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JUDICIAL COOPERATION IN CROSS-BORDER INSOLVENCY

1 In matters where it applies,[1] the Model Law imposes a duty on the relevant court to cooperate "to the maximum extent possible" with foreign courts.

2 A duty of judicial cooperation might initially seem surprising. At its most basic, the role of the judge is to do justice according to law. "Judicial power is concerned with the determination of disputes and the making of orders concerning existing rights, duties and liabilities of persons involved in proceedings before the courts".[2] The judge's task is to identify and reconcile any relevant legal principles and apply them to the dispute at hand. [3] Where might judicial cooperation with judges of different nation states fit into the performance of that task? In what circumstances might a judge be required to take action which is not directly relevant to the dispute before the Court?

3 Further, open justice is a fundamental aspect of the administration of justice in Australia.[4] Australian courts must sit in public except in rare and exceptional cases. How might an Australian judge cooperate with a foreign judge without offending the principle of open justice?

4 Back in 2005, before the adoption of the Model Law in Australia, the eminent corporations jurist Justice Barrett, now of the New South Wales Court of Appeal, contemplated the idea of

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[1] The scope of application of the Model Law is set out in Article 1 of the Model Law, as affected by s 9 of the *Cross-Border Insolvency Act 2008* (Cth) and the *Cross-Border Insolvency Regulations 2008* (Cth). The Regulations exclude ADIs, general insurers and life companies from the operation of the Model Law.

[2] *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 477 (McHugh JA).

[3] Raymond Finkelstein, 'The Role of the Judge: – Judicial Activism and the Rule of Law, October 2005' (2006) 9(1) *The Flinders Journal of Law Reform* 17.

[4] See, for example, s 17 of *Federal Court of Australia Act* (1976*); John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344 at [17]-[21]; *Commonwealth Director of Public Prosecutions v Christian* [2019] FCAFC 5 at [64] and [88] (Besanko and Robertson JJ); [113]-[115] (Flick J).

judicial cooperation. His Honour referred to protocols by which United States and Canadian courts had conducted joint hearings and said:

> 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*.[5]

5 Fast forward to 2016: insolvency judges from 10 jurisdictions around the world, including our own Federal Court of Australia (Justice Nye Perram) and the Supreme Court of New South Wales (Justice Ashley Black), met to form the Judicial Insolvency Network (**JIN**), which produced the "Guidelines for Communication and Cooperation between Courts in CrossBorder Insolvency Matters" (**JIN Guidelines**).[6] The Guidelines were drafted by the judges themselves together over the course of a two day meeting.

6 The JIN Guidelines have now been adopted by 10 courts internationally including the NSW Supreme Court as well as Courts in the important cross-border insolvency jurisdictions of Bermuda, the British Virgin Islands, Delaware (USA), England and Wales, Singapore and the Southern District of New York (USA). The Federal Court is seeking to adopt the JIN Guidelines and is awaiting their approval by the Council of Chief Justices of Australia and New Zealand.

7 The JIN Guidelines offer an example of judicial cooperation in the pursuit of judicial cooperation in cross-border insolvency proceedings. The Guidelines recognise that cooperative action need not offend either national sovereignty or the legitimate interests of parties to a proceeding that is related to a cross-border insolvency. Further, the Guidelines identify the aims that may be promoted by a cooperative approach between courts.

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[5] Reginald Ian Barrett, 'Cross-Border Insolvency – Aspects Of The Uncitral Model Law' (Paper presented at 22nd Annual Banking and Financial Services Law Association Annual Conference, Cairns, 6-7 August 2005) 2.

[6] The Guidelines can be found at http://www.jin-global.org. They are also annexed to the NSW Supreme Court's Practice Note No. SC EQ 6.

8 Today, I will look at both species of international judicial cooperation. First, I will consider judicial cooperation as provided for by the Model Law and the various sources available to guide judicial cooperation, including the JIN Guidelines. Then, I will outline some of the broader cooperative activities of the judiciary, which are designed to promote the operation of the Model Law more generally.

JUDICIAL COOPERATION UNDER THE MODEL LAW

9 The preamble to the Model Law refers to judicial cooperation at the outset, stating that the purpose of the law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objective of:

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

10 Chapter IV of the Model Law is entitled "Cooperation with foreign courts and foreign representatives". Within that Chapter, Article 25 and Article 27 provide for cooperation between courts (and between courts and foreign representatives) in the cross-border insolvency matters that are referred to in Article 1 of the Model Law. I am concerned here only with cooperation between courts.

11 As modified by s 11 of the *Cross-Border Insolvency Act 2008* (Cth) (**CBI Act**), Article 25 provides:

> **Cooperation and direct communication between a court of this State and foreign courts or foreign representatives**
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> 1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a registered liquidator (within the meaning of s 9 of the *Corporations Act 2001* (Cth)).
>
> 2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

12 The Model Law does not specify any mode of communication. However, the UNCITRAL Guide to Enactment of the Model Law (**UNCITRAL Guide to Enactment**)[7] notes that the ability of courts, with the appropriate involvement of the parties, to communicate "directly"

[7] UNCITRAL 'Model Law on Cross Border Insolvency with Guide to Enactment' http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html, [218].

and to request information and assistance "directly" from foreign courts is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory.

13 According to the UNCITRAL Guide to Enactment, Article 25 is "designed to overcome the widespread problem of national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies". [8] The Guide contemplates that "enactment of such a legal basis would be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proved to be useful".[9]

14 Article 27 identifies relevant forms of cooperation. It provides relevantly:

> **Forms of cooperation**
>
> Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:
>
> (a) Appointment of a person or body to act at the direction of the court;
>
> (b) Communication of information by any means considered appropriate by the court;
>
> (c) Coordination of the administration and supervision of the debtor's assets and affairs;
>
> (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
>
> (e) Coordination of concurrent proceedings regarding the same debtor;
>
> (f) [The enacting State may wish to list additional forms or examples of cooperation].

15 Australia has not made any alteration to Article 27 as it is in force by the CBI Act.

16 The UNCITRAL Guide to Enactment states that Article 27 was included in the Model Law in recognition that the idea of cooperation "might be unfamiliar to many judges and insolvency representatives".[10] The Guide states that the list is indicative "to avoid inadvertently precluding

[8] UNCITRAL Guide to Enactment, [213].
[9] Ibid.
[10] Ibid, [41].

certain forms of appropriate cooperation and limiting the ability of courts to fashion remedies in keeping with specific circumstances".[11]

Aims of mandating judicial cooperation under the Model Law

17 According to the UNCITRAL Guide to Enactment, the objective of Chapter IV is "to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results".[12] Cooperation may be "the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets (e.g. when items of production equipment located in two States are worth more if sold together than if sold separately) or to find the best solutions for the reorganization of the enterprise"; "[t]he ability of courts, with appropriate involvement of the parties, to communicate 'directly' and to request information and assistance 'directly' from foreign courts or foreign representatives is … critical when the courts consider that they should act with urgency".[13]

18 The UNCITRAL Guide to Enactment notes that a "widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts".[13] The UNCITRAL Practice Guide provides the following further explanation of impediments to judicial cooperation:

> In addition to the absence of specific authorization, there is very often hesitance or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitance or reluctance may be based upon ethical considerations, legal culture, language or lack of familiarity with foreign laws and their application. Some States take a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or, indeed, with other judges. In some States, *ex parte* communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable. Within States, judges and lawyers may have quite different views about the propriety of contacts between judges without the knowledge or participation of the representative or counsel for the parties. Some judges, for example, accept that there is no difficulty with private contact among them, while some lawyers would strongly disagree with that practice. Courts typically focus on the matters before them and may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or the foreign operations of the debtor.

19 The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)

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[11] Ibid, [220].
[12] Ibid, [211].
[13] Ibid, [218].
[13] Ibid, [209].

(**UNCITRAL Practice Guide)** states that "[j]udicial cooperation is increasingly viewed as essential to the efficient and effective conduct of cross-border insolvency cases, increasing the predictability of the process, because debtors and creditors do not have to anticipate judicial reactions to foreign proceedings, and enhancing the equitable treatment of all parties".[14] The Practice Guide identifies the following potential benefits of establishing communication in cross-border proceedings:

(1) assisting parties in better understanding the implications or application of foreign law, particularly the differences or overlaps that may otherwise lead to litigation;

(2) facilitating resolution of issues through a negotiated result acceptable to all;

(3) eliciting more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions;

(4) serving 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; and

(5) the possible revelation of some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

20 The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs. The JIN Guidelines sets out the following six matters which the Guidelines aim to promote:

(1) the efficient and timely coordination and administration of parallel proceedings;[16]

(2) the administration of parallel proceedings with a view to ensuring relevant stakeholders' interests are respected;

(3) the identification, preservation, and maximisation of the value of the debtor's assets, including the debtor's business;

(4) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors and the number of jurisdictions involved in parallel proceedings;

(5) the sharing of information in order to reduce costs; and

[14] UNCITRAL Practice Guide, [56] <http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf>. [16] "Parallel Proceedings" is defined in the JIN Guidelines to mean: "cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction".

(6) the avoidance or minimisation of litigation, costs, and inconvenience to the parties in parallel proceedings.

Sources of guidance about judicial cooperation

Court practice notes

21 The Federal Court's practice note GPN-XBDR "Cooperation with Foreign Courts or Foreign Representatives" is not prescriptive.[15] It provides that:

(1) The manner of cooperation appropriate to each particular case will depend on the circumstances of that case. Clause 2.4 foreshadows that "[a]s 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".[16]

(2) 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:

(a) "Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases" published by the American Law Institute (**ALI**) and the International Insolvency Institute (**III**) (**ALI Guidelines**);[17] and (b) The UNCITRAL Practice Guide.

22 The references to prior court approval and the parties' knowledge of an approved protocol emphasise that judicial cooperation may only occur in compliance with Australian laws of procedural fairness.

23 The ALI Guidelines are dated 16 May 2000. Although they are entitled "Principles of cooperation among the NAFTA Countries",[18] at the time of preparation only application between Canada and the United States was contemplated because of the very different rules governing communications with and among courts in Mexico. There are 17 guidelines, with the stated intention of encouraging and facilitating cooperation in international cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any

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[15] *Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives (GPN-XBDR)* (25 October 2016) Federal Court of Australia <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practicenotes/gpn-xbdr>.

[16] Ibid, cl 2.4.

[17] The American Law Institute, Principles of Cooperation Among the NAFTA Countries (16 May 2000) International Law Institute <https://www.iiiglobal.org/node/939>.

[18] NAFTA has three member States: Canada, Mexico and United States.

country, nor to affect or curtail the substantive rights of any party in proceedings before the Courts.[19]

24 The UNCITRAL Practice Guide is a lengthy and useful document, which addresses two main subjects:

(1) Possible forms of cooperation under Article 27 (Section II).

(2) Cross-border insolvency agreements (Section III). These are the agreements contemplated by Article 27(d) of the Model Law. The Practice Guide includes "sample clauses", which are based to varying degrees upon provisions found in actual insolvency agreements.[20]

25 The NSW Supreme Court's Practice Note SC EQ 6 is substantially similar to the Federal Court practice note, but with one important difference.[21] That is, it refers to and annexes the JIN Guidelines.[22]

26 The JIN Guidelines add to the other sources of guidance about judicial cooperation by providing a framework for parties to cross-border insolvency proceedings to customise protocols that will facilitate court-to-court communication and cooperation in the relevant case. As with other guidelines that have been published on this subject, the JIN Guidelines emphasise their non-binding nature, their aim of improving insolvency outcomes and that judicial cooperation may not occur in a manner which is inconsistent with the domestic laws of the relevant courts.

27 The Supreme Courts of the Northern Territory, Tasmania and Western Australia have each published a practice note that is substantially similar to the Federal Court practice note.

28 The Supreme Court of Victoria's practice note SC CC6 refers to the UNCITRAL Practice Guide and the following three more recent publications of the ALI and III:[23]

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[19] UNCITRAL Practice Guide, [20].

[20] Annex 1 to the UNCITRAL Practice Guide includes summaries of the cases in which the cross-border insolvency agreements that form the basis of the Practice Guide were concluded.

[21] *Practice Note SC EQ 6 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives* (15 September 2017) Supreme Court of New South Wales <http://www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9c%20a2570ed000a2b08/4f96eb1106eb1b61ca25819f0002a5dc?OpenDocument>.

[22] Ibid; the Supreme Court practice notes that the Court "adopts the JIN Guidelines … and (subject to applicable rules of substantive and procedural law and to hearing any interested party in a particular case) will be guided by them in cases involving cross-border insolvency or restructuring of one or more companies situated in different jurisdictions. This position is adopted on an interim basis and pending consideration by the Council of Chief Justices of any further amendments to the uniform Corporations Rules and this Practice Note in respect of the JIN Guidelines."

[23] *Practice Note SC CC 6 – Cross-Border Insolvency Cooperation with Foreign Courts or Representatives and Coordination Agreements* (30 January 2017) Supreme Court of Victoria <https://www.supremecourt.vic.gov.au/law-and-practice/practicenotes/sc-cc-6-cross-border-insolvency-0>.

(1) The Global Principles for Cooperation in International Insolvency Cases (**Global Principles**);[24]

(2) Global Guidelines for Court-to-Court Communications in International Insolvency Cases (**Global Guidelines**);[25] and

(3) Global Rules on Conflict-of-Laws Matters in International Insolvency Cases (**Global Rules**).[26]

29 I am not aware of any relevant publication by the Supreme Court of Queensland and South Australia.

Other sources of guidance about judicial cooperation

30 The European Union has published the "EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases", referred to as the "EU JudgeCo Guidelines". [27] These 18 Guidelines are very closely based upon Global Guidelines.

31 The Global Principles, Guidelines and Rules are the product of a report entitled "Transnational Insolvency: Global Principles for Cooperation in International Insolvency cases" (**ALI-III Global Principles Report**) presented to the ALI and III in 2012.[28] Following the publication of the ALI-III report, the Council of Chief Justices asked the Australian Academy of Law to prepare a report about what further benefit, if any, might Australia get from those documents. A report was subsequently prepared by Professor Rosalind Mason, Sheryl Jackson and Mark Wellard. That report reached the following conclusions about the ALI-III Global Principles Report:

(1) it is a valuable reference point on cross-border insolvency;

(2) it is a resource for policy makers considering domestic policy reform;

(3) it provides Australian courts with a comprehensive approach to cross-border insolvency cases that addresses key issues and that has been reviewed by experts from a range of jurisdictions;

(4) if the current Practice Notes or Directions are updated to refer to the Global Guidelines, this will reflect more extensive international support; and

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[24] American Law Institute, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' [30 March 2012] *American Law Institute* <http://iiiglobal.org/sites/default/files/alireportmarch_0.pdf>.
[25] Ibid.
[26] Ibid.
[27] *EU JudgeCo Guidelines*, Leiden University <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/fiscaal-en-economischevakken/guidelines.pdf.>.
[28] American Law Institute, above n 26.

(5) for practitioners, particularly if directed to the full ALI-III Global Principles Report by the courts, it is a credible resource with which to approach the administration of insolvent global businesses and address parties' competing interests that yet acknowledges the role of local insolvency and procedural laws.

32 UNCITRAL has also published a second explanatory text, entitled "UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective", 2011 (**Judicial Perspective**). This document contains a chapter entitled "Cooperation and Coordination".[29]

Forms of cooperation

Communication with other courts

33 The JIN Guidelines establish communication in open court on notice to affected parties as the default position. Thus, Guideline 8 specifies that:

(1) In the normal case, parties may be present.

(2) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications.

(3) The communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.

(4) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.

(5) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

34 The JIN Guidelines acknowledge that "direct" communication is explicitly contemplated by Article 25. Guideline 7 proposes methods of direct written communication as well as two-way communications with the other court, by telephone or video conference call or other electronic

[29] 'UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective' (2012) *United Nations Commission on International Trade Law* <https://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebookE.pdf>.

means. However, the guideline notes that in relation to this form of communication, Guideline 8 should be considered.

35 The Commentary to the EU JudgeCo Guidelines includes the following "safeguards" for direct "judge-to-judge" cross-border communication in international insolvency cases:

(1) direct "judge-to-judge" cross-border communication should occur only where such communication is necessary;

(2) direct "judge-to-judge" cross-border communication should relate to matters which do not concern the substantive merits of the case; and

(3) direct judicial cross-border communication can only take place where there are sufficient procedural safeguards in place to ensure that parties have an opportunity to be heard on the application to communicate and (if appropriate) to attend (or be represented at) the occasion on which the communication takes place.

Joint hearings

36 The JIN Guidelines include the following principles for application in connection with a joint hearing of courts in different jurisdictions, noting that by the implementation of the principles, "neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction":

(1) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.

(2) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.

(3) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.

(4) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.

(5) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.

(6) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

37 The EU JudgeCo Guidelines commentary notes that a joint hearing requires that either court can also question a person who has appeared before the other court or allow one or more persons to speak.

Authentication of laws and orders

38 The JIN Guidelines 12 and 13 facilitate the speedy recognition and acceptance of laws and orders made in other proceedings "except on proper objection on valid grounds and then only to the extent of such objection", providing that a court shall:

(1) recognise and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof (for the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications); and

(2) accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders.

39 JIN Guidelines 12 and 13 are consistent with EU JudgeCo Guidelines 11 and 12.

Particular cases

40 In 2010, Scott Atkins delivered a very comprehensive paper which contains, among other things, consideration of particular cross-border protocols including a study of the protocol in the liquidation of Lehman Brothers.[30] That liquidation gave rise to the sole judgment of an Australian court concerning judicial cooperation: *Parbery; in the matter of Lehman Brothers Australia Limited (in liq)* [2011] FCA 1449.

[30] Scott Atkins, 'International Cooperation and Coordination in Cross-Border Insolvency' in Kevin Edmund Lindgren *International Commercial Litigation and Dispute Resolution* (Ross Parsons Centre for Commercial, Corporate and Taxation Law, 1st ed, 2010).

JUDICIAL COOPERATION MORE GENERALLY

41 Cross-border insolvency is one of several areas in which Australian judges have recognised the importance of collaboration with their foreign counterparts. By developing relationships with insolvency judges in other jurisdictions, we learn from overseas experience and also develop an appreciation of courts with which an Australian court may, in due course, be required to cooperate under Article 25.

Judicial Insolvency Network[31]

42 The JIN serves as a platform for sustained and continuous engagement, for the furtherance of the following three objectives:

(1) judicial thought leadership in cross-border insolvency and restructuring;

(2) to develop best practices in cross-border insolvency and restructuring; and

(3) to facilitate communication and cooperation amongst national courts in cross-border insolvency and restructuring matters.

43 The current chairperson is Judge Robert Drain of the US Bankruptcy Court, Southern District of New York.

44 Following the inaugural meeting and the publication of the JIN Guidelines, in September 2018, the second JIN conference was held in New York and attended by 18 judges from around the world including Chief Justice Allsop of the Federal Court and Justice Fabian Gleeson of the NSW Court of Appeal.

45 The conference concluded with the establishment of projects on the following four topics:

(1) core principles on recognition of foreign insolvency proceedings;

(2) modalities for court-to-court communication: to devise a set of modalities to guide international stakeholders on how courts from diverse backgrounds can communicate effectively;

(3) interaction between insolvency law and admiralty law: to draft a set of guidelines to assist in insolvency matters with admiralty law elements, especially in relation to the arrest of ships and Articles 19, 20 and 21 of the Model Law; and

(4) alternative dispute resolution for insolvency disputes.

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[31] The website, http://www.jin-global.org, is a location where interested parties can find out more about the JIN and its projects.

JIN meeting, Singapore, April 2019

46 Last month, there was a meeting of the JIN in Singapore, coinciding with the INSOL Annual Regional Conference. Most attention was directed to a draft set of guidelines for modalities for court to court communications. At this stage, the draft is confidential.

47 The third JIN conference will be held in 2020.

INSOL International/UNCITRAL/World Bank Judicial colloquia on Insolvency

48 In April 2019, INSOL International,[32] UNCITRAL and the World Bank held the thirteenth multinational judicial colloquium on Insolvency in Singapore. The judicial colloquium is a biennial two day event. The twelfth judicial colloquium was held in Sydney in March 2017 and was attended by nine judges of the Federal Court and the NSW Supreme Court, including the Chief Justices of each of those courts.

49 The judicial colloquium is held in conjunction with the INSOL Annual Regional Conference. This year, the colloquium enjoyed a record attendance of just over 100 judges from across the world. The colloquium is attended by judges from countries who have adopted the Model Law, as well as judges from countries that are considering adopting the Model Law or are interested in understanding the Model Law. Judges from the European Union, which has its own crossborder insolvency regime, also participate.

50 Both the Federal Court and the NSW Supreme Court typically send a representative to the judicial colloquium. This year, it was attended by Justice Brigitte Markovic of the Federal Court and Justice Ashley Black of the Supreme Court.

51 The agenda of the colloquium has developed to cover broadly similar topics on each occasion, which provide an educative function for judges with no previous experience in cross-border insolvency, as well as presentations and group discussions based on recent developments. Judges with greater expertise share their wisdom and enthusiasm with others.

52 Topics addressed in Singapore included the bases of cross-border co-operation and the resources available to judges; judicial aspects of cross-border insolvency; and the new UNCITRAL model laws on enterprise group insolvency and recognition and enforcement of insolvency-related judgments.

53 Justice Markovic participated in a panel discussion about the theory and practice of restructuring enterprise groups. There was also a session in which the judges broke into groups

[32] INSOL International is a world-wide federation of national associations of accountants and lawyers who specialise in turnaround and insolvency. There are currently over 44 Member Associations with over 10,500 professionals participating as members of INSOL International. Individuals who are not members of a member association join as individual members.

to discuss the model law developments and their potential usefulness for their various jurisdictions.

54 On the second day of the colloquium, there was discussion of court-to-court communication guidelines; reciprocity requirements in legislation or arising out of public policy considerations; the work of the judicial training college conducted by INSOL and the World Bank Group; alternative dispute resolution in insolvency cases; and finally, recent developments, especially in the area of maritime related cross-border insolvency.

55 In my case, the judicial colloquiums have provided extremely helpful preparation for dealing with applications under the CBI Act. While such applications will not always be commercially urgent, it is quite conceivable that they will require urgent attention to protect assets. Thus, article 17(3) of the Model Law provides that an application for recognition of a foreign proceeding shall be decided upon at the earliest possible time. On the other hand, recognition applications are relatively infrequent. The judicial colloquiums that I have attended enabled me to benefit from the experience of my overseas counterparts and to share my own experiences. I found it particularly interesting to hear from judges who specialise in corporations and insolvency law from the US Bankruptcy Courts, the Supreme Court of Bermuda, the Cayman Islands Grand Court and the United Kingdom.

56 UNCITRAL documents reveal that the judicial colloquiums have been significant in developing guidance about judicial cooperation. For example, the UNCITRAL Guide to Enactment (para 217) reports that the second judicial colloquium, held in 1997, heard reports of a number of cases in which judicial cooperation in fact occurred from the judges involved in the cases. From those reports, points emerged which are recorded in the Guide and in the Judicial Perspective. One of those points was that communication should be done openly, in the presence of the parties involved (except in extreme circumstances), who should be given advance notice.

57 The Judicial Perspective was prepared following a request from judges attending the eighth colloquium in 2009. The first draft was prepared by Justice Paul Heath of the High Court of New Zealand and was developed through consultations with judges.

INSOL Annual Regional Conference

58 The regional conference attracts around 1,000 delegates each year. The conference focusses on emerging issues in practice, and its audience includes lawyers, policy makers and insolvency practitioners. As the judicial colloquium is held immediately prior to the conference, Australian judges will generally attend both events: a four day cross-border insolvency immersion experience!

59 This year, there were sessions which focussed attention on offshore, "mid-shore" and on-shore investment structures in South-East Asia and China. From a judicial perspective, the conference offers an opportunity to learn about the context in which particular cross-border legal problems may arise.

60 At the same time as the judicial colloquium, INSOL also holds an academics' colloquium.

61 In 2008, Chief Justice Brenner of the British Columbia Supreme Court delivered a speech to the INSOL Annual Regional Conference held in Shanghai, published in the Australian Law Journal.[33] The topic was "Cross border court communications". Of particular interest, Chief Justice Brenner reported on his personal experience of the operation of two cross-border protocols in proceedings in the United States and British Columbia.

Asian Business Law Institute

62 The ABLI was launched in January 2016 in Singapore, in conjunction with the International conference on "Doing Business Across Asia – Legal Convergence in an Asian Century". Its Board of Governors is chaired by Chief Justice Sundaresh Menon of the Supreme Court of Singapore. The Board includes the Honourable Robert French AC, former Chief Justice of the High Court of Australia, and the Honourable Kevin Lindgren AM QC FAAL, former Judge of the Federal Court.

63 ABLI's inaugural Advisory Board includes the following Australian members, nominated by the Board of Governors:

- Professor Richard Garnett, Professor of Law, University of Melbourne.
- Professor Rosalind Mason, Professor of Insolvency & Restructuring Law, Faculty of Law, Law School, Queensland University of Technology.
- Mr Donald Robertson, Partner, Herbert Smith Freehills.

64 ABLI's current projects are entitled:

(1) Asian Principles of Business Restructuring. This project, jointly undertaken with the International Insolvency Institute, is working towards the convergence of procedures and practices for business reorganisation regimes in Asia. Chief Justice Allsop and Justice Markovic are members of the Advisory Committee for this project.

(2) Convergence of the rules and standards for cross-border data transfers in Asia. This project is working towards the convergence of rules and standards for cross-border transfers in Asia.

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[33] Donald Brenner, 'Cross Border Court Communications' (2009) 83 *Australian Law Journal* 90.

(3) Asian Principles for the Recognition and Enforcement of Foreign Judgments. This project is working towards the convergence of the substantive laws of Asia on the recognition and enforcement of foreign judgments.

LAWASIA

65 Judges also participate in the annual conference of LawAsia, the Law Association for Asia and the Pacific, with whom UNCCA has an association. Last year, Justice Robert McDougall of the NSW Supreme Court delivered a paper to an insolvency session at the conference held in Siem Reap, Cambodia. The paper was entitled "Recognition of Foreign Insolvency Proceedings – An Australian Perspective".[34]

66 This year, the conference will be held in Hong Kong in November 2019. The conference will include an insolvency session entitled "Reorganisation Alternatives for Cross-Border Insolvency in Asia". The programmes states that it is hoped to draw upon judicial speakers for the session.

CONCLUSION

67 In summary, judicial cooperation on the subject of cross-border insolvency continues to flourish. Recent initiatives such as the JIN Guidelines reflect courts' recognition of the

[34] Robert McDougall, 'Recognition of Foreign Insolvency Proceedings – An Australian Perspective' (Paper presented at the 31st LAWASIA Conference, Siem Reap, Cambodia, 3 November 2018).

imperatives for judicial cooperation and a preparedness to engage among foreign courts in a manner that is appropriate and effective, in accordance with the requirements of the Model Law.