



# CROSS-BORDER INSOLVENCY PRACTICE NOTE: COOPERATION WITH FOREIGN COURTS OR FOREIGN REPRESENTATIVES (GPN-XBDR)

## General Practice Note

### 1. INTRODUCTION

- 1.1 This practice note applies to any proceeding in the Court which involves cross-border insolvency. It takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

### 2. CROSS-BORDER INSOLVENCY<sup>1</sup>

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

#### *Article 25*

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

1. In matters referred to in article 1, **the court shall cooperate** to the maximum extent possible with foreign courts or foreign representatives, either directly or through the trustee (within the meaning of subsection 5(1) of the *Bankruptcy Act 1966*) or a registered liquidator (within the meaning of section 9 of the *Corporations Act 2001* (Cth)).

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<sup>1</sup> Part 2 of this Practice Note is harmonised in accordance with the advice of the Council of Chief Justices’ Rules Harmonisation Committee and Part 14 of the *Federal Court (Bankruptcy) Rules 2016* (Cth) contains rules that have been harmonised in accordance with the advice of the Council of Chief Justices’ Rules Harmonisation Committee.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

### **Article 27**

#### **Forms of cooperation**

Cooperation referred to in [article 25] may be implemented by any appropriate means, including:

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

[Section 18 of the Cross-Border Insolvency Act provides that no additional forms or examples of cooperation are added.]

- 2.4 The manner 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.
- 2.5 Cooperation between the Court and a foreign court or foreign representative under Article 25 will generally occur under a co-ordination agreement that has previously been approved by the Court, and is known to the parties, in the particular proceeding. Ordinarily it will be the parties who will draft the co-ordination agreement. In doing so, the parties should be guided by the Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters ('the JIN Guidelines') and the Modalities of Court-to-Court Communication ('the Modalities') both published by the Judicial Insolvency Network<sup>2</sup> and the Practice Guide on Cross-Border Insolvency Co-operation 2009 ('the Practice Guide') published by UNCITRAL<sup>3</sup>. Other useful international guidance as to cross-border insolvency can be found at:

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<sup>2</sup> The Judicial Insolvency Network includes representatives of a group of courts which first met in Singapore on 10 and 11 October 2016 to draft the JIN Guidelines. The Courts represented at that meeting were those of Bermuda, the British Virgin Islands, Delaware (USA), England and Wales, Singapore, the Southern District of New York (USA), Ontario, New South Wales and the Federal Court of Australia. More information is available at <http://jin-global.org/index.html>

<sup>3</sup> The United Nations Commission on International Trade Law (UNCITRAL)

- *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* ('the Global Principles') published by the American Law Institute and the International Insolvency Institute;
- *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases* ('the Global Guidelines') adopted by the International Insolvency Institute and the American Law Institute;
- *Global Rules on Conflict-of-laws Matters in International Insolvency Cases* ('the Global Rules') published by the American Law Institute and International Insolvency Institute.

2.6 The publications referred to above are not intended to, and do not (a) encroach on substantive Australian law; or (b) interfere with or impact upon the exercise by any Court of its ordinary jurisdiction.

2.7 In drafting a co-ordination agreement for the approval of the Court, the parties should have regard to the above and may find the practical guidance in the Practice Guide useful.

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

- communications being subject to ex parte communication rules;
- communications between courts being notified in advance to counsel;
- advance notice of telephone or video conference communications between courts, or between the court and a court representative or foreign insolvency administrator and the ability of counsel to participate; and
- the development of service lists.

2.9 A co-ordination agreement should generally address the processes for coordination of:

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

### **3. APPLICATIONS RELATING TO A SHIP OWNER**

3.1 Where an application under the Cross-Border Insolvency Act relates to an owner of a ship or ships engaged in any commercial trade, that matter must be brought to the Court's attention before, or at the time, the application is filed together with a copy of the reasons of the Court in *Yu v STX Pan Ocean Co Ltd*<sup>4</sup>.

### **4. FURTHER PRACTICE INFORMATION AND RESOURCES**

4.1 Where a matter relates to cross-border insolvency, parties and practitioners should also note of the following, which are available on the Court's website:

- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the NCF of the Federal Court and key principles of case management procedure. The Central Practice note is an essential guide to practice in this Court in all proceedings;
- (b) the relevant National Practice Area ("**NPA**") practice note, noting that cross-border insolvency matters will generally fall within the Commercial and Corporations NPA or Admiralty and Maritime NPA and the Court's General Practice Notes;
- (c) Commercial and Corporations NPA Practice Note – Schedule 3: International Commercial Arbitration Sub-area.

4.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP  
Chief Justice  
31 January 2020

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<sup>4</sup> (2013) 223 FCR 189; [2013] FCA 680 at [2], [3] and [39] *et seq.*