



Supreme Court of Victoria

Practice Note SC CC 6

Cross-Border Insolvency Cooperation with Foreign Courts or Representatives and Coordination Agreements

1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 The purpose of this Practice Note is to describe the procedures to be followed for proceedings regarding cross-border insolvency and cooperation with foreign courts or foreign representatives.

2. COMMENCEMENT

- 2.1 This Practice Note was issued on 30 January 2017 and commences on 30 January 2017 and will apply to relevant proceedings commenced in the Supreme Court concerning cross-border insolvency and/or cooperation with foreign courts or foreign representatives.

3. DEFINITIONS

- 3.1 In this Practice Note:
Act means the *Cross-Border Insolvency Act 2008* (Cth)
Model Law means the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL)

4. FILING PROCEEDINGS UNDER THE ACT

- 4.1 All proceedings under the Act should be filed in the Commercial Court Corporations List.

5. HEARING OF URGENT APPLICATIONS

- 5.1 Urgent matters or matters involving courts operating in a different time zone, may be heard outside normal sitting hours.

5.2 Practitioners should follow the Commercial Court Duty Judge System procedure as outlined in Practice Note SC CC 1 – Commercial Court and on the Supreme Court website.

6. THE MODEL LAW

6.1 Chapter IV of the Model Law, provides for cooperation between Australian Courts¹ and registered liquidators² and the foreign equivalents in cross-border insolvency matters referred to in Article 1 of the Model Law. The Model Law is contained in Schedule 1 of, and has the force of law in Australia³ under, the Act.

6.2 Articles 1 and 25 to 27 of the Model Law (as modified by the Act) are set out in the Appendix.

7. THE CORPORATIONS RULES

7.1 Subdivision 3 of Division 15A of the *Corporations Rules* of the Federal and Supreme Courts addresses cooperation under Chapter IV of the Model Law insofar as it involves the Court.

7.2 Rule 15A. 10 provides that cooperation that involves the Court and a foreign court or foreign representative under Part IV of the Model Law should generally occur in accordance with a coordination agreement prepared by the parties and approved by the Court under rule 15A. 11.

8. REFERENCE MATERIAL

8.1 The following reference material is referred to below:

- The Global Principles for Cooperation in International Insolvency Cases (*Global Principles*)
http://iiiglobal.org/sites/default/files/alireportmarch_0.pdf
- Global Guidelines for Court-to-Court Communications in International Insolvency Cases (*Global Guidelines*)
http://iiiglobal.org/sites/default/files/alireportmarch_0.pdf⁴

¹ The Model Law refers to a "*court of this State*". Section 10 of the Act provides "The following courts are taken to be specified in Article 4 of the Model Law (as it has the force of law in Australia) as courts competent to perform the functions referred to in the Model Law relating to recognition of foreign proceedings and cooperation with foreign courts: ... if the functions relate to a proceeding involving a debtor other than an individual: ... the Federal Court of Australia; and ... the Supreme Court of a State or Territory"

² The Model Law refers to "[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]". Section 11 of the Act provides "The Model Law has the force of law in Australia as if the Model Law referred [in the case of a company] to ... a registered liquidator (within the meaning of section 9 of the *Corporations Act 2001*) wherever the Model Law indicates that the title of the person or body administering a reorganization or liquidation under the law of the enacting State is to be inserted"

³ *Cross-Border Insolvency Act 2008* (Cth) s 6. The Act modifies some provisions of the Model Law but not Part IV

⁴ Both the Principles and Guidelines appear in the same document published by the American Law Institute and International Insolvency Institute

- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (*Practice Guide*)
http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf
- Global Rules on Conflict-of-Laws Matters in International Insolvency Cases (*Global Rules*)
http://iiiglobal.org/sites/default/files/alireportmarch_0.pdf

8.2 In having regard to this reference material as suggested below, it is important for practitioners to note:

- (a) In the case of the Global Guidelines and Global Principles, their terms make clear that neither the guidelines nor the principles attempt to confer substantive rights or encroach upon substantive Australian law. (Global Principle 3, Global Guideline 18) The aims and objectives of these guidelines and principles are set out in Global Principles I and 2 and Global Guideline I.
- (b) The purpose of the Practice Guide is set out in paragraph I on page I. That purpose essentially is "to provide information for practitioners and Judges on practical aspects of cooperation and communication in cross-border insolvency cases".
- (c) While the Global Rules have been drafted with the intention of ultimately providing a comprehensive set of conflict-of-laws principles, they are referred to below as potentially helpful reference material and not as an indication that the identified rules necessarily represent Australian law or are necessarily appropriate for inclusion in cross-border insolvency agreements.

9. AUTHORITY OF THE COURT

9.1 Global Principle 3 provides:

Nothing in these Global Principles is intended to:

- (i) Interfere with the independent exercise of jurisdiction by a national court involved, including in its authority or supervision over an insolvency administrator;
- (ii) Interfere with the national rules or ethical principles by which an insolvency administrator is bound according to applicable national law and professional rules;
- (iii) Prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the forum state; or
- (iv) Confer substantive rights, interfere with any function or duty arising out of an applicable law, or encroach upon any local law.

9.2 Global Guideline 18 provides:

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

10. GUIDANCE IN DRAFTING COORDINATION AGREEMENTS

10.1 In drafting a coordination agreement for approval of the Court, the parties should have regard to the Global Guidelines, and may find the practical guidance in the Practice Guide useful.

11. TRANSPARENCY AND PROCEDURAL FAIRNESS

11.1 Parties should have regard to the aspects of the Global Guidelines designed to provide transparency and accord procedural fairness to all parties including:

- communications being subject to ex parte communication rules (Guideline 6);
- communications between courts being notified in advance to counsel (Guideline 7);
- advance notice of telephone or video conference communications between courts (Guideline 8), or between the Court and a Court representative or foreign insolvency administrator (Guideline 9) and the ability of counsel to participate; and
- the development of service lists (Guideline 13).

12. DEALING WITH CREDITORS AND CLAIMS

12.1 A coordination agreement should generally address the processes for coordination of:

- notifications of creditors;
- submission of creditor claims;
- the administration of claims; and
- the hearing of appeals where claims are rejected.

12.2 The parties may find the practical guidance in the Practice Guide ([128] - [139]) to be useful.

13. CHOICE OF LAW PROVISIONS

13.1 If choice of law provisions are considered for inclusion in cross-border insolvency agreements, the Global Rules may provide useful reference material.

14. INDEPENDENT INTERMEDIARY

- 14.1 Rule 15A.12 of the Corporations Rules addresses the appointment of independent intermediaries.
- 14.2 Parties applying to the Court to appoint an independent intermediary to assist the coordination of proceedings should have regard to Global Principle 23.

AMENDMENT HISTORY

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced former Practice Note 6 of 2011.

Vivienne Macgillivray
Executive Associate to the Chief Justice
30 January 2017

APPENDIX: RELEVANT PROVISIONS OF THE MODEL LAW

Article 1

Scope of application

1. The present Law applies where:
 - (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
 - (b) Assistance is sought in a foreign State in connection with a proceeding under Chapter 5 (other than Parts 5.2 and 5.4A), and section 601CL, of the *Corporations Act 2001*; or
 - (c) A foreign proceeding and a proceeding under Chapter 5 (other than Parts 5.2 and 5.4A), and section 601CL, of the *Corporations Act 2001* in respect of the same debtor are taking place concurrently; or
 - (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under Chapter 5 (other than Parts 5.2 and 5.4A), and section 601CL, of the *Corporations Act 2001*.

Article 25

Cooperation and direct communication between a Court of Australia and foreign courts for foreign representatives

1. In matters referred to in article I, 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 section 9 of the *Corporations Act 2001*).
2. The Court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26

Cooperation and direct communication between the registered liquidator and foreign courts or foreign representatives

1. In matters referred to in article 1, the 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.
2. The registered liquidator 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.

Article 27

Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate meaning, 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.