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News Release

BANKRUPTCY AND INSOLVENCY NEW PUBLIC/PRIVATE PARTNERSHIP ANNOUNCED

OTTAWA, September 15, 1997 — The Office of the Superintendent of Bankruptcy (OSB) and the Canadian Insolvency Practitioners' Association (CIPA) today announced a Memorandum of Understanding (MOU) to establish a one-stream licensing process through a new National Insolvency Qualification Program (NIQP) — a national training program to qualify trustees.

The M.O.U. makes the NIQP the official qualifications process for those applying to become a licensed bankruptcy trustee. It establishes the NIQP as the national admissions office for all individuals wanting to enter the program.

All training programs and entrance requirements will now come under a single administrative body. Each candidate is expected to adhere to a national set of standards to qualify for eventual licensing, thereby eliminating duplication. The NIQP strengthens the credibility of the entire qualifying process by providing for more professionally trained individuals and uniform entrance requirements.

"The OSB's mission is to provide an effective, cost-efficient national qualification program that promotes compliance with the Bankruptcy and Insolvency Act," Superintendent of Bankruptcy stated Marc Mayrand. "This Memorandum of Understanding with CIPA will ensure a consistent national approach to training that will encourage and promote professionalism and increase the level of knowledge expertise of applicants for a trustee license. The MOU provides another example of how the public and private sector can work in partnership to foster an even greater public confidence in the bankruptcy and insolvency system in Canada."

CIPA President Ralph Peterson replied, "Through this MOU, CIPA has become a partner in all of the education and examination requirements to qualify candidates for a trustee license. This represents an important stepping stone as CIPA has achieved substantial involvement in the licensing process. We are pleased that the course of study CIPA first introduced for its members in 1982 will be the foundation for the NIQP's study program. As a result of this MOU, the educational requirements to become a general member of CIPA and a trustee in bankruptcy have been harmonized."

The NIQP Board, comprising six members (three OSB selections, three CIPA selections), will be appointed by the Superintendent of Bankruptcy and CIPA and approved by Superintendent/CIPA Executive Committee. The Board will be responsible for operating the NIQP on a cost recovery basis including the preparation and presentation of the program's budget, business plan and annual report to the Superintendent of Bankruptcy and CIPA.

The NIQP is expected to come into effect September 1998. From now until that date, transitional provisions will apply.

ONE-STREAM LICENSING
HIGHLIGHTS OF THE MOU

KEY OBJECTIVES

- Establish the **National Insolvency Qualification Program (NIQP)** as a common qualification system for providers of insolvency and business-recovery services in Canada.
- Maintain consistent and high standards for the qualification of candidates seeking a trustee licence, the **Chartered Insolvency Practitioner (CIP)** designation, designation as an **administrator of consumer proposals (ACP)** and such other certifications that the parties agree to include in the NIQP.
- Harmonize the qualifications of insolvency practitioners to the end result that all trustees in bankruptcy hold the CIP designation and that all CIPs hold licences as trustees in bankruptcy.

NATIONAL INSOLVENCY QUALIFICATION PROGRAM (NIQP)

The NIQP is a joint education process that will initially consist of a body of knowledge, Prescribed Course of Study, tutorial, written examinations, oral board, and, in the case of applicants for appointment as administrators of consumer proposals, an interview after completion of the first written examination to test knowledge and application (Level 1).

One-Stream: All individuals wishing to become a trustee or ACP must enrol in and complete the NIQP, except that ACPs will complete an abbreviated program.

Entrance Requirements: Applicants to the NIQP for trustees and ACPs must hold a Canadian university degree or equivalent, or hold a relevant professional designation recognized in Canada, or be in the final level of a program leading to such a designation. The Canadian Insolvency Practitioners' Association (CIPA) will enrol all trustee candidates except the Office of the Superintendent of Bankruptcy (OSB) staff as articling members of the CIPA. Any such NIQP student who rejects articling membership in the CIPA except OSB staff, will be charged higher program and examination fees. Applicants who do not hold any of the above qualifications must have at least five (5) years of relevant work experience.

NIQP Board: The NIQP Board, appointed by the Superintendent and the Association, will consist of no more than six (6) members, and neither party will appoint more than three (3) members.

To preserve the financial integrity of the NIQP, the budgets, forecast and fees for the NIQP must be on a full cost recovery basis and be approved by the Superintendent and the Association.

KEY TRANSITIONAL PROVISIONS

The NIQP will commence at the beginning of the 1998-99 academic year, that is in September 1998. In 1998, the National Insolvency Examination (NIE) will, for the last time, be open to all applicants. Candidates who fail their first attempt at the NIE in 1998 will be required to enrol in the NIQP.

Applicants who attempted the Written Insolvency Examination before 1998 will be allowed to continue to write in accordance with the previous agreement, which permitted up to four (4) attempts at the final written examination. This transitional provision will terminate when the NIE is written in 2001.

Commencing in September 1997, the Association will admit to its Prescribed Course of Study, any candidate for a trustee licence, who meets the entrance requirements set out in this MOU.

Articling members, and all persons admitted to the CIPA Prescribed Course of Study for the 1997-98 academic year will be transferred automatically into the NIQP with no loss of credits.

The Association will make its Prescribed Course of Study available to all students in the NIQP, but the CIPA retains exclusive ownership of and copyright in the materials for five (5) years after this MOU comes into force. After five (5) years, the Association and the Superintendent will have equal ownership of the Prescribed Course of Study.

News Release

RE: 1998 NATIONAL INSOLVENCY EXAM

The National Insolvency Qualification Board wishes to advise that candidates writing the 1998 Insolvency Examination WILL BE EXAMINED on the 1997 Amendments to the *Bankruptcy and Insolvency Act* including the new regulations, forms and related Directives which will come into force in the Spring of 1998.

However, candidates WILL NOT be examined on amendments to other statutes (federal or provincial) enacted or jurisprudence published after January 1, 1998.

Directives

No. 2R — JOINT FILING

ISSUED:

December 19, 1997

(Supersedes Directive No. 2 previously issued on December 7, 1992)

INTERPRETATION

1. In this Directive,

"Act" means the Bankruptcy and Insolvency Act;

"assignment" means an assignment filed with the official receiver;

"consumer proposal" means a proposal made under Division II of Part III of the Act;

"file" means an assignment in bankruptcy or a consumer proposal, as the case may be.

PURPOSE

2. The purpose of this Directive is to specify the circumstances in which an assignment in bankruptcy or a consumer proposal of more than one individual may be dealt with jointly as one file.

BACKGROUND

3. Paragraph 155 (f) of the Act states:

"in such circumstances as are specified in directives of the Superintendent, the estates of individuals who, because of their relationship, could reasonably be dealt with as one estate may be dealt with as one estate".

4. Subsection 66.12(1.1) of the Act states:

"Two or more consumer proposals may, in such circumstances as are specified in directives of the Superintendent, be dealt with as one consumer proposal where they could reasonably be dealt with together because of the financial relationship of the consumer debtors involved."

POLICY

5. Assignments filed under the provisions relating to summary administrations may be dealt with as one estate where the debts of the individuals making the joint assignment are substantially the same and the trustee is of the opinion that it is in the best interest of the debtors and creditors.

6. Consumer proposals may be dealt with as one consumer proposal where the debts of the individuals making the joint consumer proposal are substantially the same and the administrator of consumer proposals is of the opinion that it is in the best interest of the debtors and creditors.

7. In a joint file, only one statement of receipts and disbursements shall be required. The remuneration of a trustee or administrator of consumer proposals in a joint file shall be the same as if there had been only one debtor who had filed an assignment or consumer proposal.

8. The total cost of counselling all the individuals involved in the joint file shall not exceed the total cost prescribed by the Bankruptcy and Insolvency Rules for the counselling of one individual.

9. In the case of a bankruptcy, where a conversion from a summary administration to an ordinary administration is made, the Official Receiver will separate the administration of the joint assignment.

10. Where the administration of the joint file is separated, the trustee shall apportion the joint file trust funds to each estate trust account in the same manner as if the estates had been originally filed separately.

The Superintendent of Bankruptcy

Marc Mayrand

Directives

No. 9 — FAX UTILIZATION

ISSUED:

December 19, 1997

(Supersedes Directive No. 25 previously issued on January 10, 1991)

INTERPRETATION

1. In this Directive,

"Act" means the Bankruptcy and Insolvency Act;

"business hours" means the business hours of division offices of the Office of the Superintendent of Bankruptcy, which are from 8:30 a.m. to 4:30 p.m. (subject to change), Monday to Friday (except statutory holidays);

"DAS" means District Assistant Superintendent;

"FAX" means the transmission of documentation by electronic media, commonly known as a "facsimile machine";

"locality of a debtor" means locality of a debtor as defined in section 2 of the Act;

"OSB" means Office of the Superintendent of Bankruptcy.

PURPOSE

2. This Directive, issued pursuant to the authority of paragraphs 5(4)(b) and (c) of the Act, sets out standards with respect to the utilization, by the trustee, of FAX to transmit statutory documents to the OSB.

3. The DAS, in consultation with the trustees and the Court, is responsible for establishing the supplementary administrative procedure applicable to the transmission of documents to the courts by FAX.

BACKGROUND

4. Due to the wording of the Act respecting the filing of assignments, proposals, and the application of the stays of proceedings, documents which are received at the Official Receiver's office by FAX may be deemed to be received at different times depending on whether they are related to proposals under Part III of the Act or other procedures (e.g. assignments into bankruptcy).

5. Where a court refuses to accept a FAX copy as an original document, the trustee or the OSB shall provide original documents to the court.

ASSIGNMENTS INTO BANKRUPTCY AND ALL OTHER PROCEDURES UNDER THE ACT EXCEPT PROPOSALS UNDER PART III

6. The date and time of the receipt and acceptance of a FAX legal document (except one which is related to Part III of the Act), will be the date and time the district office of the OSB receives the document and the Official Receiver accepts it. If documents are received after business hours, they will be deemed to be received the next business day.

7. The Official Receiver's Certificate of Appointment, containing an estate number, bankruptcy date and creditors' meeting date, will generally be transmitted to the trustee by FAX. The confirmation of filing is the issuance of the estate number.

8. The paper size for the transmission of documents is letter size in all bankruptcy districts with the exception of the district of Quebec where it is legal size.

9. The allowable cost chargeable in an ordinary estate when a trustee transmits documents by FAX, is the same amount as for photocopies as per Directive No. 3R plus long distance telephone charges. No charge is applicable for the receipt of documents sent by FAX.

DOCUMENTS UNDER PART III OF THE ACT

10. Documents filed by FAX relating to proceedings under Part III of the Act shall be filed with the Official Receiver in the division office which serves the locality of the debtor.

11. Documents related to proceedings under Part III of the Act which are filed by FAX after business hours and are in the proper form, are deemed to be filed with the Official Receiver on the date and at the time that they are received by FAX in the division office. The time and date of receipt shall be the time and date as recorded by the fax machine which received the document(s).

SPECIAL CIRCUMSTANCES

12. Trustees who wish to transmit legal documents by FAX, relating either to assignments or proposals, to the district office after business hours, and require confirmation from an Official Receiver that they have been received and/or are accepted, may in special circumstances communicate with an Official Receiver during business hours and make other arrangements at the discretion of that Official Receiver.

The Superintendent of Bankruptcy

Marc Mayrand

Directives

No. 10 — REDEMPTION OF SECURITY AND SECTION 147 LEVY OF THE BIA

ISSUED:

December 19, 1997

PURPOSE

This Directive is intended to specify the operation of section 147 of the BIA in the case of the liquidation of encumbered assets on behalf of a secured creditor. It is also aimed at ensuring greater transparency and uniformity in the trustee's presentation of the statements of receipts and disbursements, as well as a standard approach to the examination of these statements by bankruptcy officers.

In addition, the Directive is intended to ensure that the body of creditors is not penalized in any way and does not bear any cost for the trustee's liquidation of encumbered assets on behalf of a secured creditor.

SUBJECT

This Directive is issued pursuant to paragraph 5(4)(b) of the Act and it establishes the circumstances in which trustees are viewed as acting in a double capacity and the circumstances in which they are considered to be making a redemption of security. This Directive also establishes the cases in which the levy prescribed by section 147 of the Act is payable on amount paid to secured creditors.

In addition, it establishes the procedure to be followed in presenting a redemption in the statement of receipts and disbursements.

SECTIONS OF THE ACT CONCERNED:

13.4; 128; 147; and 152.

RELATED DIRECTIVE CONCERNED:

15R

POLICY

Except in the cases listed below, the section 147 levy is payable on all payments by a trustee to a secured creditor. This principle stands even if a third party such as, for example, a notary public, a liquidator or an auctioneer makes the payment to the secured creditor for and on behalf of the trustee.

Since the redemption is not a "consensual operation", but rather a unilateral action taken by the trustee with the intention of obtaining an advantage for the estate, it therefore excludes the case of the trustee acting on behalf of the secured creditor.

A trustee acting in this capacity can redeem a security only through the mechanism provided for in subsection 128(3) of the Act.

EXCEPTIONS

1. The trustee obtained a mandate from the secured creditor and complied the provisions of section 13.4 of the Act, Directive No. 15R, sections 245 and following sections (if applicable), and the assets were sold while the trustee acted as an agent, receiver or mandatary but not as trustee.

2. The trustee proceeded with redemption of the security within the meaning of subsection 128(3) of the Act. In such a case, all of the following conditions must be fulfilled:

a) The secured creditor must produce a proof of claim prior to the offering of the encumbered assets for sale. Should the secured creditor not produce a proof of claim, it is the trustee's responsibility to take advantage of the provisions of subsection 128(1) of the Act;

b) the encumbered assets must be sold at a net price superior to, or at least equal to, either the total of the claim or the amount of the valuation of the security as established by the creditor in the creditor's proof of claim;

c) to show that it is a redemption that fulfils these conditions, the trustee must file, with the state-

ment of receipts and disbursements, an attestation pursuant to Appendix 1 of this directive.

The said attestation contains the following information:

date of receipt of the secured creditor's proof of claim;

amount due to the secured creditor and valuation of the security established in the proof of claim;

date the encumbered assets are offered for sale and date of sale of the said assets;

gross price paid by the purchaser;

trustee's disbursements and remuneration pertaining to the redemption; and

date of redemption of the security.

For the purpose of this directive the net price is the gross price paid by the purchaser less the trustee's disbursements and remuneration pertaining to the redemption.

The receipts, the disbursements as well as the trustee's remuneration pertaining to the redemption must be recorded in the statement of receipts and disbursements. If the trustee makes several redemptions, the trustee must submit an equivalent number of Appendices with the statement.

In the event that the trustee sells unencumbered and encumbered assets in the same transaction, the disbursements must be shared pro rata between these two categories of assets. If another method is used, the trustee must indicate the method used and justify the choice.

TRANSITIONAL MEASURES

The Office of the Superintendent of Bankruptcy will process statements of receipts and disbursements that indicate a redemption of security occurred prior to the issuance of this Directive the same way it did before the issuance of this Directive.

However, there are two exceptions to this principle and their occurrence shall be reflected in the letter of comments. They are:

(a) that the general body of creditors sustained fees and/or disbursements as a result of the liquidation of secured assets; or

(b) that the trustee's remuneration was not be fully disclosed in the statement.

The Superintendent of Bankruptcy

Marc Mayrand

Appendix 1

ATTESTATION CONCERNING REDEMPTION OF THE SECURITY

In the matter of the bankruptcy of .....

I ....., trustee, report to the Superintendent (Bankruptcy Officer) on the following:

1. I received the proof of claim from the secured creditor ....., on ....

2. According to this proof of claim, a sum of $ ..... is due the creditor. The creditor has estimated his security in the amount of $ .....

3. As trustee, I initiated the sale of the assets on ....

4. I sold the encumbered assets on ..... for $ .....

5. The disbursements relating to the redemption are as follows: $.....

$.....

$.....

Total $.....

6. The part of my remuneration pertaining to this redemption amounts to $.....

7. I redeemed the security of the creditor ..... and delivered the amount of $ ..... to the creditor on .....

Dated at ....., this ..... day of ....

.....

Trustee

The International Association of Insolvency Regulators

The International Association of Insolvency Regulators was founded in 1996 after an ad hoc meeting of regulators at the INSOL conference in Vancouver in 1989. George Redling, the then Superintendent of Bankruptcy, in conjunction with representatives of the United Kingdom, Australia and New Zealand, developed a set of objectives for the new association. Meetings have now been held in New Zealand and the United States with a third meeting scheduled for Malaysia in July 1998.

The objectives of IAIR are:

- to promote liaison, co-operation and discussion among member regulators;
- to exchange or facilitate the exchange of information on the insolvency systems of member regulators, their roles and responsibilities, and issues relevant to their activities, including operational and management practices and procedures and responses to changing insolvency trends;
- to identify issues and problems that are seen to impede the efficiency and effective administration of insolvencies, particularly cross-border insolvencies; and
- to liaise with other international insolvency organizations and constituencies on common insolvency issues.

Current membership of IAIR is comprised of 13 countries. They consist of Australia, Singapore, New Zealand, Jersey Channel Islands, Canada, Malaysia, Scotland, Northern Ireland, England, Hong Kong, the United States, Thailand and Finland. The Superintendent of Bankruptcy, Marc Mayrand, is Canada's representative.

A paper was prepared by Canada on the Insolvency Processes in the member countries for the New Orleans meeting and widely distributed in 1997. If anyone wishes to receive a copy, please notify the Office of the Superintendent of Bankruptcy, attention Donna Osborne. Fax: (613)941-2862; E-mail: osborne.donna@ic.gc.ca

Challenge 2000

SUMMARY

Virtually all organizations now depend on information technology to manage their operations and deliver core business services. A world in which these vital technologies no longer function is unimaginable. But unless a simple programming problem is soon addressed, critical information and communications systems may cease to operate reliably on January 1, 2000.

DESCRIPTION

The problem: It arises from a seemingly innocuous programming convention for dealing with date-related transactions. Many information technology systems store dates in a format which uses only two digits instead of four to identify a given year. For example, January 1, 1999 is typically recorded as 01/01/99 rather than 01/01/1999. In most cases, such systems will interpret January 1, 2000 not as the beginning of the 21st century but as January 1, 1900 (01/01/00).

The implications: From a technical perspective, fixing the problem is quite simple, but the scope and scale of the work involved is daunting. Although many senior executives and even IT professionals continue to hope for a single, universal solution, it is extremely unlikely that a so-called "silver bullet" will emerge in time to deal with the problem. The implications of the Year 2000 problem extend far beyond the computer room. They are likely to affect the full range of business activity. Profitability, communications, process control, security, communications, employee morale and corporate reputation could all suffer if the issue is not adequately addressed.

The solution: Effective responses to the problem may demand a significant investment. Financial and human resources may need to be re-allocated and re-developed. Senior management, including the CEO and his closest advisors, must be fully informed and actively engaged in the assessment of the problem's impact and the definition of appropriate strategies.

Experience has demonstrated that without strong support and commitment from the highest levels of management, Year 2000 projects have little chance of success. Senior business leaders makers must provide leadership, direction, support and resources in support of Year 2000 initiatives.

The single most important step in addressing the Year 2000 problem is for senior leaders in business and government to take meaningful action. Meaningful action means committing human, technical and financial resources to address the Year 2000 problem. Meaningful action means empowering project managers to achieve organizational objectives.

An Executive Checklist: The checklist for any organization concerned about the impact of the Year 2000 date change should include answers to the following questions:

- Does executive management understand and support the actions being taken to deal with the Year 2000 problem?
- Has a decision been made to determine the appropriate mix of "make versus buy" with respect to the technical resources needed for the analysis, conversion and testing processes?
- Have appropriate tools been selected for all affected computer platforms and applications?
- Has a plan been established to set conversion priorities, based on the important of selected systems to core business activities?
- Has an overall conversion methodology, including an adequate testing plan, been selected?
- Is a procedure in place to ensure that new system resources will be adequately screened to ensure that Year 2000 problems are not reintroduced?

Summary: Although the Year 2000 deadline is fast approaching, there is still time for organizations to deal with the problem. Effective responses to the problem will demand a concerted effort, supported by the most senior levels of management.

Assistance

Industry Canada's Challenge 2000: Executive Guide to Year 2000 Computing Solutionexplains the Year 2000 problem and its implications to businesses. It offers strategies and resources to help businesses make their information systems Year 2000 compliant.

To obtain more information about Industry Canada's Challenge 2000: Executive Guide to Year 2000 Computing Solutions, please contact the Information and Communications Technologies Branch (ICTS) via INTERNET: visit the Challenge 2000 site at http://strategis.ic.gc.ca/year2000 or E-mail us at year2000@ic.gc.ca FAX: (613) 952-2718.

For further assistance, you may wish to contact the Information Technology Association of Canada (905) 602-8345 or your systems consultants and suppliers.

Canada's New International Insolvency System

*by Bruce E. Leonard and Frank Spizzirri**

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* Editor's Note: The coming into force of Bill C-5 has meant that the BIA has been greatly expanded by the addition of Part XII (Securities Firm Bankruptcies) and Part XIII (International Insolvencies). It is hoped that Parts XII and XIII will clarify and simplify two very troublesome types of administration. In Vol. 17, No. 1, 3rd trimester 1997, being the last issue of our Bulletin, we published a paper dealing with securities firm insolvencies which included an in depth analysis of the provisions found in Part XII of the BIA. In this issue, the provisions of Part XIII of the BIA are dealt with in a paper written by **Bruce E. Leonard and Frank Spizzirri of the law firm of Cassels Brock & Blackwell**, in Toronto. In much the same way as the paper dealing with securities firms insolvencies, the Leonard and Spizzirri paper analyses the complexities and difficulties which have traditionally plagued the administration of cross-border restructurings and insolvencies while highlighting the more important provisions of the newly enacted Part XIII of the BIA.

CANADA'S NEW INTERNATIONAL INSOLVENCY SYSTEM

I. INTRODUCTION

The trend towards greater international co-operation in multinational insolvencies and reorganizations was given new momentum on April 25, 1997 with the passing of Bill C-5. The Bill for the first time in Canadian insolvency legislation introduced provisions dealing specifically with international insolvencies into both the BIA and the CCAA.

Until Bill C-5, there had been a legislative void in this area and solutions to multinational problems could only be developed on a case by case basis. Co-ordination of administrations in multinational insolvencies has always been a difficult area in which to achieve meaningful progress as issues of national interest and sovereignty are invariably involved. In the absence of legislative provisions or international treaties, co-ordination could only result from initiatives produced by the insolvency profession and accepted by the courts.

The new Canadian international insolvency initiative began in earnest in 1992 with the passing of the revised BIA and the creation of the Bankruptcy and Insolvency Advisory Committee (BIAC), a public sector/private sector committee charged with advising the Government on improving Canada's insolvency legislation. The BIAC Working Group on International Insolvencies (which the author was privileged to co-chair with George Redling, Canada's then Superintendent of Bankruptcy) was set up specifically to deal with international insolvency issues.

The newly-enacted amendments recognize that progress toward international co-operation will be enhanced if domestic legislation provides a framework within which the insolvency community and the courts may continue to reach commercial solutions to commercial problems that have cross-border aspects. The international insolvency provisions of Bill C-5 represent a Canadian response to the challenge of improving international co-operation in insolvency matters. The amendments represent the first, rather than the last, step of the process and should provide both a constructive and workable basis from which to co-ordinate administrations in different countries for the benefit of all parties concerned and the basis of additional levels of co-operation and co-ordination.

II. OPTIONS IN MULTINATIONAL RESTRUCTURINGS

The legislative framework for dealing with multinational and cross-border businesses in financial difficulties has hardly evolved from the state it was in several decades ago. There have been limited legislative initiatives into the area of co-operation in international insolvencies and restructurings (section 304 of the United States Bankruptcy Code and section 426 of the U.K. Insolvency Act are good examples) but the relative infrequency of the actual use of these types of provisions shows, however, that they have not brought about the significant changes and improvements that are needed to deal with the globalization and internationalization of business and commerce.

There are several options that could improve the current state of international co-operation in insolvencies and reorganizations. The most logical and obvious solution would be a multinational treaty or convention to deal with insolvencies and reorganizations of multinational businesses. In practice, however, multinational treaties and conventions have proved exceptionally difficult to arrive at. There are very few functioning examples of international treaties on insolvency and reorganizations. The European efforts in the area, perhaps, illustrate the difficulty in negotiating an effective international insolvency convention. Clearly, multinational conventions cannot be expected to be the primary means of achieving significant improvement in the international insolvency area.

Bilateral treaties between countries are another option. These are easier to negotiate but there are still very few examples of functioning bilateral treaties in existence. The difficulty with bilateral treaties as well as with multinational treaties is that they become exercises in the negotiation of sovereign rights. What is needed more is an appreciation that treaties or conventions on international insolvency and reorganizations really represent primarily the regulation of

commercial interests in the event of a financial failure. As long as the negotiation of treaties remains in the realm of sovereignty and national interest, the road toward a successful conclusion of a treaty or convention will be hard to find and successful efforts will be few and far between.

In the absence of effective treaty or convention arrangements, the choice in a multinational or cross-border insolvency or reorganization seems to be primarily between a primary/secondary jurisdiction structure for an administration on the one hand and a concurrent/parallel proceedings structure on the other. In concept, a primary/secondary jurisdiction model would involve a filing in the primary jurisdiction where the debtor's central operations are located and subsequent secondary filings in other jurisdictions where assets are located. In the concurrent/parallel jurisdiction model, the reorganizing business would file full proceedings in both the jurisdiction where its central operations are located and in other jurisdictions where key assets are located.

In a genuine primary/secondary model, the secondary jurisdiction would defer in major respects to the primary jurisdiction even, perhaps, to the point of turning over assets for administration in the primary jurisdiction. Conceptual difficulties will arise, of course, where the first case to be filed is in the "secondary" jurisdiction rather than the jurisdiction of the debtor's central operations. Moreover, recent experience has shown that some businesses opt to locate their offices in jurisdictions that are inconvenient for the creditors, thereby giving rise to an initial threshold issue in the proceedings as to which jurisdiction is the primary jurisdiction and which jurisdiction is the secondary jurisdiction. In addition, experience has shown that courts in all countries continue to be influenced by the interests of domestic creditors and that the courts of one jurisdiction are generally reluctant to yield authority or concede primacy to the courts of another. Consequently, administrations that appear to fall within the primary/secondary model may in fact actually be examples of the concurrent/parallel proceedings model.

It is clear, however, that courts in different countries are often very willing to co-operate with each other and to co-ordinate their administrations in the case of a cross-border or multinational reorganization or insolvency. The key to this increased willingness to co-operate and co-ordinate may well lie in the experience gained from cross-border insolvency protocols that have been negotiated in recent cases and from the example of the International Bar Association's Cross-Border Insolvency Concordat (discussed in detail below).

Recent international experience with concurrent proceedings shows that orderly administrations of portions of business entities in different countries can be successfully carried out. The concurrent proceedings model recognizes the reality of a situation in which the courts of one jurisdiction are reluctant to yield their jurisdiction to the courts of another but wish to co-ordinate their administrations.

III. CANADIAN CROSS-BORDER REORGANIZATIONAL PRACTICE PRIOR TO BILL C-5

1 | INTRODUCTION

Prior to Bill C-5, cross-border insolvency and reorganizational co-ordination relied on the international co-operation between the insolvency community and the courts. Because of the lack of legislation or even legislative guidelines, *ad hoc* solutions were reached based on consensus agreements and a shared view that international co-operation in a multinational restructuring or insolvency would produce the best result for the affected shareholders.

Though slow at the outset, the trend towards international co-operation accelerated in the 1990's as more multinational businesses encountered financial difficulties. The Canadian approach to international insolvency cases has also evolved and matured. Early Canadian cases were cautious and judicial decisions were based on technical considerations. Later decisions took an "appropriate forum" approach, to co-operation by looking at which jurisdiction was the most appropriate one to deal with the parties and issues involved.

2 | THE EARLY INTERNATIONAL INSOLVENCY CASES

While Canadian courts have dealt with cross-border insolvencies for decades, the number of such cases has been extremely small thereby making general legal propositions difficult to extract. It is clear, however, from recent Canadian cases concerning the recognition of foreign proceedings that increasing global economic internationalization is leading to a more

international view of insolvency in Canada. Typically, Canadian courts in early cases dealt with foreign insolvency-related proceedings only to the extent that they were called upon to recognize bankruptcy and insolvency-related judgments concerning the vesting of property in the insolvency administrators appointed in a foreign proceeding. Recent cross-border insolvencies have, however, focused less on the rights of foreign trustees or receivers to property in Canada and more on the complex international legal issues which accompany the financial difficulties of an international business enterprise.

3 | THE TURNING POINT: *MORGUARD INVESTMENTS LTD. V. DE SAVOYE*

Traditionally the recognition of foreign insolvency proceedings by Canadian courts has focused on whether or not the foreign court had jurisdiction over the debtor in the international conflict-of-laws sense of the term. Under Canadian conflict-of-laws rules it has been generally understood that a foreign court has jurisdiction over a debtor where the debtor was either resident in the jurisdiction at the time that the insolvency proceedings were initiated or had submitted to the jurisdiction of the foreign jurisdiction through some act on its part. Canadian conflict-of-laws rules are, however, becoming more accommodating and seem to be taking a more modern view which looks to the connection between the forum and the matter rather than focusing on the narrow issue of "jurisdiction".

The leading authority for this new accommodation is *Morguard Investments Ltd.* v. *De Savoye:* [1990] 3 S.C.R. 1077 (S.C.C.). In *Morguard,* the Supreme Court of Canada rejected the traditional approach to the recognition of foreign proceedings. The Court emphasized the necessity that foreign proceedings be recognized in the interests of fairness and economic necessity in an economically integrated world. The Supreme Court determined that recognition of foreign proceedings should be dependent on the strength of the connection between the matter and the jurisdiction. This has become known as the "real and substantial connection test".

Strictly speaking, *Morguard* dealt with inter-provincial issues and was not an international conflict-of-laws case. Subsequent to *Morguard,* however, Canadian courts have consistently applied the real and substantial connection test to the recognition of orders rendered by the courts in jurisdictions where the legal regimes had principles compatible with Canadian concepts of justice. The courts have found that it would be at odds with the reality of modern commercial life if a business could be carried on in a country for a number of years and then shelter itself from the legal ramifications of the failure of the business behind Canadian borders.

The Canadian courts' approach to the recognition of foreign proceedings following *Morguard* recognizes that increasing international economic integration requires that domestic courts afford appropriate recognition to foreign proceedings. These cases proceed from the practical reality that "modern rules of international [private] law must accommodate the flow of wealth, skills and people across state lines and promote international commerce" (*Morguard* at p. 1096). In the context of cross-border insolvency, this principle allows and encourages Canadian courts to recognize foreign insolvency proceedings from jurisdictions that have a real and substantial connection to the debtor and its business.

The Supreme Court of Canada linked the choice of jurisdiction issue with *Morguard* in another case involving inter-provincial conflicts: *Hunt* v. *T & N plc.* (1994), 109 D.L.R. (4th) 16 (S.C.C.). Several Québec companies had manufactured and sold products containing asbestos, allegedly causing the plaintiff in British Columbia to develop cancer. He sued in British Columbia, but was frustrated in document discoveries by a Québec law prohibiting the removal of documents from that province. The Supreme Court struck down that law as being *ultra vires* the province and contrary to inter-provincial comity. The Court also expanded upon the "real and substantial connection" test of *Morguard* and provided further guidance on when such a connection would be found to exist, emphasizing considerations of order and fairness, rather than an approach which mechanically counts the number of contacts with a given jurisdiction, as would have been the case in the past.

IV. THE BIAC PROCESS: CONTROVERSY AND CONSENSUS

1 | INTRODUCTION

After a lengthy effort, and a number of failed attempts along the way, Canada reformed its 1949 bankruptcy legislation in November,

1992 through amendments to the old Bankruptcy Act (which was renamed as the "Bankruptcy and Insolvency Act" in the process). In an attempt to avoid another 40 year interval before the next legislative consideration of new insolvency legislation, the new Act required a review and report on additional changes to Canada's bankruptcy legislation. As a prime feature in the review process, the Government of Canada established a new Bankruptcy and Insolvency Advisory Committee to consider and provide private sector input into a Phase II of insolvency reform in Canada.

The Bankruptcy and Insolvency Advisory Committee (BIAC) then established eight Working Groups to consider several major aspects of Canadian bankruptcy law and practice with a view to identifying areas for improvement in Canada's insolvency regime. Working Groups were established in the following major areas:

i) Consumer Proposals and Bankruptcies;

ii) Commercial Reorganizations;

iii) International Insolvencies;

iv) Stockbroker Insolvencies;

v) Priorities and Privileges;

vi) Legislative and Technical Issues; and

vii) Directors' Liabilities.

The objective of the Working Group on International Insolvencies was to canvass international experience in the insolvency area and to recommend changes to the Bankruptcy and Insolvency Act under which the recognition of foreign insolvency representatives and proceedings by Canadian courts would be facilitated and enhanced. This was a daunting task, as had been treaty initiatives in the area, and the most recent draft legislation containing international insolvency provisions (Bill C-17 in 1984) had died on the order paper.

2 | THE BIAC WORKING GROUP ON INTERNATIONAL INSOLVENCIES

During the course of its work, the BIAC Working Group on International Insolvencies identified a number of difficult conceptual issues in the area of multinational and cross-border insolvencies and reorganizations. The Working Group opted to pursue changes in Canada's domestic legislation as being the most feasible means of achieving significant progress in the area of international insolvencies. Difficult choices had to be made between the differing approaches represented by Section 304 of the United States Bankruptcy Code and Section 426 of the U.K. Insolvency Act. The problems of recognition of foreign proceedings, the rights to be given to foreign representatives, the need to co-ordinate administrations and the impact of priority and preferential claims on assets involved in a corporate failure were identified as major issues in the process of improving the Canadian treatment of multinational and cross-border insolvencies and reorganizations.

In the course of its deliberations, the Working Group recognized an alternative approach to assessing domestic legislative provisions dealing with international insolvencies and reorganizations. The traditional conflicts of laws approach to the area involves largely focusing on the legal principles by which a local court would or would not afford recognition to the orders and proceedings taken in a court in another country. However, it was felt that a different approach used in conjunction with the traditional conflicts of laws principles would be beneficial.

Specifically, the Working Group felt that the legislative focus should not be as heavily weighted toward the formal principles for recognition of foreign insolvency representatives and foreign proceedings. In an era of steadily increasing globalization, it seemed more appropriate to consider affirmatively providing in domestic legislation the means by which Canadian courts could co-operate with other courts in multinational cases and co-ordinate administrations for the benefit of the stakeholders involved in the cases.

a) Recognition of Foreign Insolvency Representatives and Proceedings

The Working Group recommendations reflected the view that a universalist approach to insolvency would be more likely to promote efficiency, fairness and equity in multinational cases than the traditional territorial approach. The Working Group recommended that once foreign representatives or insolvency proceedings had been recognized, the Canadian courts should be given specific powers to assist in an orderly co-ordination of the Canadian and multinational aspects of the case.

b) International Co-operation

The Working Group considered the two differing approaches taken by the United States and the U.K. with respect to judicial assistance and co-operation in multinational cases. The U.K. Insolvency Act provides for mandatory judicial co-operation with foreign insolvency administrations but only for certain prescribed countries. The United States, on the other hand, does not have a list of "approved" jurisdictions but sets out criteria to be applied on a case by case basis regardless of the country of origin.

The Working Group recommended that the Canadian legislative approach focus co-ordinating administrations generally rather than co-ordinating on administrations from particular countries. The Working Group recommended criteria based on international comity and the degree of similarity in the statutory framework for proceedings in Canada and in the foreign jurisdiction. In this way there would be no outright exclusions as in the U.K. model. As an alternative recommendation, the Working Group suggested creating a two-tiered system whereby proceedings from certain countries would receive automatic recognition and others would have to satisfy the court as to the suitability of extending recognition.

c) Foreign Priority Claims

Despite some early discussion of giving foreign priority claims, such as government or employee claims, comparable priority treatment in Canada, the Working Group recommended that foreign priority claims be recognized only as unsecured claims in Canada and then, subject to public policy considerations (e.g., as in the case of foreign revenue authority claims).

d) Reorganizations vs. Liquidations

The Working Group recognized that international reorganizations present a quite different array of issues than liquidations. The Working Group suggested that the courts might benefit from clear criteria for reorganizing foreign reorganizational proceedings. It recommended that in dealing with reorganizations courts take into consideration international comity; the economic and expeditious administration of the company or group of companies being reorganized; the extent to which similar remedies would be available in Canada and whether the recognition of the foreign proceeding in Canada would materially and unfairly prejudice any creditors.

V. THE NEW CANADIAN INTERNATIONAL INSOLVENCY SYSTEM

1 | INTERNATIONAL CO-OPERATION IN CROSS-BORDER REORGANIZATIONS AND INSOLVENCIES

One of the most important features of the new international insolvency amendments is the specific power given to the courts to facilitate or implement arrangements that will result in a co-ordination of proceedings under the BIA with foreign proceedings: section 268(3). A Canadian court now has the power to make "such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding." Such orders may be made "on such terms and conditions as the court considers appropriate in the circumstances": section 268(4). These broad powers recognize the complex and varied situations which can arise in cross-border insolvencies and enable the court to shape the judicial assistance it makes available to fit the particular circumstances of the case. The section avoids the traditional conflicts of law approach to cross-border insolvency situations. It allows case specific solutions to be worked out between the courts involved and allows them to draw upon the emerging international solutions on how to manage multinational problems through case specific protocols and treaties (such as the IBA's Cross-Border Insolvency Concordat, MIICA and the UNCITRAL Model Law on Cross-Border Insolvencies, which are discussed further below).

The aim of these international amendments, is not to choose one law or the other to govern a cross-border matter, but to allow the Canadian court to harmonize its administration with that of the foreign jurisdiction. For this reason, the jurisdiction to make orders under this section depends on the existence of a foreign insolvency proceeding.

There was considerable discussion during the BIAC process as to the legislative principles that would govern the ability of Canadian courts to co-ordinate their administrations with administrations in foreign countries. From a universalist point of view, one of

the new amendments specifies that Canadian courts can continue to apply traditional Canadian legal and equitable rules provided they are not inconsistent with the amendments: section 268(5). From a territorial point of view, the new legislation also stipulates that Canadian courts are not required to make any order that is not in compliance with Canadian law or to automatically enforce any order made by a foreign court: section 268(6).

One of the critical components in cross-border coordination and harmonization is the ability for the courts and the professionals involved in each jurisdiction to communicate with each other. The new Canadian legislation contains provisions which are unique and precedent-setting. Canadian courts in multinational cases may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by way of order, written request or "otherwise as the court considers appropriate": section 271(1). This provision is a recognition derived from the BIAC process that modern means of communication are developing and evolving at a remarkable pace and that the best judges of how communications should be carried out effectively, fairly and efficiently should be the judges of the courts themselves.

In another step toward creating an atmosphere that is more conducive to cross-border co-operation and harmonization, the new amendments provide that a Canadian court can limit the authority of a Canadian-appointed trustee to deal with property of the debtor. The object of this amendment is to enable the Canadian administration to mesh fairly and efficiently with a foreign administration: section 268(2). Interestingly, the section is only triggered when there is a foreign proceeding. The provision confers no power to trim back the cross-border scope of a Canadian proceeding when there are no foreign proceedings on foot. Of course, a Canadian trustee cannot count on exercising extraterritorial power because any attempt to enforce rights outside of Canada must be recognized by the relevant foreign court (e.g. under section 304 of the U.S. Bankruptcy Code).

2 | RECOGNITION AND ACCESS: FOREIGN INSOLVENCY PROCEEDINGS AND FOREIGN INSOLVENCY REPRESENTATIVES

i) Recognition of Foreign Insolvency Proceedings

The new amendments define the concept of a "foreign proceeding" very broadly to mean a judicial or administrative proceeding under bankruptcy or insolvency legislation which deals with the collective interests of creditors generally. The foreign proceeding must have been commenced "outside of Canada" but there is no list of acceptable or prescribed countries as under the comparable U.K. or Australian legislation.

This provision could potentially capture proceedings as diverse as foreign bankruptcies, foreign insolvent liquidations, foreign reorganization proceedings, foreign insurance company insolvencies and rehabilitations. It may, however, exclude non-insolvent reorganizations such as arrangements under corporate legislation (even though such legislation has been used to reorganize ostensibly insolvent companies in Canada such as Dome Petroleum, Gentra and Trizec). Widening the field of recognition in this manner is a major advance over the restrictive common law approach to cross-border recognition based on traditional conflicts of laws principles.

ii) Recognition of Foreign Insolvency Representatives

A "foreign representative" for the purposes of the new provisions is someone who is assigned functions under the foreign jurisdiction that are similar to those performed in Canada by a trustee, liquidator, administrator or receiver appointed by the court. Hence a person sanctioned by a court (or tribunal) in a foreign jurisdiction will be recognized as a foreign representative in Canada. However, it would appear that a Chapter 11 debtor in possession would not qualify, although an examiner appointed by the court in a Chapter 11 proceeding probably would.

A foreign representative is not prevented from seeking recognition from the court by reason that proceedings by way of appeal or review of its appointment have been taken in the foreign proceeding. The Canadian court may grant relief as if the

appeal or review proceedings had not been taken in the foreign jurisdiction: section 273.

To assist in the recognition process, the new amendments provide that a certified or exemplified copy of a bankruptcy, insolvency or reorganization order made in the foreign proceeding may be accepted by the Canadian court and that the order is proof, in the absence of evidence to the contrary, that the debtor is insolvent: section 268(1). The order is also proof of the appointment of a foreign representative. This allows Canadian courts to accept foreign orders, on their face, as being a valid starting point for any proceedings in Canada.

iii) Powers of Foreign Insolvency Representatives

In line with the international co-operation mandated in the new legislation, a foreign representative is given the power to appear before a Canadian court to seek the remedies available to it without attorning to the jurisdiction of the Canadian court. Consequently, foreign representative may seek relief in Canada without inadvertently transferring an otherwise foreign insolvency matter to Canada and subjecting the whole process to Canadian law and the auspices of Canadian courts: section 272.

A foreign representative may seek relief in several areas of the insolvency process. In particular:

a) Commencement of Proceedings

A foreign representative, may commence and continue a proceeding under sections 43 (Petitions), 46 to 47.2 (Interim Receivers), 50(1) (Proposals) and 50.4(1) (Notices of Intentions to make a Proposal) of the BIA as if the foreign representative were a creditor, trustee, liquidator or receiver of property of the debtor: section 270.

b) Stays of Proceedings

A foreign representative may apply to the court for a stay of proceedings in Canada. A stay can be granted on terms that are similar to stays of proceedings otherwise available under the provisions of the BIA: section 271(2).

c) Interim Preservation Powers

A foreign representative may apply to the court for the appointment of an interim receiver. An interim receiver appointed by the court can be given the power to take conservatory measures and summarily dispose of perishable or depreciable property, to take possession of all or part of the debtor's property, or to exercise such control over the property and/or the debtor's business as the court considers appropriate: section 271(3). This relief can be granted where the court is satisfied that it is necessary for the protection of the debtor's estate or the interest of one or more of the creditors of the debtor.

d) Examination Powers

A foreign representative may request authority from the court to examine the debtor under oath in the same manner in which a bankrupt under the BIA may be examined: section 271(5).

3 | STAYS OF PROCEEDINGS

Recognition of foreign stays of proceedings is always a contentious issue in multinational insolvencies. The reason is that automatic recognition of stays from foreign proceedings implies either the automatic recognition of the extraterritorial effect of the laws of the foreign jurisdiction or a concession on the part of the court in the domestic jurisdiction that the court in the foreign jurisdiction has the primary authority in the case. The new amendments bring a new concept to the recognition of stays from foreign proceedings which is consistent with the new legislation's emphasis on international co-ordination and concurrent administrations.

Under the new amendments, a stay of proceedings that operates against creditors of a debtor in a foreign proceeding does not apply in respect of creditors who reside or carry on business in Canada with respect to property in Canada unless the stay of proceedings is a result of proceedings taken in Canada: section 269. A foreign representative would be entitled to seek a stay of proceedings in Canada: section 271(2).

The new provision appears to provide some relief from the uncertainty created by the extraterritorial application of the automatic stay provisions of, for example, the United States Bankruptcy Code. Section 362 of the Bankruptcy Code creates an automatic worldwide stay of proceedings against the debtor immediately upon a bankruptcy or reorganizational filing and this stay would continue to be enforceable against, among others, Canadian creditors who are

subject to the *in personam* jurisdiction of the United States courts by virtue of their doing business or having assets in the United States. Hence, even with the new amendment in force, a Canadian creditor with assets in the United States could well find itself in a position where the United States stay is inapplicable in Canada under Canadian law, but it is unable to take enforcement steps without risking being in contravention of the United States automatic stay. The only solution in such situations may be for the Canadian creditor to apply to the United States courts for relief from the stay as it applies to proceedings in Canada. This may also be a situation where a cross-border insolvency protocol (discussed further below) would be a helpful solution in a cross-border insolvency.

4 | FOREIGN PRIORITY AND FOREIGN CURRENCY CLAIMS

The amendments give no explicit instructions on the handling of foreign priority claims i.e., claims of foreign governments and other entities with priority claims in their own jurisdictions. The BIAC Working Group had suggested that foreign preferred claims be treated as unsecured claims against Canadian assets. This arguably remains the common law approach to foreign preferred claims, and in the absence of any contrary indication in the legislative amendments, will remain the normal approach. Nonetheless, the scope of authority explicitly given to the courts to facilitate international co-operation endorses the creative approaches that the Canadian courts have already been developing on an *ad hoc* basis. In one exceptional case, Re *Sefel Geophysical Ltd.*, (1988), 70 C.B.R. (N.S.) 97 (Alta. Q.B.), the Canadian court in fact effectively recognized a foreign preferred claim. The amendments open the door to such exceptional treatment, but only in the face of exceptional facts.

Foreign currency claims have long been an area of unnecessary uncertainty and the new legislation provides some easy-to-apply rules. Section 275 of the BIA provides that all foreign currency claims will be converted to Canadian currency at the exchange rate prevailing on certain prescribed dates, generally on the date of the commencement of the bankruptcy liquidation or reorganization. (See the new definition in section 2.1 of the BIA.)

However, section 275 only provides for the treatment of foreign currency claims in Canadian bankruptcy proceedings, it is silent about the treatment of foreign currency claims in foreign proceedings whose recognition is sought in Canada. From the structure of the provisions discussed above, it appears that the court would have the power, but not the duty, to address the issue as a condition of granting recognition to the foreign proceeding or representative.

5 | COMPLEMENTARY AMENDMENTS TO THE CCAA

Bill C-5 also amended the CCAA so that the CCAA adopts the same harmonization and co-operation principles as the BIA while at the same time leaving the CCAA as the more flexible restructuring regime. The CCAA amendments give the court the power to "make such orders and grant such relief as it considers appropriate to facilitate or implement arrangements that will result in the co-ordination of proceedings under this Act with any foreign proceeding": section 18.6(2). While this provision also appears in the BIA, there are no comparable provisions in the CCAA dealing with what orders may be sought on application. The CCAA also allows, in the same fashion as the BIA, a foreign representative to seek relief from Canadian courts without attorning to the jurisdiction of the Canadian court: section 18.6(7).

In line with the thrust of Bill C-5 to increase international co-operation between courts, the new CCAA amendments contain a provision which allows a Canadian court to seek the aid and assistance of a foreign judicial body by order, written consent or otherwise as the court considers appropriate: section 18.6(6).

The amendments to the CCAA do not contain the BIA's provisions on the extraterritorial effect of foreign stays nor the ability of the court to appoint an interim receiver on the application of a creditor in CCAA proceedings. The ability of a foreign representative to bring an application regardless of appeal or review proceedings in its home jurisdiction does not appear in the CCAA amendments nor does the rule requiring creditors to receive the same proportionate dividends regardless of the administrations they participate in.

The new amendments to the BIA and the CCAA are, on the whole, a very constructive and positive step toward an increased level of co-operation and co-ordination in international and cross-border insolvencies and reorganizations. They are a legislative

encouragement to the courts to continue to follow the path of comity and co-operation established in Canada's recent major multinational insolvencies. While courts of sovereign countries have traditionally tended to view each other with some measure of apprehension, in the international insolvency sphere where a relatively small number of senior and experienced judges seem to be involved in major international insolvencies, the examples of co-operation and *Maxwell, Olympia & York* and *Everfresh* show that the courts in the United States, Britain and Canada in this area are now more inclined to adopt commercial solutions to the issues that arise in cross-border insolvencies and to co-ordinate their respective administrations than ever before. This is a trend which the legislative impetus in the amendments to the BIA and the CCAA dealing with international insolvencies can only reinforce.

VI. CURRENT INITIATIVES IN CROSS-BORDER INSOLVENCIES

1 | THE INTERNATIONAL BAR ASSOCIATION AND COMMITTEE J

The improvement in the means by which international insolvencies and reorganizations are dealt with and the prospects for further improvements seem fated to be derived primarily from the co-operation and co-ordination of the insolvency community in many different countries. As indicated above, there is a highly-noticeable unwillingness or lack of attention among governments toward implementing effective multinational treaties in the insolvency area. Because of this legislative void, the insolvency community has had both the obligation and, as well, the opportunity to achieve advances in the current international regime for dealing with cross-border insolvencies and reorganizations.

Some of the most significant initiatives in improving the framework for cross-border insolvencies are being pursued by the Insolvency and Creditors' Rights Committee of the Section on Business Law of the International Bar Association (Committee "J" in IBA parlance). The International Bar Association is the world's largest international organization of law societies, bar associations and individual lawyers engaged in multinational legal issues. It is comprised of over 17,000 individual lawyer members in over 180 countries. Its member organizations include over 165 Law Societies and Bar Associations which together represent more than 2,500,000 lawyers around the world. The IBA is comprised of three major Sections: the Section on Business Law, the Section on General Practice and the Section on Energy and Resource Law. Of the three, the Section on Business Law is the largest with over 13,000 individual lawyer members. Committee J is one of the major Committees of the Section on Business Law with a membership of 1,200 insolvency and creditors' rights lawyers from over 80 countries world wide.

Committee J meets annually in conjunction with meetings of the International Bar Association and the IBA's Section on Business Law, usually in September or October. Recent meetings have been held in Berlin, Paris, Melbourne, New Orleans, Cannes and Hong Kong, and future meetings are planned for New Delhi, Vancouver, Barcelona and Amsterdam. Committee J's meetings feature discussions of current and significant topics in the insolvency and reorganizational field featuring experienced and knowledgeable speakers from around the world. The collected materials from Committee J Conferences are maintained in the Committee J International Insolvency Database where they are available to members of the Committee. The objective of the Committee's International Insolvency Database is to achieve a broader dissemination of insolvency and creditors' remedies materials among members of the insolvency community, and within the commercial and financial communities around the world.

Committee J has several Subcommittees that are dedicated to pursuing particular activities on behalf of the Committee. The Subcommittee on the Cross-Border Insolvency Concordat produced Committee J's unique Concordat (described in more detail below) and the Subcommittee on Model Bankruptcy Legislation is well under way with a project to produce a Model Insolvency Code (also described in more detail below). The Subcommittee on Insolvency in Regulated Financial Institutions was recently created to consider and deal with the ramifications of insolvency issues that affect institutions and creditors in the banking and insurance industries. The Subcommittee on Remedies under Security Interests is conducting an international survey on issues relating to the creation and enforcement of security interests worldwide.

Committee J's Subcommittee on International Treaties has conducted a survey of over 150 countries to determine the existence of international insolvency treaty arrangements and any prospective arrangements that are under negotiation and actively participated in the development of the UNCITRAL Model Law on Cross-Border Insolvencies. Committee J's Subcommittee on Professional Liaison has as its goal the establishment of a network of contacts with insolvency and insolvency-oriented organizations within the insolvency profession from around the world. The Programs and Publications Subcommittee is responsible for publishing Committee J's twice-yearly newsletter, the *International Insolvency and Creditors' Rights Report* which is now in its ninth year of publication.

2 | COMMITTEE J'S CROSS-BORDER INSOLVENCY CONCORDAT

Committee J has sponsored a major new initiative in international insolvency and reorganizations. The initiative is the Committee's Cross-Border Insolvency Concordat which was formally adopted by the Council of the Section on Business Law of the International Bar Association at its Twelfth Biennial Meeting in Paris in September, 1995 and by the Council of the International Bar Association itself at the IBA Council meeting in Madrid in May, 1996.

The Cross-Border Insolvency Concordat is intended to suggest rules applicable to cross-border insolvencies and reorganizations which the parties or the courts could adopt as practical solutions to cross-border issues arising in proceedings in different countries. The Concordat is based on the view that an insolvency regime which is predictable, fair and convenient can promote international trade and commerce. International commerce can clearly be enhanced and facilitated by an international understanding that particular principles or guidelines are available in the event of a business failure or reorganization. The Concordat is intended to focus the experience of the insolvency community to develop guidelines which could be used in identifying solutions to individual cross-border insolvencies.

The Cross-Border Insolvency Concordat has been a Committee J project for several years. Country teams were established in over twenty-five of Committee J's member countries and these teams reviewed the Concordat from the point of view of their domestic law and practice to ensure that its principles would be acceptable to the domestic courts in their countries. The process has been inestimably assisted by the active participation of distinguished judges from several different countries including Canada, the United States, South Africa, Japan, France, England, and Denmark.

Shortly after the IBA's approval of the Cross-Border Insolvency Concordat, theory met practice when Everfresh Beverages Inc. fell into financial difficulty. Everfresh was an integrated multinational manufacturer and distributor of beverages and beverage products. It was a Delaware company with head office in Chicago and with operations in Illinois, Michigan and Ontario. When it encountered financial difficulty, it filed a BIA Notice of Intention to make a Proposal in Toronto and concurrently filed under Chapter 11 in the United States Bankruptcy Court in New York. In an initial Order in the Canadian proceeding, Mr. Justice J.M. Farley of the Ontario Court of Justice in Toronto, directed Everfresh and its creditors to have regard to the Chapter 11 proceedings pending in New York. The judge presiding over the Chapter 11 proceedings in New York, the Hon Jeffrey Gallet, similarly encouraged the company and its creditors to co-ordinate the Chapter 11 administration with the Canadian administration.

In less than five weeks, Everfresh, its major operating lender and the United States Creditors' Committee had developed a Cross-Border Insolvency Protocol based on the Committee J Cross-Border Insolvency Concordat. The Cross-Border Insolvency Protocol set up procedures to deal with such things as the administration of assets in both countries, the sale of assets in both countries, the distribution of the proceeds of sales, co-ordination in classifying and dealing with creditors' claims, and proceeding with the development of a plan of reorganization in the Chapter 11 proceedings and a proposal in the Canadian proceedings.

In a remarkable example of international comity and co-operation, the Cross-Border Insolvency Protocol in the *Everfresh* case was approved by the two courts on the same day. Chief Judge Burton R. Lifland issued an Order approving the Cross-Border Insolvency Protocol in *Everfresh* in New York on the morning of December 20, 1995 and Mr. Justice Farley

issued a comparable Order approving the Cross-Border Insolvency Protocol later that same afternoon in Toronto.

In approving the Cross-Border Insolvency Protocol in *Everfresh*, Mr. Justice Farley stated:

> *I would congratulate the parties for their initiative in taking their lead from the Concordat adopted by International Bar Association at the Paris Assembly this past September and in crafting the Protocol which I believe will prove of significant value to all concerned, both in the aspect of eliminating certain procedural difficulties, reducing legal expenses and uncertainties and hopefully in maximizing everyone's recovery. I would think that this protocol demonstrates the "essence of comity" between the courts of Canada and the United States of America.*

The adoption of the Cross-Border Insolvency Protocol in the *Everfresh* case dramatically reduced the number of issues that might otherwise have arisen and it put the emphasis in the *Everfresh* reorganization on the commercial and reorganizational aspects of the case rather than on the more obscure conflicts of law issues that might otherwise have been litigated at some length and with considerable delay and expense. This is the kind of international co-operation and co-ordination that prompted the development of the Cross-Border Insolvency Concordat and it was a remarkable achievement to have negotiated the Cross-Border Insolvency Protocol in *Everfresh* in such a short period of time. The negotiations were unquestionably assisted by the co-operative approaches taken by the Courts in New York and Toronto and the process was very greatly assisted by the example of IBA's Cross-Border Insolvency Concordat.

Subsequent to the Ontario and New York Courts' approval of the Cross-Border Insolvency Protocol, sales of Everfresh's assets were negotiated and completed in both Canada and the United States. In accordance with the Protocol, sales of assets in Canada were approved by the Canadian Court and sales in the United States were approved by the United States Bankruptcy Court. In the Canadian asset sales, the United States Creditors' Committee appeared and made representations to the Canadian Court. Under the Protocol, it was entitled to do so and it was not considered to have attorned to the jurisdiction of the Canadian Court as a result.

The *Everfresh* example may show the way toward future examples of international co-operation in cross-border cases. In a sense, it would seem that the insolvency community and the courts have taken the matter of the improvement in cross-border co-operation and co-ordination into their own hands and in so doing are in the process of creating a framework for a much higher level of international co-operation and co-ordination in future cross-border insolvencies and reorganizations.

3 | HARMONIZATION OF LEGISLATIVE INSOLVENCY REGIMES: COMMITTEE J'S MODEL INSOLVENCY CODE

Committee J's Subcommittee on Bankruptcy Legislation has been vigorously pursuing the Committee's Model Insolvency Code project for several years. The project is intended to focus on the major insolvency concepts that occur in insolvency practice in all of Committee J's member countries. Following a review and analysis of fundamental insolvency concepts in the Committee's member countries, a set of uniform concepts that would be acceptable to or adaptable into local domestic legislation in those countries is being prepared. The Model Insolvency Code will also serve as a model for countries that are in the process of studying the reform of their insolvency legislation or are actually doing so.

The Subcommittee on Bankruptcy Legislation established a network of over 25 country teams from among Committee J's member countries to study the concepts in the Model Insolvency Code. Task Forces were established to lead the review and analysis of fundamental insolvency principles. The work on the Model Insolvency Code has become a mainstay of Committee J's Annual Meetings and its Biennial Conference Series. From Committee J's research and analysis, it was pleasantly surprising to find out that there are often quite striking similarities in the manner in which fundamental insolvency concepts are dealt with in Committee J's member countries around the world.

The ultimate goal of the Model Insolvency Code is to promote harmonization in the insolvency regimes in Committee J's member countries and to facilitate the

proper and fair treatment of claims of creditors in multinational insolvencies or reorganizations. The Model Insolvency Code, when finalized, will represent the analysis and reflection of some of the most experienced insolvency lawyers in the world from a variety of different jurisdictions and backgrounds and will be a product which will be worthy of consideration in all of Committee J's member countries.

4 | COMMITTEE J'S MODEL INTERNATIONAL INSOLVENCY CO-OPERATION ACT

Committee J's original project to foster and enhance international co-operation in insolvency matters was its Model International Insolvency Co-operation Act ("MIICA"). The MIICA project was intended to create the framework of a treaty which could be signed by countries willing to agree to a common approach to major issues in multinational insolvencies. The advantage of MIICA was that it would serve as framework legislation which could be adopted concurrently by interested nations without the need to separately negotiate on a wide variety of matters which, based on past experience, would usually doom the effort to failure.

The primary objective of MIICA was to ensure that the status and authority of a foreign representative or trustee could be recognized without the necessity for a full-scale proceeding which would simply re-litigate the issues which led to he insolvency in the originating country. MIICA essentially requires a domestic court to recognize a foreign representative as long as the foreign representative complies with its orders. Domestic courts are directed, without apparent qualifications or reservations, to aid and assist the courts in the other jurisdiction if the other jurisdiction has adopted legislation comparable to MIICA. In addition, domestic courts are required to act in aid of foreign proceedings if they are satisfied that the foreign forum is proper and convenient to supervise the administration of the debtor's property, and that the administration of the debtor's property in the other jurisdiction is in the overall interests of all of the debtor's creditors.

The Model Insolvency Co-operation Act was approved by the Council of the Section on Business Law and by the Council of the International Bar Association and was sent to the Attorneys General and Ministers of Justice in all of the IBA's member countries. In addition, it has been translated into seven different languages and was published in 1994 in *Current Issues in Cross-Border Insolvency and Reorganization* (Graham & Trotman/Kluwer, London). Both MIICA and Committee J's Model Insolvency Code have been considered in several countries that have undertaken reviews and modifications in their domestic insolvency legislation.

5 | THE AMERICAN LAW INSTITUTE TRANSNATIONAL INSOLVENCY PROJECT

The proclamation in January, 1994 of the North American Free Trade Agreement created a framework which was intended to liberalize the flow of trade and investment among Canada, Mexico and the United States. The recognition of the increased levels of commercial and investment activity that would result from NAFTA prompted an initiative on the part of the American Law Institute ("ALI") to determine whether a framework for cross-border insolvencies among the NAFTA countries could be articulated and put into practice. The ALI's Transnational Insolvency Project, consequently, is a major initiative to analyze and suggest a framework for resolving or reducing conflicts in international insolvency proceedings between the there NAFTA countries.

By way of background, the American Law Institute was organized in 1923 following a study by prominent judges, lawyers and academics working as the "Committee on the Establishment of a Permanent Organization for the Improvement of the Law". The ALI was formed "to promote the clarification and simplification of the law and better its adaptation to social needs [and] to secure the better administration of justice..."

The ALI has developed authoritative *Restatements* of the Law of Agency, Conflict of Laws, Contracts, Judgments and Foreign Relations. Other ALI projects have resulted in the development of model statutory formulations as in the Institute's studies on Evidence, Securities Law and Land Development. With the National Conference of Commissioners on Uniform State Laws, the ALI participated in developing the Uniform Commercial Code which many authorities regard as the most important development in American law. Part of the current work on the Uniform Commercial Code includes the development of international annotations to the Code.

The American Law Institute has achieved for itself a well-deserved and unparalleled measure of influence on the development of law and public policy in the United States. The Transnational Insolvency Project is only its second major project involving international law and the first in which the Institute will collaborate with similar law-reform groups in other countries.

The first phase of the Transnational Insolvency Project produced authoritative Statements of the insolvency law and practice in the United States, Canada and Mexico. The intention was that these surveys would be comprehensive and readily understandable by an international audience. Each of the three countries involved in the Project has, in accordance with American Law Institute practice, established an Advisory Group comprised of senior insolvency lawyers and academics to assist in the preparation of the respective National Reports. The analysis of bankruptcy law and practice in the United States has been produced by the Main Reporter for the Transnational Insolvency Project, Professor Jay Westbrook of the University of Texas in Austin. Professor Westbrook's work is a highly valuable description and summary of United States domestic and international bankruptcy law and practice.

The Transnational Insolvency Project has also produced Statements of Canadian and Mexican insolvency law and practice. The United States Statement and the Canadian Statement recently received the approval of the membership of the American Law Institute at its 74th Annual Meeting in Washington, D.C. This represents the first occasion on which a Statement on a international law topic from outside the United States has been formally approved by the American Law Institute.

The subsequent phases of the ALI's Transnational Insolvency Project, while not yet settled, may take the Transnational Insolvency Project to Europe and Asia. Phase II will review and consider the options and bases that are available and which would be effective in increasing international co-operation and co-ordination in multinational and cross-border insolvency and reorganizational cases.

6 | THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCIES

The United Nation Commission on International Trade Law (UNCITRAL) is a United Nations organization headquartered in Vienna, Austria. It has undertaken exhaustive studies and reviews in many significant areas of international commercial law and its efforts have led to a number of international conventions and model laws which have been adopted by many of the U.N.'s member countries.

In April 1994, as a result of an international insolvency Colloquium in Vienna sponsored with Insol International, UNCITRAL began a study of the feasibility of achieving higher levels of co-operation in the international insolvency area. It thereafter established a Working Group on Insolvency Law which held regular, extensive meetings to review and discuss the format for a Model Law on Cross-Border Insolvencies. The UNCITRAL Working Group comprised representatives from over 30 countries with observers from several others. In addition, the Project had representation from Committee J, from Insol International and from a number of other international organizations as well.

The initial focus of the Working Group on Insolvency Law was on issues relating to access and recognition of foreign insolvency administrators in domestic courts. The objective was to provide a set of uniform principles for members of the United Nations to deal with the standards and prerequisites under which a foreign insolvency administrator could have access in cross-border or multinational cases to the courts of other countries affected by the insolvency or the reorganization.

Because of the involvement of a number of leading insolvency professionals in its deliberations, the UNCITRAL Insolvency Law Project proceeded at a pace which is rarely seen in international projects of this kind. The Project reached a highly successful conclusion at the UNCITRAL meeting in Vienna in May 1997 where the Model Law on Cross-Border Insolvencies was adopted and approved. The Official Text of the Model Law will be published shortly and will be transmitted to all member states of the United Nations for their consideration. There is considerable room for optimism that the Model Law will be widely adopted in domestic insolvency legislation around

the world and, if so, it will move international insolvency co-operation to an entirely new and higher plane.

VII. COMPARATIVE LEGISLATION OF CANADA'S MAJOR TRADING PARTNERS

There are two quite different legislative approaches to recognition of foreign insolvency proceedings. These are reflected in section 426 of the U.K. Insolvency Act and section 304 of the United States Bankruptcy Code

1 | U.K. INSOLVENCY ACT, 1986, SECTION 426

Section 426 of the Insolvency Act replaced a provision which had been in U.K. insolvency legislation since at least 1869, requiring U.K. courts to act in aid of and be auxiliary to courts elsewhere in the U.K. and in the Empire in bankruptcy matters. The 1986 amendment to sections 426(4) and (5) extended the scope of the provision to these designated countries (referred to in the Regulations as "relevant" countries). The key provisions of section 426 are attached as Appendix A to this paper.

Section 426 also gives the U.K. court the discretion to apply either U.K. law or the law of the foreign court requesting the assistance. This is a very open and flexible approach to international cooperation.

The obligation to provide assistance internationally, however, extends only to "relevant" countries and territories. These "relevant" countries are designated by Regulation, and include Canada and other Commonwealth members, but, notably, not other E.U. states or the United States. This provision reflects the continuing caution in the U.K. towards surrender of sovereignty in the aid of internationalism generally, and its particular concern as to the risks of opening U.K. assets to what may be perceived to be the overseas vagaries of the United States Chapter 11 reorganizational system.

Secondly, the proviso that, in exercising its discretion under subsection (5), the court "shall have regard in particular to the rules of private international law" causes the choice of law question to revert to existing common law rules. This is essentially a legislative acknowledgment of long-standing U.K. common law practice in the area of international cooperation. In this respect it is much like the Canadian legislative proposals, but without the substantive guidance given by the details in the Canadian legislation.

2 | UNITED STATES BANKRUPTCY CODE, SECTION 304

Section 304 appears to readily recognize foreign proceedings through ancillary proceedings in the United States. It empowers the court to grant a stay of proceedings and authorizes the turnover of assets to the foreign representative. However, several criteria are specified that must be met in order for the Court to make such orders. The consideration of these factors, obviously, is key to whether the provision is interpreted in a parochial or liberal manner. A copy of Section 304 is attached as Appendix A to this paper.

Comity is the most significant of the factors listed. To this extent, section 304 has the potential to encourage full cooperation by United States courts with foreign proceedings. United States courts have in some cases granted stays and transferred assets to foreign representatives (although the number of reported 304 cases is much smaller than might be expected). Among countries of similar legal traditions, particularly U.K. and Canada, the weight of these considerations is significant. However, the consideration, in particular, of whether the foreign proceeding will result in a distribution substantially in accordance with the Bankruptcy Code, and the specific direction to consider the outcome for domestic creditors, have had the effect of limiting the value of the international perspective of the provision.

While section 304 may have the capacity to be interpreted in a variety of manners, it nonetheless has the virtue of explicitly setting out the factors to be considered (and which are likely to be considered by any court whether or not enumerated in a statute). In comparison, the Canadian amendments have shied away from explicit reference to factors such as comity and the prejudice of domestic creditors. In practice, these are the factors which will be considered, but as an extension of common law practice and common sense rather than on the basis of the new legislation.

3 | AUSTRALIA, BANKRUPTCY ACT, SECTION 29, AND COMPANIES CODE SECTION 581

In Australia, both the Companies Code and the Bankruptcy Act deal with cross-border insolvency matters. Both provide for international assistance and co-op-

eration in dealing with international insolvencies in Australia. The provisions in the two statutes are similar to the section 426 provisions in the U.K. legislation. The two provisions are attached as Appendix A to this paper.

Section 581 of the Australian Companies Code provides that the Australian court shall act in aid of and be auxiliary to the courts of prescribed countries. Prescribed countries include Canada, the U.K., the United States and New Zealand. Australian courts can act to assist a foreign court upon being requested to do so by the foreign court. Reciprocally, the Australian court has the power to request a foreign court to assist it in cross-border insolvency matters.

Section 29 of the Bankruptcy Act mirrors the language in the Companies Code, requiring Australian courts to assist foreign courts that request assistance from the Australian court. Section 29 of the Bankruptcy Act also empowers the Australian court to request aid of a foreign court in dealing with a bankruptcy matter in Australia and abroad.

What is interesting to note from both the Companies Code and the Bankruptcy Act is the mandatory language used by the provisions. The Australian courts must act and provide assistance when a request comes from a "prescribed country", although the extent of that assistance remains in the discretion of the courts. When a request is received from non-prescribed country, the court's power and duty is discretionary and it may decline to provide assistance if circumstances warrant.

VIII. CONCLUSION

The international insolvency provisions that have been introduced by Canada into the BIA and the CCAA represent a broad precedent-setting set of measures designed to enhance and facilitate international co-operation and co-ordination in cross border insolvencies and reorganizations. They reflect the experience gained in the major multinational insolvencies of the last dozen years and are a significant step forward, in many respects, from the provisions of section 304 of the United States Bankruptcy Code (which dates from 1978) and the provisions of section 426 of the U.K. Insolvency Act (which was last considered in 1986).

The UNCITRAL Model Law on Cross-Border Insolvencies takes an approach that is very much consistent with the approach taken by the new amendments to Canada's insolvency legislation and, in some respects, goes farther than the new Canadian provisions. International co-operation in insolvency cases and legislation seems to be developing at an accelerating pace which can only be beneficial to international commerce and all those who participate in it and are affected by it. In this process, the new amendments to Canada's insolvency legislation have played and will continue to play a significant and valuable role.

Appendix A

COMPARATIVE LEGISLATION OF CANADA'S MAJOR TRADING PARTNERS

SECTION 426 U.K. INSOLVENCY ACT, 1986

The key subsections of section 426 provide as follows:

(4) The courts having jurisdictions in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For purposes of subsection (4) a request made to a court in any part of the United Kingdom or in any relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

SECTION 29 OF THE BANKRUPTCY ACT

Section 29 of the Bankruptcy Act relevantly provides:

"(2): In all matters of bankruptcy the Court —

a): shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and

b): may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

c): Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction"

"(4): The Court may request a court of an external Territory, or a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy."

SECTION 304 OF THE BANKRUPTCTY CODE

The approach of section 304 of the *Bankruptcy Code* might be described as almost the reverse image of the Canadian proposals. Section 304 states:

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may —

(1) enjoin the commencement or continuation of —

(A) any action against —

(i) a debtor with respect to property involved in such foreign proceedings;

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceedings to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(C) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with —

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

SECTION 581 OF THE COMPANIES CODE

The relevant part of that provision in section 581 reads:

"(2): In all [matters relating to the insolvency administration of a foreign company], the Court:

(a): shall act in aid of, and be auxiliary to, the courts ... of prescribed countries, that have jurisdiction in [such] matters; and

(b): may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in [such] matters.

(3): Where a letter of request from a court ... of a country other than Australia, requesting aid in [such a] matter is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

(4): The Court may request a court ... of a country other than Australia, that has jurisdiction in [such] matters to act in aid of, and be auxiliary to, it in [such a] matter."