agreement with the locally appointed insolvency representative in order to facilitate coordination of the proceedings and avoid frustrating the purpose of the ancillary proceedings. In the *SENDO* case, for example, the insolvency representatives concluded an agreement "for the purpose of defining a practical means of functioning which would allow for the efficient coordination of the two insolvency proceedings", as they recognized that the existing legal framework, i.e. the EC Regulation, established only very general operating principles.[79]

(b) Stays of proceedings

89. The UNCITRAL Legislative Guide notes that an essential objective of an effective insolvency law is protecting the value of the insolvency estate against diminution by the actions of the various parties to insolvency proceedings and facilitating administration of those proceedings in a fair and orderly manner. A stay or suspension of proceedings is one of the means by which those objectives are achieved. Cross-border insolvencies involving multiple proceedings often raise difficult questions concerning the stay, particularly with respect to implementing or respecting stays issued by foreign courts in foreign proceedings or issuing parallel stays in support of those foreign proceedings. National legislation may impose limitations on recognizing or respecting a stay issued by a foreign court or may not permit the court to grant a stay of proceedings based on the presumed validity of the filing of insolvency proceedings abroad. Moreover, the scope of a stay ordered in foreign proceedings may not find a direct parallel in a State in which its implementation is sought. The respect accorded to a stay ordered by a foreign court may be dependent upon political and economic considerations, as well as upon familiarity with the State ordering the stay or tangible business contacts with that State. Even where domestic law provides for the universal effect of an automatic stay, a foreign court might be inclined to protect the interests of its local creditors and disregard the foreign stay, even where that worked against maximizing the potential recovery for all creditors.

90. The Model Law provides for an automatic stay on recognition of foreign proceedings and deals with a number of issues concerning coordination of relief between main and non-main proceedings.[80] In States enacting the Model Law, the position with regard to the stay should be relatively clear and transparent.[81] However, in other States, or in States where recognition of foreign proceedings will not be sought, the issue may be addressed in a cross-border agreement. Since recognition of a foreign stay of proceedings cannot be imposed on a court simply by agreement between the parties, the courts would generally need to approve an agreement including such provisions.

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[78] See, for example, GBFE, Peregrine, SENDO.

[79] See, for example, SENDO.

[80] UNCITRAL Model Law, articles 20-21, 28-29.

[81] Not all States enacting legislation based upon the Model Law have adopted the automatic stay.

91. Agreements adopt different approaches to the question of the stay. Some provide for joint recognition of stays of proceedings, stipulating that the court of one State should extend and enforce the stay imposed in the other State involved in the agreement in its own territory and vice versa. A proviso might be that enforcement of the stay should take place only to the extent necessary and appropriate or to the same extent that it is applicable in the State in which it is ordered. In recognizing and implementing a stay applicable in another State, the agreement might provide for the court to consult with the issuing court regarding interpretation and application of the stay, including its possible modification, relief from the stay, and issues of enforcement.

92. Other agreements do not provide for the automatic recognition in relevant courts of a stay of proceedings issued by one court involved in the agreement, but permit recognition and assistance to be sought from those relevant courts, where that assistance might include giving effect to the stay or providing an equivalent remedy or relief.[82]

93. In addition to a court-ordered stay of proceedings, parties may agree to suspend any proceedings commenced by them against the debtor for a specific period, in order to allow time for the optimal approach to coordination of the different proceedings to be found. Such an agreement may be coordinated through creditor committees or involve the agreement of creditors (especially where those creditors have applied for commencement of the insolvency proceedings) and might be included in a written agreement,[83] but would also be feasible outside a written agreement. Similarly, in a case concerning main and non-main proceedings, the insolvency representative of the main proceeding agreed not to apply, for a certain period of time, for a stay in the non-main proceeding, in order to achieve the best means of recovery of the assets of the debtor, notwithstanding their right to so apply under applicable law.[84]

94. The issue of relief from the stay might also be addressed. One agreement, for example, provided a safeguard that permitted the parties to seek relief after entry into force of the agreement, in the event of an emergency. Another agreement facilitated coordination by granting the foreign insolvency representative relief from the automatic stay for a specific period of time to investigate assets allegedly belonging to the debtor's estate in the forum State. In a case where the cross-border insolvency proceedings were to be administered jointly and a workplan to be agreed upon, the court-approved agreement granted the insolvency representatives relief from any stay or similar order so that the agreed plan could be implemented.

95. In situations involving assets or persons in a third State, an agreement may provide that each court involved could grant emergency relief upon application by the insolvency representative. In one agreement including such provisions, it also specified that since that relief could be granted by the court of one forum, the insolvency representative should attempt to obtain the ex post facto approval of the other courts as soon as possible.[85]

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[82] See, for example, Federal Mogul.
[83] See, for example, Inverworld.
[84] See, for example, SENDO.
[85] See, for example, Nakash.

(c) Applicable law

96. Where insolvency proceedings involve parties or assets located in different States, complex questions may arise with respect to the law that will apply to questions of validity and effectiveness of rights in those assets or of other claims; and to the treatment of those assets and of the rights and claims of those parties not located in the State in which the insolvency proceedings have been commenced. In the case of such insolvency proceedings, the forum State will generally apply its private international law rules (or conflict-of-laws rules) to determine which law is applicable to the validity and effectiveness of a right or claim and to its treatment in the insolvency proceedings. While insolvency proceedings may typically be governed by the law of the State in which the proceedings are commenced (the *lex fori concursus*), many States have adopted exceptions to the application of that law, which vary both in number, scope and policy justification. The diversity in the number and scope of such exceptions may create uncertainty and unpredictability for parties involved in cross-border insolvency proceedings. By specifically addressing the issue of applicable law, an insolvency law can assist in providing certainty with respect to the effects of insolvency proceedings on the rights and claims or parties affected by those proceedings.

97. However, formally articulated conflict-of-laws rules specific to solving cross-border insolvency issues do not exist in most States. An example serves to illustrate the difficulties. In the *Toga Manufacturing* case, the bankruptcy court in the United States did not grant an injunction to the applying Canadian debtor, because the United States' creditor's claim, which would be given priority under United States' law, would be treated in the Canadian proceeding as an ordinary unsecured claim.[86]

98. In the absence of clear rules under applicable law, an agreement can seek to avoid the conflict arising from different conflict-of-laws rules by specifying the applicable law for specific issues. Many agreements address applicable law issues with respect to questions such as 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.[87] Different approaches are taken to the determining the law applicable to those issues. One approach is to apply the law of the forum, unless considerations of comity require application of another law. Other agreements indicate that issues should be decided by the forum court using an analysis based upon the conflict-of-laws rules applicable in that forum or in accordance with the law governing the underlying obligation. In the case of avoidance provisions, for example, that agreement may specify the law of the State in whose territory the entities to which transfers of assets were made are situated or the law as determined by the rules of the jurisdiction to which the creditors are subject.[88]

99. A proviso might be that if the law governing the underlying obligation is either unclear or the law of a State not involved in the agreement, the choice of law rules of one of the relevant States should be applied to determine which of the courts

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[86] In re Toga Manufacturing Ltd., 28 B.R. 165 (E.D.Mich. 1983).

[87] The Concordat refers the decision on value and admissibility of claims as well as the determination of certain creditor's rights to each forum for the claims filed before it, using an analysis based upon conflicts of laws rules (Principle 8A).

[88] See, for example, AgriBioTech, Everfresh.

should be responsible for that matter. A further approach specifies that the conflict-of-laws rules of a third country should apply if application of the laws of the jurisdictions involved leads to conflicting results.[89]

100. Parties may also agree how to approach certain issues that would be treated differently under the laws of the different jurisdictions. In one case involving the Netherlands and the United States, which was coordinated without a written cross-border arrangement, the parties agreed that one burdensome contract governed by the law of a third jurisdiction would be rejected in accordance with United States' law. The parties further agreed that the effects of such rejection would be considered in an arbitration in the Netherlands, applying the third jurisdiction's law.[90] The parties further agreed not to apply the law of one State and thus not to subordinate certain claims to the level of equity interests, because it would have been inconsistent with the law of the insolvency law of the other jurisdiction.[91]

101. As already noted (see para. 22 above), several agreements may be concluded between the parties in the course of the insolvency proceedings. Where that occurs, a preliminary agreement may record that the parties will attempt to negotiate a subsequent agreement addressing, for example, the treatment of claims that would specify the law applicable to claims submitted by each debtor and their respective creditors in the other proceedings.[92]

Sample clauses

Priority of proceedings

(19) Subject to the terms of this agreement, the State A proceeding shall be the main proceeding and the State B proceeding shall be the non-main proceeding. However, as a practical matter, given that the business activities of the company are and always have been focussed in State B, substantially all of the liquidation of the company shall be carried out in and from State B.

Stays of proceedings

(20A) The State A court recognizes the validity of the stay of proceedings and actions applicable against the State B debtor and its property under the insolvency law of State B. In implementing the terms of this paragraph, the State A court may consult with the State B court regarding (a) the interpretation and application of the State B stay and any orders of the State B court modifying or granting relief from the State B stay and (b) the enforcement of the State B stay in State A.

Nothing in this agreement shall affect or limit the debtors' or other parties' rights to assert the applicability or non-applicability of the State A or the State B stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

Nothing in this agreement shall affect or limit the ability of either court to direct (a) that any stay of proceedings affecting the parties before it shall not apply

[89] See, for example, Peregrine Investment.

[90] See United Pan Europe.

[91] Ibid., the law not to be applied was section 510 (b) of the United States Bankruptcy Code.

[92] See, for example, Calpine, Quebecor.

to any application by those parties to the other court or (b) that relief be granted to permit those parties to apply to the other court on such terms and conditions as the court considers appropriate.

(20B) To promote the orderly and efficient administration of the insolvency proceedings and the protection of the debtor's estates for the benefit of creditors and other stakeholders, the parties shall:

(a) If so requested by the State A insolvency representative, request the State B court, to the extent permitted under State B law, to recognize and/or provide judicial assistance to the State A proceeding and extend and give effect to the State A stay in State B or provide equivalent remedies and relief;

(b) [*Repeat clause (a) for the State A court*.]

Applicable law

(21) The adjudicating forum shall decide the value, admissibility and priority of claims submitted using an analysis based upon the conflict-of-laws rules applicable in that forum.

5. Allocation of responsibilities between the parties to the agreement

102. Cooperation is most needed in areas where potential conflict can be expected. Agreements on the responsibilities of each party or at least cooperation in these areas constitute one way to avoid potential conflicts. Consequently, agreements often allocate responsibility between the parties to the proceedings for a range of matters, including: supervision of the debtor; reorganization plans; treatment of assets; power to commence legal actions; treatment of claims, including claims verification and creditor notification; and post-commencement finance. However, as soon as an agreement touches upon involvement of the court, responsibility of the court or action to be taken by the court, court approval of such arrangement would be required for the agreement to be effective.

103. In some States, an insolvency representative may be able to allocate responsibility for certain actions to another insolvency representative where it is practical to do so, and satisfy its own obligation by overseeing and reviewing what the other insolvency representative does; this may even include insolvency representatives in other States. Insolvency representatives may also be able to provide certain undertakings in order to coordinate their activities with courts or other parties. For example, in a case in which no written agreement was concluded, the insolvency representative provided to the court of the other jurisdiction a letter confirming that it would not consent to the disposition of any estate assets or funds until approved by that court, to the extent required.[93]

(a) General means of cooperation

104. Some agreements do not address the allocation of responsibilities between the various parties and the courts in detail, but include a broad statement concerning cooperation between the parties which is in the nature of a statement of good faith

[93] See United Pan Europe.

or intent, leaving flexibility to the parties to determine the manner in which cooperation will be achieved.[94]

105. Examples include provisions to the effect that: the parties, which may include some or all of the debtor, the creditor committee and the insolvency representatives depending upon the circumstances of the case, will take all reasonable steps to cooperate with each other in connection with actions taken in the courts of the States involved, and to coordinate the administration of the proceedings for the benefit of the respective insolvency estates and stakeholders;[95] to the extent possible, all actions taken in the different insolvency proceedings should be consistent; and the administration of the proceedings should be organized to ensure efficiency and reduce costs, focussing upon coordination of the activities of the insolvency representatives, the matters to be addressed by the courts and relevant procedural issues.

106. More detailed provisions may specify the means of achieving cooperation, such as sharing the administration of the proceedings, where the insolvency representatives reach agreement on how to coordinate their activities with each other, subject to their respective obligations and responsibilities under applicable law. These provisions might include agreement that: each representative control the administration of the subsidiaries of the debtor in its State and seek the assistance of the other where needed; an insolvency representative may act without the prior consent of the other representative and without giving prior notice on any matter that does not require notice to be given to interested parties under the law governing those insolvency proceedings; or an insolvency representatives should attempt, in good faith, to obtain the consent of the other insolvency representative prior to taking certain actions, including seeking or consenting to the substantive consolidation of the debtor with any other entity and or any other action that would have an adverse impact on the debtor or any member of the debtor.[96] The provisions may also specify the procedure to be followed to achieve this cooperation, including, for example, holding an initial meeting, at which the insolvency representatives should discuss all actions already taken concerning the debtor's assets and develop a workplan together, followed by meetings on a regular basis. Further details could include the particulars of those meetings, including a timetable and how they should take place (e.g. in-person, via telephone). Other elements of cooperation could include that documents prepared in one proceeding may be used for similar purposes in other proceedings or that the insolvency representatives should participate as management exercising the rights, powers and duties of a debtor in possession in the insolvency proceedings in the other forum.[97]

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[94] See, for example, Philip, Systech.

[95] See, for example, Federal Mogul, Laidlaw; the Concordat takes a similar approach, stipulating that for cases with more than one plenary forum, but no main forum, each forum should coordinate with each other, subject in appropriate cases to a governance protocol (Principle 4A). The CoCo Guidelines recommend the cooperation of the insolvency representatives and sets out details for this cooperation (Guideline 12.1-4), including the court appointment of the main insolvency representative's or its agent as a co-insolvency representative in non-main proceedings to ensure coordination between different proceedings under the court's supervision (Guideline 16.3).

[96] See, for example, AIOC.

[97] See, for example, Manhatinv, Commodore.

(b) Supervision of the debtor

107. An agreement can establish the extent to which the debtor will be responsible for supervision of its business, addressing what the management can or cannot do without prior consultation with, or the consent of, the insolvency representatives. Prior consent may be required, for example, for the use and disposal of assets, while prior consultation may be required with respect to commencing legal proceedings; recruiting or dismissing employees, other than in the ordinary course of business; and consulting with any trade unions except in the ordinary course of business.[98]

(c) Reorganization plans

108. Where reorganization proceedings are commenced against a debtor in a number of different States or against several members of an enterprise group in different States, a question arises as to whether it will be possible to reorganize the debtors in a coordinated manner, perhaps through a single plan that will deliver savings across the various insolvency proceedings, ensure a coordinated approach to the resolution of the debtors financial difficulties and maximize value for creditors. Some insolvency laws permit the development of such a plan, while under others it will only be possible where the different proceedings can be coordinated. Accordingly, this issue is commonly addressed in cross-border agreements, many of which provide that for each proceeding, a reorganization plan or similar arrangement should be submitted to each responsible court and that the plans should be substantially similar to each other.[99] The development of a similar plan of reorganization in different forums may also be achieved in the absence of a written agreement, by the parties working together to ensure that the plan and the approval and confirmation process are in accordance with both legal systems. It may also be possible pursuant to the statutory obligation of the insolvency representative to maximize the value of the estate and to act in the interests of the debtors.

109. The joint development of the plans is an appropriate means for addressing concerns of creditors and the courts, where they have a role to play in approval and implementation of the plans, and can be coordinated through a cross-border agreement. That agreement might cover: preparation of the plan or plans; classification and treatment of creditors;[100] procedures for approval, including solicitation and voting; and the role to be played by the courts (where applicable), particularly with respect to confirmation of a plan approved by creditors and its implementation.[101] An agreement might also provide that the plans, once approved by creditors and, where required, confirmed by the respective courts, should be binding upon claimants in relevant States, regardless of whether those claimant had submitted claims in proceedings in those States or otherwise submitted to the jurisdiction of those States.[102]

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98 See, for example, Federal Mogul.

99 See, for example, Solv-Ex; the CoCo Guidelines also emphasize the cooperation of the insolvency representatives in any manner consistent with the objective of reorganization or the sale of the business as a going concern wherever possible (Guideline 14.1).

100 See, for example, Everfresh.

101 See, for example, AgriBioTech.

102 See, for example, AgriBioTech.

110. Where the agreement does not establish those procedures, it may nevertheless provide that they should be established in accordance with applicable law, by the debtor in consultation with the insolvency representatives, or by order of the relevant courts. A cross-border agreement that provides generally for coordination but does not specifically address reorganization plans might also facilitate coordination of such plans. In the *360Networks* case, for example, the agreement itself did not address the issue of reorganization plan but in the course of reorganization, the parties agreed to draft two substantially similar plans and make each dependent on the approval of the other.

111. One particular concern with negotiating a single reorganization plan relates to the equal treatment of creditors in each jurisdiction and the need to ensure that some do not receive less favourable treatment than others. For example, in the *Felixstowe Dock and Railway Co.* case,[103] the United States' debtor sought the cooperation of the English courts to lift injunctions applying to the debtor's assets in England to prevent their realization or removal. Although the United States' court assured the English court that if the injunctions were lifted, prosecution of the English claims in the English courts would not give rise to actions for contempt in the United States' court, the English court declined to lift the injunctions. That decision was based on the English court's concern that English creditors would receive less favourable treatment under a United States' plan of reorganization.

112. Different approaches may be taken to preparation and submission of the plan. Responsibility could be given to the debtor or debtors respectively, where the insolvency law provides for the debtor to remain in possession and continue operating the business or to the insolvency representatives, possibly in cooperation with the debtor. Where the plan is to be developed together with the insolvency representative, different approaches may be adopted to coordinate the process in different States. The management of the debtor's business in one State, for example, may be best positioned to develop a reorganization plan for all of the debtor's businesses in consultation with all of the insolvency representatives; or the plan may be prepared by the debtor together with the insolvency representative of only one forum, but with the involvement of other insolvency representatives, especially if the insolvency law requires the insolvency representative to participate in the negotiation of, or to consent to, the reorganization plan.[104]

(d) Treatment of assets

113. The conduct of insolvency proceedings will often require assets of the debtor to continue to be used or disposed of (including by way of encumbrance) in order to enable the goal of the particular proceedings to be realized. Where the insolvency of the debtor involves proceedings in different States, coordination of the use and disposal of the debtor's assets may be required to ensure maximization of the value of assets for the benefit of all creditors. Agreements can be used to facilitate this coordination by establishing requirements for approval; allocation of responsibility between the different parties in interest; and details concerning the procedures for use or disposal. Although the extent to which responsibility can be allocated

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[103] Felixstowe Dock and Railway Co. v. U.S. Lines Inc.; [1989] Q.B. 360 (1987) (Eng.). Re T & N Ltd; [2005] B.CC. 982.

[104] See, for example, AgriBioTech, Maxwell.

between the different courts and insolvency representatives will depend upon the requirements of applicable law, practice suggests that a number of different approaches are possible.[105]

(i) Supervision by the courts

114. Some agreements allocate responsibility for supervising use and disposal of assets to the courts, whether to the court of the State in which assets are located; to the court of the State in which the debtor is located; or jointly to the courts competent for the different insolvency proceedings.[106] In some agreements, use of the location criteria is relevant only to specific kind of assets, such as immovables.[107] Another approach, which may be appropriate in certain cases such as where there is a high level of managerial and operational interdependence among the cross-border companies, is to make sales of certain assets subject to the joint approval of the courts involved, regardless of the location of those assets,[108] although it would be desirable to ensure that such a provision did not cause unnecessary delay and reduction of value. To facilitate that joint approval and the allocation of proceeds between the different debtors, some agreements permit joint hearings to be conducted.[109] The requirement for court approval may be limited to assets that exceed a specified value or to certain types of transactions, distinguishing for example, between disposals in the ordinary course of business and disposals outside the ordinary course, with approval required only for transactions in the latter category. An agreement may also specify that approval is not required for certain types of transactions, e.g. depositing funds in bank accounts. Some agreements envisage approval being sought for each and every transaction, while others provide that a single court order might cover all disposals of assets, enabling the insolvency representatives to take action without seeking approval in each instance.[110]

(ii) Supervision by insolvency representatives

115. Another approach explicitly authorizes the insolvency representative to use or dispose of the debtor's assets without court approval where permissible by applicable law, reducing the time needed for those actions. This authorization could include requesting the debtor to dispose of certain assets. In some situations, it might be appropriate to require the insolvency representative to seek the prior consent of their foreign counterpart for disposal of assets, including the disposal of shares or interests. To avoid an impasse, the requirement to seek consent might be limited to making a "good faith attempt" or to consultation. Where the debtor is

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[105] In cases with more than one plenary forum, but no main forum, the Concordat refers the assets within each jurisdiction to that forum (Principle 4B). Where proceedings involve a main and non-main proceeding, the CoCo Guidelines recommend that every insolvency representative should seek to sell the assets [in its jurisdiction] in cooperation with the other insolvency representatives so as to maximize the value of the assets as a whole [Guideline 13.1]. Further, any national court, where required to act, should approve those sales or disposals that would produce such value [Guideline 13.1].

[106] See, for example, AgriBioTech, Everfresh.

[107] See, for example, PSINet.

[108] See, for example, Tee-Comm.

[109] See, for example, Livent, PSINet.

[110] See, for example, Livent, Solv-Ex.

permitted to manage the assets, for example, as a debtor in possession, approval of the insolvency representatives may be required for sale or disposal outside the ordinary course of business, but not otherwise.[111] Even where court approval is not required for sale or disposal of assets, the courts may nevertheless oversee the use and disposal of assets by requiring the insolvency representative to provide regular reports on their work.[112]

116. Other details which an agreement may address regarding the use and disposal of assets might include: the manner of the disposition; the setting of a foreign exchange rate for transactions that require the computation of an amount in different currencies; the manner or place of payment of the proceeds; and the use of the proceeds from sales, such as to fund working capital, cover court-approved expenses, plan funding or distribute to creditors.[113]

(iii) Investigation of assets

117. Investigation of the debtor's assets is often key to the successful conduct of insolvency proceedings and a coordinated approach might avoid duplication of effort and save costs. Investigations may be coordinated by allocating responsibility for their conduct to, for example, the insolvency representative of one State or by coordinating the activities of the insolvency representatives in other ways, such as by establishing provisions for notice and reporting. Where responsibility is allocated to one insolvency representative, it will be desirable that the investigating representative informs its counterpart in the other States about the investigation[114] and periodically consults with it with respect to progress and results, as well as proposed actions, providing the counterpart with drafts of any requests proposed to be made to the courts.

(e) Allocation of responsibility for commencing proceedings

118. During insolvency proceedings, it might become necessary to commence various types of proceedings concerning the debtor or third parties, including insolvency or other similar proceedings with respect, for example, to subsidiaries of the debtor (wherever situated) not already subject to insolvency proceedings, or parallel proceedings, for example, on the basis of presence of substantial assets, substantial business or place of incorporation[115] or actions concerning third parties, such as avoidance of certain transactions or with respect to submission and verification of claims. To avoid possible conflict, an agreement may allocate responsibility for commencing such actions between the different representatives, subject to certain requirements, such as the written consent of the other insolvency representative.[116]

119. Allocation of responsibility in this manner may be important to satisfy the requirements of local law as many laws, in specifying the persons who may request the commencement of insolvency proceedings, do not include foreign insolvency

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[111] See, for example, AIOC, Manhatinv.
[112] See, for example, Inverworld.
[113] See, for example, AIOC, Everfresh.
[114] See, for example, Maxwell, Nakash.
[115] See, for example, Commodore.
[116] See, for example, Manhatinv.

representatives and or address the question of their standing under those laws to make such a request, which is therefore in doubt. Article 11 of the Model Law is designed to ensure that a foreign representative, following recognition of main or non-main proceedings, has the standing to request commencement of an insolvency proceeding in the recognizing State, provided the conditions for commencement are otherwise met; the Model Law does not modify the conditions under local law for commencement of those proceedings. Similarly, article 23 provides the standing, following recognition of a foreign proceeding, for a foreign representative to initiate avoidance actions as available in the recognizing State. Where the Model Law has not been enacted however, or there is doubt as to the standing of a foreign representative to commence such proceedings, allocating that responsibility in a cross-border agreement to another insolvency representative may facilitate commencement of those proceedings. An agreement may also cover related procedural issues, such as deadlines for filing certain documents and reports and provision of notice, in accordance with applicable national law.

(f) Treatment of claims

120. Claims by creditors operate at several levels in insolvency, determining which creditors may vote in the proceedings, how they may vote and how much they would receive in a distribution. Accordingly, the procedure for submission of claims and their verification and admission is a key part of the insolvency proceedings. Where insolvency proceedings cross borders, procedural matters with respect to coordination of claims processing such as place and time (including deadlines) of submission, responsibility and procedure for verification and admission, provision of notice of claims submitted and cross-recognition of admission can be clarified and coordinated in an agreement. Such an agreement may or may not require approval by the court, depending upon the role played by the court in the claims admission and verification process. Details of the claims procedure to be followed may be negotiated at the commencement of those proceedings or the agreement negotiated at that time might provide that certain claims would be dealt with later in a claims protocol to address the timing, process, jurisdiction and law applicable to the resolution of inter-company claims.[117]

121. While agreements in writing typically address coordination of the treatment of claims, coordination may be achieved without an agreement. In one case involving the United States and the Netherlands, for example, the debtor in possession and the insolvency professionals worked together to coordinate various processes without a written agreement, ensuring that the laws of both jurisdictions involved were complied with.

122. Agreements may also address issues of priority and subordination. For example, in one case the parties agreed not to subordinate certain claims to the level of equity interests, which they could have done under the law of one of the jurisdiction involved, because it would have been inconsistent with the law of the other jurisdiction.

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[117] See, for example, Calpine, Quebecor.

(i) Submission of claims

123. Agreements can establish the proceedings in which claims should be submitted, and address the issue of claims submitted in more than one proceeding to establish where they should be verified and admitted. Claims submitted in one jurisdiction could be treated as if they had been properly submitted in the other jurisdiction in which they would then be considered or a claim submitted in one proceeding may be deemed to have been submitted in both proceedings, with the place of last submission being responsible for its consideration. An agreement may also clarify that submitting a claim is a prerequisite for participating in a distribution or voting upon any proposal or plan of reorganization.[118]

(ii) Claim verification and admission

124. Verification and admission of claims may be conducted in a variety of ways by different parties, involving the courts, the insolvency representatives and in some cases the debtor. As noted above, agreements may address the procedure for verification and admission of claims and the allocation of responsibility between the courts or insolvency representatives.[119] For example, the agreement may provide that the insolvency representatives should work together to agree on the procedure or that claims should be adjudicated in accordance with applicable law.

125. Where the court is involved in the process, parties may agree that the court of one forum will verify and admit all claims[120] or that each court responsible for the different insolvency proceedings will verify and admit claims properly submitted in those proceedings.[121] Where claims are to be adjudicated by one court, it may be the court of the State in which the debtor is located or the court in which the claim is submitted, unless principles of comity require otherwise or another court is a more appropriate forum in view of all the circumstances.[122]

126. Where the agreement provides for claims to be verified and admitted in one State, it might require recognition of those claims by the other courts involved in the proceedings and acceptance of that process by the debtor. Similarly, where claims are to be adjudicated in several courts, an agreement can stipulate that each court should consider the claims against the debtor submitted in its proceeding and that that court's decision on those claims should be applied and recognized by the other courts, to the extent allowed under applicable governing law. Where action is required to be taken to ensure recognition, the agreement may allocate responsibility for taking the necessary steps to, for example, the debtor or the insolvency representative.[123] Requiring insolvency representatives to periodically exchange a register of the claims submitted in each proceeding may facilitate coordination of claims processing.[124] Where creditors are required under applicable law to attend in person to verify their claims, a cross-border agreement might address the obstacle

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[118] See, for example, AgriBioTech, Livent.

[119] See, for example, Inverworld; the Concordat stipulates principles for the filing of claims for cases with a main forum and for cases with more than one plenary forum, but no main forum (Principle 2 D & E, 4 C-E).

[120] See, for example, AgriBioTech.

[121] See, for example, Commodore.

[122] See, for example, PSINet.

[123] See, for example, PSINet, AgriBioTech.

[124] See, for example, AIOC.

caused by the costs of travel for foreign creditors, which might prevent smaller claim-holders from pursuing their rights at all.

127. An agreement may provide that the adjudicating forum will decide the value, admissibility and priority of the claims, using an analysis based upon the conflict-of-laws rules applicable in that forum or in accordance with the law governing the underlying claim.[125] The agreement may also address the question of objections to claims, for example, by permitting objections to be made in each proceeding.[126]

128. As an alternative to adjudication by the courts, an agreement may provide for claims to be verified and admitted by the insolvency representative, and specify the details of the procedure. One agreement, for example, provided that the insolvency representatives of main and non-main proceedings in different European Union States should each verify the amount and form of the claims submitted in their proceedings and that the insolvency representative of the non-main proceedings should provide to the insolvency representative of the main proceeding a list of the claims in the non-main proceedings. The verification was to be undertaken independently in conformity with national law in accordance with the provisions of the EC Regulation.[127]

129. Responsibility for treatment of specific claims, such as unsecured claims, may in some cases be referred to specified parties, for example, the debtor in possession, subject to consultation with the insolvency representatives.[128]

130. An agreement may also address treatment of claims in reorganization proceedings, prior to approval and implementation of the plan. One agreement, for example, referred primary responsibility during that time to the insolvency representatives in consultation with the debtor for agreement on the validity or amount of claims and their payment or other settlement.[129]

131. Another issue that an agreement may address is the manner in which, and the court to which, appeals concerning rejection of claims should be made. To facilitate coordination, enhance transparency and predictability, an agreement may also include certain standard forms relating to verification and admission of claims, such as (i) the proof of claim, (ii) the notice of rejection, and (iii) a notice of election.[130]

(iii) Distribution

132. Where creditors are able to submit claims in multiple proceedings, it is desirable that the proceedings be coordinated to avoid a situation in which one creditor might be treated more favourably than other creditors of the same class by obtaining payment of the same claim in more than one proceeding. Article 32 of the Model Law includes a rule to address that situation (incorporating the so-called *hotchpot rule*).

133. Some agreements include a general provision on distribution, such as that all of the debtor's assets should be realized for the benefit of all secured, priority, and

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[125] See, for example, Everfresh, AgriBioTech.
[126] See, for example, Everfresh.
[127] See, for example, SENDO.
[128] See, for example, Everfresh.
[129] See, for example, Federal Mogul.
[130] See, for example, GBFE.

non-insider unsecured creditors, with the net proceeds of sale to be distributed in accordance with priorities established under the laws of one forum. Other agreements specifically address the issue of double payment. One approach is to include a general provision that a creditor should not be paid twice where, in parallel proceedings, it submits a claim in both proceedings. Other agreements are more specific, detailing how this should be avoided, including by the insolvency representatives exchanging relevant information, such as draft distribution schedules and, if distributions have occurred, lists of the recipient creditors. It may also be avoided by providing that the creditor should receive a distribution from the debtor's assets as if it had submitted a single claim in either proceeding, but limited to a rateable recovery from the debtor's assets not greater than would be permitted under both laws.[131]

134. An agreement may also address the means of distribution, for example, the currency in which claims should be paid; who will pay the dividends, for example, each insolvency representative may be responsible for making distributions in the proceedings in which it was appointed;[132] and to which creditors they will be paid.

(g) Post-commencement finance

135. The continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization, and to a lesser extent, liquidation, where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services. Where the debtor has no available liquid assets to meet its immediate cash flow needs, it will have to seek finance from third parties.[133] Since many insolvency laws either restrict the provision of new money in insolvency or do not specifically address the provision of new finance or the priority for its repayment in insolvency, the uncertainty created by these different approaches in a cross-border insolvency situation makes post-commencement an issue that might be addressed in a cross-border agreement.

136. Many agreements, however, do not address the provision of post-commencement finance. Sometimes, the court order approving the agreement contains provisions on post-commencement finance. Such order might, for example, authorize the applicants to pursue all avenues of refinancing and the sale of material parts of their business or assets, subject to prior approval of the court and the lenders, as applicable and approve and recognize the finance approved in proceedings in other jurisdictions.[134] One agreement included a provision that the insolvency representative with responsibility for operation of the business on an ongoing basis required the consent of the other insolvency representatives and approval of the court of the other forum to obtain financing, regardless of whether

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[131] See, for example, AIOC, SENDO.

[132] See, for example, Peregrine Investment, GBFE.

[133] The CoCo Guidelines recommend the insolvency representatives' cooperation with regard to obtaining any necessary post-commencement financing, including through granting of priority or a security interest to reorganization lenders as might be appropriate and insofar as permitted under any applicable law (Guideline 14.2); see also UNCITRAL Legislative Guide, part two, II, paras. 94-107 and recommendations 63-68.

[134] See, for example, Systech.

that consent was required under the applicable law.[135] That mechanism was adopted to ensure that the parallel insolvency proceedings achieved the goal of maximizing the value of the estate and preserving the interests of each of the insolvency regimes involved. An agreement may also address issues of jurisdiction providing, for example, that any post-commencement finance lender should only be subject to the jurisdiction in which the post-commencement finance was provided.[136]

137. Similarly, an agreement can explicitly permit the insolvency representative to borrow funds or encumber assets and impose conditions such as the consent of the creditor committee, or permit the use of the proceeds of certain transactions other than the sale of assets to fund, for example, working capital or to invest, leaving the manner of investment to the insolvency representative's reasonable judgment.[137]

Sample clauses

General means of cooperation

(22) To assist in the efficient administration of the insolvency proceedings, the debtor, the creditor committee and the insolvency representatives shall (a) cooperate with each other in connection with actions taken in the courts of States A and B, and (b) take any other appropriate steps to coordinate the administration of the proceedings in States A and B for the benefit of the debtor's respective estates and stakeholders.

Supervision of the debtor

(23) The debtor shall not:

(a) Without the prior consent of the State A insolvency representative, take any of the following steps:

(i) Subject any asset to any new mortgage, charge or security interest;

(ii) Except as provided in any reorganization plan to which effect is given under State A law, agree to the validity or amount of, pay or settle the claims of any pre-petition creditor of the debtor out of the debtor's assets;

(iii) Undertake intragroup sales or purchases other than in the ordinary course of business and in compliance with the debtor's present transfer pricing policies;

(b) Without prior consultation with the State A insolvency representative take any of the steps:

(i) File in the State A court, or circulate to the creditors of the debtor or any class of them for approval by them, any reorganization plan;

(ii) Except in the ordinary course of business, consult with any trade unions;

(iii) Recruit or dismiss any employees other than in the ordinary course of business, and the debtor shall, in respect of any recruitment

[135] See, for example, Maxwell.
[136] See, for example, Mosaic.
[137] See, for example, GBFE, Livent.

or dismissal of employees, comply at all times with applicable employment law.

Reorganization plans

(24) To the extent permitted by the laws of the respective jurisdictions and to the extent practicable, the insolvency representatives of States A and B shall submit substantially similar reorganization plans in States A and B in accordance with the respective insolvency laws of States A and B. The insolvency representatives of States A and B shall, to the extent practicable, coordinate all procedures in connection with those reorganization plans, including solicitation proceedings procedures regarding voting on the reorganization plan, treatment of creditors and classification of claims. To the extent not provided for in this agreement, those procedures will be established either by applicable law or further orders of courts of States A and B.

In order to coordinate the contemporaneous submission of reorganization plans in States A and B, the insolvency representatives of States A and B shall take any action necessary to seek extension of the submission dates in both States.

Treatment of assets: supervision by the courts

(25) Transactions relating to the State A assets will be subject to the sole approval of the State A court. Transactions relating to the State B assets will be subject to the sole approval of the State B court. Any transactions involving assets located in both States A and B will be subject to the joint jurisdiction of both courts.

Supervision by the insolvency representatives

(26) The debtor shall not, without the prior consent of the insolvency representatives of States A and B, acquire, sell or dispose of any asset outside the ordinary course of business.

Investigation of assets

(27) There shall be an investigation into the debtor's assets wherever located. The State A insolvency representative has already commenced such an investigation, and in the interests of continuity, efficiency and expense, shall continue with its investigation in accordance with this agreement. Notwithstanding the foregoing, the State B insolvency representative, the debtor or any other party in interest shall have the right at any time to request either court to permit or order the State B insolvency representative to conduct an independent investigation.

In conducting the investigation, the State A insolvency representative shall, at all times, notify the State B insolvency representative of any actions that the State A insolvency representative desires to pursue and consult in good faith with the State B insolvency representative as to the reasons for and propriety of pursuing those actions. Unless not reasonably practical due in the circumstances, the State A insolvency representative shall provide the State B insolvency representative with a draft of each application that the State A insolvency representative proposes to make to either court in pursuit of those actions. The State A insolvency representative shall not be required to obtain the consent of the State B insolvency representative

with respect to such actions, but to the extent the State B insolvency representative disagrees with any of the proposed actions, (a) the State A insolvency representative shall be required to inform the court in which it is seeking to pursue such actions of the State B insolvency representative's disagreement, and (b) the State B insolvency representative shall have a reasonable opportunity to appear and be heard in, and to seek relief from, the relevant court.

The State A insolvency representative shall at all times keep the State B insolvency representative informed as to the course and conduct of the investigation into the debtor's assets and periodically consult with the State B insolvency representative as to progress. Unless otherwise requested by the State B insolvency representative or directed by either court with respect to specified information, the State A insolvency representative shall promptly share with the State B insolvency representative all documents and other information obtained in connection with the State A insolvency representative's investigation.

Allocation of responsibility for commencing proceedings

(28) The State A insolvency representative shall attempt in good faith to obtain the consent of the State B insolvency representative prior to:

(a) Commencing or consenting to insolvency proceedings (whether in States A, State B or elsewhere) with respect to the State A debtor; and

(b) Causing the State A debtor or its subsidiary to commence legal proceedings.

Submission of claims & claim verification and admission

See sample clause number 12: *Allocation of responsibility between courts: treatment of claims.*

Distribution

(29) In order to avoid the risk, arising from the plurality of insolvency proceedings, of paying a creditor an amount that is greater than should be received, each insolvency representative is required to send to the other insolvency representative:

(a) Prior to any payment, the draft distribution plan based on which the payment of dividends will be made. The insolvency representatives to whom this draft is sent shall respond to the other insolvency representative within […] days from the date of receipt of the draft. Failure to respond within this time period shall be treated as acceptance of the draft plan;

(b) After any payment of dividends, a list providing the names and addresses of the creditors who have been paid, the amount paid and nature of the claim.

Post-commencement finance

(30) The State A insolvency representative shall attempt, in good faith, to obtain prior approval of the State B insolvency representative before borrowing funds or pledging or charging any assets of the debtor.

6. Communication

138. As noted above, communication between the parties in cross-border insolvency proceedings is often viewed as an essential means of addressing the uncertainty that may be encountered in cross-border cases where the parties are not necessarily familiar with the laws of other States and their application. Accordingly, the most common goal of cross-border agreements is to establish procedures for communication between the parties. Where the provisions of chapter IV of the Model Law (articles 25-27) have been enacted into national law they will provide the legislative framework for communication between the courts, between insolvency representatives and between the courts and insolvency representatives. An agreement might provide further detail as to the types of information to be exchanged; means of exchanging information; methods and frequency of communication; provision of notice; and confidentiality. Where the Model Law has not been adopted, an agreement might both establish the framework and provide the necessary practical detail. Formalizing the procedures for communication in an agreement will assist the overall coordination of the proceedings, promote the confidence of the parties, avoid disputes and increase transparency.[138]

139. A communication agreement might be used to address some, or all of the issues noted above, as required in each particular case and as permitted by local procedural requirements. While many such agreements have been endorsed by the court, that may only be a requirement where the communication agreement covers aspects of communication between the courts; an agreement addressing communication between, for example, the insolvency representatives and the creditors, may be implemented without such approval. Such an agreement might be one of a series of agreements entered into in the course of proceedings to address different issues and may be used as an initial step to facilitate resolution of those other issues.

(a) Communication between courts

(i) Direct communication

140. As noted above (part II.B), communication between relevant courts is very often essential because of the important supervisory role of courts in insolvency proceedings and may assist in preventing a "duelling of insolvency proceedings", undue delays and costs, unduly cumbersome and lengthy hearings, inconsistent treatment of similarly situated creditors, and the loss of valuable assets. In addition, direct communications might facilitate the resolution of problems created when different laws accord different treatment to the same types of claims. In the *Stonington Partners* case, for example, involving parallel insolvency proceedings in the United States and Belgium, an issue concerned the ranking of a securities-fraud claim that would effectively be denied any share under United States law, but could

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[138] The CoCo Guidelines recommend that courts communicate with each other for the purpose of coordinating and harmonizing the different insolvency proceedings (Guideline 2), including the communication between courts and foreign insolvency representatives (Guideline 4); and that courts should cooperate with each other directly, through insolvency representatives or through any person or body appointed to act at the direction of the court (Guideline 16.4). Other recommendations address the time (Guideline 15), method and means of communication (Guidelines 6 and 7).

be allowed under Belgian law and would rank equally with all other unsecured claims if proven.[139] Where permitted under applicable law, the ability to communicate with each other provides a safeguard for the courts, facilitating direct knowledge of the administration of the other proceeding. In a case concerning litigation against the debtor in the United States and insolvency proceedings in the Netherland Antilles, a telephone call from the judge in the court of the Netherlands Antilles to the court in the United States led to correction of erroneous information communicated by the parties. In the same case, direct communication between the courts resulted in an order by the United States' court, with the concurrence of the court of the Netherlands Antilles, directing mediation and the appointment of a mediator with the consent of the parties.[140] In a further example, in a case concerning the United States and Canada, the Canadian court needed information from the United States court on whether the criteria for independence was fulfilled by the "foreign representative", so that the Canadian court could recognize the foreign representative and order needed actions in Canada.[141]

141. In the *Cenargo* case,[142] which involved insolvency proceedings in the United States and the United Kingdom, direct communication between the judges was arranged via a telephone conference in which the various parties' counsel participated after the English judge was contacted by the United States' judge seeking direct dialogue to resolve problems caused by competing orders. In the course of the conference, the English judge mentioned that English law did not permit him to speak to another judge officially on any matter without the consent and the participation of the parties. The parties were given the opportunity to comment at the end of the conference and a transcript was circulated upon the request of the English judge. The various safeguards that might apply to direct communication are discussed in part II (see para. 8 above) and below (see paras. 185-188 below).

142. Provisions on court-to-court communication included in cross-border agreements may include different levels of detail. For example, they may provide that the courts of the different forums may communicate with one another generally or with respect to any matter relating to the insolvency proceedings or in order to coordinate their efforts and avoid potentially conflicting rulings[143] or they specify particular issues on which courts may communicate and, in some cases, seek guidance and advice from other courts, such as the application of the law of the other forum with respect to certain issues, for example the interpretation, application and enforcement of the stay ordered by that court.[144]

143. Where courts are unable to communicate directly, communication may nevertheless be facilitated through the insolvency representatives or through an intermediary or by way of letter or other written communication. As noted above, direct communication across borders is subject to the provision of national law and practice, which might not always facilitate that communication (see part II, para. 9

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[139] Unfortunately, the lower court did not follow the strong recommendations of the higher court to directly communicate with the Belgium court, see supra note 10.

[140] Supra note 21.

[141] AgriBioTech.

[142] In re Cenargo Int'l, PLC, 294 B.R. 571 (Bankr. S.D.N.Y. 2003).

[143] Financial Asset Management, Laidlaw, Pioneer, Systech.

[144] Calpine.

above). Article 31 of the EC Regulation provides for communication between insolvency representatives, but is silent on communication between courts. Some EU Member States have elaborated that provision. One law, for example, authorizes the judge or insolvency representative to provide to the foreign insolvency representative all information deemed necessary for the foreign proceeding and requires domestic courts or insolvency representatives to give the foreign insolvency representative the opportunity to make proposals with respect to the treatment of assets in the domestic proceedings.[145]

144. The *Maxwell*, *Nakash* and *Matlack* cases provide examples of the use of an intermediary through whom the judges could communicate (see part II, para. 3 above). An agreement may specify the type of information to be exchanged and the manner of its exchange (see part II, para. 6 above). Communication may also be facilitated by incorporating guidelines, such as the Court-to-Court Guidelines, into the agreement (see part II, para. 10 above)[146] and may be made subject to general provisions of a cross-border agreement relating to dispute resolution.[147]

(ii) Joint hearings

145. One means of facilitating coordination of multiple proceedings is to hold joint hearings or conferences, where appropriate, to resolve issues that have arisen. Joint hearings or conferences have the advantage of enabling the courts to deal with the complex issues of different insolvency proceedings directly and in a timely manner. Parties involved in the various proceedings have the opportunity for direct contact and are able to ask questions and seek clarification of counsel in the other jurisdiction. Such direct communication proved to be very successful in one case involving the United States and Germany, in which the German insolvency representative appeared in a hearing, testifying by telephone.[148] Where videoconference facilities are available, the ability of the parties to "see" each other might further assist mutual understanding.

146. Some agreements leave it to the courts to determine when joint hearings or conferences should be conducted, providing, for example, that they may be conducted with respect to any matter relating to the administration, determination or disposition of any aspect of the proceedings, where the courts consider it to be necessary or advisable or to facilitate coordination with the proper and efficient conduct of the insolvency proceedings.[149] A more limited example permits joint hearings with regard to specific issues, such as disposal of assets.

147. Some agreements set out procedures to be followed for joint hearings and in some cases also for conferences. Some agreements adopt procedures similar to Guideline 9 of the *Communications Guidelines*; other agreements incorporate the *Guidelines* by reference. Those procedures may include:[150]

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[145] § 239 I and II of the Austrian Bankruptcy Act (Konkursordnung).
[146] See, for example, Matlack.
[147] See, for example, Calpine.
[148] See Dornier Aviation [DANA], proper citation to be provided later.
[149] See, for example, 360Networks, Quebecor.
[150] See, for example, Solv-Ex, Inverworld.

(a) The establishment of a telephone or video link to enable the courts to simultaneously hear or see the proceedings in the other Court;[151]

(b) Limitation of submissions or applications by any party to the court in which the party is appearing, unless specifically given leave by the other court. Some agreements add that after the scheduling of the joint hearing, courtesy copies of such submissions or applications should be provided to the other court, and that application seeking relief from both courts must be filed with both courts;[152]

(c) The judges of the different fora who will hear such applications are entitled to communicate with each other in advance of the hearing, with or without counsel being present, to establish guidelines for the orderly submission of documents and the rendering of decisions by the courts, and to deal with any related procedural, or other matters;[153] and

(d) The judges of the different fora, having heard an application, are entitled to communicate with each other after the hearing, without counsel present, for the purpose of determining whether consistent rulings can be made by both courts, and the terms upon which such rulings shall be made, as well as to address any other procedural or non-substantive matter.

148. A different approach to joint hearings provides that the judges of the different fora might appear and sit jointly in either court as agreed between them, provided that where they do, creditors and other parties in interest may appear and be heard in person or at the courtroom of the judge who has travelled to appear in the other courtroom.[154]

149. Rather than leaving it to the judges to establish, some agreements establish the rules for submission of evidentiary materials in joint hearings and for submissions or applications by any party becoming subject to a joint hearing.[155]

150. In cases where the cross-border agreement included relevant provisions, joint hearings have been successfully arranged and have included holding a telephone conference to develop a coordinated schedule for the case and video joint hearings to discuss a proposed sale of assets in the different jurisdictions.[156]

(b) Communication between the parties

(i) Information-sharing between insolvency representatives

151. In addition to communication between courts, communication between insolvency representatives may be important to the coordination of insolvency proceedings, facilitating exchange of information and coordination of the activities to be undertaken by the insolvency representatives in pursuance of their obligations. Practice indicates that exchange of information has taken place on the basis of both written and oral agreements.[157]

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[151] See, for example, Livent.
[152] See, for example, Mosaic, Philip.
[153] See, for example, PSINet.
[154] See, for example, Livent.
[155] See, for example, Laidlaw, Loewen.
[156] See, for example, Everfresh, Systech.
[157] See, for example, United Pan Europe.

152. Exchange of information may be specifically addressed in the agreement or it may be pursued under a more general obligation to cooperate.[158] An agreement may specify a procedure such as that communication should take place on a regular basis, for example, through the provision of monthly operating reports prepared by the insolvency representatives and transmitted to specified parties or consultations by quarterly meetings or conferences.[159] The agreement may specify how those meetings should be conducted, whether by phone, or in person, and the procedures to be followed.[160] A further approach may provide for joint development of a workplan to coordinate and govern the material steps to be taken by the insolvency representatives, including keeping each other regularly informed about their activities and material developments with respect to the debtor, as well as providing notice of any application to the court and, in some cases, drafts of those applications or copies of any documents filed in the proceeding or other significant documents,[161] such as expert opinions. Provision of information may be assisted by requiring the insolvency representatives to keep clear records of the administration of the estate, including of significant management decisions,[162] books and records that would account for disposal of the assets and monthly reports of the fees and expenses of the administration.

153. Insolvency representatives may agree to make themselves available for consultation with their foreign counterparts upon request or to consult each other on specific matters, such as the preparation and negotiation of reorganization plans to be submitted in the different States.[163] One agreement dealing with main and non-main proceedings in European Union Member States referred to Article 31 of the EC Regulation and required each insolvency representative, prior to any disposal of assets, to prepare and provide to the other a list of the assets located in the territory of the non-main proceeding. It also required the insolvency representative of the main proceeding to make to the insolvency representative of the non-main proceeding a proposal for the global transfer of all assets. The insolvency representative of the non-main proceeding was to provide the proposal and its response to that proposal to the court administering the non-main insolvency proceeding. The insolvency representatives were also required to share a draft distribution plan and a list of creditors who had received distributions.[164]

(ii) Sharing information with other parties

154. In addition to the sharing of information between insolvency representatives, a cross-border agreement may also address the sharing of that information with other parties, such as the courts involved and the creditors or creditor committee. Such provisions may be useful to provide a degree of certainty and avoid potential conflict. The agreement may require, for example, that information shared by the insolvency representatives, such as monthly reports on their activities, could also be

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158 Compare 360Networks and Loewen with Manhatinv.
159 See, for example, Peregrine Investment, Commodore.
160 See, for example, Manhatinv.
161 See, for example, Peregrine Investment, Nakash.
162 See, for example, Federal Mogul, Inverworld.
163 See, for example, Peregrine Investment, Maxwell.
164 See SENDO.

provided to the creditors or the creditor committee or the courts.[165] Additional information may be exchanged on request, either by an insolvency representative or a creditor committee.

155. With a view to enhancing the transparency of the proceedings, some agreements provide that information publicly available in one forum should be made available in all forums[166] or that all claimants in the proceedings should have similar access to disclosed information, including information as to the financial condition, status and activities of the debtor, the nature and effect of any reorganization plan and the status of proceedings in each jurisdiction. Sharing of information may also be enhanced by measures such as a court holding monthly status conferences.[167]

156. An agreement may also cover communication between the management of the debtor and the insolvency representatives. It may provide, for example, that the insolvency representatives and the management of the debtor entities should regularly consult on strategic matters, specifying the kind of information that management should provide to the insolvency representatives or providing the insolvency representatives with access to all books and other records requested. Relevant information might include: minutes of board meetings of the debtor; periodical account information; periodical reports on the status of other legal proceedings involving the debtor; and copies of all tax returns.[168]

(iii) Notice

a. When notice is required

157. Provision of notice to interested parties is an essential element of the efficient administration of global insolvency proceedings and a reliable mechanism for the dissemination of basic information. Notice may be required to be given, under applicable law, to a number of different parties and stakeholders in those insolvency proceedings. While a cross-border agreement cannot circumvent the requirements of applicable law, it can extend those requirements (e.g. by providing notice more widely or including more comprehensive information), clarify the manner in which the provisions will operate across the different proceedings and supplement them if necessary to take account of the relationship between the different proceedings. Details that might be included in such agreements may include the party to give notice; to whom notice should be given; when notice is required; and the content of that notice.

158. Notice provisions in an agreement may be very general, relying upon procedures applicable under the relevant insolvency laws. Without specifying the exact circumstances warranting the provision of notice, the approach may be limited to indicating that where notice is required, one party should provide notice to the other parties in writing, in accordance with the applicable law.[169] Another approach

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[165] See, for example, Inverworld, Commodore.

[166] See, for example, Calpine, Everfresh.

[167] See, for example, Solv-Ex, Inverworld.

[168] See, for example, Maxwell, Federal Mogul; see also UNCITRAL Legislative Guide on obligations of the debtor (part two, III, paras. 22-33 and recommendation 110).

[169] See, for example, AIOC.

might be to provide that all parties should receive notice of all proceedings in accordance with the practices of the respective courts.[170]

159. Agreements may also limit the requirements for provision of notice, excluding matters of a purely formal and non-substantive nature or limit notice to cases where joint hearings are held.[171] Failure to provide notice as required may also be addressed, excusing a party from providing advance notice in a timely manner, if circumstances reasonably prevented it from doing so,[172] with the proviso that notice should be given as soon as practicable after the preventing event.

160. Matters requiring notice to be given might include: an application made by an insolvency representative to commence proceedings with respect to a member of the debtor's group,[173] any other application, request or document filed in one or all of the insolvency proceedings; related hearings or other proceedings mandated by applicable law in connection with the insolvency proceedings; an application for approval of remuneration and expenses of the insolvency representatives and professionals; issues concerning treatment of claims and reorganization plans; court orders or reasons and opinions issued in the proceedings; an action relating to investigation of assets in other forums; the seeking of emergency relief; a transaction, or an application for approval of a transaction, involving the assets of the estate, including the use, sale, lease, deposit of funds or any other disposal; and with respect to post-commencement finance.[174]

b. Parties required to give notice

161. Some agreements specify the persons required to provide notice, for example, the insolvency representatives of the different proceedings, the debtor or the party otherwise responsible for affecting notice in the State where certain documents are filed or the proceedings are to be conducted.[175]

c. Recipients of notice

162. Different approaches are taken to specifying the persons to be notified of different aspects of cross-border insolvency proceedings. Some agreements specify that notice requirements apply only to parties to the agreement, others require notice to be given generally to a number of recipients, including the debtor, creditor committee, creditors, the insolvency representatives and sometimes to other persons appointed or designated by the courts or that are entitled to receive notice according to the practice of the State where the documents are filed or the proceedings occur. Notice may be limited, with respect to creditors, to the creditor committee or to a certain number of the largest creditors, for example, the twenty largest creditors. Recipients may also be determined by reference to a list maintained in one proceeding or to all parties that are entitled to notice in accordance with any order issued in either proceeding. Some agreements specify contact details, including fax

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[170] See, for example, Livent, Solv-Ex.
[171] See, for example, Federal Mogul, PSINet.
[172] See, for example, AIOC.
[173] See, for example, Commodore, including e.g. a subsidiary or an intermediate holding company situated between the debtor and its affiliate or subsidiary companies: Maxwell.
[174] See, for example, AgriBioTech, Matlack.
[175] See, for example, Inverworld, Mosaic.

numbers or the full addresses of the parties entitled to receive notice. Others not only list the parties entitled to receive notice, but also emphasize the obligations of those parties to give notice in accordance with the practices of the respective courts.[176]

163. Another example requires the insolvency representative of the main proceeding to give notice to all creditors based in other forums by regular mail in the form of individual notices setting forth the required formalities and penalties provided by the law applicable in the main proceeding. Notice may also be required to be given to creditors whose claims are to be dealt with by a court other than the one to which the claim was submitted.[177]

164. Where the insolvency representative is required to obtain court approval in order to investigate or pursue assets of the debtor in a particular State, an agreement may require notice to be given to other courts involved in the proceedings.[178] Some agreements provide that where a request for an order contrary to the provisions of the agreement is made, all parties should be notified.[179]

d. Method of giving notice

165. Some agreements do not specify how the notice should be given, other than requiring that it should be in accordance with the practices of the respective courts or in writing. Other agreements list different methods, from which the parties can choose including: courier, telecopier, facsimile, email or other electronic forms of communication or overnight mail, overnight delivery service or even delivery by hand. An agreement may also regulate the publication of notice, stipulating the time and medium (e.g. the newspaper) in which the debtor should publish the notice and the language of the notice to be given, in order to ensure creditors, wherever situated and other parties in interest will be able to understand it, satisfying requirements for effectiveness and sufficiency.[180]

166. An agreement may address the effectiveness of service of notice and the impact of changes of the address for service. One example provided that notice would be effective notwithstanding a change of address, where the change of address was not notified within certain time limits determined by reference to the giving of notice. In case of personal delivery, for example, notification of the change had to be received before the time of delivery; in case of communication by facsimile, at the time of transmission (with confirmed answerback). In addition, an agreement can indicate the evidence required to prove service.

e. Notice concerning operation and implementation of the agreement

167. Some agreements include notice provisions with respect to operation or implementation of the agreement, requiring that notice be given for any supplementation, modification, termination or replacement of the agreement in

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[176] See, for example, AIOC, Laidlaw.

[177] See, for example, Solv-Ex.

[178] See, for example, Nakash.

[179] See, for example, Everfresh, Solv-Ex; the CoCo Guidelines provide, inter alia, that notice of any court hearing or any order should be given to the insolvency representatives where relevant to that insolvency representative (Guidelines 17.1-3).

[180] See, for example, Federal Mogul, Olympia & York.

accordance with the notice procedure described in it.[181] Where disputes relating to the agreement arise, the agreement might require notice to be provided to specified parties.[182]

(c) Confidentiality of communication

168. Much of the information relating to the debtor and its affairs that needs to be considered and shared in insolvency proceedings may be commercially sensitive, confidential or subject to obligations owed to third persons (such as trade secrets, research and development information and customer information). Accordingly, its use needs to be carefully considered and disclosure appropriately restricted to avoid third parties being placed in a position where they can take unfair advantage of it. Confidentiality of information, especially in a cross-border case where requirements for protection of confidentiality may vary from State to State, may be an issue that could be addressed in an agreement.[183]

169. Not all agreements provide for confidentiality of communication.[184] Those that do, adopt various approaches, including: providing generally that the information exchanged should be kept confidential, or that non-public information may be made available subject to appropriate protections, for example, that confidentiality arrangements are made; the insolvency representatives have entered into a written agreement with the objective of protecting and preserving all privileges; the written consent of the concerned party has been obtained; or disclosure is required by applicable law or a court order. Where information is exchanged, an agreement may provide that such exchange does not constitute a waiver of any applicable privileges, including attorney-client or work product privileges.[185]

170. In addition to the sharing of information, confidentiality requirements may also apply to the dispute resolution process concerning any conflicts under or regarding the agreement and any material produced in that process. Divulgence of information by any participants in that process may be limited or the agreement may provide that divulgence of such information cannot be compelled by, for example, the insolvency representative.[186]

171. Confidentiality agreements might also affect the creditor committee. One agreement provided that the creditor committee would be bound by the by-laws

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[181] See, for example, Loewen, Mosaic, Pioneer.

[182] See, for example, PSINet, Systech.

[183] Principle 3D of the Concordat also addresses the issue of confidentiality; the CoCo Guidelines recommend that to the fullest extent permissible under applicable law, any relevant information not available publicly should be shared by an insolvency representative subject to appropriate confidentiality arrangements to the extent that this is commercially and practically sensible (Guideline 7.5); that the duty to provide information, within the meaning of the Guidelines, includes the duty to provide copies of documents at reasonable cost on request (Guideline 7.6). They also address communication between insolvency representatives (Guideline 6.1 and Guideline 7.1-7), including between insolvency representatives of a main and a non-main proceeding (Guideline 8).

[184] See, for example, Maxwell and SENDO do not.

[185] See, for example, Commodore, Inverworld, Everfresh, Livent, Manhatinv, Federal Mogul.

[186] See, for example, Manhatinv.

adopted in one jurisdiction, to relieve it from executing the confidentiality agreements otherwise required in the other proceeding.[187]

Sample clauses

Communication between courts

(31) The courts of States A and B may communicate with one another with respect to any matter relating to the State A and B proceedings and, in addition to joint hearings contemplated by this agreement, may conduct other joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of those proceedings, provided both courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate the proper and efficient conduct of the State A and B proceedings.

Communication between the parties: information sharing between insolvency representatives

(32) In addition to other provisions of this agreement addressing information sharing, the insolvency representatives of States A and B agree to share on an unlimited basis all information regarding the debtor, its present and former officers, directors, employees, advisors, professionals, agents and its assets, and liabilities, which each has or may have under its possession or control and which each may lawfully share with the other. The insolvency representatives may, but are not obliged to, share privileged information with each other. Each of the insolvency representatives shall keep the other fully apprised of their activities and material developments in matters concerning the debtor known to them.

The entry of an order approving this agreement shall constitute the recognition by each relevant court, each insolvency representative, the professionals retained by them, their employees, agents and representatives that they are subject to, and do not waive any attorney-client, work product, legal, professional or any other privileges recognized under any applicable law.

Communication between the parties: sharing information with other parties

(33) Information publicly available in either forum State shall be made publicly available in the other. To the extent permitted, non-public information shall be made available to official representatives of the debtor, including the creditor committee and any other official committee appointed in proceedings with respect to the debtor, and parties in interest, including providers of post-commencement finance, subject to appropriate confidentiality agreements.

Notice

(34) Notice of any application or documents filed in one or both of the insolvency proceedings and notice of any related hearing or other proceeding mandated by applicable law in connection with the insolvency proceedings or the agreement shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following parties:

[187] See, for example, Quebecor.

(a) All creditors and other parties in interest in accordance with the practice of the jurisdiction where the documents are filed or the proceedings are to occur; and

(b) To the extent the parties referred to in paragraph (a) are not entitled to receive such notice, to counsel to the creditor committee, the insolvency representatives and such other parties as may be designated by either of the courts from time to time.

Notice in accordance with this paragraph shall be given by the party otherwise responsible for affecting notice in the jurisdiction where the documents are filed or the proceedings are to occur. In addition to the foregoing, the debtor shall provide to the court of State A or B, upon request, copies of all orders, or similar papers issued by the other court in the insolvency proceeding.

Confidentiality of communication

(35) The insolvency representatives of States A and B acknowledge and agree that each shall not provide any non-public information received from the other regarding any present or former officer, director or employee of the debtor to any third party, unless the provision of that information is either:

(a) Agreed to by the other party;

(b) Required by applicable law; or

(c) Required by order of any relevant court.

7. Effectiveness, amendment, revision and termination of agreements

(a) Effectiveness and conditions precedent to effectiveness

172. Parties negotiating an agreement want the result to be effective. For this reason, some agreements set out the procedure by which they are to become effective, generally involving approval of the courts of the different forums. The approval may be that of a specific court or all courts involved in the proceedings and an additional provision may make it clear that the agreement will have no binding or enforceable legal effect until that approval is obtained. In approving an agreement, a court may also specify that it will only be binding upon the parties when approval of the other courts has been obtained.[188] Some agreements include additional requirements, such as that the decision to approve by one court should be transmitted to all creditors that have submitted claims in the insolvency proceedings before that court or to the parties that have signed the agreement.[189]

173. Under some national laws, a creditor committee may be required to approve an agreement and copies of the agreement and approval be provided to the court in order for the agreement to become effective.[190]

174. In practice, the courts involved in approval of agreements to date have been willing to do so, on the basis that they represent the consensus reached by the

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[188] See, for example, Solv-Ex, Systech.

[189] See, for example, AIOC, Nakash.

[190] Under German law, for e.g. the insolvency judge could not order that a cross-border agreement between insolvency representatives was binding, as such a decision can only be made by the creditor committee; see, for example, ISA-Daisytek.

relevant parties, including the insolvency representatives that are often appointed by the courts. Courts have tended to trust the professional judgment of insolvency representatives who, as experienced insolvency practitioners, have drafted the agreement as a pragmatic solution to harmonize and coordinate concurrent insolvency proceedings.[191] The English Judge in the *Maxwell* agreement, for example, said that it took him about 20 minutes to read and approve the agreement, as he only checked whether there was anything like an obvious mistake. In *Everfresh*, the courts of both jurisdictions involved approved the agreement on the day approval was sought.

175. In deciding on the approval of an agreement, courts have looked to factors such as whether a conflict with any principle of comity was at stake and whether the principle of equal treatment of creditors was observed.[192] Courts have ensured they do not approve an agreement that would authorize something contrary to the law or ultra vires. In a case concerning concurrent insolvency proceedings, the court had before it a plan of reorganization drafted by the insolvency representatives of the other jurisdiction. The court only approved the plan with modifications, on the basis that it could not approve a reorganization plan that authorized something contrary to the law or ultra vires, as the plan would have amounted to a waiver of any liability for the directors of any company in the debtor group for any breach of duty to its company.[193] To facilitate approval and avoid challenges, the process of approval may permit creditors to raise objections to the content or drafting of the agreement. Those objections would be considered by the court in deciding upon approval.

176. In addition to court approval, an agreement may authorize the parties to take such actions and execute such documents as might be necessary and appropriate for its effective implementation or the parties may expressly agree that they will do everything appropriate to give full effect to the terms of the agreement.[194]

(b) Amendment, revision and termination of an agreement

177. To accommodate changing circumstances, many agreements contain provisions on amendment. Typically, those agreement approved by the court stipulate that the agreement cannot be supplemented, amended or replaced in any manner except as approved by the respective courts, following notice to specified parties and a hearing. Some agreements require, in addition to the approval of the courts, the written consent of the parties. Those parties may be specified and include the debtor, the insolvency representatives, certain creditors or a creditor committee.[195]

178. Not all amendments to an agreement will require court approval and examples of some that may not would include: (a) the addition as a party of one or more members of the debtor group, wherever incorporated, and in respect of which

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[191] See supra note 20. The English judge involved in the Maxwell case noted that "in general the attitude of the court is that if the administrator's business judgment is that doing something would be in the best interest of creditors, the court will accept that judgment".

[192] Ibid.

[193] See Re APB Holdings Ltd., High Court of Justice of Northern Ireland, Chancery Division, [1991] N.I. 17.

[194] See, for example, Inverworld, Nakash.

[195] See, for example, Solv-Ex, Quebecor.

insolvency proceeding in any State have been commenced; (b) the removal as a party of any debtor if that debtor has ceased, or is about to cease, to be a member of the debtor group, or if that debtor has ceased, or is about to cease, to be the subject of insolvency proceedings in any State; (c) the substitution, addition or removal of an individual as an insolvency representative; or (d) conforming amendments that result from the preceding examples. Some agreements include a safeguard that no amendment may adversely affect any rights to indemnification, immunity or other protection contemplated by the agreement with respect to service prior to such amendment.

179. Some agreements particularize who has the right to amend or terminate the agreement; when this could be done; and its impact. One agreement, for example, specified that any party in interest could apply to either court at any time to amend or terminate the agreement. In an agreement requiring the parties' consent for effectiveness, any amendment would generally need the consent of each party. Amendment would render the earlier version of an agreement null and void.

180. Although not all agreements include a provision on termination, those that do mention it in the context of amendment or specify when it would terminate. Those situations might include, in relation to any of the debtors of one country, (a) if the insolvency representative gives notice in writing to the other parties that it was terminated; (b) if management gives notice in writing to the parties that it was terminated; or (c) in relation to any of the debtors to which a reorganization plan relates, upon that plan becoming effective under applicable law.

Sample clauses

Effectiveness and conditions precedent to effectiveness

(36A) This agreement shall become effective only upon its approval by both the courts of States A and B.

(36B) According to the law of State A, the effectiveness of this agreement is subject to the approval of the creditors of the debtor. The State A insolvency representative will convene a creditors meeting in State A as soon as practicable and will use all reasonable endeavours to obtain the creditors' approval of this agreement.

The State A insolvency representative will report the terms of this agreement to the State A court within […] days and to the State B court within […] days of the creditors meeting referred to above.

Amendment, revision and termination

(37) This agreement may not be supplemented, modified, terminated or replaced in any manner except by the written agreement of the parties and approval of both the courts of States A and B. Notice of any legal proceeding to supplement, modify, terminate or replace this agreement shall be given in accordance with paragraph x above [*paragraph on notice*].

8. Costs and fees

181. Costs may be incurred in the course of administration of insolvency proceedings, be it the investigation of the debtor's assets, the insolvency representative's remuneration, costs of the proceedings (e.g. court fees) and so forth. To ensure efficient administration of the proceedings, many agreements address the costs and fees of proceedings, and at least some specifically address the insolvency representatives' fees [Solv-Ex]. In general, agreements follow the principle that obligations incurred by the insolvency representatives should be funded from the respective insolvency estate.[196]

182. Agreements typically address the costs and fees that are to be paid, how they are to be paid and which court has jurisdiction over the issue. Some provide, for example, that fees of professionals retained by the debtor or even by the secured lenders or the lenders providing post-commencement finance, including financial or other advisors for activities performed in one State or in connection with the insolvency proceeding in that State, should be subject to the sole and exclusive jurisdiction of the court of that State; approval of another court is not required. Typically, such a provision will apply in respect of each State involved in the cross-border agreement and may require parties in interest to request the courts to consider whether a different allocation of expenses would be more appropriate based on the facts and circumstances of the case. Similarly, the fees, costs and ordinary expenses of the insolvency representative and of professionals retained by the insolvency representative would generally be paid from the insolvency estate in the State in which they are appointed.[197] A detailed procedure for accounting, including the exchange of a monthly accounting between the insolvency representatives and its confidential nature may also be stipulated.

183. Where an agreement covers main and non-main insolvency proceedings, provisions on costs might address how the costs are to be apportioned between them.[198] In one agreement, for example, the legal costs of the non-main proceeding were to be met from the assets of the debtor as an expense of the administration of the main proceeding, but subject to certain limits and to applicable law as to what those costs could include, for example, verification of claims lodged, establishment of statements of wages due, and recovery of assets as a result of actions initiated or pursued by the insolvency representatives. Moreover, the agreement specified the amount that the insolvency representatives of the non-main proceeding would receive as an expense of the administration of the main proceeding and determined which judge would have jurisdiction to set the fees.

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[196] See, for example, Manhatinv; see also Principles of European Insolvency Law, 2003 by the International Working Group on European Insolvency Law and common to many national insolvency laws (Principal 5.1); the CoCo Guidelines recommend that obligations incurred by the insolvency representative during proceedings and the insolvency representative's fees should be funded from the assets administered in the proceedings in which it is appointed (Guideline 11.1).

[197] See, for example, Mosaic, Systech.

[198] See, for example, SENDO; the CoCo Guidelines recommend that obligations and fees incurred by the insolvency representative in the main proceedings prior to the opening of any non-main proceedings, but concerning assets to be included in the estate in principle should be funded by the estate corresponding to the non-main proceedings (Guideline 11.2).

184. Some agreements include a provision concerning disclosure of costs and fees, requiring costs and remuneration received in each proceeding to be disclosed in the other proceedings, to ensure transparency and to guarantee trust and confidence between the courts of different jurisdiction regarding payment of compensation to professionals. In a case where no written agreement was concluded, one court approved the fees of the professionals retained in the foreign proceeding and, in turn, the foreign representative participated in the review of the fees of professionals retained in the local proceeding.

Sample clauses

Costs and fees

(38) The insolvency representatives of States A and B agree that their respective fees, costs and ordinary course expenses (including those of the professionals and other agents retained by each of them, as well as the cost of assisting one another) in the first instance shall be payable from the funds that each holds in State A or B, respectively. Nothing in this agreement shall preclude those insolvency representatives from transferring funds to each other to meet fees approved by the relevant court, costs and ordinary course expenses of administration or for purposes of distribution, if, to do so, would in the reasonable opinion of either insolvency representative be consistent with the objectives of this agreement.

9. Safeguards

185. The terms of an agreement should not lead to infringement of local law or the rights of parties in interest. Consequently, an agreement may include a range of safeguards provisions, i.e. provisions that safeguard a certain status, which can be related to rights, principles or facts. Typically, safeguard provisions are intended to preserve rights and jurisdiction, exclude or limit liability and warrant the parties' authority to enter into the agreement. The latter is of particular importance, as parties want to be assured that their counterpart is appropriately authorized and that applicable law will be observed. As noted above (see para. 46 above), some agreements include a sentence at the end of a provision to the effect that notwithstanding the foregoing, that provision should not be construed as having a certain effect. Other agreements include more general safeguard provisions.[199]

(a) Preservation of rights and jurisdiction

186. An agreement can stipulate that neither its terms nor any actions taken under it should prejudice or affect the powers, rights, claims and defences of the debtor and its estates, the insolvency representatives, the creditors or equity holders under applicable law nor preclude or prejudice the right of any person to assert or pursue their substantive rights against any other person under applicable law.[200]

187. An agreement may include provisions on the preservation of jurisdiction, for example that nothing in the agreement is intended to affect, impair, limit, extend or

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[199] The Court to Court Guidelines provide that the Guidelines should not affect any powers, orders or substantive determination of any matter in controversy before the court or other court nor a waiver by any party of its rights or claims (Guideline 17).

[200] See, for example, 360Networks, Loewen, Philip.

enlarge the jurisdiction of the courts involved, as notwithstanding cooperation and coordination, each court should be entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.[201]

188. An agreement may also provide examples of what it should not be construed as doing, including: requiring the debtor, the creditor committee or the insolvency representative to breach any duties imposed on them by national law, including the debtor's obligations to pay certain fees to the insolvency representative under the applicable law; authorizing any action that requires specific approval of one or both courts; precluding any creditor or other party in interest from asserting its substantive rights under applicable law including, without limitation, the right to appeal from decisions taken by one or all of the involved courts; or affecting or limiting the debtor's or other parties' rights to assert the applicability or otherwise of the stays ordered in the different proceedings to any particular proceeding, asset, or activity, wherever pending or located.[202]

(b) Limitation of liability

189. An agreement may provide that, notwithstanding cooperation between the different parties, neither the insolvency representatives nor the professionals retained by them, their employees, agents or representatives should incur any liability in respect of, or resulting from the actions of their counterparts in other States. Some agreements also provide that granting relief from the automatic stay for a specific purpose, such as allow the insolvency representative to investigate the debtor's assets, should not be construed as approval of any specific actions the insolvency representative might take in pursuit of that purpose. The parties may also agree to include further persons in such a clause, including a mediator, if the process of dispute resolution foresees mediation.[203]

(c) Warrantees

190. Some agreements contain a provision in which each party represents and warrants to the other that its execution, delivery, and performance of the agreement are within its power and authority, although such a provision may not be required where the court is to approve the agreement.[204]

Sample Clauses

Preservation of rights

(39) Neither the terms of this agreement nor any actions taken under the terms of this agreement shall prejudice or affect the powers, rights, claims and defences of the debtors and their estates, the creditor committee, the insolvency representatives or any of the debtor's creditors under applicable law, including the laws relating to insolvency of States A and B and the orders of the courts of States A and B.

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[201] See, for example, Laidlaw, Commodore.
[202] See, for example, Livent, Systech.
[203] See, for example, Manhatinv.
[204] See, for example, Everfresh, Inverworld.

Preservation of jurisdiction

(40) Nothing in this agreement shall increase, decrease or otherwise affect in any way the independence, sovereignty or jurisdiction of any of the relevant courts, or any other court in States A, B or […], including, without limitation, the ability of any of the relevant courts or other courts under applicable law to provide appropriate relief.

Limitation of liability

(41) The State A insolvency representative acknowledges (a) that the State B insolvency representative acts as insolvency representative of the debtor in accordance with the applicable law of State B and without any personal liability and any personal liability on its part under this agreement or otherwise is expressly excluded; and (b) that neither she nor the debtor has any claim whatsoever against the State B insolvency representative other than under this agreement.
[*Repeat for the State B insolvency representative.*]

Warrantees

(42) Each party represents and warrants to the other that its execution, delivery and performance of this agreement are within its power and authority and have been duly authorized by it or approved by the court as applicable.

Annex

Summaries of the cases referred to in Part III.B

1. AgriBioTech Canada Inc. (2000)[205]

In the case of AgriBioTech Canada, Inc., parallel insolvency proceedings were conducted in Canada and the United States with respect to the subsidiary of one of the largest forage and turf grass seed producers in the United States. One key point of the protocol was coordination of the sales of the debtor's assets, which were made conditional on approval by both courts. Resulting proceeds were to be kept in a segregated account under the authority of the Canadian court. Joint hearings by means of modern telecommunications were contemplated by the protocol, as well as the judges' right to discuss related matters in confidence. Creditors had the right to appear before either court and would then be subject to the respective court's jurisdiction. The debtor agreed to submit substantially similar reorganization plans in both jurisdictions, which the creditors could either jointly accept or reject. The Canadian court was appointed to process the creditor claims in accordance with Canadian law, but the validity of those claims was to be determined in accordance with the law governing the underlying obligation. The protocol also included a provision on avoidance of transactions.

2. AIOC Corporation and AIOC Resources AG (1998)[206]

In AIOC Corporation, a liquidation protocol was developed between Switzerland and the United States. The difficulties in the case arose not only because of the differences between Swiss and United States insolvency law, but also because of the inability of the Swiss and United States insolvency representatives to abstain from their statutory responsibilities to administer the respective liquidations. The parties agreed upon a protocol as a means of providing joint liquidation of resources in a manner consistent with the insolvency laws of both countries. The management of liquidations by means of the protocol is one of the key features of the case. The protocol was based upon the Concordat, but focused generally on marshalling resources, and specifically on procedures for administering the reconciliation of claims.

3. Akai Holdings Limited and Kong Wah Limited (2004)[207]

The cases of Akai Holdings Limited and Kong Wah Limited were identical, involving concurrent insolvency proceedings in the Hong Kong Special Administrative Region of China (SAR) and Bermuda. The objective of the protocol was that both liquidation proceedings would be administered simultaneously from Hong Kong, which was the principal place of business of the debtor companies,

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[205] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 31-OR-371448, (16 June 2000) and the United States Bankruptcy Court for the District of Nevada, Case No. 500-10534 LBR, (28 June 2000) (Unofficial Version).

[206] United States Bankruptcy Court for the Southern District Court of New York, Case Nos. 96 B 41895 and 96 B 41896, (3 April 1998).

[207] High Court of the Hong Kong Special Administrative Region, Cases No. HCCW 49/2000 and HCCW 50/2000 (6 February 2004) and the Supreme Court of Bermuda.

though the protocol recognized the Bermuda proceeding as the "main proceeding". The protocols were drafted to take into account the relevant provisions of the Hong Kong SAR and Bermudan insolvency laws and enable the insolvency representatives to administer both liquidations in the most economical way. Accordingly, creditor claims could be filed in either jurisdiction. The Hong Kong SAR court approved the protocols, noting that in the absence of legislation to deal with matters affecting cross-border insolvency, the proposed protocols seemed to be the best way to serve the interests of creditors. As in the protocols in the Peregrine and Greater Beijing cases, the same individuals were appointed as insolvency representative for each of the companies in the two jurisdictions.

4. Calpine Corporation (2007)[208]

Calpine Corporation, a Delaware corporation, is the ultimate parent company of a multinational enterprise that operates through various subsidiaries and affiliates in the United States, Canada and other countries. Reorganization proceedings commenced in the United States and in Canada, with the respective debtors being separate and distinct. The protocol was developed, inter alia, to coordinate and harmonize both proceedings. A Memorandum of Understanding, aimed at the resolution of intercompany claims, preceded and was subsequently incorporated into the protocol. In addition, the protocol contained a provision that required the Canadian and the United States debtors to negotiate a specific claims protocol to address claims filed by each other (and their respective creditors) in the other's case. The goals set out in the protocol were: to avoid duplication of activities; to honour the sovereignty of the courts involved and to facilitate the fair, open and efficient administration of the insolvency proceedings. For those purposes, the protocol provided for court-to-court cooperation, notably joint decisions on issues of jurisdiction and on disputes arising out of the protocol; joint hearings; notice requirements and mutual recognition of stays of proceedings. The protocol incorporated by reference the Court-to-Court Guidelines.

5. Commodore Business Machines (1994)[209]

The case of Commodore involved insolvency proceedings in the Bahamas and the United States. The protocol was entered into by the Bahamian insolvency representatives and the creditor committee. Its main purpose was to convert the involuntary Chapter 7 proceedings under the United States Bankruptcy Code, which had commenced on the application of some creditors, into Chapter 11 proceedings in the United States and to resolve contemplated litigation. The parties agreed in the protocol that the Bahamian insolvency representatives would serve the functions customarily held by a debtor in possession under Chapter 11. Other objectives of the protocol included: facilitating the liquidation of assets in both jurisdictions; and avoiding conflicting decisions by the courts involved. Consequently, the Bahamian insolvency representatives were appointed as debtors in possession in the United States proceedings. The protocol regulated the submission of claims; the retention and compensation of insolvency representatives; accountants and attorneys; the

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[208] United States Bankruptcy for the Southern District of New York, Case No. 05-60200 (9 April 2007) and Court of Queens Bench of Alberta, (Canada) Case No. 0501-17864 (7 April 2007).

[209] United States Bankruptcy Court for the Southern District of New York and the Supreme Court of the Commonwealth of the Bahamas (1994).

responsibility of the insolvency representatives to inform both courts and the creditor committee and to manage funds; to sell assets; to lend or to borrow monies and to initiate legal proceedings.

6. EMTEC (2006/2007)[210]

The case of EMTEC involved a group interlinked in a classical pyramidal structure with a holding company, incorporated in the Netherlands, and below it three French companies and a German company, which themselves held the share capital of other companies located in the European Union or Asia. Insolvency proceedings commenced in France for all companies in the group, including those whose registered offices were located abroad. Secondary insolvency proceedings were opened in Germany upon the request of the insolvency representative of the French proceedings. Both insolvency representatives then entered into an agreement for the purpose of establishing the practical terms for the distribution of the assets among the creditors and organizing the cooperation between the insolvency representatives, in particular the exchange of information regarding the verification of claims and the distribution of assets. The agreement provided that the insolvency representative of the main proceedings would transfer a certain amount of funds to the insolvency representative of the secondary proceeding, which the latter would then distribute to the creditors without discriminating between the creditors in the different proceedings. The insolvency representative in the secondary proceeding agreed to avoid double payment to creditors who had filed in both proceedings. It was further agreed that claims admitted in both proceedings would be paid in the proceedings, in which they would receive the higher amount. The insolvency representative of the secondary proceeding agreed to inform the insolvency representative of the main proceeding in writing before making any distribution. The agreement provided that it was governed exclusively by French law and that the French court would have exclusive jurisdiction over any dispute concerning the agreement.

7. Everfresh Beverages Inc. (December 1995)[211]

The first protocol developed after drafting of the Concordat was finalized (and modelled on the Concordat principles) in a case involving the United States and Canada, Everfresh Beverages Inc. A United States company with Canadian operations applied for commencement of reorganization proceedings in both countries at the same time. The protocol explicitly addressed a broad range of cross-border insolvency issues such as choice of law, choice of forum, claims resolution and avoidance proceedings. Creditors were given, for example, the express right to submit claims in either proceeding. The protocol followed many of the principles of the Concordat very closely, using as a starting point Principle 4, which addresses the situation where there is no main proceeding, but essentially two competing proceedings in different jurisdictions. The protocol was finalized approximately one month after proceedings began and used to hold the first cross-border joint hearing to coordinate the proceedings.

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[210] Commercial Tribunal of Nanterre (France) and the Insolvency Court of Mannheim (Germany).

[211] Ontario Court of Justice, Toronto, (Canada) Case No. 32-077978, (20 December 1995) and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405, (20 December 1995).

8. Federal-Mogul Global Inc. (2001)[212]

Federal-Mogul concerned reorganization proceedings of a major automotive parts supplier in the United States and in Great Britain. The protocol, which had to take into account pending asbestos claims against the English subsidiaries; established as its goals the orderly and efficient administration of the insolvency proceedings; the coordination of activities and the implementation of a framework of general principles. The protocol gave responsibility for the development of a reorganization plan and the handling of the asbestos and insurance claims to the United States debtors in possession. The acquisition, sale and encumbrance of assets were subjected to prior approval by the insolvency representatives, as were most other activities outside the ordinary course of business. Further, the protocol dealt with communication procedures between the debtors and the insolvency representatives; confidentiality issues; rights to appear before the respective courts; the mutual recognition of stays of proceedings; and the retention and compensation of insolvency representatives and professionals.

9. Financial Asset Management Foundation (2001)[213]

In the Financial Asset Management (FAM) Foundation case, insolvency proceedings respecting a trust were opened in Canada and the United States. A protocol was entered into by the debtor, the insolvency representatives and the main creditor. Each court agreed to defer in general to the judgement of the other court, as was "appropriate and feasible". The protocol outlined the procedure for joint hearings and appearance before either court. It also confirmed the enforceability of a judgment which the main creditor had previously obtained against the debtor before a court in California. The protocol further specified the responsibility of the courts for determining certain issues, for example, the United States court to be responsible for determining whether or not FAM violated any order of the aforementioned judgment.

10. Greater Beijing First Expressways Limited (2003) (GBFE)[214]

The Greater Beijing First Expressway case involved insolvency proceedings in the British Virgin Islands (BVI) and the Hong Kong SAR, concerning the liquidation of a toll way operator. The case is very similar to Peregrine, as the proceedings in the BVI were mainly initiated to support the Hong Kong SAR proceeding and to further avoid jurisdictional conflicts and the dissipation of assets. Similarly to Peregrine, the insolvency representatives appointed in both proceedings were the same professionals, in order to coordinate activities; to facilitate the exchange of information and to identify, preserve and maximize the value of and realize the debtor's assets. Responsibilities for matters were split between both proceedings, for example, the Hong Kong SAR representatives being responsible for the conduct of day-to-day business and the adjudication of creditor claims with the BVI representatives being responsible for the realization of assets. In addition,

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[212] United States Bankruptcy Court for the District of Delaware, Case No. 01-10578 (SLR), and the High Court of England and Wales, Chancery Division in London, (2001).

[213] United States Bankruptcy Court for the Southern District of California, Case No. 01-03640-304, and the Supreme Court of British Columbia, (Canada) Case No. 11-213464/VA.01, (2001).

[214] High Court of the Hong Kong Special Administrative Region, HCCW No. 338/2000, and the High Court of Justice of the Eastern Caribbean Supreme Court, Suit No. 43/2000, (2003).

the protocol regulated the filing of claims; currency of payments; the representatives' remuneration; and notice requirements and attached forms for the proof of debt; notice of rejection and notice of election.

11. Inverworld (1999)[215]

Inverworld involved the United States, the United Kingdom and the Cayman Islands. It was a complicated case in which applications for commencement of insolvency proceedings were made for the debtor and several subsidiaries in the three States. To avoid the ensuing conflicts, various parties created protocols that were agreed by courts in each of the jurisdictions. The protocol arrangements included: dismissal of the United Kingdom proceedings, upon certain conditions regarding the treatment of United Kingdom creditors; strict division of outstanding issues between the other two courts; and each court was to take the other court's actions as binding, preventing parallel litigation and leading to a coordinated worldwide settlement.

12. ISA-Daisytek (October 2007)[216]

In the ISA-Daisytek case, parallel insolvency proceedings commenced in England and in Germany. The decision of the English court that the English proceedings were the main proceeding pursuant to the EC Regulation was challenged and not recognized for over one year in Germany. As a result, there had been uncertainty as to the respective status and powers and responsibilities of the English and German insolvency representatives. After the German courts finally recognized the English proceeding as a main proceeding, the German and English insolvency representative developed a "cooperation and compromise agreement" in order to resolve all outstanding issues between them and to deal with future steps in the insolvency proceedings. The protocol included a compromise provision, which regulated payment of proceeds in the secondary (German) proceedings and dividends from certain foreign subsidies to the main (English) proceedings, distributions to creditors, and liability of the insolvency representatives. The protocol also included a provision on its approval and provided that the protocol should be construed in accordance with English law and that the English courts would be exclusively responsible for enforcing its terms.

13. Laidlaw Inc. (2001)[217]

The case of Laidlaw involved insolvency proceedings pending in Canada and the United States of a multinational enterprise operating through various subsidiaries and affiliates in the United States, Canada and other countries. The debtors forwarded the protocol for the courts' approval in order to implement basic administrative procedures necessary to coordinate certain activities in the

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[215] United States District Court for the Western District of Texas, Case No. SA99-C0822FB, (22 October 1999), the High Court of England and Wales, Chancery Division, (1999), and the Grand Court of the Cayman Island (1999).

[216] High Court of England and Wales, Chancery Division, Leeds and the Insolvency Court of Düsseldorf, (Germany).

[217] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 01-CL-4178, (10 August 2001) and the United States Bankruptcy Court for the Western District of New York, Case No. 01-14099, (20 August 2001).

insolvency proceedings. The protocol closely resembles the protocol in Loewen, including provisions on comity and independence of the courts; cooperation, including joint hearings; retention and compensation of insolvency representatives; notice; recognition of stays of proceedings; procedures for resolving disputes under the protocol; effectiveness of and modification of the protocol; and preservation of rights.

14. Livent Inc. (1999)[218]

Livent was the first case in which joint cross-border hearings were conducted via a closed circuit satellite TV/video-conferencing facility. Two hearings were held. The first hearing was conducted to approve a cross-border protocol for the settlement of creditor claims against the debtor. The second hearing was to approve the sale of all or substantially all of the debtor's assets. The protocol expressly provided for such hearings, and allowed the two judges some discretion to discuss and resolve procedural and technical issues relating to the joint hearing. The joint hearing was successfully concluded after two days and the courts granted complementary orders permitting the sale of assets in both countries to a single successful purchaser.

15. Loewen Group Inc. (1999)[219]

The debtor, a large multinational company, applied for commencement of insolvency proceedings in Canada and the United States and immediately presented both courts with a fully developed protocol establishing procedures for coordination and cooperation. The debtor had quickly identified cross-border coordination of court proceedings as vitally important to its reorganization plans, and took the initiative of constructing a draft protocol that was approved as a "first day order" in both proceedings. The protocol provided that: the two courts could communicate with each other and conduct joint hearings, and set out rules for such hearings; creditors and other interested parties could appear in either court; the jurisdiction of each court over insolvency representatives from the other jurisdiction was limited to the particular matters in which the foreign insolvency representative appeared before it; and any stay of proceedings would be coordinated between the two jurisdictions.

16. Manhattan Investment Fund (2000)[220]

The protocol in Manhattan Investment Fund, a case involving the United States and the British Virgin Islands, listed a number of objectives including: coordinating the identification, collection and distribution of the debtor's assets to maximize the value of such assets for the benefit of the debtor's creditors and

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[218] United States Bankruptcy Court for the Southern District of New York, Case No. 98-B-48312, and the Ontario Superior Court of Justice, Toronto, (Canada) Case No. 98-CL-3162, (11 June 1999).

[219] United States Bankruptcy Court for the District of Delaware, Case No. 99-1244, (30 June 1999), and the Ontario Superior Court of Justice, Toronto, (Canada) Case No. 99-CL-3384, (1 June 1999).

[220] United States Bankruptcy Court for the Southern District of New York, Case No. 00-10922BRL, (April 2000), the High Court of Justice of the British Virgin Islands, (19 April 2000), and the Supreme Court of Bermuda, Case No. 2000/37, (April 2000).

activities and the sharing of information (including certain privileged communications) between the respective insolvency representatives to minimize costs and to avoid duplication of effort.

17. Matlack Inc. (2001)[221]

In the case of Matlack, a bulk transportation group operative in the United States, Mexico and Canada, a protocol was developed to coordinate insolvency proceeding pending in Canada and in the United States. The protocol incorporated the Court-to-Court Guidelines as an appendix. In the protocol, both courts agreed to recognize the respective foreign court's stay of proceedings to prevent adverse actions against the debtor's assets. The debtors, their creditors and other interested parties could appear before either court, and would therefore be subject to that court's jurisdiction. Other issues dealt with by the agreement were the retention and compensation of professionals, notice requirements and the preservation of creditors' rights.

18. Maxwell Communication Corporation plc. (1991/1992)[222]

The earliest reported cross-border insolvency protocol was developed in Maxwell Communication plc which involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two different jurisdictions, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that a protocol between the two administrations could resolve conflicts and facilitate the exchange of information. Under the protocol, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the United Kingdom proceedings, once it was determined that certain criteria were present. Specificities included: that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the United Kingdom insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the United Kingdom insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; the United Kingdom insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the protocol to be resolved

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221 Superior Court of Justice of Ontario, (Canada) Case No. 01-CL-4109, and the United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (MFW), (2001).

222 In re Maxwell Communication Corporation plc, 93 F.3d 1036, 29 Bankr.Ct.Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084) and Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the protocol.

19. Mosaic (2002)[223]

This case involved parallel insolvency proceedings in Canada and in the United States. From the beginning, the parties understood that the insolvency of the Mosaic web of companies was going to involve a number of complicated and contentious hearings in both jurisdictions, and that establishing a framework within which the courts could independently, but cooperatively, deal with the various corporate entities was critical. The protocol closely resembled, in both format and contents, the protocols in Loewen and Laidlaw, including provisions on comity and independence of the courts; cooperation, including joint hearings; retention and compensation of insolvency representatives; notice; recognition of stays of proceedings; procedures for resolving disputes under the protocol; effectiveness and modification of the protocol; and preservation of rights. The protocol was instrumental to the success of cross-border sales in the proceedings.

20. Nakash (1996)[224]

The protocol in the Nakash case involved the United States and Israel. It required express statutory authorization in Israel and direct court involvement generally in its negotiation. It focused on enhanced coordination of court proceedings and cooperation between the judiciaries, as well as between the parties (previous protocols had focused on the parties). Unlike previous cases involving cross-border insolvency protocols, this case did not involve parallel insolvency proceedings for the same debtor. The relevant conflict and central issue in the case that the protocol sought to resolve was between the pursuit of a judgment against the debtor in Israel and the automatic stay arising from the debtor's insolvency proceedings (pursuant to Chapter 11) in the United States, which should have prevented pursuit of the judgment. The debtor was not a signatory to the protocol and opposed its approval and implementation.

21. 360Networks Inc.[225]

In *360Networks*, the protocol involved the United States and Canada. The 360 Group was a fiber-optics network provider with international operations, comprising more than 90 companies registered in about 33 jurisdictions with nearly 2000 employees. As the main part of its assets and employees were located in both Canada and the United States, insolvency proceedings were commenced in both jurisdictions. The initial orders included a cross-border protocol with the following goals: promoting orderly, efficient, fair and open administration; honouring the respective courts' independence and integrity; promoting international cooperation

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223 Ontario Court of Justice, Toronto, (Canada) Court File No. 02-CL-4816, (7 December 2002) and the United States Bankruptcy Court for the Northern District of Texas, Case No. 02-81440, (8 January 2003).

224 United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840, (23 May 1996), and the District Court of Jerusalem, (Israel) Case No. 1595/87, (23 May 1996).

225 British Columbia Supreme Court, Vancouver, (Canada) Case No. L011792, (28 June 2001) and United States Bankruptcy Court for the Southern District of New York, Case No. 01-13721-alg, (29 August 2001).

and respect for comity between the Canadian and United States court and any foreign court; and implementing a framework of general principles to address administrative issues arising from the cross-border nature of the proceedings. To achieve these goals, the protocol addressed, amongst other things, court-to-court coordination and cooperation, including joint hearings; notice; the retention and compensation of professionals; joint recognition of stays of proceedings; future foreign proceedings; and a procedure for resolving disputes under the protocol. However, the two restructuring processes progressed relatively independently with little reference to the protocol. Plans substantially similar to each other were filed in each jurisdiction, each being dependent on the approval of the other. Although the protocol made provision for joint hearings, none were needed.

22. Olympia & York Developments Limited (1993)[226]

The case of Olympia & York Developments Ltd. involved a Canadian parent company and its subsidiaries that operated primarily in the United States, Canada and the United Kingdom. The protocol was drafted to harmonize the Canadian and the United States proceedings, and to achieve a consensus among the various parties regarding the corporate governance of the debtor by reconstructing the board of directors of each corporation. The protocol included provisions, amongst others, on the composition, authority, actions, removal and re-election of the directors, and also the modification and approval of the protocol. The Olympia & York cross-border cooperation framework resulted in the speedy and efficient reorganizations of the debtors.

23. Peregrine Investments Holdings Limited (1999)[227]

In the Peregrine case, the debtor was incorporated in Bermuda and had its principal place of business in the Hong Kong SAR, where insolvency proceedings were commenced. Shortly afterwards, insolvency proceedings were also initiated in Bermuda, primarily to avoid jurisdictional conflicts and to ensure that the insolvency representatives appointed in the Hong Kong SAR had full authority in other jurisdictions and in relation to assets located outside of Hong Kong. The insolvency representatives were the same persons in both proceedings except for one person appointed only in the Bermudan proceedings, but all were employed by the same international law firm. The protocol was developed to harmonise and coordinate the proceedings; ensure the orderly and efficient administration of the proceedings in the two jurisdictions; identify, preserve and maximize the value of the debtor's worldwide assets for the collective benefit of the debtor's creditors and other parties in interest; coordinate activities; and share information. The protocol determined that the Bermudan proceedings would be the main proceedings and the Hong Kong SAR proceedings the non-main proceedings. Nevertheless, substantially all of the liquidation of the debtor's assets was to be carried out in and from the

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[226] Ontario Court of Justice, Toronto, (Canada) Case No. B125/92, (26 July 1993) and United States Bankruptcy Court for the Southern District of New York, Case No's 92-B-42698-42701, (15 July 1993) (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

[227] High Court of the Hong Kong Special Administrative Region, HCCW Companies (Winding-up) No. 20 of 1998, and the Supreme Court of Bermuda Companies (Winding-up) No. 15 of 1998, (1999).

Hong Kong SAR, as the debtor's business activities were and had always been focussed there. The protocol determined which matters should be principally dealt with in the Hong Kong SAR, for example the adjudication of claims of creditors and distribution of dividends to creditors. It also included provisions on claims and distribution; the rights and powers of the insolvency representatives with respect to the exchange of information; costs and their taxation; and applications to the courts. As annexes, the protocol contained forms for the proof of debt; notice of rejection of proof of debt and notice of election.

24. Philip Services Corporation (1999)[228]

This case is noted as being the first "cross-border pre-pack".[229] Prior to the instigation of insolvency proceedings, the debtor negotiated a reorganization plan with its creditors over several months. It was intended that, following court approval, the plan would be implemented in both jurisdictions. As in the Loewen case, a fully developed protocol was presented to and approved by the courts as an initial order. The case has been cited as an example of a protocol providing for broad and general harmonization and coordination of cross-border proceedings, in line with the principles of the Concordat (as opposed to the very specific protocol in Tee-Comm. Electronics (see below, para. 31). The broad goals of the protocol included: promoting orderly, efficient, fair and open administration; respecting the respective courts' independence and integrity; promoting international cooperation and respect for comity; and implementing a framework of general principles to address administrative issues arising from the cross border nature of the proceedings. To achieve those goals, the protocol addressed, among other things, court-to-court coordination and cooperation; the retention and compensation of professionals; and joint recognition of stays of proceedings. Under the protocol, the courts also agreed to cooperate, wherever feasible, in the coordination of claims processes; voting procedures; and plan confirmation procedures.

25. Pioneer Companies Inc.[230]

The Pioneer case involved insolvency proceedings in the United States of a United States multinational enterprise and certain of its direct and indirect subsidiaries and affiliates and insolvency proceedings in Canada concerning one Canadian subsidiary, which was also a debtor in the United States cases. The format and provisions of the protocol resembled those in Laidlaw, Loewen, and Mosaic cases. In addition, the protocol recognized that it was in the interests of the debtors and their stakeholders that the United States court should take charge of the principal administration of the reorganization and set forth general principles for the manner in which claims made against the debtors should be adjudicated, in particular relating to proving claims against the debtors.

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228 United States Bankruptcy Court for the District of Delaware, Case No. 99-B-02385, (28 June 1999), and the Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3442, (25 June 1999).

229 A process available in some jurisdictions, where a reorganization plan is negotiated voluntarily prior to commencement of insolvency proceedings and subsequently approved by the court.

230 Quebec Superior Court, (Re PCI Chemicals Canada Inc.,) (Canada) Case No. 5000-05-066677-012, (1August, 2001) and the United States Bankruptcy Court for the Southern District of Texas, (Re Pioneer Companies Inc.) Case No. 01-38259, (1 August 2001).

26. PSINet Inc. (2001)[231]

PSINet involved insolvency proceedings in Canada and the United States. The protocol was entered into to coordinate the insolvency proceedings pending in both jurisdiction and was similar in structure to the protocols in Loewen, Laidlaw and Mosaic. In addition, the protocol set out certain cross-border insolvency and restructuring matters raised by the nature of the debtors' business operations in the United States and Canada and the interconnectivity and interdependence of the lines of communications in the group's global business and internet operations, which required the assistance of both courts to resolve fairly and efficiently. Those matters included: asset sale approval; allocation of proceeds; treatment of inter-company claims; and approval and implementation of any reorganization plan involving as parties the debtors of each jurisdiction. The protocol established guidelines with respect to those matters, which were to be determined and resolved by joint hearings of the courts. The protocol authorized use of the Court-to-Court Guidelines. The protocol was a key factor in the successful sale of PSINet's Canadian assets.

27. Quebecor World Inc. (2008)[232]

The Quebecor case involved parallel proceedings pending in the United States and Canada. The debtors proposed approval of a protocol at the outset of the cases as one of their "first day" orders, anticipating the need for court to court communication and joint hearings to facilitate the proceedings due to the large scale of the debtors' operations in both countries. The United States judge delayed the approval of the protocol, in order to establish a creditor committee and provide it with the opportunity to comment on the procedure. As a result, the original protocol was amended to include expanded notice provisions; a provision to further develop a joint claims protocol with respect to the timing, process, jurisdiction and the law applicable to the resolution of intercompany claims filed by the debtors' creditors in both proceedings; and a detailed provision relating to procedures to be followed when relief requested in one State was deemed to have a material impact in other States. The protocol also incorporated the Court-to-Court Guidelines. Joint hearings were held to approve the sale of the debtors' European operations and resulted in the prompt entry of separate orders approving that sale.

28. SENDO International Limited (2006)[233]

In the cases of SENDO, main insolvency proceedings were pending in the United Kingdom and secondary insolvency proceedings in France. The secondary proceedings were commenced at the request of the insolvency representative in the main proceeding because of employees of SENDO in France. Through the opening of the secondary proceedings, the employees in France were covered by French insolvency law, which was more favourable than English law, and the French

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231 Ontario Superior Court of Justice, Toronto, (Canada) Case No. 01-CL-4155, (10 July 2001) and the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213, (10 July 2001).

232 Montreal Superior Court, Commercial Division, (Canada) No. 500-11-032338-085 and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (JMP), (2003).

233 Insolvency proceedings before the High Court of Justice, Chancery Division of London (United Kingdom) and before the Commercial Court of Nanterre (France), (2006).

insolvency representative could sell assets located on French territory and gather together statements of outstanding receivables registered by SENDO's French and foreign creditors. The insolvency representatives of both proceedings entered into an agreement to coordinate the two insolvency proceedings, noting that the EC Regulation only established very general operating principles. In the agreement, the insolvency representatives agreed to act, for the purposes of implementing such operating principles, with mutual trust and to adhere to the duty to communicate information and to cooperate as defined by Article 31 of the EC Regulation, with the main proceeding taking precedence over the secondary proceeding. The agreement included provisions on the treatment of notice and submission of claims of creditors; on practical means of verification of claims; treatment of legal costs; and on the treatment of the assets of the French branch of the debtor.

29. Solv-Ex Canada Limited and Solv-Ex Corporation (1998)[234]

In the case of Solv-Ex Canada, involving the United States and Canada, a number of contrary rulings by the two courts had effectively deadlocked proceedings. Following negotiations between the parties, simultaneous proceedings, connected by telephone conference call, were arranged to approve the sale of the debtors' assets. The courts reached identical conclusions authorizing the sale, and encouraged the parties to negotiate a cross-border insolvency protocol to govern further proceedings in the case. Procedural matters agreed between the parties included that identical materials would be filed in both jurisdictions and the presiding judges could communicate with one another, without counsel present, to (a) agree on guidelines for the hearings, and, subsequently, (b) determine whether they could make consistent rulings. The courts subsequently approved the protocol.

30. Systech Retail Systems Corp. (2003)[235]

Systech Retail Systems involved insolvency proceedings in the United States and Canada for a large provider of retail point of sale field services, operating though various Canadian and American subsidiaries and affiliates. The debtor companies developed a protocol to establish basic administrative procedures between the proceedings in both jurisdictions. The protocol included provisions on comity and independence of the courts; cooperation; retention and compensation of insolvency representatives and professionals; notice; joint recognition of the stays of proceedings under the laws of both jurisdictions; rights to appear and be heard; and procedures on resolving disputes under the protocol. The protocol also included the Court-to-Court Guidelines. Subsequent to approval of the protocol by both courts, a joint hearing was held in accordance with the Guidelines, which resolved and coordinated a number of cross-border issues in the case.

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[234] Alberta Court of Queen's Bench, Case No. 9701-10022, (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA, (28 January 1998).

[235] Ontario Court of Justice, Toronto, Court File No. 03-CL-4836, (20 January 2003) and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division, Case No. 03-00142-5-ATS, (30 January 2003).

31. Tee-Comm. Electronics Inc (1997)[236]

The protocol in Tee-Comm. Electronics Inc., a case involving the United States and Canada, may be characterized as a specific-purpose protocol with a narrow focus. It established a framework under which the administrators in the two jurisdictions would jointly market the debtors' assets, so as to maximize the value of the estate. Accordingly, it addressed the sale of those assets, which was the key issue at the outset of the case, but no other matters, such as entitlement to and distribution of proceeds.

32. United Pan-Europe Communications N.V. (2003)[237]

In this case, the debtor was a leading cable and telecommunications company based in the Netherlands with ownership interests in direct and indirect operating subsidiaries, including in the United States. Insolvency proceedings commenced in the United States and the Netherlands. As the debtor's Dutch counsel was of the view that a protocol was not permissible under Dutch law and procedure, the debtor's Dutch and United States counsel worked closely together as issues arose in the proceedings to ensure that all decisions complied with both laws, Dutch and United States. Both insolvency representatives were involved in the deliberations. The coordination included: continuous provision of information to the courts and insolvency representatives; retention and compensation of counsel and insolvency representatives; the development of solicitation procedures for use in both cases; assets sales; and a reorganization plan. As a result, the United States and the Dutch proceedings closed on the same day.

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[236] In re AlphaStar Television/Tee-Comm Distribution, Inc, Ontario Court of Justice (Canada) and the United States Bankruptcy Court for the District of Delaware, (27 June 1997).

[237] Proper citation to be provided later.