

DEVELOPMENTS IN COURT TO COURT COMMUNICATIONS IN INTERNATIONAL INSOLVENCY CASES

SHERYL JACKSON* AND ROSALIND MASON**

I INTRODUCTION

As business increasingly operates on a global basis, courts are called upon more often to adjudicate insolvency cases with international connections. The financial collapse of Lehman Brothers Holding Inc ('Lehman Holdings') provides a recent example where courts across many jurisdictions were called upon to determine issues arising from a multi-state insolvent enterprise. Lehman Holdings filed for Chapter 11 bankruptcy protection in the United States on 15 September 2008. Lehman Brothers was the fourth largest investment bank in America and the largest company ever to file for bankruptcy in the United States. However the effects of its collapse were felt worldwide, including within Australia.

While Lehman Holdings was incorporated and based in New York, it operated through a network of affiliates across the globe. As Lehman Holdings managed substantially all the material cash resources of the Lehman Brothers group centrally, its inability to settle obligations of these affiliates resulted in some 75 separate and distinct insolvency proceedings commencing in 16 jurisdictions. These proceedings covered the rescue-liquidate spectrum – from out-of-court workouts through formal reorganisation proceedings to liquidations.¹

In Australia, directors resolved in September 2008 that various local Lehman companies enter into voluntary administration, and appointed joint and several administrators. In 2009, a majority of creditors in number and value of Lehman

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* Adjunct Associate Professor, School of Law, Queensland University of Technology, Brisbane, Australia.

** Professor of Insolvency and Restructuring Law, School of Law, Queensland University of Technology, Brisbane, Australia.

1 Alvarez & Marsal Holdings LLC, *Lehman Brothers Holdings Inc: International Protocol Proposal* (2009).

Brothers Australia Ltd ('Lehman Australia') resolved that the company execute a deed of company arrangement. During a challenge by minority creditors to the deed's provisions,² the administrators were appointed as liquidators. In 2013, creditors voted on a scheme of arrangement to end the complex liquidation and distribute funds to creditors more quickly and efficiently. During this lengthy external administration which is ongoing at the time of writing, Australian insolvency administrators have participated in a Cross-Border Insolvency Protocol³ approved by a United States court as well as in numerous local and foreign court proceedings to resolve issues arising out of the international connections and concurrent proceedings.⁴

The bottom line when insolvency strikes a business is that parties' individual private rights may be stayed by a formal insolvency administration and transformed into an opportunity to participate in a collective administration. Where a business operates in multiple jurisdictions, then there may be concurrent formal administrations.⁵ An important aspect of international insolvency law then is how best to address concurrent litigation against a business or even concurrent insolvency administrations occurring in more than one jurisdiction. Cooperation and coordination is critical to bringing certainty, saving time and minimising costs for the parties – debtors, creditors and third parties alike.

Where there are concurrent court proceedings in multiple jurisdictions pending the appointment of concurrent insolvency administrations, 'cooperation' in the form of the doctrines of *forum non conveniens* and *lis alibi pendens* as well as through anti-suit injunctions help regulate the manner in which courts may defer to proceedings in another state. Where domestic and foreign courts appoint concurrent insolvency administrations, then procedural cooperation may assist in minimising delay and expense through processes to reduce the burden of filing in

2 *Lehman Brothers Holding Inc v City of Swan* (2010) 240 CLR 509.

3 Lehman Bros Holdings Inc, *Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies* (2009). See also *Re Lehman Brothers Holdings Inc* (Bankr, SD NY, No 08–13555, 17 June 2009).

4 See, eg, *Parbery; Re Lehman Brothers Australia Ltd (in liq)* (2011) 285 ALR 476 (discussed below at n 105). An example of a foreign proceeding is the application to the US Bankruptcy Court resulting in an order on 15 February 2012 recognising the liquidation of Lehman Australia as a foreign main proceeding and the Australian liquidators as foreign representatives under chapter 15 of the *US Bankruptcy Code*: 11 USC §§ 1501–32. See PPP Advisory, *Lehman Brothers Australia Limited (in Liquidation) ACN 066 797 760: Report to Creditors* (2012) <<http://www.ppbadvisory.com/uploads/i7-Lehman-Brothers-Australia-Limited-Report-to-Creditors-4-September-2012.pdf>>.

5 See, eg, *Re Artola Hermanos; Ex parte Chale* (1890) 24 QBD 640, in which there were concurrent bankruptcy proceedings in England and France. Lord Justice Fry described three potential approaches to concurrent bankruptcy proceedings. Firstly, each forum is to administer the assets locally situated within its jurisdiction. Secondly, every other forum should yield to the forum of the domicile, acting only as accessory and in aid of the forum of the domicile. Finally, the forum of the country in which the debtor has assets and which first adjudicates him bankrupt (whether or not it is the forum of the domicile), is entitled to claim foreign assets.

multiple jurisdictions; the sharing of information regarding distributions; and the joint sale of assets.⁶

The multistate bank collapses of the late 19th century in Australia,⁷ which largely involved parties from the Australian colonies, the United Kingdom, and other parts of the British Empire such as New Zealand, established a jurisprudence which facilitated concurrent administrations and cross-border cooperation.⁸ This has provided a sound basis for Australia in the early 21st century to respond to multilateral developments in dealing with international insolvencies that reveal, in high-income economies in particular, a growing acceptance of concurrent administrations combined with increasing international cooperation.

Domestic laws are clearly limited in their ability to regulate insolvency proceedings that cross jurisdictional borders. Various multilateral bodies have sought to assist in resolving international insolvency and related commercial issues. Multilateral organisations of member states, such as the United Nations Commission on International Trade Law ('UNCITRAL') have taken an interest in insolvency. In 1997 the United Nations formally adopted the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* ('Model Law'), UNCITRAL recommended that member states adopt the *Model Law* as part of domestic legislation in order to promote uniform recognition laws in international insolvencies.⁹

Professional associations representing advisers to business, such as the American Law Institute ('ALI') and the International Insolvency Institute ('III'), have also engaged with the issues. A regional initiative has been the ALI's Transnational Insolvency Project (1993–2000) 'to provide a nonstatutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states, consisting of the United States, Canada, and Mexico'.¹⁰ The project was conducted by a team of judges, lawyers and academics from the three NAFTA countries. Part of this project involved the development of *Guidelines*

6 Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 *Cornell Law Review* 696, 750.

7 Alan L Tyree, *Banking Law in Australia* (LexisNexis Butterworths, 7th ed, 2011) 3.

8 See cases considered in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, such as *Re English Scottish and Australian Chartered Bank* [1893] 3 Ch 385. However, Australian courts have not always extended aid and assistance to foreign courts. See, eg, *Rolfe v Transworld Marine Agency Company NV* (1998) 83 FCR 323 in which a Belgian Court made a court-to-court request of an Australian court pursuant to *Corporations Act 2001* (Cth) ss 580–1. The request for a stay on local proceedings and an assignment of funds to the Belgian insolvency administrators for distribution as part of a worldwide administration of the company's assets and liabilities was denied.

9 *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*, GA Res 52/158, UN GAOR, 52nd sess, 72nd mtg, Supp No 17, UN Doc A/52/17 (15 December 1997) annex I.

10 Ian F Fletcher and Bob Wessels, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012) ('*ALI III Report*') xvii <<http://www.iiiglobal.org/component/jdownloads/viewdownload/36/5897.html>>.

Applicable to Court-to-Court Communications in Cross-Border Cases, adopted by the ALI on 16 May 2000, and by the III on 10 June 2001 ('*ALI NAFTA Guidelines*'). These *ALI NAFTA Guidelines* were largely based on examples from actual cross-border cases involving cross-border insolvency protocols.¹¹ The *Guidelines* were not intended to alter or change the domestic rules or procedures in any country, nor to affect or curtail any substantive rights of any parties in court proceedings.

Following this work the ALI published in 2003 the American Law Institute's *Principles of Cooperation between the Member States of the North American Free Trade Agreement* ('*ALI NAFTA Principles*'). In February 2006, the ALI in conjunction with the III appointed Professor Ian Fletcher, University College London, and Professor Bob Wessels, University of Leiden, to consider the application of the *ALI NAFTA Principles* worldwide. The project resulted in a Report entitled the *ALI III Report*.

The *ALI III Report* covers: 37 Global Principles for Cooperation in International Insolvency Cases ('Global Principles'); 18 Global Guidelines for Court-to-Court Communications in International Insolvency Cases ('Global Guidelines'); a list of 158 terms and expressions with definitions; and, as an Annex, the Reporters' Statement with 23 Global Rules on Conflict-of-Laws Matters in International Insolvency Cases. The report was presented to the ALI's Annual Meeting in Washington on 23 May 2012, and to the III Annual Meeting in Paris on 22 June 2012, where the report was unanimously approved.

The ALI III Global Principles are described as 'the result of a combined effort' by the ALI with the III. A global research survey and systematic evaluation was undertaken to assess the feasibility of worldwide acceptance of the *ALI NAFTA Principles* and their accompanying *ALI NAFTA Guidelines* on court-to-court communications to be endorsed as 'global best practice'. The following groups participated in the project: International Advisers appointed by ALI and III; an ALI Members Consultative Group; an III Working Group; and International Consultants, consisting of recognised experts with an interest in the project who were not ALI or III members. In addition, discussions and debates were convened in many international gatherings, seminars and lectures.¹² The Joint Reporters also took into account recent multilateral developments such as the *Model Law* and the EU Insolvency Regulation, as well as numerous other attempts to develop modes of international cooperation in international insolvency.¹³

The report records that its authors 'are therefore confident that the Principles and Guidelines contained in this Report can be commended for endorsement by

11 Bruce Leonard, 'The Development of Court-to-Court Communications in Cross-Border Cases' (2008) 17 *Norton Journal of Bankruptcy Law and Practice* 619, 622. Bruce Leonard is Chair of the International Insolvency Institute.

12 *ALI III Report*, above n 10, 27.

13 *Ibid* 21.

leading domestic associations, courts, and other groups across the world',¹⁴ for use by jurisdictions across the world.

The focus of this article is on the Global Guidelines. By way of background the legislative and procedural framework for cross-border insolvency proceedings in Australia will be reviewed. It will be seen that although some reference is made to the *ALI NAFTA Guidelines* in some Australian jurisdictions, this is to a limited extent that appears to have had minimal impact. The Global Guidelines will then be examined against that background, and some cases which have involved direct communication between courts, or between courts and insolvency representatives, will be considered. The article discusses various means by which communication and cooperation might be fostered in insolvency proceedings in Australia which cross jurisdictional boundaries. In light of the commendation of the *ALI III Report*, some particular conclusions are drawn about the means by which Australia might derive benefits from the Global Guidelines.

II AUSTRALIAN INTERNATIONAL INSOLVENCY LAW AND PRACTICE

A Legislative Framework

1 *Cross-Border Insolvency Act 2008 (Cth)*

Australia implemented UNCITRAL's recommendation that member states adopt the *Model Law* as part of their domestic legislation with the enactment of the *Cross-Border Insolvency Act 2008* (Cth) ('*CBLA*'). That Act adopts the *Model Law*, largely unchanged. In this way Australia has endorsed an approach that accepts a lack of agreement on fundamental issues such as jurisdiction, and consequently recognises the likelihood of concurrent insolvency proceedings. It focuses on the recognition and enforcement of 'foreign proceedings' and coordination and cooperation between concurrent proceedings.

Prior to 2008, recognition of and cooperation with foreign insolvency adjudications or proceedings was primarily through a letter of request process from court to court. Section 29 of the *Bankruptcy Act 1966* (Cth) and sections 580–1 of the *Corporations Act 2001* (Cth) permit cooperation between Australian and foreign courts in external administration matters. These draw a distinction between the degree of cooperation afforded courts from 'prescribed' states¹⁵ (an obligation to act in aid of and be auxiliary to that court) and those from other states (a discretion whether to cooperate). The letter of request process is still available, although the *CBLA* prevails to the extent of inconsistency with existing

¹⁴ Ibid xviii.

¹⁵ *Corporations Regulations 2001* (Cth) reg 5.6.74 prescribes the Bailiwick of Jersey, Canada, Papua New Guinea, Malaysia, New Zealand, Singapore, Switzerland, the United Kingdom and the United States of America.

cooperation provisions.¹⁶ Parties in Australia have continued to make use of the letter of request process¹⁷ and it has also proved to be useful for situations where recognition and enforcement is not possible under the *CBIA*.¹⁸

Potentially supplementing the legislative framework, there have been statements in some common law jurisdictions to the effect that superior courts may rely upon an inherent jurisdiction to recognise and enforce foreign insolvency proceedings.¹⁹ More recent cases have raised questions about the extent of such comity in a cross-border insolvency context.²⁰

In Australia in 2011, the New South Wales Supreme Court considered, but did not determine, whether it might grant recognition and declaratory relief without reference to any statutory foundation.²¹ Justice Barrett referred to '[n]otions of comity that have, in recent years, facilitated recognition and effectuation of foreign insolvency administrations by the deployment of the local court's inherent jurisdiction.'²²

The New Zealand Law Commission has endorsed the granting of comity in an international insolvency based on 'the need to ensure that a debtor's property is realised as quickly as possible for the benefit of all creditors entitled to participate in the distribution of assets' as well as consistency with 'economies of scale in having an individual insolvency administrator act on behalf of all creditors, with a view, subject to priorities accorded by national legislation, to ensuring maximum returns to creditors on a *pari passu* basis'.²³

The Guide to Enactment of the *Model Law* also refers to the notion of comity:

To the extent that cross-border judicial cooperation in the enacting State is based on principles of comity among nations, the enactment of articles 25 to 27 offers an opportunity for making this principle more concrete and adapted to the particular circumstances of cross-border insolvencies.²⁴

16 *Cross-Border Insolvency Act 2008* (Cth) s 22.

17 *Re McGrath* [2008] NSWSC 881, [18].

18 *Gainsford v Tannenbaum* (2012) 216 FCR 543.

19 *McGrath v Riddell* [2008] 3 All ER 869, [24] (Lord Hoffman), [63] (Lord Walker).

20 *Rubin v Eurofinance SA* [2012] 3 WLR 1019 ('*Rubin*'). See also *PriceWaterhouseCoopers v Saad Investments Co Ltd (in liq)* [2013] CA (BDA) 7 CIV, citing *Rubin* [2012] 3 WLR 1019; *Cambridge Gas v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] 3 All ER 829 (Lord Hoffman).

21 *Re Chow Cho Poon (Private) Ltd* (2011) 80 NSWLR 507.

22 *Ibid* 525, [78].

23 New Zealand Law Commission, *Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model on Cross-Border Insolvency?*, Report No 52 (1999) [24] (footnotes omitted).

24 UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2013) [214] <<http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> ('*Guide to Enactment*').

2 Cooperation and Coordination under the Model Law

The *Model Law* is built on a number of key principles which encourage uniform approaches to recognition and enforcement.²⁵ The *cooperation and coordination* principle places obligations on both courts and insolvency representatives in different jurisdictions to communicate and cooperate to the maximum extent possible. In liquidation proceedings the aim is to maximise returns to creditors, for example by preventing dissipation of assets, or maximising the value of assets.²⁶ In reorganisation proceedings the aim is to facilitate protection of investment and the preservation of employment²⁷ through fair and efficient administration of the insolvency estate.²⁸

The *cooperation and coordination* principle is reflected primarily in Chapter IV of the *Model Law* (articles 25–7).²⁹ Chapter V complements these provisions, with article 29 making specific directives about procedures to be followed in cases where a foreign proceeding and a proceeding under Australian insolvency laws are taking place concurrently regarding the same debtor, and article 30 dealing with coordination when there is more than one foreign proceeding regarding the same debtor.

Article 25 provides that in matters referred to in article 1, which governs the scope of the application of the *Model Law*, ‘the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives,’³⁰ either directly or through a trustee or registered liquidator.³¹ It further provides that the court is entitled to communicate directly with, or to request information or

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- 25 The *access* principle establishes the circumstances in which a ‘foreign representative’ has rights of access to the receiving court in the enacting state from which recognition and relief is sought. Under the *recognition* principle, the receiving court may make an order recognising the foreign proceedings (either as a foreign main or non-main proceeding). The *relief* principle applies to three distinct situations. Interim relief may be granted to protect assets within the jurisdiction of the receiving court where an application for recognition is pending. Automatic relief applies if a receiving court recognises the foreign proceedings as a main proceeding. Discretionary relief is available, in addition to automatic relief, in respect of main proceedings and also available where a receiving court recognises the foreign proceedings as non-main proceedings: UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (2012) 13 <http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf> (‘*UNCITRAL Judicial Perspective*’).
- 26 Eg, when items of production equipment located in different jurisdictions are worth more if sold together than if sold separately: *Guide to Enactment*, above n 24, [211].
- 27 *Model Law*, UN Doc A/52/17, Preamble para (e).
- 28 *UNCITRAL Judicial Perspective*, above n 25, 46.
- 29 *Model Law*, UN Doc A/52/17, art 7 recognises that additional assistance may be provided by other domestic law, and seeks to preserve the efficacy of those laws.
- 30 *Model Law*, UN Doc A/52/17, art 25(1) (emphasis added). ‘Foreign representative’ is defined as ‘a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding’: at art 2(d).
- 31 In domesticating the *Model Law*, UN Doc A/52/17, a ‘foreign representative’ in bankruptcy proceedings refers to the trustee within the meaning of *Bankruptcy Act 1966* (Cth) s 5(1) and in corporate insolvencies it refers to a registered liquidator within the meaning of *Corporations Act 2001* (Cth) s 9: *Cross-Border Insolvency Act 2008* (Cth) s 11.

assistance directly from, foreign courts or foreign representatives. This avoids the need to rely on time-consuming procedures traditionally in use, such as letters rogatory. This is of critical importance in insolvency proceedings, where the value of assets can evaporate quickly with the passage of time.

Article 26 reflects the significant role played by persons appointed to administer assets of insolvent debtors in devising and implementing cooperative arrangements, within the parameters of their authority. It requires that, in matters referred to in article 1, the trustee or registered liquidator shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives. Further, the trustee is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

The cooperation mandated by articles 25 and 26 of the *Model Law* does not require any formal decision to recognise the foreign proceeding.³² An indicative list of the types of cooperation authorised by these articles is provided in article 27. The list is intended to be particularly helpful for jurisdictions, such as Australia, which have a limited tradition of direct cross-border judicial cooperation, and in jurisdictions where judicial discretion has traditionally been limited.³³ The examples provided are:

- (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.³⁴

Although article 27 envisages that the enacting state may wish to list additional forms or examples of cooperation in further subparagraphs, no additional forms or examples of cooperation are added to the *Model Law* as it has force in Australia.³⁵ As the list is inclusive only, this does not preclude other forms of cooperation.

Though in this way the *Model Law* encourages a more cooperative and coordinated approach to business rescue, or the efficient disposal of insolvent enterprises, it does not articulate how that communication and cooperation is to take place, beyond the examples set out in article 27. This is therefore a matter

32 *Guide to Enactment*, above n 24, [216].

33 *Ibid* [220].

34 *Model Law*, UN Doc A/52/17, art 27.

35 *Cross-Border Insolvency Act 2008* (Cth) s 18.

which must be determined by application of the laws and the practices of the relevant courts.³⁶

B Procedural Framework

The obligations imposed on Australian courts to communicate and cooperate with foreign courts or foreign representatives may be viewed as a component of their case management responsibilities. It is accordingly appropriate to consider briefly case management as it applies in Australian courts to corporations and insolvency matters, with particular examination of the procedural requirements for proceedings under the *Cross-Border Insolvency Act 2008* (Cth).

1 Case Management

An international trend in procedural reform over the past few decades has been a move away from allowing the parties complete control of their proceedings to a process in which the court takes greater control of the litigation. The strength of this trend is reflected in the *Principles of Transnational Civil Procedure*,³⁷ promulgated jointly by the ALI and the International Institute for the Unification of Private Law ('UNIDROIT') for application to transnational commercial transactions. In relation to case management, the *Model Principles* place responsibility on the court to direct the proceeding. They require that '[c]ommencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed.'³⁸

The shift to managerial judging has been generally reflected in Australia³⁹ even though the *Model Principles* have not been formally adopted in Australia. Case management moves control of the litigation process away from the parties and to the court; however it does not of itself 'alter in any way the purpose for which the litigation process is carried out.'⁴⁰ Accordingly, as case management became more interventionist, it has been viewed as necessary for the courts to underpin the managerial approach that judges now take to their task through a

36 For proceedings involving a debtor who is an individual, this will be the Federal Court of Australia; for proceedings involving a debtor other than an individual this will be either the Federal Court of Australia or the Supreme Court of a State or Territory: *Cross-Border Insolvency Act 2008* (Cth) s 10.

37 ALI and UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press, 2006) ('*Model Principles*').

38 Ibid 33 (Principle 14.1).

39 Managerial judging is now widely practised by judges of the Supreme Courts of the States, the Federal and Family Courts, the District and County Courts, and some lower courts: see, eg, Victorian Law Reform Commission, *Civil Justice Review: Final Report*, Report No 14 (2008) 297–8. For a detailed report incorporating a summary of the then case management initiatives and processes in Australian Courts and in the High Court of New Zealand and Supreme Court of New Zealand, see Australian Institute of Judicial Administration, 'Case Management Seminar' (Report, 25 February 2005).

40 John Sorabji, 'The Road to New Street Station: Fact, Fiction and the Overriding Objective' (2012) 23 *European Business Law Review* 77, 78.

statement of overriding objective or overriding purpose. In the Federal Court, for example, section 37M of the *Federal Court of Australia Act 1976* (Cth) provides:

37M The overarching purpose of civil practice and procedure provisions

- (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
 - (a) according to law; and
 - (b) as quickly, inexpensively and efficiently as possible.
- (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
 - (a) the just determination of all proceedings before the Court;
 - (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
 - (c) the efficient disposal of the Court's overall caseload;
 - (d) the disposal of all proceedings in a timely manner;
 - (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

Every jurisdiction in Australia has adopted an overriding purpose clause to similar effect.⁴¹

Two basic models of pre-trial case management have been generally identified.⁴² The first model involves 'individual lists' or 'docket lists'. In this model management involves continuous control by a judge, who personally monitors each case on an ad hoc basis. In the second model, involving a 'master list', control is exercised by requiring the parties to report to the court (often in the form of a master or registrar) at fixed milestones, and where the court exercises routine and structured control.

Although the master list is the method generally adopted in Australian courts, different jurisdictions often create special lists for particular types of claims. There are specialist lists which will apply to proceedings involving cross-border insolvencies in New South Wales and Victoria such that in those jurisdictions such matters will be individually case-managed by judges with specialist expertise. Specialist commercial judges are also likely to hear cross-border insolvency proceedings in the New South Wales and Queensland registries of the Federal Court. Although some case management will apply to cross-border insolvency proceedings in other jurisdictions, the proceedings will not necessarily be managed or heard by a judge with experience in proceedings of

41 *Court Procedures Rules 2006* (ACT) r 21; *Civil Procedure Act 2005* (NSW) ss 56–8; *Supreme Court Rules 1987* (NT) r 1.10; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Supreme Court Civil Procedure Rules 2006* (SA) r 3; *Supreme Court Rules 2000* (Tas) r 414A; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 1.14; *Rules of the Supreme Court 1971* (WA) rr 1.4A–1.4B. For consideration of the overriding purpose provisions generally, see Justice P A Bergin, 'Presentation of Commercial Cases in the Supreme Court of New South Wales' (Paper presented at the LexisNexis Commercial Litigation Conference, Melbourne, 26 October 2005) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_bergin261005>.

42 See, eg, Australian Law Reform Commission, *Judicial and Case Management*, Adversarial Background Paper 3 (1996).

this kind. Appendix A provides more detail about the general procedural approach to case management in each Australian jurisdiction.

2 *Proceedings under the Cross-Border Insolvency Act 2008 (Cth)*

The various case management practices in Australian jurisdictions must be considered in the context of specific procedural requirements for proceedings under the *Cross-Border Insolvency Act 2008* (Cth), as well as the provisions of the *Model Law*, and in particular the provisions relating to cooperation and communication between courts.

In the Federal Court, part 14 of the *Federal Court (Bankruptcy) Rules 2005* and division 15A of the *Federal Court (Corporations) Rules 2000* now contain procedural requirements for proceedings under the *Cross-Border Insolvency Act 2008* (Cth).⁴³ In each of the Australian Capital Territory,⁴⁴ New South Wales,⁴⁵ the Northern Territory,⁴⁶ South Australia,⁴⁷ Tasmania,⁴⁸ Victoria⁴⁹ and Western Australia⁵⁰ there is a similar division containing harmonised rules within the relevant Corporations Rules governing proceedings under the *Cross-Border Insolvency Act 2008* (Cth).

These rules explain the processes to be followed by applicants for orders under the various provisions of the *Model Law*. In broad terms, these include the requirement that an application by a foreign representative for recognition under article 15 of the *Model Law* is to be made by filing an originating process, with the foreign representative named as the plaintiff and the debtor as defendant, with supporting statements and affidavit to comply with the requirements of article 15 and section 13 of the *Cross-Border Insolvency Act 2008* (Cth). The rules also set out the procedural requirements for applications for provisional relief under article 19, for relief under article 21 after the court has made an order for recognition of a foreign proceeding, and for applications to modify or terminate an order for recognition of a foreign proceeding or for other relief under article 22. There are also associated rules relating to service of process, the giving of notice of applications to known creditors of the defendant and to the public, and the giving of notice of orders made in the proceedings.

43 For a useful discussion and application of the procedural requirements in div 15A of the *Federal Court (Corporations) Rules 2000* (Cth), and relating to an application for recognition of foreign proceedings under the *Cross-Border Insolvency Act 2008* (Cth) generally, see *Cussen v Bank of Nauru* (2011) 85 ACSR 524.

44 *Court Procedure Rules 2006* (ACT) sch 6 pt 6.15A.

45 *Supreme Court (Corporations) Rules 1999* (NSW) div 15A.

46 *Corporations Law Rules* (NT) div 15A.

47 *Corporations Law Rules 2003* (SA) div 15A.

48 *Supreme Court (Corporations) Rules 2008* (Tas) r 4 adopts the *Federal Court (Corporations) Rules 2000* (Cth) (with necessary modifications).

49 *Corporations Law Rules 2003* (Vic) div 15A.

50 *Supreme Court (Corporations) Rules 2004* (WA) pt 15A.

In the Federal Court⁵¹ and for each of the Supreme Courts in New South Wales,⁵² the Northern Territory,⁵³ Tasmania,⁵⁴ and Western Australia⁵⁵ these procedural rules are now supplemented by harmonised practice directions or notes relating to the issue of cooperation and communication in cross-border insolvencies. The Practice Directions first note that, by virtue of section 6 of the *Cross-Border Insolvency Act 2008* (Cth), the *Model Law*, with the modifications set out in part 2 of the Act, has the force of law in Australia. Reference is then made to chapter IV of the *Model Law*, comprising articles 25–7. Those articles, as modified by section 11 of the *Cross-Border Insolvency Act 2008* (Cth), are extracted. The Practice Directions then provide:

The form or forms of cooperation appropriate to each particular case will depend on the circumstances of that case. As experience and jurisprudence in this area develop, it may be possible for later versions of this Practice Note to lay down certain parameters or guidelines.

Cooperation between the Court and a foreign court or foreign representative under Article 25 will generally occur within a framework or protocol 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 framework or protocol. In doing so, the parties should have regard to:

- the *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases* published by The American Law Institute and The International Insolvency Association (available at <http://www.ali.org/doc/Guidelines.pdf>); and
- the Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings (available at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html, by clicking the link

51 Federal Court of Australia, *Practice Note CORP 2 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 22 November 2013. The contents of this Practice Note were previously contained in the practice note of the same name, issued on 1 August 2011. The new Practice Note followed the decision in *Yu v STX Pan Ocean Co Ltd (South Korea)*; *Re STX Pan Ocean Co Ltd (rec apptd in South Korea)* [2013] FCA 680 and includes an additional requirement which applies when an application under the Act relates to an owner of a ship or ships engaged in any commercial trade.

52 Supreme Court of New South Wales, *Practice Note SC Eq 6 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 3 November 2009. Paragraph 32 of the Supreme Court of NSW, *Practice Note SC Eq 4 – Corporations List*, 15 October 2008 provided:

Co-operation between the Court and a foreign representative under article 25 of the Model Law in a particular case should generally occur within a framework proposed by the parties and approved by the Court. In formulating a proposed framework, parties should have regard to the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published by The American Law Institute and The International Insolvency Institute and available at ali.org/doc/Guidelines.pdf.

The paragraph was deleted following the commencement of *Practice Note SC Eq 6*.

53 Supreme Court of the Northern Territory, *Practice Direction No 5 of 2009 – Corporations Law Rules Division 15A – Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*, 11 June 2009.

54 Supreme Court of Tasmania, *Practice Direction No 2 of 2009 – Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*, 27 February 2009.

55 Supreme Court of Western Australia, *Consolidated Practice Directions 2009 – 9.11 – Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*, 27 July 2012.

under the heading ‘35th Session, 17–21 November 2008, Vienna’ – the Draft is the last item under this heading).⁵⁶

There is also a practice note in the Supreme Court of Victoria.⁵⁷ The only difference between that Practice Note and those in the other state and territory jurisdictions is that it refers to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009⁵⁸ in lieu of the Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings.

It can be seen that the practice notes proceed on the basis that the cooperation mandated by the *Model Law* will ‘generally occur within a framework or protocol that has previously been approved by the Court, and is known to the parties.’⁵⁹ Such a framework or protocol is clearly encompassed by article 27(d) of the *Model Law*, which refers to ‘approval or implementation by courts of agreements concerning the coordination of proceedings’ as one of the means by which the cooperation referred to in articles 25 and 26 may be implemented. Cross-border insolvency agreements typically come into effect through negotiation between the parties before they are presented to courts – while providing for ‘the independence of the courts’ and affirming ‘the principle of comity’.⁶⁰ These negotiations may take place either prior to the commencement of or during the insolvency proceedings.

3 *Interaction between the Model Law and the Global Principles and Global Guidelines*

The *Model Law* reflects the centrality of cooperation in cross-border insolvency proceedings in order to achieve its public policy objectives, and this must encompass cooperation between the courts involved in the various proceedings, as well as cooperation between those courts and the insolvency representatives appointed in the various proceedings.⁶¹

In an address in 2005 on aspects of the *Model Law*, then proposed to be adopted in Australia, Barrett J of the Supreme Court of New South Wales referred to the articles in Chapter IV of the *Model Law* relating to cooperation

56 See, eg, Federal Court of Australia, *Practice Note CORP 2 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 22 November 2013, [5].

57 Supreme Court of Victoria, *Practice Note No 6 of 2011 – Cross-Border Insolvency Applications and Cooperation with Foreign Courts or Foreign Representatives*, 8 August 2011. This Practice Note also includes confirmation that all proceedings under the Act will continue to be filed in the Corporations List in the Commercial Court, information about the court in which the proceedings will be heard, and provides arrangements which permit urgent matters or matters involving courts operating in different time zones, to be heard outside normal sitting hours.

58 UNCITRAL, *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (United Nations Publications, 2010).

59 Federal Court of Australia, *Practice Note CORP 2 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 22 November 2013, [5].

60 UNCITRAL, above n 58, 32.

61 See the five objectives expressed in the Preamble to the *Model Law*, UN Doc A/52/17.

and coordination, and to the forms of cooperation referred to in article 27. His Honour proceeded:

It will be interesting to see where this leads. Under some of the protocols developed between the US and Canada, as I understand it, two courts may effectively sit together and decide some matter of common interest. The words of the Model Law here – ‘communicate directly with foreign courts or foreign representatives’ – leave open the possibility of a judge in Sydney or Melbourne or Brisbane phoning a judge of the US Bankruptcy Court for a chat about what order should be made in the case of X. Deeply rooted principle would, of course, be against this. Judges do nothing that might affect the position of X without giving X an opportunity to be heard. And judges do nothing in the absence of the public except in exceptional circumstances where the public interest in open justice is outweighed by some other public interest. The new concepts are going to have to accommodate the old ways in this area – and I do not think anyone should have in mind an image of cosy judicial fireside chats sorting out Enron or Parmalat or HIH.⁶²

More recently at a regional judicial seminar in 2010, and despite the adoption of the *Model Law* in the *Cross-Border Insolvency Act 2008* (Cth), the then Chief Justice of the Supreme Court of New South Wales, the Hon James Spigelman AC QC, described the possibility of direct communication between courts in the context of cross-border insolvencies as something which ‘remains controversial’.⁶³ His Honour referred to what he termed a ‘complete disconnect’ between the willingness and ability of commercial corporations to operate and interact across borders seamlessly, and the restrictions which still constrain public authorities, both regulatory and judicial, from acting in a similar manner. He noted that anything that can be interpreted as impacting on the sovereignty of a jurisdiction, by reason of the intrusion of any manifestation of the sovereign power of another jurisdiction, is subject to restrictions that have been abolished for private actors, including state owned commercial actors.⁶⁴ In his Honour’s view, however, direct communication between courts in the context of cross-border insolvency is ‘a particular manifestation of the new sense of international collegiality that has emerged amongst judges of different nations, who now meet in many different multilateral, regional and bilateral contexts.’⁶⁵ His Honour described such communication as something that should not now be regarded as

62 Justice R I Barrett, ‘Cross-Border Insolvency – Aspects of the UNCITRAL Model Law’ (Speech delivered at the 22nd Banking and Financial Services Law Association Annual Conference, Cairns, 6–7 August 2005) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/l_sc.nsf/vwPrint/l_SCO_barrett060805>.

63 J J Spigelman, ‘Cross-Border Issues for Commercial Courts: An Overview’ (Paper presented at the Second Judicial Seminar on Commercial Litigation, Hong Kong, 13 January 2010) <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2010.pdf> 17. See also UNCITRAL, above n 58, 20–1 for a consideration of the ‘hesitance or reluctance’ frequently demonstrated by courts of different jurisdictions to communicate directly with each other.

64 Spigelman, above n 63, 17. See also J J Spigelman, ‘The Global Financial Crisis and Australian Courts’ (2010) 10 *Australian Law Journal* 615, 622, where his Honour expressed similar views.

65 Spigelman, above n 63, 17–18.

unusual, subject to the obligation to ensure a fair trial and to obey the principles of natural justice.⁶⁶

The ALI III Global Principles build on the *ALI NAFTA Principles*. They may fairly be said to reflect a formulation, which may assist Australia and jurisdictions across the world, in determining exactly how the ‘new concepts’ of cooperation and coordination in the *Model Law* may accommodate the ‘old ways’ to which Barrett J refers. The Global Principles, which provide a broad framework for cooperation, have not been adopted in Australia.

The overriding objective of the Global Principles is to enable ‘courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor’s global assets, preserving where appropriate the debtors’ business, and furthering the just administration of the proceeding’.⁶⁷ They emphasise the central role courts play in furthering the efficient and timely administration of an international insolvency case and take a more comprehensive approach than the *Model Law* to the management by courts of international insolvency cases.

Costs feature in the Global Principles, in particular where there are concurrent and parallel proceedings, more than in the *Model Law*. The aims in Principle 2 specifically include reduction of costs and proportionate case management.⁶⁸ Principle 4 addresses Case Management and Principle 23 Communications between Courts. The latter requires courts, if necessary, to communicate with each other directly or through insolvency administrators so as to promote the ‘orderly, effective, efficient and timely administration of cases’.⁶⁹ Principle 23.2 requires the use of modern methods of communication, including commonly used and reliable electronic communications, as well as written documents in traditional ways. It also requires the use of the Global Guidelines.

These Global Guidelines were formulated for use in connection with the Global Principles. They focus on communication as an essential element of cooperation. They explain in a practical sense how the direct communication envisaged may occur in a manner consistent with the principles of natural justice and the obligation to ensure a fair trial, to which both Barrett J and former Spigelman CJ refer.

The Global Guidelines build on the *ALI NAFTA Guidelines*⁷⁰ and closely follow their original text, though individual headings have been added in the Global Guidelines. The Global Guidelines are not intended to be static, but rather

66 Ibid 17. Chief Justice Spigelman had earlier argued for improved communications between courts as assisting to minimise the degree of unfamiliarity which can sometimes be held by parties who become embroiled in litigation in a foreign jurisdiction, as well as minimising transaction costs: J J Spigelman, ‘Transaction Costs and International Litigation’ (2006) 80 *Australian Law Journal* 438, 444–5.

67 ALI III Global Principles, Principle 1.1: *ALI III Report*, above n 10, 1.

68 See, eg, Principle 2.3 (ii) and (iii): *ibid*. They encourage the courts’ use of protocols and independent intermediaries, providing far more detail than *Model Law*, UN Doc A/52/17, art 27.

69 ALI III Global Principles, Principle 23.1: *ALI III Report*, above n 10, 8.

70 Preamble to the Global Guidelines: *ALI III Report*, above n 10, 134–5 [1].

‘a flexible tool to manage cooperation and communication in each individual case’, which ‘should be available and open for adaption, modification and tailoring to fit the circumstances of individual cases.’⁷¹

As explained in the Preamble to the Global Guidelines, it is intended that a court that wishes to employ all or some of the Global Guidelines, with or without modifications, should formally adopt them before applying them. It is suggested that the court may wish to make its adoption contingent upon, or temporary until, other courts concerned in the matter also adopt the Global Guidelines. It is also suggested in the Preamble that the court may want to make the adoption or continuance of the Global Guidelines conditional upon the other court adopting them in substantially similar form, so as to ensure that judges, counsel and parties are not subject to different standards of conduct. Further, the Global Guidelines should only be adopted after such notice has been given to the parties and counsel as would be given under local procedures regarding any important procedural decision under similar circumstances.

III GLOBAL GUIDELINES FOR COURT-TO-COURT COMMUNICATIONS

A Content and Derivation

There are 18 Global Guidelines, along with extensive commentary and reporters’ notes accompanying each guideline.

Global Guideline 1 (Overriding Objective) sets out the overriding objective of the Global Guidelines. It stipulates that the Global Guidelines embody the overriding objective to enhance coordination and harmonisation of insolvency proceedings that involve more than one state through communications among the jurisdictions involved. It also makes it clear that the Guidelines are to function in the context of the Global Principles and therefore do not intend to interfere with the independent exercise of jurisdiction by national courts as expressed in Global Principles 13 and 14.⁷² This Guideline reflects as an overriding objective part of the sentiment expressed in the introduction to the *ALI NAFTA Guidelines*.

Global Guideline 3 (Court to Court Communication) is in the same terms as Guideline 2 of the *ALI NAFTA Guidelines*. It provides that a court may communicate with another court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonising

⁷¹ Ibid 136 [7].

⁷² Global Principle 13 (International Jurisdiction) chooses the forums which will have jurisdiction to open an insolvency case for a debtor, referring as does the *Model Law*, UN Doc A/52/17, to the place of the debtor’s ‘centre of main interests’, or where the debtor has an ‘establishment.’ Global Principle 14 (Alternative Jurisdiction) provides for alternative jurisdiction for the forum to open an insolvency case under local law if the local court has no international jurisdiction. This proceeding is usually restricted to local assets and operations and the local court is to cooperate with the court in the jurisdiction of the ‘main proceeding.’ Australia has not adopted the Global Principles.

proceedings before it with those in the other jurisdiction. The entitlement to communicate directly with other courts is provided in article 25(2) of the *Model Law*.⁷³ Since article 25(1) of the *Model Law* requires that the court ‘shall cooperate to the maximum extent possible’ (emphasis added) with foreign courts or foreign representatives, the obligation under the *Model Law* is more extensive in this respect than the Guideline. The qualifying words in the *Model Law* that the cooperation be ‘to the maximum extent possible’ will absolve an Australian Court from any infringement of its duty if the foreign court is not subject to a corresponding obligation⁷⁴ and in the exercise of its discretion declines to engage in a process of cooperation.

The right is qualified by Global Guideline 2 (Consistency with Procedural Law), which imposes an obligation on the court, except in circumstances of urgency, to be satisfied that its communication is consistent with the applicable rules of procedure. As is true for most common law countries, ethical rules in Australia prohibit communications by one party to the court in the absence of the other party.⁷⁵ In other jurisdictions, the prohibition may be weaker, or may even not exist at all. This Guideline makes it clear that arrangements for court-to-court communications in cross-border cases must not promote or condone any contravention of domestic rules, procedures or ethics.⁷⁶

Global Guideline 2 envisages that parties will in certain cases invite a court to apply or adopt one or more of the Global Guidelines,⁷⁷ as this Guideline also stipulates that ‘wherever possible’ the court intends to apply the Global Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should be formally adopted in each individual case before they are applied. It is explicitly stated that coordination of Global Guidelines between Courts is desirable, and authority is given to officials of both

73 See *Parbery; Re Lehman Brothers Australia Ltd (in liq)* (2011) 285 ALR 476.

74 In the United Kingdom, for example, art 25(1) of the *Model Law*, UN Doc A/52/17, has been enacted in modified terms under which the court ‘may’, in lieu of ‘shall’, ‘cooperate to the maximum extent possible.’ The mandatory form of drafting adopted in the Australian enactment of the *Model Law* is also adopted in New Zealand (*Insolvency (Cross-Border) Act 2006* (NZ) sch 1) and in the US (11 USC § 1525(a) (2013)).

75 Rule 22.5 of the *Australian Solicitors’ Conduct Rules 2011* provides:

A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent’s absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

Related obligations are imposed by rules 22.5 and 22.7.

76 Leonard, above n 11, 622.

77 *ALI III Report*, above n 10, 144.

courts to communicate in accordance with Global Guideline 9(d)⁷⁸ with regard to the application and implementation of the Global Guidelines.

In general terms this Guideline reflects due process, which requires that there be legal certainty about the procedural rules that apply, and that all parties involved in a proceeding know in advance what those rules are. Due process also requires that the process be transparent, that parties are notified of any communications that may take place between courts, and that parties are able to be heard on any issues that arise, whether by personal appearance or through written submissions.⁷⁹ However, the express statement in the Global Guidelines may be expected to assist in ensuring that due process is followed.⁸⁰ The insertion of the words ‘in each individual case’, coupled with the phrase ‘in whole or in part and with or without modifications’ in relation to the application of the Guidelines, ensures that a court retains its full authority in each individual case and may choose not to be bound by one or more of the Guidelines. This Guideline is very similar to Guideline 1 of the *ALI NAFTA Guidelines*, though the clarification that the Guidelines to be employed should be formally adopted ‘in each individual case’ is not included in the *ALI NAFTA Guidelines*.

Global Guideline 4 (Court to Insolvency Administrator Communication) is in the same terms as Guideline 3 of the *ALI NAFTA Guidelines*. It authorises a court to communicate with an insolvency administrator or an authorised representative of the court in another jurisdiction in connection with the coordination and harmonisation of the proceedings before it with the proceedings in the other jurisdiction. The entitlement to communicate directly with foreign representatives is provided in article 25(2) of the *Model Law*. As discussed in the context of court-to-court communications, the obligation under the *Model Law* is more extensive in this respect than the Guideline, because article 25(1) of the *Model Law* also requires that the court ‘shall cooperate to the maximum extent possible’ (emphasis added) with foreign courts or foreign representatives.

It has been seen that it may well be the case that the judge before whom a cross-border insolvency proceeding is being heard may not have experience in proceedings of this type. Even if familiar with the nature of cross-border insolvency proceedings, the judge is unlikely to have specific knowledge of the issues raised on the initial application to the court. As these cases will frequently involve large sums of money and complex issues requiring urgent resolution,⁸¹

78 Global Guideline 9(d) authorises court personnel other than judges to ‘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.’: *ibid* 15.

79 For consideration of the historical development and contemporary expression of the due process principle in Australia, see Will Bateman, ‘Procedural Due Process under the Australian Constitution’ (2009) 31 *Sydney Law Review* 411, 413–19.

80 *UNCITRAL Judicial Perspective*, above n 25, 8.

81 *Model Law* art 17 emphasises the need for speedy resolution of applications for recognition of a foreign proceeding.

the judge may require assistance from the foreign representative, generally or through his or her legal counsel, and this could include briefs and evidence.⁸²

Global Guideline 5 (Insolvency Administrator to Foreign Court Communication) authorises a court to permit a duly authorised 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 authorised representative of the foreign court on such terms as the court considers appropriate. The Guideline is essentially the same as Guideline 4 of the *ALI NAFTA Guidelines*.

The entitlement of a trustee or registered liquidator, in the exercise of their functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives is provided in article 26(2) of the *Model Law*. Since article 26(2) of the *Model Law* requires that the trustee or registered liquidator ‘shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible’ (emphasis added) with foreign courts or foreign representatives, this obligation under the *Model Law* is also more extensive than the Guideline. The qualifying words in the *Model Law* that the cooperation be ‘to the maximum extent possible’ will absolve a trustee or registered liquidator from any infringement of its duty if the foreign courts or foreign representatives are not subject to a corresponding obligation and decline to engage in a process of cooperation.

The Global Guidelines also deal with the receiving and handling of communications from a foreign court or from an authorised representative of the foreign court or from a foreign insolvency administrator. Under Global Guideline 6 (Receiving and Handling Communication) a court may receive such communications and should respond directly if the communication is from a foreign court,⁸³ and may respond directly or through an authorised representative of the court or through a duly authorised insolvency administrator if the communication is from a foreign insolvency administrator, subject to local rules concerning ex parte communications.

This Guideline, which is in the same terms as Guideline 3 of the *ALI NAFTA Guidelines*, provides clarity about the procedure to be adopted in these circumstances which is not made express in the *Model Law*.

‘Communication of information by any means considered appropriate by the court’ is one of the examples, provided by article 27 of the *Model Law*, of the means by which the cooperation referred to in articles 25 and 26 of the *Model Law* may be implemented. However, the Global Guidelines provide procedural elaboration by specifically sanctioning wide-ranging methods of communication. Global Guideline 7 (Methods of Communication) permits ‘to the fullest extent

82 *UNCITRAL Judicial Perspective*, above n 25, [23].

83 This is subject to Global Guideline 8 in the case of two-way communication. That guideline provides a number of procedural safeguards when the communication is by means of telephone or video conference call or other electronic means.

possible under any applicable law' communications from a court to another court by the court sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other court, or by directing counsel or a foreign or domestic insolvency administrator to transmit or deliver copies of any documents that are filed or to be filed with the court to the other court in an appropriate manner. In either case, advance notice should be given to counsel for affected parties in the manner the court considers appropriate.

Subject to the procedural safeguards in Guideline 8 (E-Communication to Court), as outlined below, the Guideline also sanctions the participation in two-way communications with the other court by telephone or video conference call or other electronic means.

Global Guideline 7 corresponds generally with Guideline 6 of the *ALI NAFTA Guidelines*, although the ALI NAFTA guideline does not include the qualification that the communication be 'to the fullest extent possible under any applicable law.' The addition of that qualification in the Global Guidelines provides the flexibility that may be required in the event that information to be communicated is possibly of a non-public nature, either by law or by contract, or contains data that is protected from disclosure by rules of privacy, cross-border data exchange, or protection of computerised personal data or business secrecy.⁸⁴

Procedural safeguards, which are not made express in the *Model Law*, are contained in Guidelines 8 (E-Communication to Court) and 9 (E-Communication to Insolvency Administrator). Global Guideline 8 corresponds generally with Guideline 7 of the *ALI NAFTA Guidelines*. The safeguards under this guideline apply in the event of communications between courts by means of telephone or video conference call or other electronic means.⁸⁵ Unless directed by either of the two courts:

- (a) Counsel for all affected parties should be entitled to participate in person⁸⁶ 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 that, with the approval of both courts, should be treated as an official transcript of the communication;

⁸⁴ *ALI III Report* above n 10, 146.

⁸⁵ The Global Guidelines, as incorporated into the report to the ALI dated March 2012, *ALI III Report*, above n 10, appear to include an error in that Global Guideline 8 applies its requirements to 'communications between the courts in accordance with Global Guidelines 2 and 5 by means of telephone or video conference call or other electronic means ...'. Guideline 7 of the *ALI NAFTA Guidelines*, on which Global Guideline 8 is based, refers to 'communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means ...'. It seems clear Global Guideline 8 is intended to refer to the comparable Global Guidelines, ie, Global Guidelines 3 and 6.

⁸⁶ Participating 'in person' includes participating literally 'in person' or otherwise by conference call or videoconference: *ALI III Report*, above n 10, 147.

- (c) Copies of any recording of the communication, or 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.
- (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.⁸⁷

The provision made for ‘personnel’ other than judges in each court to communicate in order to establish appropriate arrangements for the communication does not include the insolvency administrator, even if that person might be seen, according to the applicable law, as a representative of the court. It is intended to refer to assistants to the judges or to the court, who may be involved in arranging agendas and setting up and breaking off any means of communication.⁸⁸

The corresponding safeguards to those under Global Guideline 8, expressed in Global Guideline 9, apply to telephone or other electronic communications between the court and an authorised representative of the foreign court⁸⁹ or a foreign insolvency administrator in accordance with Global Guidelines 4 and 6. The Guideline is essentially the same as Guideline 8 of the *ALI NAFTA Guidelines*.

Global Guideline 10 (Joint Hearing) corresponds with Guideline 9 of the *ALI NAFTA Guidelines*. It provides for a court to conduct a joint hearing with another court. The conduct of a joint hearing is not one of the examples provided in article 27 of the means by which the cooperation referred to in articles 25 and 26 of the *Model Law* may be implemented.⁹⁰ A number of procedural requirements apply, though the court may make a contrary order, and a previously approved protocol applicable to the joint hearing may otherwise provide. The requirements are that:

- (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 assessable system before 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.

87 Ibid 14–15.

88 Ibid.

89 ‘Authorised representative’ in the meaning of the Global Guidelines includes an intermediary within the meaning of Global Principle 23.4. See *ALI III Report*, above n 10, 188.

90 *Cross-Border Insolvency Act 2008* (Cth) s 18 states: ‘To avoid doubt, no additional forms or examples of cooperation are added by subparagraph (f) of Article 7 of the Model Law (as it has the force of law in Australia’. However the art 27 list is inclusive and so does not preclude other forms of cooperation.

- (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 Global Guideline 8(b), the court should be entitled to communicate with the other court in advance of the 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 or administrative matters relating to the joint hearing.
- (e) Subject to Global Guideline 8(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.⁹¹

Article 16(2) of the *Model Law* allows the Court to presume that documents submitted in support of an application for recognition are authentic, whether or not they have been legalised. Global Guidelines 11 (Authentication of Regulations) and 12 (Orders) correspond with Guidelines 10 and 11 of the *ALI NAFTA Guidelines*. They extend beyond documents supporting an application for recognition, and provide presumptions concerning the authentication of regulations and orders. Global Guideline 11 requires the court to recognise and accept that provisions of statutes, regulations and rules of court of general application applicable to the proceedings in the other jurisdiction are authentic without the need for further proof or exemplification, except on proper objection on valid grounds and then only to the extent of the objection.⁹²

Global Guideline 12 provides similar assistance with establishing that orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates.⁹³ This is subject to proper reservations the court may view as appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders.

Global Guideline 13 (Service List) provides an additional procedure not expressed in the *Model Law*. It permits the court to coordinate proceedings before it with proceedings in another jurisdiction by establishing a service list that may include parties entitled to receive notice of proceedings before the court in the other jurisdiction. Orders may be made that such parties be provided or served with any materials served for the purposes of the proceedings before the court, in the manner specified in the order. The manner specified may be one of a

91 *ALI III Report*, above n 10, 15–16.

92 For detailed examination of the usual requirements in each Australian jurisdiction in relation to the proving of foreign written laws, see J D Heydon, *Cross on Evidence* (LexisNexis, 9th ed, 2013) [41005], [41020]; James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400; P L G Brereton, 'Proof of Foreign Law: Problems and Initiatives' (2011) 85 *Australian Law Journal* 554.

93 See, eg, *Evidence Act 1995* (Cth) s 157 on public documents relating to court processes. For a comprehensive discussion, see Heydon, above n 92, [41095] ff.

range of methods set out in the Guideline, or such other manner as may be directed by the court in accordance with the procedures applicable in the court. This Guideline is equivalent to Guideline 12 of the *ALI NAFTA Guidelines*.

Global Guideline 14 (Limited Appearance in Court) corresponds with Guideline 13 of the *ALI NAFTA Guidelines*. It gives a specific power for the court to 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 authorised 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.

This guideline provides an important safeguard against potential miscarriages of justice through de facto denial of due process and opportunity to be heard. Without an assurance that the act of intervening in the proceedings for the purpose of informing the court of relevant matters, or to make representations on the merits, an insolvency administrator may be compelled not to engage in the proceedings in order to ensure that neither the insolvency administrator or the estate for which the administrator is responsible, becomes amenable to the potentially unlimited jurisdiction of the foreign court.⁹⁴

In broad terms, the Global Guidelines 15–17, which are to the same effect as Guidelines 14–16 of the *ALI NAFTA Guidelines*, provide power for the court to limit the extent of any stay or other orders made so as not to apply to applications brought before the court in the foreign jurisdiction (Guideline 15 Applications and Motions); encourage court-to-court communications where the interests of justice so require for purposes of harmonising proceedings before the court with proceedings in another jurisdiction wherever there is commonality among the issues and/or parties in the proceedings (Guideline 16 Coordination of Proceedings); and provide mechanisms for the amendment, modification and extension to directions issued by the court under the Global Guidelines as appropriate to reflect changes and developments in the proceedings before both courts (Guideline 17 Directions).

Global Guideline 18 (Powers of the Court) confirms that the arrangements contemplated under the Global Guidelines do not constitute a compromise or waiver by the court of any powers, responsibilities or authority, or any waiver by any of the parties of any of their substantive rights and claims, and do not constitute a substantive determination of any matter in controversy before either court. Guideline 17 of the *ALI NAFTA Guidelines* is to the same effect.

B Adoption of the Global Guidelines: Case Examples

Although the Global Guidelines are comparatively new, they have been assessed as ‘world standard’ and suitable for application in a ‘wide and diverse array of national insolvency systems and legal traditions’.⁹⁵ Also, they are very

⁹⁴ *ALI III Report*, above n 10, 150–1.

⁹⁵ *Ibid* 27.

closely based on the *ALI NAFTA Guidelines*. There are now many cases in the United States and Canada in which the *ALI NAFTA Guidelines* have been adopted by reference in cross-border insolvency agreements.⁹⁶

In 2001 in *Re Matlack Inc.*,⁹⁷ for example, an insolvency protocol was developed to coordinate insolvency proceedings relating to a bulk group in the business of transporting chemical products throughout the United States, Mexico and Canada pending in Canada and in the United States. The courts in both Canada and the United States agreed to recognise the respective foreign court's stay of proceedings to prevent adverse actions against the debtors' assets.

The protocol covered an extensive range of matters now commonly dealt with in cross-border insolvency agreements, including background purpose and goals, and comity and independence of the courts.⁹⁸ The debtors, their creditors and other interested parties could appear before either court, and would by virtue of such appearance be subject to that court's jurisdiction. The agreement also dealt with the retention and compensation of professionals, notice requirements and the preservation of creditors' rights.

Specific provisions of the protocol governed cooperation and communication, and they incorporated the *ALI NAFTA Guidelines*. In the case of any conflict between the terms of the protocol and the terms of the *ALI NAFTA Guidelines*, the terms of the protocol were to govern. Justice Farley approved the proposed protocol from the Canadian side, to be effective once approved by the United States Bankruptcy Court for the District of Delaware. In doing so, his Honour noted the Guidelines had been recently developed as a practical aid as part of the Transnational Insolvency Project of the American Law Institute. As this appeared to be the first opportunity to incorporate the Guidelines, a copy of the Guidelines and the protocol were annexed to the reasons 'for the benefit of other counsel involved in anything similar.'⁹⁹

There have also been several examples of the conduct of cross-border joint hearings.¹⁰⁰ In *Re PSI Net Inc.*,¹⁰¹ for example, a joint hearing was held by video link, involving judges in the United States and Canada, and representatives for all parties. The judge in each jurisdiction heard argument on the substantive issues with which his court was concerned. The representatives and the judge in each jurisdiction were able to see and hear the substantive argument in the other

96 See, eg, UNCITRAL, *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009) <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html>. See also International Insolvency Institute, *Welcome to the Institute Website* (2013) <www.iiiglobal.org>.

97 (2001) 26 CBR (4th) 45; *Re Matlack Systems Inc* (Bankr D Del, No 01-1114, 24 May 2001).

98 See UNCITRAL, above n 58, 115 n 1 for an outline of matters ordinarily included in agreements there referred to as 'standard' insolvency agreements.

99 *Re Matlack Inc* (2001) 26 CBR (4th) 45, [13].

100 As now provided for under Global Guideline 10.

101 28 CBR (4th) 95; *Re PSINet Inc* (Bankr SD NY, No 01-13213, 10 July 2001) (cross-border insolvency protocol and order approving protocol). See also *Bruce Agra Food Inc v Everfresh Beverages Inc (interim rec apptd)* (1996) 45 CBR (3d) 169; *Re Quebecor World Inc* [2008] QCCS 134; *Re Quebecor World Inc* (Bankr, SD NY, No 08-10152, 17 April 2008).

jurisdiction but did not actively participate in that part of the hearing. Once the substantive arguments in each court had been completed, the hearing was adjourned and, with the consent of the parties, both judges spoke to each other by telephone, in private. The hearing was subsequently resumed, and each judge made orders in their respective proceedings. Although one judge confirmed that an outcome had been agreed by both, it was clear that each judge had independently reached a decision in respect of only the proceeding with which he was dealing.¹⁰²

Reports from participants in such joint hearings have indicated each court has obtained greater information about what was occurring in the other jurisdiction and made positive attempts to coordinate proceedings, with the result that returns to creditors were maximised.¹⁰³

Although Australian experience and jurisprudence in this area is undeveloped, the Lehman Australia insolvency involved the adoption of protocols and direct court-to-court communication. Representatives in Australia were party to a cross-border insolvency agreement which incorporated in part the *ALI NAFTA Guidelines*.¹⁰⁴ The collapse of the Lehman Brothers enterprise involved different types of insolvency proceedings and different administering bodies (judicial, administrative, governmental, regulatory) across some 16 jurisdictions. The initial signatories of the cross-border insolvency agreement included the United States debtors and the representatives of proceedings in Germany, Hong Kong SAR, Singapore and Australia. The agreement was intended to cover all proceedings spread over 16 jurisdictions.

To further the aims of the agreement, and recognising that not all representatives would be able or willing to sign the agreement, the agreement expressly permitted adherence to its terms without formal signature. The provisions of the agreement covered communication among insolvency representatives, among courts and among creditor committees, and they incorporated the *ALI NAFTA Guidelines* by reference where applicable.

There has also been an example of some direct communication emanating from an Australian court to a foreign court, though not to the extent that was sought. In *Parbery; Re Lehman Brothers Australia Limited*¹⁰⁵ the liquidators of Lehman Brothers Australia Limited (in liquidation) applied ex parte to Jacobson J, as the docket judge for matters arising in that liquidation. His Honour was asked to exercise his powers under the *Cross-Border Insolvency Act 2008* (Cth) to communicate directly with the docket judge who was responsible for administering the insolvencies of the Lehman group of companies in the US, and who was also the docket judge for a proceeding in the US, the outcome of which

102 The information provided about this case is as reported in *UNCITRAL Judicial Perspective*, above n 25, 68–9. This records this information as being based on the transcript of the hearing by video link between the two courts, 26 September 2001, on file with the UNCITRAL secretariat.

103 Ibid 69.

104 *Re Lehman Brothers Holdings Inc* (Bankr, SD NY, No 08–13555, 17 June 2009).

105 (2011) 285 ALR 476.

had a bearing on the ability of the liquidators in Australia to collect and realise the assets of Lehman Brothers Australia Ltd for the benefit of creditors. The applicants submitted that the direct communication sought may assist in resolving conflicting orders of courts in England and the US on a question relating to priority over certain securities.

Without deciding whether article 25 was wide enough to permit him to seek the assistance of the United States court in the manner sought, Jacobson J did not consider that it was appropriate to do so at that time. The reasons his Honour provided for this view included: that it might pre-empt the United States court decision on a proceeding before it and in that way impinge on the principle of comity which is based on common courtesy and mutual respect and be seen by the United States judge as an unwarranted interference; the application had been made ex parte and all concerned parties had not been heard; cooperation between the Australian court and any foreign court would generally occur within a framework or protocol that had previously been approved by the court, and was known to the parties in the particular proceeding,¹⁰⁶ and no protocol had been established in this case;¹⁰⁷ and that it was clear from the history of the proceedings in England and in the United States that the United States judge was acutely aware of the conflict between the authorities in those jurisdictions.

Nevertheless, Jacobson J agreed that it might be appropriate to write to the United States judge to inform him of the application and to ask whether a protocol for future communication might be established. A draft of the letter to be sent to the United States court was appended to the judgment, and the liquidators were provided with the opportunity to comment on the draft within a stipulated time.

IV FOSTERING COMMUNICATION AND COOPERATION IN AUSTRALIA IN CROSS-BORDER LITIGATION

It is apparent that Australia has yet to embrace fully direct communication with foreign courts and foreign representatives. The question arises as to what might be done to facilitate communication and cooperation in cross-border insolvency proceedings involving Australia whenever a benefit might be gained from engaging in structured communications with foreign courts or foreign representatives. Consideration should be given in particular to the steps which might be taken to promote the adoption of the Global Guidelines. Wider benefits may ultimately follow, as the Global Guidelines might well be applied or adapted for court-to-court communication in other matters. Former Chief Justice of the

106 Justice Jacobson referred in this context to the Federal Court of Australia, *Practice Note Corp 2 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 1 August 2011, [5] and to the *ALI NAFTA Guidelines*.

107 While the Australian insolvency representatives were signatories to the protocol approved by the US Bankruptcy Court, it had not been before an Australian court.

Supreme Court of New South Wales, the Hon James Spigelman AC QC has suggested, for example, that in the context of freezing and search orders and a discussion of the ALI UNIDROIT principles:

Wherever genuine and enforceable reciprocity is proffered, it is in the self interest of every jurisdiction to offer such assistance upon request. The most efficacious mode of determining such matters, which will minimise delay and the possibility of leaks, will be to establish a mechanism for direct communication between courts. In an international context this may require treaty and/or legislative support. However, any jurisdiction can expressly adopt legislation or rules of court which proffer such assistance to any other jurisdiction which will reciprocate.¹⁰⁸

A New and Strengthened Practice Directions

In addition to the positive judicial endorsement and adoption of the *ALI NAFTA Guidelines* as has been discussed, a number of foreign courts have promulgated Practice Directions to encourage the adoption of the Guidelines. In Canada, most major reorganisations proceed in the Toronto Commercial Division of the Ontario Superior Court of Justice.¹⁰⁹ That court approved the adoption of the *ALI NAFTA Guidelines* by 'Protocol Concerning Court-to-Court Communications in Cross Border Cases' dated 4 April 2004.¹¹⁰ The Commercial List endorses the application of the guidelines in court-to-court communications between Canada and other countries, and as between Ontario and the other provinces and territories. The Protocol makes it explicit that the Guidelines are to apply only in a manner which is consistent with the local court rules and practice. The many cases in that court which have subsequently adopted the Guidelines suggest that the Protocol has had considerable impact.

The Superior Court of British Columbia has also approved the use of the *ALI NAFTA Guidelines*, with the relevant Practice Direction in that jurisdiction applying not only to insolvency and restructuring cases, but to all cases within the Court's jurisdiction. The Practice Direction in that jurisdiction not only confirms the Court's adoption of these guidelines but also directs that the Guidelines 'should be followed in all cross-border actions requiring court-to-court communications including, but not limited to, insolvency and family proceedings.'¹¹¹ This practice direction also makes it explicit that, unless otherwise ordered by the court, the adoption of the guidelines does not change any requirement to comply with rules or procedures governing proceedings in British Columbia.

The Supreme Court of Bermuda has also adopted the *ALI NAFTA Guidelines*. The guidelines are described as representing approaches that are likely to be

108 Spigelman, above n 63, 15–16.

109 Leonard, above n 11, 626.

110 See *Re Systech Retail Systems Corporations* (2003) CarswellOnt 353; *Re Systech Retail Systems Corporations* (Bankr, ED NC, No 03–00142–5–ATS, 30 January 2003).

111 Supreme Court of British Columbia, *Practice Direction No 6 of 2010 – 'Court to Court Communications in Cross-Border Cases'*, 1 July 2010, 1.

highly useful in achieving efficient and just resolution of cross-border insolvency cases, and '[t]heir use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.'¹¹²

As has been seen, there are practice notes in six Australian jurisdictions which acknowledge that cooperation between the court and a foreign court or foreign representative under article 25 of the *Model Law* will generally occur within a framework or protocol that has been previously approved by the court and is known to the parties in the particular proceedings. Those practice notes require parties, if drafting a framework or protocol to govern communication between the Court and a foreign court or foreign representative, to have regard to the *ALI NAFTA Guidelines*.

It has been shown that the *ALI NAFTA Guidelines* vary in only minor respects from the Global Guidelines. The Global Guidelines are commended by its joint reporters, with apparent justification, for use in jurisdictions across the world.

At a minimum, it is suggested as appropriate for those courts in Australia that currently include reference to the *ALI NAFTA Guidelines*,¹¹³ to amend the relevant practice directions to refer to the Global Guidelines in lieu of the *ALI NAFTA Guidelines*. Consideration should also be given to strengthening the terms of the Practice Directions. It is suggested that it would be appropriate, for example, to adopt the approach of the Superior Court of British Columbia, so as to require the adoption of the Global Guidelines, subject to any other rule and procedure governing the proceedings in the particular court.

There is clearly scope for similar practice directions in the Australian Capital Territory, South Australia and Queensland, where there is currently no reference to any of the guidelines for court-to-court communication by legislation or practice note.

B Harmonisation of Procedures for Commercial Litigation Crossing Borders

It is the differences in legal traditions of the various nations which may be involved in cross-border insolvency litigation, particularly between those from

¹¹² Supreme Court of Bermuda, Commercial Court, *Practice Direction Circular No 17 of 2007 – Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, 1 October 2007, 2.

¹¹³ Eg, Federal Court of Australia, *Practice Note CORP 2 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 22 November 2013; Supreme Court of New South Wales, *Practice Note SC Eq 6 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 3 November 2009; Supreme Court of the Northern Territory, *Practice Direction No 5 of 2009 – Corporations Law Rules Division 15A – Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*, 11 June 2009; Supreme Court of Tasmania, *Practice Direction No 2 of 2009 – Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*, 27 February 2009; Supreme Court of Western Australia, *Consolidated Practice Directions 2009 – 9.11 – Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*, 27 July 2012. Supreme Court of Victoria, *Practice Note No 6 of 2011 – Cross-Border Insolvency Applications and Cooperation with Foreign Courts or Foreign Representatives*, 8 August 2011.

the common law and those from the civil law tradition, that create considerable uncertainty for the judges and practitioners involved. An increase in the similarity of or harmonisation in procedures for commercial litigation crossing borders is one way in which this uncertainty might be reduced.

It is suggested that Australia should give serious consideration to the possibility of adopting the *Model Principles*, promulgated jointly by the ALI and UNIDROIT for application to transnational commercial transactions. These combine features of both the civil and common law traditions, and make provision with respect to many aspects of civil procedure, including case management, joinder of parties, service of process, exchange of evidence, burden of proof and cross-examination of witnesses.

As has been suggested by Beaumont J,¹¹⁴ and by Einstein J and Alexander Phipps,¹¹⁵ the adoption of the ALI UNIDROIT Project into Australian domestic procedural law would present no significant problem for Australian commercial courts because many of the provisions contained within the text of the ALI UNIDROIT Project take a broadly similar approach to Australian procedural law.

In a similar vein, Spigelman CJ (as he then was) has described the *Model Principles* as ‘a serious attempt to develop a hybrid model which is understandable to lawyers from both civil and common law traditions.’¹¹⁶ He said

The *Principles* represent a checklist which it is appropriate for any jurisdiction to use as a reference for purposes of assessing its own procedures. An increase in the degree of similarity or of harmonisation in procedures for commercial litigation between jurisdictions would reduce the sense of unfamiliarity, even of bewilderment, which can sometimes be held by parties and their legal advisors about becoming embroiled in litigation in a foreign jurisdiction.¹¹⁷

C Increasing Awareness of Global Guidelines

If Australia were to adopt the *Model Principles* promulgated jointly by the ALI and UNIDROIT, this would no doubt increase the degree of harmonisation in procedures for commercial litigation between jurisdictions. However it is unlikely this will occur in the short term.

It is suggested, however, that a range of steps might be taken in the short term to assist judges and practitioners to increase their familiarity with the Global Guidelines, and in general with the various means by which cooperation and communication might be enhanced.

A valuable resource which is available and might be promoted for use by the judiciary and insolvency practitioners is the *UNCITRAL Practice Guide*. This

114 Bryan Beaumont, ‘The Proposed ALI / UNIDROIT Principles of Transnational Civil Procedure and Their Relationship to Australian Jurisdictions’ (2001) 6 *Uniform Law Review* 951, 959.

115 Clifford R Einstein and Alexander Phipps, ‘The Principles and Rules of Transnational Civil Procedure and Their Application to New South Wales’ (2004) 9 *Uniform Law Review* 815.

116 Spigelman, above n 63, 10.

117 Ibid 10–11 (emphasis added).

was endorsed by the General Assembly in 2010.¹¹⁸ The *UNCITRAL Practice Guide* discusses, by reference to actual cases, various means by which cooperation among insolvency representatives, courts or other competent bodies may be enhanced to increase the fairness and efficiency of the administration of the estates of insolvent debtors who have assets or creditors in more than one jurisdiction. It discusses the cross-border insolvency agreement in some detail, and this is a particularly valuable mechanism which may be used to facilitate cooperation. In most cases it will be necessary or appropriate for the court to approve such an agreement, though this will depend on the subject matter of the particular cross-border agreement. The *Practice Guide* discusses examples of such agreements.¹¹⁹

The courts may also assist to raise awareness relating to cross-border insolvency agreements by annexing a copy of any protocol formally adopted. In *Re Matlack Inc*,¹²⁰ for example, Farley J noted when approving the proposed Protocol from the Canadian side, that this appeared to be the first opportunity to incorporate the then recently developed *ALI NAFTA Guidelines*. His Honour annexed a copy of the Guidelines and the Protocol to the reasons 'for the benefit of other counsel involved in anything similar.'¹²¹

This approach is encouraged on an international scale by the International Insolvency Institute. In his foreword to the *ALI NAFTA Guidelines* as Chair of the International Insolvency Institute, Bruce Leonard said:

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; e-mail: 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.¹²²

D Regional or Bilateral Treaty

Another possible approach to securing communication and coordination in cross-border insolvency cases would be through the development of a regional or bilateral treaty. At the 2010 regional judicial seminar previously mentioned, the then Spigelman CJ concluded his remarks as follows:

The further development of cooperation between courts will generally require statutory support, perhaps by way of implementing international arrangements which authorise communication and cooperation between courts. Such matters are

118 *Practice Guide on Cross-Border Insolvency Cooperation of the United Nations Commission on International Trade Law*, GA Res 64/112, UN GAOR, 64th sess, 64th plen mtg, Agenda item 79, UN Doc A/RES/64/112 (15 January 2010, adopted 16 December 2009).

119 See generally, UNCITRAL, above n 58, ch III and the case summaries included in annex I to the *Practice Guide*.

120 (2001) 26 CBR (4th) 45.

121 Ibid [13].

122 American Law Institute and the International Insolvency Institute, *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (2003) vi (emphasis in original).

capable of being included in regional or bilateral treaties, as they have been in the treaties that Australia has entered into on judicial cooperation with South Korea and Thailand.¹²³

However he went on to comment upon the difficulties of convincing relevant authorities of the significant ‘inhibiting effects of the complexities of the international commercial dispute resolution upon international trade and investment’¹²⁴ in the negotiation of bilateral free trade treaties. There are few successful specialised insolvency conventions or treaties and insolvency proceedings have been excluded from general jurisdiction and recognition conventions.¹²⁵

The only examples of successful multilateral insolvency treaties are regional treaties where states share ‘generally close legal and cultural affinities’, such as in Latin America¹²⁶ and Scandinavia.¹²⁷ This is understandable given the embedding of insolvency law in ‘the economic and social culture’ of a state.¹²⁸ Even the European Community (‘EC’), after some three decades of negotiating an insolvency convention, finally addressed cross-border insolvency through a Council Regulation.¹²⁹

Perhaps the one area where there are grounds for some optimism that bilateral arrangements will improve communication and coordination in cross-

123 Spigelman, above n 63, 29, citing *Treaty on Judicial Assistance in Civil and Commercial Matters between the Government of Australia and the Government of the Republic of Korea*, signed 17 September 1999 [2000] ATS 5 (entered into force 16 January 2000); *Agreement between the Government of Australia and the Government of the Kingdom of Thailand on Judicial Assistance on Civil and Commercial Matters in Arbitration*, signed 2 October 1997 [1998] ATS 18 (entered into force 29 August 1998). An example of such statutory support in cross-border insolvency would be through adopting the *Model Law*, UN Doc A/52/17.

124 Spigelman, above n 63, 30.

125 See *Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2001] OJ L 12/1. It was recast as *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2012] OJ L 351/1. The *Regulation* shall not apply to ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’: at art 1(2)(b).

126 I F Fletcher, ‘Cross-Border Co-operation in Cases of International Insolvency: Some Recent Trends Compared’ (1991–2) 6/7 *Tulane Civil Law Forum* 171, 175. In relation to Latin America, see *Treaty on International Commercial Law*, signed 11 January 1889 (entered into force) arts 35–48; *Treaty on International Commercial Terrestrial Law*, signed 19 March 1940, 37(Supp) AJIL 132 (entered into force) arts 40–53; *Convention on Private International Law*, signed 20 February 1928, 86 LNTS 111 (entered into force 26 November 1928) (‘*Bustamante Code*’). See also Juan M Dobson, ‘Treaty Developments in Latin America’ in Ian F Fletcher (ed), *Cross-Border Insolvency: Comparative Dimensions* (United Kingdom National Committee of Comparative Law, 1990) 237–62.

127 *Convention between Denmark, Finland, Iceland, Norway and Sweden Regarding Bankruptcy*, signed 7 November 1933, 155 LNTS 115, 133–9 (‘*Nordic Bankruptcy Convention*’); Michael Bogdan, ‘The Nordic Bankruptcy Convention’ in Jacob Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (Clarendon Press, 1994).

128 Fletcher, above n 126, 175. Insolvency law interlocks with ‘the general law of the system in question’.

129 *Council Regulation (EC) No 1346/2000 of 20 May 2000 on Insolvency Proceedings* [2000] OJ L 160/1. Note it does not apply to Denmark.

border insolvencies is in trans-Tasman cases. Early cooperation between Australia and New Zealand came in 1983 through the Australia New Zealand Closer Economic Relations Trade Agreement (known as ANZCERTA or the CER agreement). It covers substantially all trans-Tasman trade in goods, and includes free trade in services. The Australian and New Zealand governments concluded the *Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement* in July 2008, with a view to streamlining processes for resolving civil proceedings with a trans-Tasman element and enforcing certain judgments. However, it was not until 25 July 2013 that the Governor General fixed a date for the commencement of the *Trans-Tasman Proceedings Act 2010* (Cth), which (together with subsidiary legislation) gives effect to Australia's obligations under the Agreement. The date fixed was 11 October 2013.¹³⁰ While insolvency judgments recognised under the *CBIA* are not covered by the Australian and New Zealand Trans-Tasman Proceedings statutes,¹³¹ a Memorandum of Understanding on the Coordination of Business Law includes more extensive cross-border insolvency coordination on its short term work programme.¹³²

V CONCLUSION

A range of benefits have been identified as flowing from establishing communication in cross-border cases. These include:

- assisting parties to better understand 'the implications or application of foreign law,' especially 'differences or overlaps that may otherwise lead to litigation';
- helping to resolve issues 'through a negotiated solution acceptable to all';
- eliciting 'more reliable responses from parties', and in this way avoiding 'inherent bias and adversarial distortion that may be apparent' if 'parties represent their own particular concerns in their own jurisdictions'; and
- potential to 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.'¹³³

130 The relevant provisions of the *Trans-Tasman Proceedings Act 2010* (NZ), which give effect to New Zealand's obligations under the agreement, commenced on the same date.

131 For the purposes of *Trans-Tasman Proceedings Act 2010* (Cth) s 66(2)(j), a 'registrable New Zealand judgment' does not include an order made by a New Zealand court under New Zealand domestic insolvency laws commencing a proceeding and appointing a representative, if the order is subject to recognition in Australia under the *CBIA: Trans-Tasman Proceedings Regulation 2012* (Cth) reg 16. Likewise, specified Australian insolvency judgments are excluded from recognition and enforcement under the *Trans-Tasman Proceedings Act 2010* (NZ): *Trans-Tasman Proceedings (Specified Australian Insolvency Judgments Excluded From Recognition or Enforcement in New Zealand and Excluded Matter) Order 2013* (NZ).

132 Department of Foreign Affairs and Trade (Cth), *Memorandum of Understanding between the Government of New Zealand and the Government of Australia on the Coordination of Business Law*, <http://www.dfat.gov.au/fta/anzcerta/memorandum_of_understanding_business_law.html>.

133 UNCITRAL, above n 58, 19.

As suggested in the Guide to Enactment of the *Model Law*, cooperation mechanisms more generally also assist to combat international fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions. This was regarded as an increasing problem, in terms of both its frequency and its magnitude.¹³⁴

Other potential benefits may not be easily identified at the outset, but may become apparent once the parties have communicated. It may be, for example, that cross-border communication reveals some fact or procedure that will substantially inform the best resolution of the case, and in the longer term this may serve as an impetus for law reform.¹³⁵

The aim of the Global Guidelines is ‘to permit rapid cooperation in a developing insolvency case while ensuring due process’ is observed.¹³⁶ If adopted at the earliest possible stage of a cross-border proceeding, whether or not as part of a specific cross-border insolvency agreement or protocol, they will then be in place whenever there is a need for communication with a foreign court or representative. In that way they will assist to promote transparent and effective communication between courts.

There are benefits for Australian interests in considering the ALI III Global Guidelines to assist courts when adjudicating on insolvency cases with international connections. This is for the purposes of implementing cooperation and coordination under article 25 of the *Model Law* and improving case management. The size of the Australian economy and the volume of its international trade mean that Australian courts would not deal with the volume or diversity of international insolvency cases as occur in the NAFTA region or within the European community. However, this supports rather than detracts from an argument that Australian courts and insolvency practitioners consider the ALI III Global Guidelines and international jurisprudence in cases applying the *Model Law*. Courts are encouraged to recognise the international origins of the *Model Law* as the Explanatory Memorandum to the *CBA* states: ‘[i]t is expected that Australian courts will make use of international precedents in interpreting the provisions of the *Model Law*.’¹³⁷

Some ambitious suggestions, to improve international commercial litigation in general as well as international insolvency cases in particular, have been canvassed. These include adopting the *Model Principles* into domestic procedural law or entering into regional or bilateral treaties on judicial cooperation generally, if not on insolvency specifically.

However the increasing incidence of international business insolvencies and ‘real time’ (rather than ‘forensic’) litigation requires a prompt response. The

134 *Guide to Enactment*, above n 24, [6].

135 UNCITRAL, above n 58, 19.

136 *ALI III Report*, above n 10, 135.

137 Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) [2.24].

following recommendations build upon existing approaches and can be implemented promptly.

First, courts in the six Australian jurisdictions may review their existing practice notes that require parties to have regard to the *UNCITRAL Practice Guide* and the *ALI NAFTA Guidelines* when drafting a framework or protocol on cooperation between the court and a foreign court or foreign representative under article 25. Those courts which mention an earlier draft of the *UNCITRAL Practice Guide* could amend their practice notes to refer to the final version adopted by the General Assembly.¹³⁸ All six jurisdictions could amend their practice notes to refer to the Global Guidelines instead of the ALI NAFTA document.

Secondly, the relevant courts in the remaining three Australian jurisdictions (Australian Capital Territory, South Australia and Queensland) could introduce harmonised practice notes to assist parties.

Thirdly, in order to raise awareness of the various means by which cooperation and communication might be enhanced in cross-border insolvency matters, if appropriate, courts may consider annexing to their reasons for judgment a copy of the Global Guidelines and of the protocol, if any, formally adopted.¹³⁹

By the courts directing practitioners to the *UNCITRAL Practice Guide* and the Global Guidelines, these reference documents are highlighted as credible resources for approaching the administration of insolvent global businesses. In so doing, they address the limitations of local insolvency and procedural laws in dealing with cross-border insolvency proceedings while not altering their independence, sovereignty or jurisdiction over the subject matter of the cases before them.¹⁴⁰

138 UNCITRAL, above n 58.

139 See *Re Matlack Inc* (2001) 26 CBR (4th) 45, [13] (Farley J).

140 UNCITRAL, above n 58, [58]: Cross-Border Insolvency 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'. See, eg, *Matlack Inc Protocol* paras 6–8: at *ibid* app 2.

APPENDIX A: PROCEDURAL APPROACH TO CASE MANAGEMENT IN AUSTRALIAN JURISDICTIONS

Jurisdiction	General Approach to Case Management
Federal Court	<u>Individual Docket System</u> Each case filed is randomly allocated for pre-trial management and ultimate determination to a particular judge: Federal Court of Australia, <i>Practice Note CM1 – Case Management and the Individual Docket System</i>, 1 August 2011. The docket judge makes any interlocutory orders, conducts case management conferences, refers matters to mediation, and supervises the parties' adherence to directions and timetables. The New South Wales and Queensland registries of the Federal Court have established specialist panels of judges to hear and determine particular types of matters, including a Corporations Panel, and proceedings involving a panel matter are allocated to a judge who is a member of the relevant panel: Federal Court of Australia, <i>Panels for the Docket System</i> (May 2014) <http://www.fedcourt.gov.au/case-management-services/case-allocation/national-panels>.
Australian Capital Territory	<u>Individual Docket System</u> Judicial officers manage docketed matters from an early stage. Introduced in August 2012, with acknowledgment that the procedures established for the initial introduction of a docket system would be subject to change over the subsequent months in light of experience with the system, with an expectation that further practice directions would be issued to deal with aspects of the docket system not yet provided by practice direction: Supreme Court of the Australian Capital Territory, <i>Practice Direction No 1 of 2012 – Docket System Civil Matters – Callovers, Duty Judges, the Master's Applications List and Return of Subpoenas</i>, 13 August 2012.
New South Wales	<u>15 Specialist Lists</u> Each list is managed by a judge identified as the list judge for that list. List judges responsible to either Chief Judge at Common Law or Chief Judge in Equity, in turn responsible to the Chief Justice. List Judges assisted by Case Management Registrar who conducts directions hearings to define acceptable timeframes and consider other pre-trial matters. Structure and operation of Corporations List in Equity Division regulated by Supreme Court of New South Wales, <i>Practice Note SC Eq 4 – Corporations List</i>, 11 March 2009, [1]. The Note applies to all Corporations Matters in the Equity Division, encompassing any proceedings under or relating to the <i>Cross-Border Insolvency Act 2008</i> (Cth). Proceedings under applications in the Corporations List (except those in the Corporation's Registrar's List) are case managed by the Corporations List Judge with the aim of achieving a speedy resolution in the proceedings. A Corporations Duty Judge is available at all times to hear urgent applications in Corporations matters.

Jurisdiction	General Approach to Case Management
Northern Territory	<u>Differential Case Management System</u> Under <i>Supreme Court Rules 1987</i> (NT) order 48 cases are assigned to designated procedural categories on the basis of their individual characteristics, such as the nature of the dispute and the number of parties. The levels of judicial management and prescribed time limits vary for the different categories. However these case management procedures are generally designed to give the members of the court greater control of the progress of cases to trial, so the procedures will not ordinarily apply to proceedings under the <i>Cross-Border Insolvency Act 2008</i> (Cth): order 48 applies to proceedings commenced by writ, and proceedings in respect of which an order has been made under rule 4.07 (Continuance as writ of proceeding by originating motion); for a proceeding commenced by originating motion a judge or master may order that order 48 apply to the proceeding if it is proposed to call oral evidence under rule 45.02(2), or if for any other reason that appears desirable. For procedures relating to applications under the <i>Cross-Border Insolvency Act 2008</i> (Cth), see <i>Corporations Law Rules 2000</i> (NT) division 15A.
Queensland	<u>Commercial List</u> The Queensland Supreme Court operates a Commercial List to expedite commercial matters: Supreme Court of Queensland, <i>Practice Direction No 3 of 2002 – Commercial List</i>, 26 March 2002, as amended by Supreme Court of Queensland, <i>Practice Direction No 2 of 2008 – Commercial List: Amendment of Practice Direction 3 of 2002</i>, 14 August 2008. There is no separate list for corporations matters. In the ordinary course a proceeding may be listed on the Commercial List if the issues involved are, or are likely to be, of a general commercial character, or arise out of trade or commerce in general, and the estimated trial time is 10 days or fewer, although a case on the Supervised Case List, established under Supreme Court of Queensland, <i>Practice Direction No 11 of 2012 – Supervised Case List</i>, 18 May 2012, for longer matters or matters identified as imposing a greater than normal demand on resources, may be assigned by the judge responsible for that to the Commercial List. Once on the Commercial List a proceeding will be case managed by the Commercial List Judge designated to be responsible for the case.
South Australia	<u>General Powers Only</u> The Supreme Court has general powers to manage and control litigation, but does not operate a general individual docket system: <i>Supreme Court Civil Procedure Rules 2006</i> (SA) chapter 6, part 1, division 1. Rule 115, however, makes provision for individual case management if the Court is satisfied that an action is sufficiently complex to warrant the assigning of a special classification. Provision is made in chapter 7, part 1 of the rules of court for court initiated status hearings for most cases commenced in the court, but actions governed by the <i>Corporations Rules 2003</i> (SA), which include proceedings under the <i>Cross-Border Insolvency Act 2008</i> (Cth), are not subject to the relevant part unless a direction has been given that the action proceed on pleadings.

Jurisdiction	General Approach to Case Management
Tasmania	<u>Case Management of Proceedings in Specified Classes</u> Proceedings are generally subject to case management under division 1 of part 14 of the <i>Supreme Court Rules 2000</i> (Tas). Matters to which that division applies include proceedings of a class specified by practice direction authorised by the Chief Justice as being a class of proceedings to which the division applies: <i>Supreme Court Rules 2000</i> (Tas) r 414(a). Practice Direction No 11 of 2005 (Supreme Court of Tasmania, <i>Practice Direction No 11 of 2005 – Case Management</i>, 1 February 2005) extends the application of the division to ‘all proceedings commenced by originating application intended to be served’, and the practice direction then makes these proceedings returnable at first instance before the Associate Judge for directions.
Victoria	<u>Commercial Court</u> This was established within the Commercial and Equity Division of the Trial Division of the Supreme Court from 1 January 2009. It comprises a team of eight judges and associate judges within the Commercial and Equity Division of the Trial Division appointed by the Chief Justice. Proceedings in the Trial Division under the <i>Cross-Border Insolvency Act 2008</i> (Cth) are conducted in the Corporations List in the Commercial Court, and allocated to a docket on that list. A judge and associate judge are assigned to the list and manage and try cases within it. General advice to practitioners on the Commercial Court is provided by: Supreme Court of Victoria, <i>Notice to Practitioners: Commercial Court</i>, 12 December 2008.
Western Australia	<u>Commercial and Managed Cases List</u> Order 4A of the <i>Rules of the Supreme Court 1971</i> (WA) provides for a Commercial and Managed Cases List, and matters on that list are managed by the Commercial and Managed Case List Judge to whom the case is assigned. Defamation and judicial review cases are automatically placed on the list, and the court may place other cases on the list of its own motion or on request of a party. The need for expedition is one of a range of relevant factors influencing the determination as to whether a matter should be placed on the list: Supreme Court of Western Australia, <i>Consolidated Practice Directions 2009 – 4.1 Case Management</i>, 27 July 2012, 4.1.2, item 3. Other matters are managed by Registrars up to the listing conference stage. The rules permit a master or a case management registrar to review other cases at any time and require a status conference, and in most cases a case evaluation conference, at nominated stages in a proceeding. The rules also provide for a range of orders which may be made on review, including the making of any case management direction the Court considers just.