

**SUPREME COURT
OF THE
NORTHERN TERRITORY OF AUSTRALIA**

**PRACTICE DIRECTION
NO 4 of 2017**

CROSS-BORDER INSOLVENCY¹

1. The *Cross-Border Insolvency Act 2008* (Cth) (“Cross-Border Insolvency Act”) provides in section 6 that, subject to the Act, the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (“UNCITRAL”) (“Model Law”), with the modifications set out in Part 2 of the Cross-Border Insolvency Act, has the force of law in Australia. The English text of the Model Law is set out in Schedule 1 to the Cross-Border Insolvency Act.
2. Chapter IV of the Model Law, comprising Articles 25 - 27, provides for cooperation with foreign courts and foreign representatives in the cross-border insolvency matters that are referred to in Article 1 of the Model Law.
3. Articles 25 and 27 of the Model Law, as modified by sections 11 and 18 of the Cross-Border Insolvency Act, and as presently relevant, provide:

Article 25

Cooperation and direct communication between *[this Court]*
and foreign courts or foreign representatives

1. In matters referred to in Article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee or a registered liquidator.
2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

¹ This Practice Note is harmonised in accordance with the advice of the Council of Chief Justices' Rules Harmonisation Committee.

Article 27

Forms of cooperation

Cooperation referred to in Article 25 may be implemented by any appropriate means, including:

- (a) Appointment of a person or body to act at the direction of the court;
 - (b) Communication of information by any means considered appropriate by the court;
 - (c) Coordination of the administration and supervision of the debtor's assets and affairs;
 - (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
 - (e) Coordination of concurrent proceedings regarding the same debtor.
4. The manner of cooperation appropriate to each particular case will depend on the circumstances of that case.
 5. Cooperation between the Court and a foreign court or foreign representative under Article 25 will generally occur under a co-ordination agreement that has previously been approved by the Court, and is known to the parties, in the particular proceeding. Ordinarily it will be the parties who will draft the co-ordination agreement. In doing so, the parties should be guided by the *Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters* ("The JIN Guidelines") published by the Judicial Insolvency Network² (a copy is attached to this practice direction) and the *Practice Guide on Cross-Border Insolvency Co-operation 2009*³ ("the Practice Guide") published by UNCITRAL⁴. Other useful international guidance as to

² The Judicial Insolvency Network includes representatives of a group of courts which met in Singapore on 10-11 October 2016 to draft the guidelines. The Courts represented at that meeting were those of Bermuda, the British Virgin Islands, Delaware (USA), England and Wales, Singapore, the Southern District of New York (USA), Ontario, New South Wales and the Federal Court of Australia.

³ http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html

⁴ The United Nations Commission on International Trade Law (UNCITRAL)

⁵ http://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf

⁶ <http://www.iiiglobal.org/node/939>

⁷ http://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf

cross-border insolvency can be found at:

- *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*⁵ (“the Global Principles”) published by the American Law Institute and the International Insolvency Institute;
 - *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*⁶ (“the Global Guidelines”) adopted by the International Insolvency Institute and the American Law Institute;
 - *Global Rules on Conflict-of-laws Matters in International Insolvency Cases*⁷ (“the Global Rules”) published by the American Law Institute and International Insolvency Institute.
6. Each of the above are not intended to, and do not:
- (a) encroach on substantive Australian law; or
 - (b) interfere with or impact upon the exercise by any Court of its ordinary jurisdiction.
7. In drafting a co-ordination agreement for the approval of the Court, the parties should have regard to the above and may find the practical guidance in the Practice Guide useful.
8. Parties should have regard to the aspects of the JIN and Global Guidelines designed to provide transparency and accord procedural fairness to all parties including:
- communications being subject to ex parte communication rules (Global Guideline 6);
 - communications between courts being notified in advance to counsel (Global Guideline 7);
 - advance notice of telephone or video conference communications between courts (Global Guideline 8), or between the court and a court representative or foreign insolvency administrator (Global Guideline 9) and the ability of counsel to participate; and
 - the development of service lists (Global Guideline 13).

9. A co-ordination agreement should generally address the processes for coordination of:
 - notifications of creditors;
 - submission of creditor claims;
 - the administration of claims; and
 - the hearing of appeals where claims are rejected.
10. If choice of law provisions are considered for inclusion in a co-ordination agreement, the Global Rules may provide useful reference material.
11. The Corporations Law Rules deal with the appointment of independent intermediaries.
12. Parties applying to the court to appoint an independent intermediary to assist the coordination of proceedings should have regard to Global Principle 23.

Dated 6 November 2017

Michael Grant
Chief Justice

GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS

INTRODUCTION

- A. The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction (“Parallel Proceedings”) by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings.
- B. In all Parallel Proceedings, these Guidelines should be considered at the earliest practicable opportunity.
- C. In particular, these Guidelines aim to promote:
- (i) the efficient and timely coordination and administration of Parallel Proceedings;
 - (ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders’ interests are respected;
 - (iii) the identification, preservation, and maximisation of the value of the debtor’s assets, including the debtor’s business;
 - (iv) the management of the debtor’s estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;
 - (v) the sharing of information in order to reduce costs; and
 - (vi) the avoidance or minimisation of litigation, costs, and inconvenience to the parties¹ in Parallel Proceedings.
- D. These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit².
- E. These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.
- F. Courts should consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the court to facilitate such implementation by a protocol or order derived from these Guidelines, and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

¹ The term “parties” when used in these Guidelines shall be interpreted broadly.

² Possible modalities for the implementation of these Guidelines include practice directions and commercial guides.

ADOPTION & INTERPRETATION

Guideline 1: In furtherance of paragraph F above, the courts should encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings; and (b) benefit from communication and coordination between the courts. For the purpose of these Guidelines, “administrator” includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in-possession in a reorganisation or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

Guideline 2: Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order³, following an application by the parties or pursuant to a direction of the court if the court has the power to do so.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

- (i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by a court in any proceedings including its authority or supervision over an administrator in those proceedings;
- (ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;
- (iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction; or
- (iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the other court or a waiver by any of the parties of any of their substantive rights and claims.

Guideline 6: In the interpretation of these Guidelines or any protocol or order under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

³ In the normal case, the parties will agree on a protocol derived from these Guidelines and obtain the approval of each court in which the protocol is to apply.

COMMUNICATION BETWEEN COURTS

Guideline 7: A court may receive communications from a foreign court and may respond directly to them. Such communications may occur for the purpose of 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 any joint hearing where Annex A is applicable. Such communications may take place through the following methods or such other method as may be agreed by the two courts in a specific case:

- (i) 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.
- (ii) Directing counsel to transmit or deliver copies of documents, pleadings, affidavits, 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.
- (iii) Participating in two-way communications with the other court, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications between courts, unless otherwise directed by any court involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol, the following shall apply:

- (i) In the normal case, parties may be present.
- (ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications and the communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.
- (iii) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.
- (iv) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

Guideline 9: A court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to be provided to such other 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.

APPEARANCE IN COURT

Guideline 10: A court may authorise a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, a court may authorise a party to a foreign proceeding, or an appropriate person, to appear and be heard by it without thereby becoming subject to its jurisdiction.

CONSEQUENTIAL PROVISIONS

Guideline 12: A court shall, except on proper objection on valid grounds and then only to the extent of such objection, recognise and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: A court shall, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and 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. Notice of any amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

Guideline 14: A protocol or order made by a court under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the court, and to reflect the changes and developments from time to time in any Parallel Proceedings. Notice of such amendments, modifications, or extensions shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

- (i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.
- (ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.
- (iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.
- (iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.
- (v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.
- (vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures 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.
- (vii) A 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 outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.