

The Development of Court-to-Court Communications in Cross-Border Cases

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1. *The Globalization of Reorganizations and Restructurings*

The tremendous advances in information technology within the last two decades have made it possible for businesses to operate in a variety of different countries at the same time and to link all of these operations as if they were right next door. A multinational business can make decisions quickly that affect its global operations; it can allocate resources internationally in a manner which best suits its objectives and it can utilize its going-concern values to augment the value of its underlying operating assets on the basis that the whole is greater than the sum of the parts.

The onset of an insolvency case, however, stops all that and turns the otherwise cohesive business into a series of disconnected segments in several different countries. In a typical international insolvency, different sets of creditors assert different kinds of claims to different assets under different rules in different countries. The unified international business that was once carried on comes to an end and separate, unconnected remnants of the organization attempt to continue until they either starve or implode. It is almost as if a cross-border insolvency system had been set up deliberately to *promote* failures and liquidations.

¹ The author serves as Chair of the International Insolvency Institute, a non-profit association of leading insolvency professionals, Judges, academics and credit professionals from 65 countries worldwide. The Court Orders referred to in this article are available without charge on the website of the International Insolvency Institute at:

<http://www.iiiglobal.org/international/protocols.html>

The III welcomes contributions of additional orders, decisions and opinions that recognize and encourage cross-border communications in international cases which should be directed to the III at info@iiiglobal.org.

The structural framework for dealing with multinational and cross-border businesses that encounter financial difficulties has not fully evolved from the state it was in several decades ago. When insolvency or financial failure affects a multinational business, it is still most commonly dealt with through a variety of independent, separate and often-unconnected administrations, most often for different, if not conflicting, purposes. However, recent experience and developments on the horizon hold the promise of significant improvements. There have been initial domestic legislative initiatives into the area of cooperation in international insolvencies and restructurings, but, more profoundly, it is the widespread adoption of the UNCITRAL *Model Law on Cross-Border Insolvency* (reflected in Chapter 15 of the *Bankruptcy Code*) and coordination and co-operation among Courts that will free the international legal regime for insolvencies from its detrimental compartmentalization.

The dual impact of globalization and technological innovation has changed international commerce forever. Transactions involving multinational businesses can be carried out in mere seconds, regardless of the geographical location of the parties to the transaction. Transactions among units of the same global enterprise have also moved firmly into the 21st century but, where unforeseen or unfortunate circumstances lead to the need for reorganizations or restructurings, the pace of communication among jurisdictions reverts to the 19th century. By and large, the stakeholders of the global business are the losers in this technological regression.

Current and evolving protocols and judicial practices can be made to assist in the revival and rehabilitation of global businesses in financial difficulty. This increased level of cooperation can be achieved without in any way compromising or infringing upon local domestic practices and procedures that exist in the Courts involved. On the whole, significant stakeholder value can be preserved and maintained if communications between Courts in multinational and cross-border cases are facilitated and enhanced.

2. Developing the Basis for Court-to-Court Communications

As Mr. Justice J.M. Farley of the Ontario Superior Court of Justice observed some time ago, (in “A Judicial Perspective on International Cooperation in Insolvency Cases” in the *American Bankruptcy Institute Journal*: March, 1998 at page 12), reorganization cases involve “real time litigation” where matters must often be dealt with urgently if there is to be anything left to save. This contrasts with “autopsy litigation” where it “doesn’t matter much whether

the case is dealt with this month or next year". To maximize the value of the overall enterprise for the benefit of all stakeholders, it is important for each of the Courts that are administering the different segments of the same overall insolvency to be aware of what the other Courts are doing.

One of the primary influences in the movement toward increasing cooperation and coordination among Courts in cross-border cases is The American Law Institute (the "ALI"). The ALI is a prestigious organization comprising senior and respected judges, lawyers and academics (with a strong international component from over 20 countries). The ALI was organized in 1923 following a study by the "Committee on the Establishment of a Permanent Organization for the Improvement of the Law". The ALI was formed to "promote the clarification and simplification of the law and better its adaptation to social needs [and] to secure the better administration of justice...".

The ALI has developed authoritative *Restatements* of the law of agency, conflict of laws, contracts, judgments, and foreign relations. Other ALI projects have resulted in the development of model statutory formulations in the areas of evidence, securities law and land development. With representatives of the governments of U.S. States, the ALI participated in developing the Uniform Commercial Code which many authorities regard as one of the most important developments in United States commercial law. Part of the current work on revisions to the Uniform Commercial Code includes the development of international annotations to the Code.

The ALI's *Transnational Insolvency Project* was the ALI's first private international law project. It was intended to develop cooperative procedures for use in business insolvency cases involving companies with assets or creditors in more than one of the United States, Canada, and Mexico. The ALI assumed that harmonization of the formal legislation of the three countries would not be achieved in the foreseeable future and that prospects of a comprehensive insolvency treaty were slim. The primary thrust of the Project was, therefore, on approaches that could be implemented by the insolvency community and the Courts without the need for actual formal legislation.

The project proceeded in two phases. The first phase produced authoritative summaries of the insolvency law and practice in each of the United States, Canada and Mexico. These survey statements are intended to be comprehensive but readily understandable by an international audience. They

contain a useful and succinct description and summary of the domestic and international bankruptcy law and practice in each NAFTA country.

3. *Guidelines for Court-to-Court Communications in Cross-Border Cases*

The second and more challenging phase of the *Transnational Insolvency Project* was the development of principles and procedures that would be acceptable to all three NAFTA countries which would lead to harmonization and coordination of insolvency proceedings in cases that involved more than one of the NAFTA jurisdictions. As with the first phase of the Project, the second phase proceeded under the guidance of Country Teams that had been assembled by the ALI in the United States, Canada and Mexico consisting of leading insolvency practitioners, judges and academics. The preparation of the *ALI Statement*, consequently, was a rigorous process for the Reporters on the Project, particularly for the Main Reporter, Professor Jay L. Westbrook of the University of Texas at Austin.

One of the most important elements in the second phase of the Project was the preparation of guidelines that could facilitate cross-border communications between Courts in multinational insolvency cases. The *Guidelines Applicable to Court Communications in Cross-Border Cases* (the "*Guidelines*") were reviewed by the Reporters and Advisors in each of the three NAFTA countries and approved by the Council and the membership of the American Law Institute. The *Guidelines* are, in fact, largely based on examples from actual cross-border cases involving cross-border insolvency protocols.

The *Guidelines* recognize that one of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the Courts in insolvency and reorganizational proceedings, it is essential that the supervising Courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

Many jurisdictions, including most common law jurisdictions, have prohibitions against communications by one party to the Court in the absence of the other party. In some jurisdictions, by contrast, the prohibition may be milder and may not even exist at all. Arrangements for court-to-court communications in cross-border cases must not promote or condone any contravention of domestic rules, procedures or ethics. The *Guidelines*, in fact, specifically mandate that local domestic rules, practices and ethics must be fully observed at all times.

The *Guidelines* are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. The *Guidelines* are intended to encourage such communications and to permit rapid cooperation in a developing insolvency case, while ensuring due process to all concerned. The concept of court-to-court communications is best seen as a linking of two concurrent court hearings, all conducted in accordance with proper systems and procedures. The only change from a purely domestic hearing is the technological link to the other Court.

The intent behind the *Guidelines* was that a Court intending to employ the *Guidelines* — with or without modifications — should adopt them formally before applying them. A Court might make its adoption of the *Guidelines* contingent upon, or temporary until, the corresponding adoption of them by other courts concerned in the matter, in order to ensure that judges, counsel, and parties are not subject to different standards of conduct.

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

One of the issues that may arise is whether a party's participation in arguments or submissions being made in a hearing in the other country constitutes an attornment to the jurisdiction of the other court. The *Guidelines* attempt to anticipate that difficulty by indicating that such participation will not constitute an attornment to the jurisdiction of the other court unless the party who participates in the hearing in the other court is actually seeking relief from that court. This is consistent with Section 1510 of the *Bankruptcy Code* (Article 10 of the UNCITRAL Model Law), which indicates that an application to the Court by a foreign representative does not subject the foreign representative or the

foreign assets or the affairs of the debtor to the jurisdiction of the domestic court for any purpose other than the actual application.

In actual practice, court orders made in cross-border cases usually indicate that any informal participation in the proceedings in the foreign court does not constitute an attornment. It is also the case, moreover, that a party in one jurisdiction would have to be represented by counsel admitted to the bar of the other jurisdiction in order to even receive an audience from that court. In practice, therefore, a properly prepared joint court hearing need not unnecessarily or unexpectedly expose a party in one country to the risk of attornment to the jurisdiction of the other court.

The *Guidelines* are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are intended to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure as those requirements are depend upon the law and practice in each jurisdiction. However, the *Guidelines* set out approaches that are likely to be useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, will almost certainly be advantageous to all stakeholders.

4. *Judicial Adoption of the ALI/III Guidelines.*

The advantages of the ALI *Guidelines* have been recognized in a growing number of cross-border cases, primarily between the United States and Canada, although the example of the *Guidelines* has encouraged court-to-court communications among Courts of other countries as well. A partial listing of cases in which Courts have specifically adopted, approved and applied the *Guidelines* is attached as Schedule "A" to this article. The listing reflects the approval and adoption of the *Guidelines* by no fewer than eighteen separate Judges in twelve Bankruptcy Courts to this point.

To encourage international use of court-to-court communications through the procedures provided by the *Guidelines*, the International Insolvency Institute, a non-profit international association dedicated to the improvement of international insolvency systems and procedures, has arranged for the translation of the *Guidelines* into fourteen languages. The translated *Guidelines*

are available on the International Insolvency Institute's website at: <http://www.iiiglobal.org/international/guidelines.html> in English, Arabic, Chinese, Croatian, French, Georgian, German, Greek, Italian, Japanese, Korean, Portuguese, Russian, Spanish and Swedish. The availability of the *Guidelines* in all of the translated versions that are available provides a uniform basis for communications among Courts in virtually all of the world's major economies. The Courts involved in multinational cases are able to be satisfied that each Court, is applying the *Guidelines*, is applying exactly the same text as the other Courts involved, even if the Courts involved do not speak each other's language. In this way, the *Guidelines* are a truly modern international response to the need for globalized coordination in multinational insolvencies and restructurings.

There has been authoritative United States appellate level recognition of the importance of communication between courts involved in international insolvency proceedings. In a decision by the United States Court of Appeals for the Third Circuit in *Stonington Partners v. Lernout & Hauspie Speech Products N.V.*, 310 F. 3d 118 (3rd. Cir 2002), the Court made several pointed observations about the need for international cooperation. The case, involved related plenary insolvency proceedings in both the U.S. and Belgium where the application of each jurisdiction's law led to different results. Seeing the need for direct court-to-court communication, the Third Circuit, virtually ordered the parties to have direct communication with the Belgian Court:

We strongly recommend, in a situation such as this, that an actual dialog occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws. Maxwell provides a good example. There, the Court of Appeals for the Second Circuit attributed the "high level of international cooperation and a significant degree of harmonization of the laws of the two countries" in large part to "the cooperation between the two courts overseeing the dual proceedings." Maxwell, 93 F.3d at 1053. While we do not know whether the cooperation there was initiated by the court or the parties, there is no reason that a court cannot do so, especially if the parties (whose incentives for doing so may not necessarily be as great) have not been able to make progress on their own....In Maxwell, the court suggested that "bankruptcy courts may best be able to effectuate the purposes of

the bankruptcy law by cooperating with foreign courts on a case-by-case basis." *Id.* Even if cooperation could not be achieved, it would be valuable to communicate regarding the policies animating a certain law so as to be better able to perform a choice-of-law analysis. While not required by our case precedent or any principle of law, we urge that, in a situation such as this, communication from one court to the other regarding cooperation or the drafting of a protocol could be advantageous to the orderly administration of justice. [Emphasis added.]

5. *Endorsement of the ALI/III Guidelines for Court-to-Court Communications in Cross-Border Cases.*

There have been a number of positive endorsements of the *Guidelines for Court-to-Court Communication in Cross-Border Cases* by Bankruptcy Courts and leading professional associations in the insolvency area which show the increasing acceptability of Court-to-Court communications in multinational cases.

(a) *Approval by the Toronto Commercial Division of the Ontario Superior Court of Justice:-*

The Toronto Commercial Division of the Ontario Superior Court of Justice is the Court in which most major Canadian reorganizations proceed. It was the first Court to give its formal approval to the *Guidelines* several years ago when it approved the adoption of the *Guidelines* and published a Court Practice Direction to the profession encouraging the use of the *Guidelines* in cases in the Commercial Division.

(b) *Approval by the Supreme Court of British Columbia:-*

Subsequent to the approval of the *Guidelines* by the Toronto Commercial Division of the Ontario Superior Court of Justice, the Supreme Court of British Columbia approved the use of the *Guidelines* for *all* cases within its jurisdiction, not only for insolvency and restructuring cases. A Court Practice Direction issued by Chief Justice Donald I. Brenner recommending the use of the *Guidelines* was promulgated to all Judges in the Supreme Court of British Columbia. (In

Canadian usage, a Provincial Supreme Court is a Court of inherent jurisdiction and exercises jurisdiction akin to that of a U.S. Federal District Court).

(c) *Approval by the Canadian Judicial Council:-*

In August, 2005 the Uniform Law Conference of Canada recommended that all Courts in Canada adopt the *Guidelines* to assist in communications in national class actions filed in various provinces. Subsequently, the Canadian Judicial Council (which is comprised of the Chief Justices of all of the Provinces and Territories) established a Working Group to consider and report on the coordination of national class actions. The Working Group recommended to the Council that the *Guidelines* be adopted generally and in September, 2006, the Canadian Judicial Council resolved as follows:

“That all jurisdictions adopt the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* that were promulgated in the insolvency area by The American Law Institute. These *Guidelines* have been adopted in British Columbia and by the Commercial List in Ontario.”

(d) *Approval by the United States National Bankruptcy Conference:-*

At its Annual Meeting in Washington in October, 2006, the United States National Bankruptcy Conference unanimously endorsed the use of the *Guidelines* in cross-border and multinational insolvencies and reorganizations. Members of the Conference are highly active in insolvency reform in the United States and reference may be included in the Official Rules under the Bankruptcy Code to the desirability of “Guidelines” and to cross-border communications among courts.

(e) *Approval by the National Conference of Bankruptcy Judges:-*

The National Conference of Bankruptcy Judges (the “NCBJ”) is the umbrella organization to which most Bankruptcy Court Judges in the United States belong. In 2006, the International Relations Committee of the NCBJ agreed to consider the appropriateness of the *Guidelines* in cross-border and multinational cases. This Committee made a recommendation to the Board of Directors of the NCBJ that the *Guidelines* be approved by the NCBJ for use in cross-border and multinational cases involving the United States. The Board of Directors of the NCBJ at the NCBJ’s Annual Meeting in San Francisco in

November, 2006 and passed a unanimous resolution encouraging Bankruptcy Courts in the United States to use the *Guidelines* in cross-border cases.

(f) *Adoption by the United States Bankruptcy Court for the Central District of California:-*

The *Guidelines* have also been adopted and promulgated in the Bankruptcy Court for the Central District of California (as approved by the District Court). The *Guidelines* were incorporated into a General Order for procedures under Chapter 15.

(g) *Adoption by the Supreme Court of Bermuda: -*

The Supreme Court of Bermuda has recommended the adoption of the *Guidelines* for commercial proceedings in the Courts of Bermuda. The genesis of the new Bermuda Practice Direction was a *Refco* cross-border case with New York which involved a communication between the Bermuda Court and the New York Court. The advantages of the *Guidelines* to cross-border cases were officially commented on by Mr. Justice Ian Kawaley of the Supreme Court of Bermuda in an opinion written during the *Refco* proceedings (which is referred to in Schedule "A").

Apart from the Courts, judicial organizations and professional associations referred above that have already approved of the application of the *Guidelines* in cross-border cases, Courts in other jurisdictions and in other countries are currently considering the suitability of the *Guidelines* for proceedings in their jurisdictions. The *Journal* will keep readers apprised of jurisdictions in which approval is given to the *Guidelines* and will report separately on the growing practice of cross-border insolvency protocols that are being increasingly implemented in multinational cases to assist in the coordination of administrations between different countries.

A copy of the text of the ALI/III *Guidelines for Court-to-Court Communications in Cross-Border Cases* is attached as Schedule "B" to this article. Comments on experience with the *Guidelines* in cross-border cases are warmly encouraged as are suggestions for encouraging the wider use and application of the *Guidelines* in cross-border cases. Comments are highly appreciated and should be directed to the author at: bleonard@casselsbrock.com.

SCHEDULE A:

TABLE OF CASES

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

Cross-Border Liquidation Protocol in *Re AIOC Corporation and AIOC Resources AG* between United States and Switzerland: United States Bankruptcy Court for Southern District Court of New York (Chief Judge Tina L. Brozman), Case Nos. 96 B 41895 and 96 B 41896, (April 3, 1998) and Bankruptcy Court for the Canton of Zug (Case No. 1996/180).

Orders Adopting the American Law Institute Guidelines for *Court-to-Court Communications in Cross-Border Cases* with Certain Modifications in *Re Androscoggin Energy LLC*, United States Bankruptcy Court for the District of Maine (Hon. Louis H. Kornreich), Case No. 04-12221-LHK, (January 12, 2005), and Ontario Superior Court of Justice (Mr. Justice J.M. Farley), Court File No. 04-CL-5643 January 6, 2005).

Cross-Border Insolvency Protocol and Order in *Re Calpine Corporation* between the United States Bankruptcy for the Southern District of New York (Hon. Burton R. Lifland), Case No. 05-60200 (April 9, 2007) and Court of Queens Bench of Alberta (Madam Justice B.E.C. Romaine), Case No. 0501-17864 (April 7, 2007) including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

Cross-Border Insolvency Protocol in *Re Matlack Inc.* between Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley), Case No. 01-CL-4109, (April 19, 2001) and United States Bankruptcy Court for the District of Delaware (Hon. Mary F. Walrath), Case No. 01-01114 (MFW), (May 24, 2001) including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

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

Cross-Border Insolvency Protocol in *Re Pope & Talbot Ltd.* between the British Columbia Supreme Court, Vancouver (Chief Justice Donald I. Brenner), Case No. SO77839, (December 14, 2007) and the United States Bankruptcy Court for the District of Delaware, (Hon. Christopher Sontchi), Case No. 07-11738 including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

Cross-Border Insolvency Protocol in *Re Progressive Moulded Products Ltd.* between the Ontario Superior Court of Justice, Toronto (Mr. Justice Geoffrey B. Morawetz), Case No. CV-08-7590-00CL, (June 24, 2008) and the United States Bankruptcy Court, including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

Cross-Border Insolvency Protocol in *PSINet Inc.* et al. between Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley), Case No. 01-CL-4155, (July 10, 2001) and United States Bankruptcy Court for the Southern District of New York (Hon. Robert E. Gerber), Case No. 01-13213, (July 10, 2001) including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

Cross-Border Insolvency Protocol in *Re Quebecor World Inc.* between the Superior Court for the Province of Quebec (Mr. Justice Robert Mongeon), Case No. 500-11-032338-085 (January 21, 2008) and the United States Bankruptcy Court, Southern District of New York (Hon. James Peck), Case No. 08-10152, (April 17, 2008), including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

Court Opinion in *Re Refco Capital Markets* (Supreme Court of Bermuda) (Mr. Justice Ian R. Kawaley) Case No. 2005:328 (December 12, 2006), approving the application of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

Cross-Border Insolvency Protocol in *Re Systech Retail Systems Corporation* between the Ontario Court of Justice, Toronto (Mr. Justice J.D. Ground), Court File No. 03-CL-4836, (January 20, 2003) and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division (Hon. A. Thomas Small), Case No. 03-00142-5-ATS, (January 30, 2003) including approval and adoption of the American Law Institute *Guidelines for Court-to-Court Communications in Cross-Border Cases*.

SCHEDULE B:

THE AMERICAN LAW INSTITUTE

in association with

THE INTERNATIONAL INSOLVENCY INSTITUTE

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

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

BY

THE AMERICAN LAW INSTITUTE

At Washington, D.C., May, 2000

And as Adopted by

THE INTERNATIONAL INSOLVENCY INSTITUTE

At New York, June, 2001



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

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

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Foreword by the Director of The American Law Institute

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

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

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

LANCE LIEBMAN
Director
The American Law Institute

January 30, 2004

Foreword by the Chair of the International Insolvency Institute

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

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

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

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

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

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

E. Bruce Leonard
Chairman
The International Insolvency Institute

Toronto, Ontario
March 2004

Judicial Preface

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

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

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

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

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

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

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

Mr. Justice Miodrag Dordević
Supreme Court of Slovenia
Ljubljana

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

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

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

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

Hon. Hyungdu Kim
Supreme Court of Korea
Seoul

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

Mr. Justice Gavin Lightman
Royal Courts of Justice
London

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

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

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

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

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

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

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

Introduction:

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

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

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

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

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

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

Guideline 2

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

Guideline 3

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

Guideline 4

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

Guideline 5

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

Guideline 6

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

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

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

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and
- (d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the

communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

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

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and
- (d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

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

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

- (b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.
- (c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
- (d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
- (e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

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

Guideline 11

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

Guideline 12

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

Guideline 13

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

Guideline 14

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

Guideline 15

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

Guideline 16

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

Guideline 17

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