INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE (ONLINE)

2021 / 2022

Module B: Session 16 Materials – Co-operation and Co-ordination in Practice

CONTENTS

INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

INSOL GLOBAL INSOLVENCY PRACTICE COURSE MODULE B, SESSION 16 – COOPERATION AND COORDINATION IN PRACTICE

Presented by Scott Atkins, Richard Pedone & Timothy Graulich
Fellows of INSOL

Overview of session

The Cooperation and Coordination in Practice session is aimed at introducing students to the use of protocols and other coordination tools. It is intended that the in-class session will be an active session with an opportunity for the students to work with Fellows on negotiating and drafting sample protocols based on an assignment to be distributed shortly before the session but completed within its duration. The focus will be on a set of protocols common to most cross-border cases so students become familiar with those issues and the in-class component will include the negotiation of a potentially difficult protocol.

Session material

1. UNCITRAL Model Law on Cross-Border Insolvency (1997) (**Model Law**) – Chapters V and VI

   Available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency

2. American Law Institute and International Insolvency Institute Global Principles for Cooperation in International Insolvency Cases (2012) (**ALI-III Global Principles**)

   Available at https://www.iiiglobal.org/sites/default/files/ALI-III%20Global%20Principles%20booklet_0.pdf

3. European Union Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (2014) (**JudgeCo Principles and Guidelines**)

   Available at https://www.iiiglobal.org/sites/default/files/media/EU%20Cross-Border%20Insolvency%20Court-to-Court%20Cooperation%20Principles.pdf

4. European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007) (**CoCo Guidelines**)

   Available at https://www.insol-europe.org/download/documents/1113

5. Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Matters (2016) (**JIN Guidelines**)

Available at http://www.jin-global.org/content/jin/pdf/Guidelines-for-Communication-and-Cooperation-in-Cross-Border-Insolvency.pdf

6. Judicial Insolvency Network Modalities of Court-to-Court Communication (2019) (**JIN Modalities**)

   Available at http://jin-global.org/content/jin/pdf/Modalities_for_court-to-court_communication.pdf

7. Supreme Court of the Republic of Singapore, Registrar's Circular No 7 of 2020, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters and Modalities of Court-to-Court Communication, 19 June 2020

   Available at https://www.supremecourt.gov.sg/docs/default-source/module-document/registrarcircular/rc-7-2020---guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters-and-modalities-of-court-to-court-communication.pdf

   Reflects Supreme Court of Singapore's adoption of the JIN Guidelines and JIN Modalities – referenced here for illustrative purposes

8. Federal Court of Australia, Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives, 31 January 2020

   Available at https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-xbdr

   Reflects Federal Court of Australia's adoption of the JIN Guidelines and JIN Modalities – referenced here for illustrative purposes

9. *Kelly, Re Halifax Investment Services Pty Ltd (in liq) (No 5)* [2019] FCA 1341

   Available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1341.html?context=1;query=[2019]%20fca%201341;mask_path=

   Federal Court of Australia held that it could make a request to the New Zealand High Court for there to be a joint hearing in relation to a pooling application for funds the subject of Australian and New Zealand liquidations. Note that the joint hearing was ultimately held by the Federal Court of Australia and the High Court of New Zealand between 39 November 2020 and 9 December 2020

10. *Re Latam Finance Limited* (unreported, 24 August 2020, FSD 105, 106 and 154 of 2020)

    Available at https://files.lbr.cloud/public/2020-08/Latam%20Cayman%20protocol%20judgment.pdf

    Grand Court of the Cayman Islands approved a protocol for mutual cooperation and assistance and direct communications between itself and

courts in New York, Colombia and Chile concerning a Chapter 11 restructure of an entity under the US Bankruptcy Code which was based on the ALI-III Guidelines

11. *Nortel Networks Corporation* – Justice Newbould, Superior Court of Justice, Ontario, 12 May 2015 ONSC287 – extract from judgment dealing only with protocols. For the US judgment see (but do not read for the session) *Nortel Networks Inc.* – Judge Gross, US Bankruptcy Court, Delaware 12 May 2015 WL2374351 (Bkrtcy. D. Del.)

12. Cross Border Protocol for the Lehman Brothers Group of Companies

13. L Peacock, 'A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial' (2015) 23 *American Bankruptcy Institute Law Review* 543

14. P Zumbro, 'Cross Border Insolvencies and International Protocols - An Imperfect but Effective Tool' (2010)11(2) *Business Law International* 157

15. P Omar, 'Judicial Cooperation in the Post-Singularis World' (2018) 15(1) *International Corporate Rescue*

16. B Wessels and G Boon, 'When Soft Law Instruments Matter: OBLB Influences Cayman Islands' Judgement Approving Cross-Border Insolvency Protocol', *Oxford Business Law Blog*, 25 November 2020

    Available at https://www.law.ox.ac.uk/business-law-blog/blog/2020/11/when-soft-law-instruments-matter-oblb-influences-cayman-islands

17. N Lupton, M Hecht and Z Nolan, 'Cayman Communication: The Grand Court of the Cayman Islands Approves Direct Court-to-Court Communications Protocol for the First Time in *Re Latam Finance Limited*' (2020) 17(6) *International Corporate Rescue*

    Available at https://www.walkersglobal.com/images/Cayman_Communication_-_The_Grand_Court_of_the_Cayman_Islands_Approves_Direct_Court-to-Court_Communications_Protocol_for_the_First_Time_In_Re_LATAM_Finance_Limited_and_others.pdf

Source material – not for reference during the session but as a source for future consultation:

18. United States Bankruptcy Court Southern District of New York, Procedural Guidelines for Coordination and Cooperation Between Courts In Cross-Border Insolvency Matters, 17 February 2017

    Available at http://www.nysb.uscourts.gov/sites/default/files/m511.pdf

19. UNCITRAL Practice Guide on Cross-Border Insolvency Co-Operation.

Available at
http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf

ARTICLE

Judicial Cooperation in the Post-*Singularis* World

Dr Paul J. Omar, Barrister, Gray's Inn, London, UK

Introduction

The extent to which judges are able to cooperate in the absence of specific enabling legislation or an international convention or treaty, relying solely on their inherent jurisdiction and powers crafted at common-law, has often been an issue for the judiciary. This is because courts are always mindful of their delicate relationship with legislatures and the niceties of constitutional conventions that often carefully circumscribe the role of judges in crafting legal rules. That said, courts have not shied away from giving assistance in cross-border insolvency cases with examples noted from as early as the mid- to late-18th century.[1] The lines of jurisprudence inaugurated by such cases have, over the years, featured cooperation as diverse as recognising overseas proceedings and the appointments of office-holders, granting title to office-holders over property, giving them powers to act within the jurisdiction, ordering examinations and the production of documents to aid discovery, issuing injunctions and stays to prevent piecemeal dismemberment of the debtor's estate, opening ancillary proceedings in aid of procedures elsewhere and also approving reconstructions and creditors' schemes.

In many jurisdictions, nevertheless, the common-law has ceded authority to specific cross-border assistance frameworks and to international texts, though it continues to be instrumental in crafting remedies under such frameworks and often must need be invoked to interpret the scope and extent of legislative provisions. However, despite constant exhortations from international bodies in favour of the adoption of such texts, particularly the UNCITRAL Model Law on Cross-Border Insolvency Proceedings 1997, it is not the case that all jurisdictions have such measures available, often because local legislatures do not see it as a priority for enactment. Even where there are local rules for assistance, their design may not have fully anticipated the development of the types of assistance that would be useful in international cases. In such instances, the pronouncements of the court continue to be the major or only source of rules on cooperation. In that light, the guidance of the highest courts as to the permissible extent of cooperation is often relied upon for authority by the lower courts for the continued development of common-law assistance.

Cambridge Gas to *Singularis*: the journey

As such, the arrival, in 2006, of the decision in *Cambridge Gas*,[2] a case heard before the Privy Council, seemed to herald a new era of cooperation. In reliance on a principle of 'active assistance', first articulated in a Transvaal case,[3] the courts would be free to determine the scope and range of assistance they would be prepared to give, subject to only two caveats. The first, acknowledging the hierarchy of rules, would be the presence of any local rule impeding such assistance. The second, harking back to the ideals of *pari passu* (or *pars condicio creditorum*), would be where to do so would prejudice the body of creditors. Otherwise, judges would do their utmost to assist and thereby promote the ideals of unity and universality in insolvency. This appeared to authorise a special treatment for requests in the context of cross-border assistance. 'Judge-made' cooperation would thus fill the gap in legislative frameworks and usher in a revived and reinvigorated form of assistance that appeared to have been regarded as less important given the emphasis on the adoption and development of statutory frameworks.

Cambridge Gas was greeted with a great deal of enthusiasm. Though the Privy Council is the apex court of only two dozen or so Commonwealth countries and territories, its decisions are treated by other jurisdictions within the common-law world with the greatest respect as persuasive precedent. Thus, judgements referring to and adopting the tenets of *Cambridge Gas* rapidly proliferated in jurisdictions such as Australia,[4]

Notes

1 *Solomons v Ross* (1764) 1 Hy. Bl. 131n; 126 ER 79; *Sill v Worswick* (1781) 1 H. Bl. 665.
2 *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 ('*Cambridge Gas*').
3 *Re African Farms Ltd* [1906] TLR 373 ('*Re African Farms*').
4 *Bank of Western Australia v Henderson (No 3)* [2011] FMCA 840 (*obiter*).

Bermuda,[5] the Cayman Islands,[6] Ireland,[7] Jersey,[8] New Zealand[9] and the United Kingdom.[10] The 'active assistance' principle, referred to in *Cambridge Gas*, found itself being employed in a number of diverse situations. These included the recognition and enforcement of foreign judgments non-compliant with traditional private international rules at common-law,[11] the opening of domestic proceedings designed to further requests from jurisdictions absent an appropriate rescue procedure[12] as well as the extension of domestic litigation powers to assist an overseas office-holder despite no domestic proceedings being envisaged or possible.[13] The last of these cases also furnished a precedent for two Caribbean cases, in which the principles in *Cambridge Gas* were developed to permit the issue of a discovery and examination order against a third party in Bermuda[14] and to authorise a foreign office-holder to bring set-aside proceedings in the Caymans.[15]

Prior to the decisions in these two cases, however, some resistance to the broad-brush approach in *Cambridge Gas* had been seen in judgements rendered by the Supreme Courts of Ireland[16] and the United Kingdom.[17] While the decisions bound only the courts within their respective hierarchies, the courts in Bermuda and the Cayman Islands attempted to reconcile the United Kingdom and Privy Council decisions, with the preference being to retain, as far as possible, the greater latitude represented by *Cambridge Gas*. As both cases represented high stakes for the litigants, they were appealed. In Bermuda, the appellate court held the wide views of the judge at first instance to be wrong.[18] In the Caymans appeal, the court reversed the findings of the first instance judge in part, holding that the domestic statutory provision the judge had discounted could in fact confer the powers the judge sought to provide at common-law.[19] On the issue of whether the common-law furnished similar powers, the court stayed its decision pending the hearing of the further appeal from Bermuda, by then on its way to the Privy Council, where it was heard in April 2014.

The outcome of the Privy Council case was keenly awaited, particularly in how it would deal with the principles in *Cambridge Gas*, which had been called into question by the Irish and British decisions. In November 2014, two related judgments appeared in the matter. The first dealt with *locus standi* for appealing a winding-up order where the third party was not contemplated by the statute, but nonetheless impacted by the decision.[20] The second dealt with the powers to assist discovery the subject of the case.[21] The publication, especially of the latter judgment, caused a storm in the common-law world and elicited much commentary.[22]

Notes

5 *Re Founding Partners Global Fund Ltd (No 2)* [2011] SC (Bda) 19 Com.
6 *Re Lancelot Investors Fund Ltd* (2008) (unreported), cited in S. Dickson, 'The Quick March of Modified Universalism: Rubin v Eurofinance SA' (Mourant Ozannes Briefing, June 2010).
7 *Fairfield Sentry Ltd (In Liquidation) & Anor v Citco Bank Nederland NV & Ors* [2012] IEHC 81.
8 *Re Montrow International Ltd* 2007 JLR Note 40.
9 *Williams v Simpson Civ 2010-419-1174* (12 October 2010) (High Court, Hamilton).
10 *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 ('*Re HIH*'); *Rubin & Anor v Eurofinance SA & Ors* [2010] EWCA Civ 895; *New Cap Reinsurance Corp Ltd & Anor v Grant & Ors* [2011] EWCA Civ 971.
11 Idem.
12 *HSBC Bank v Tambrook Jersey Limited* [2013] EWCA Civ 576. See, by this author, 'Visa Denied: An End to the Jersey Practice of Insolvency "Passporting"?' (2013) 17 *Jersey and Guernsey Law Review* 182; 'Passport Renewed: Extension of Rescue Proceedings to Foreign Companies under Section 426 of the Insolvency Act 1986' (2013) 10 *International Corporate Rescue* 310.
13 *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann & Ors* [2012] EWHC 62 (Ch) ('*Re Phoenix*'). See, by this author, 'The Resurgence of Cross-Border Recognition and Enforcement of Insolvency Judgments: The *Re Phoenix* Case' [2013] 9 *International Company and Commercial Law Review* 329.
14 *Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation)* [2013] SC (Bda) 28 Com (15 April 2013). See, by this author, 'The "Empire" Strikes Back: Lessons for the Mother Country in Insolvency Cooperation', [2013] 11 *International Company and Commercial Law Review* 411.
15 *Picard and Anor v Primeo Fund (In Official Liquidation)* (unreported) (14 January 2013). See, by this author, '*Après Rubin: le Déluge?* Thoughts on the Future of Common Law Insolvency Cooperation' (2013) 10 *International Corporate Rescue* 356.
16 *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* [2012] IESC 12. See, by this author, 'An Irish Perspective on Insolvency Cooperation: The *Re Flightlease* Case' (2013) 10 *International Corporate Rescue* 158.
17 *Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others* [2012] UKSC 46 ('*Rubin*'). See, by this author, 'The Limits of Co-operation at Common Law: *Rubin v Eurofinance* in the Supreme Court' (2013) 10 *International Corporate Rescue* 106.
18 *Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation)* [2013] CA (Bda) 7 Civ (18 November 2013). See, by this author, 'A Singular Tide in Insolvency Cooperation in Bermuda' (2014) 11 *International Corporate Rescue* 159.
19 Judgment in CICA 1/2013 and 2/2013 Appeals (16 April 2014) ('*Primeo*'). See, by this author, 'The Universe of Insolvency Cooperation and the Primeo Directive' (2015) 12 *International Corporate Rescue* 32.
20 *PwC v Saad Investments Company Ltd* [2014] UKPC 35.
21 *Singularis Holdings Ltd v PwC* [2014] UKPC 36 ('*Singularis*'). See, by this author, 'Diffusion of the Principle in *Cambridge Gas*: A Sad and Singular Deflation' (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 31. The excerpts from the judgments in the paragraphs below are a summary of a section of this article.
22 See, *inter alia*, Justice P. Heath, 'The Waxing and Waning of the Tides: From the Isle of Man to Bermuda' (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 9; Chief Justice I. Kawaley, '"Relashio!": Liberating the Common Law on Judicial Cooperation from its State of Arrested

Of the members of the panel,[23] extensive views were expressed by three of the judges: Lords Sumption, Collins and Mance, the last two of whom had emitted contrasting views in *Rubin* on whether *Cambridge Gas* was to be regarded still as good law.

Lord Sumption began with the assertion that Bermudian common-law was in all material respects identical to English common-law. However, ancillary liquidation provisions were absent from the relevant Bermudian statute.[24] This threw the problem back to the common-law and the need for the court to determine what powers it might have to assist in the absence of a facility to conduct an ancillary liquidation. In particular, local powers would need to exist to ensure collective enforcement, to enable the variation of rights, to facilitate the location of assets and to assert the rights of the debtor.[25] Lord Sumption asserted that it would be possible, as a matter of private international law, for recognition of the vesting of the assets of the company in an 'agent or office-holder' appointed under the law of the jurisdiction of incorporation.[26] As such, he was of the view that the decision in *Re African Farms* was 'significant', given that it permitted the exercise of remedies equivalent to the company being in ancillary liquidation despite the absence of a local power to do so.[27]

Lord Sumption summarised the propositions in *Cambridge Gas*, particularly in how it sought to extend the principle in *Re African Farms*, as being three-fold: (i) the aspiration of modified universalism as the fount for the common-law to assist 'as far as it can do so'; this power being the source of jurisdiction, (ii) the result that the common-law rules on *in rem* and *in personam* jurisdiction were no longer relevant to the exercise of insolvency jurisdiction to assist; and (iii) as a consequence, the ability for the court to extend powers normally found in a domestic insolvency, subject to the limitations of law and public policy.[28] Turning to *Rubin*, Lord Sumption discussed disapproval of *Cambridge Gas* by the United Kingdom Supreme Court. He referred to the Privy Council's decision antedating *Cambridge Gas* in *Al-Sabah*,[29] which had doubted the ability of a court to assume jurisdiction simply on the basis of its power to assist. For the judge, the existence of a statutory power might influence the development of policy at common-law. However, the assumption could not be made automatically that such a power existed, even if there might be no objections on public policy grounds to its existence.[30]

For Lord Sumption, this assumption (or lack thereof) weakened the second and third propositions in *Cambridge Gas*, but left the first (modified universalism) intact, its application being subject to local law and public policy. Nonetheless, a court needed to remember that it could only act within the limits of its statutory and common-law powers. Where statute was silent, the common-law would apply and might still be developed, depending on the nature of the power the court was asked to exercise.[31] The assumption that all statutory powers must, of necessity, have a common-law analogue, applicable where the statute was not available, did not seem to the judge to be tenable. Lord Sumption ultimately held that there was a power (at common-law) to assist by ordering the production of information so as to enable the office-holders to identify and gather in property. However, the use of such a power was subject to a considerable number of caveats, such as only being available, as necessary, to assist foreign office-holders appointed by a court, but not to enable them to do anything they were unable to do in the jurisdiction of their appointment.[32]

Lord Collins began by agreeing that the extension of a domestic power in aid of an international recognition application could not be supported. Moreover, where a power in aid existed, it could not be used where a similar power could not be invoked in the foreign jurisdiction.[33] For the judge, the answer rested on some essential propositions: (i) that the common-law did contain a power to recognise and grant assistance to a foreign proceeding; (ii) that the power could normally be exercised through use of the court's existing powers; and (iii) that, as an alternative, these powers could be extended or developed through judicial law-making. Nonetheless, the development of legislation by analogy did not permit judges to extend insolvency rules to cases where they did not and were not intended to apply. As a result, the application of otherwise domestic powers to a foreign proceeding could not stand.[34]

For Lord Collins, the issue was a practical one, but necessarily limited to those jurisdictions where the

Notes

Development – The British Atlantic and Caribbean World' (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 10.
23 Lords Neuberger, Mance, Clarke, Sumption and Collins (the last four of whom were also members of the bench that had heard *Rubin*).
24 *Singularis*, at paragraph 9.
25 Ibid., at paragraph 11.
26 Ibid., at paragraph 12.
27 Ibid., at paragraph 13-14.
28 Ibid., at paragraph 15.
29 *Al-Sabah v Grupo Torras* [2005] 2 AC 333 ('*Al-Sabah*').
30 *Singularis*, at paragraph 18.
31 Ibid., at paragraph 19.
32 Ibid., at paragraph 25.
33 Ibid., at paragraphs 32-33.
34 Ibid., at paragraph 38.

statutory powers either did not exist or whose use was not without controversy, Bermuda and the Cayman Islands being examples.[35] As such, the scope of assistance at common-law in the case of international insolvencies fell to be considered. Referring to *Rubin*, there was no doubt in Lord Collins' mind that the first proposition in *Cambridge Gas* existed: there was a power to recognise and give assistance to foreign proceedings.[36] The absence of a comprehensive international framework for cooperation did not inhibit, however, the courts from rendering what assistance they 'properly' could through the application or extension of the court's existing statutory or common-law powers.[37]

The judge referred to two categories where such assistance has historically been forthcoming: firstly, the use of common-law and/or procedural powers for the granting of stays or enforcement of foreign judgments, for which *Re African Farms* was also authority. For the judge, *Re African Farms* could be understood as a stay against enforcement by the secured creditor and the use of the Transvaal court's powers to give that effect. As such, Lord Collins' view was that the case was not authority for any proposition that local statutory law could be applied by analogy.[38] The second group of cases he cited was the use of statutory powers in aid of a foreign insolvency by, for example, opening an ancillary liquidation or authorising a remittance of funds under the aegis of the statutory cooperation provision, as in *Re HIH*.[39]

Lord Collins also agreed with the Court of Appeal in finding that the extension of the power by the trial judge in the case constituted 'impermissible legislation from the bench' and thus 'a plain usurpation of the legislative function'.[40] Though he conceded that the common-law did develop to meet changing situations, 'sometimes radically',[41] Lord Collins reminded the court of the finding in *Rubin* that a change to the jurisdiction rule in the context of insolvency was normally a matter for the legislature.[42] Seen against that background, the proposition that the court should apply clearly inapplicable legislation 'as if' it applied was in fact even 'more radical' than the change proposed in *Rubin* and thus to be resisted.[43] According to Lord Collins, the methodology in *Cambridge Gas* was erroneous.[44] In his view, the court was not entitled to apply domestic procedures by analogy at common-law.[45] In that light, cases relying on the second and third propositions in *Cambridge Gas* for 'an impermissible application of legislation by analogy' were simply wrong. These included *Re Phoenix*,[46] *Primeo*[47] and the decision in the instant case.[48]

Lord Mance essentially summarised the argument as revolving around two axes: (i) whether the power the court sought to use could have been used appropriately for the purpose; and (ii) whether, if it existed, the power could be used in aid of foreign proceedings where the foreign court did not enjoy a similar power.[49] Though the simple answer to the second question was, for the judge, to be answered in the negative, thus obviating an answer to the first becoming necessary.[50] As such, Lord Mance also agreed that the second and third propositions in *Cambridge Gas* could no longer be supported, in light of the pronouncements in the earlier case of *Al-Sabah* as well as the analysis in *Rubin*.[51]

The journey beyond: case-law post-*Singularis*

In the aftermath of *Singularis*, the crucial question was what survived of *Cambridge Gas*. In light of the Privy Council's pronouncements, only the first proposition, that of 'modified universalism', apparently remained unaltered. 'Active assistance', as a principle newly revived by *Cambridge Gas*, could not justify the extension of powers beyond the common-law's traditional, and incrementally developed, range of methods of assistance. In that light, judges should be cautious about seeking to develop powers in areas going beyond these, where they might tread on the prerogatives of legislatures. It became evident, in the case-law after *Singularis* that considered its findings, that these propositions would come to be tested. The discussion that follows picks up a few examples of a jurisprudence that is

Notes

35 Ibid., at paragraph 42.
36 Ibid., at paragraph 51.
37 Ibid., at paragraphs 52-53.
38 Ibid., at paragraphs 54-56.
39 Ibid., at paragraphs 58-59.
40 Ibid., at paragraphs 61-64.
41 Ibid., at paragraph 65.
42 Ibid., at paragraph 72.
43 Ibid., at paragraph 78.
44 Ibid., at paragraph 83.
45 Ibid., at paragraph 93.
46 Ibid., at paragraph 98.
47 Ibid., at paragraph 102.
48 Ibid., at paragraph 94.
49 Ibid., at paragraph 117.
50 Ibid., at paragraph 118.
51 Ibid., at paragraph 134.

steadily growing, using four examples from a variety of jurisdictions, including the Bahamas, Bermuda and Guernsey, for which the Privy Council would be the natural apex court.

(i) Re X[52]

This case involved the application by a trustee in bankruptcy in respect of recognition of her appointment in England and Wales, her right to collect assets belonging to the debtor located in Guernsey and to examine persons involved in the administration of companies connected to the debtor.[53] The first two orders were granted without much ado, while the third, the subject of the judgment, was said to be 'more controversial'.[54] For reasons of speed, the trustee sought to avoid the Letter of Request route and asked the court to exercise powers to permit the examination.[55] The court was concerned as to the source of these powers, whether the law of Guernsey or indeed of England and Wales, where the order could have been made (but might have been limited by concerns over service out of the jurisdiction), or whether it was necessary to invoke its inherent jurisdiction to grant the request.[56]

Counsel for the trustee based his initial argument on the effects of *Singularis*, which, given that the facts were dissimilar as to any differences in powers between the courts, supported the contention that the only issue for the Guernsey court to determine was whether it would be contrary to Guernsey public policy to make such an order.[57] The similarity between the two courts and the powers they had available was supported by the way that the Guernsey court had previously authorised the use of its inherent jurisdiction to make an order in similar terms in furtherance of corporate insolvency law, holding that to do so was part of the 'broad supervisory power' the court had in relation to the administration of insolvencies.[58] The court was not particularly moved by the analogies to be drawn with corporate insolvency in Guernsey, but more the lack of similarity between Guernsey and English bankruptcy law. In the court's view, this prompted greater consideration of the public policy choice involved in recognising a power for which there could be no parallel in Guernsey, given that personal insolvency in Guernsey could be said not to have any equivalent to the regime in England and Wales.[59]

Two further arguments made in a similar vein, seeking to persuade the court that statutory frameworks could be extended by analogy, equally did not find favour. The first argument relied on the powers found in the English Bankruptcy Act 1914, whose section 122 extended the orders-in-aid procedure to all British courts overseas, including Guernsey, where the Act was registered in 1961 (the process necessary for extension locally). This, counsel stated, must be taken to have extended useful provisions in the remainder of the Act, including those that allowed for the examination of debtors and connected parties.[60] The second argument sought to rely on the fact that the debt-collection mechanism available through the local procedure of *désastre*, in support of which the law contained powers to investigate in cases where doubt existed over the cooperation of the debtor in surrendering property and papers, could authorise the extension of similar powers in the case of a debtor subject to proceedings elsewhere, but whose conduct in Guernsey was under scrutiny.[61]

For the court, the issue in all of these cases was not whether public policy prevented the extension of these powers, but whether there was in fact any inherent jurisdiction to apply such powers, from whichever source drawn, in situations those powers did not apply, 'on the grounds simply that the court judges the situation to be sufficiently analogous'. Thus, *Singularis* needed to be reconsidered.[62] The court noted the division in opinion before the Privy Council on whether the power in fact existed,[63] but referred to the collective view, which appeared to be that a court could not 'conjure for itself an inherent jurisdiction' simply because it would be a 'good idea' to do so. There would need to be a 'sound separate basis' for determining the existence of just such an inherent jurisdiction apart from the fact that a power existed in another context, which it might be useful to import into the one under scrutiny.[64]

In the Guernsey court's view, powers to examine and compel discovery, which by their nature were draconian, needed express statutory authority. Furthermore, the customary law in Guernsey was very different to the common law at issue in *Singularis* and it would

Notes

52 *In the matter of X (A Bankrupt), Brittain v JTC (Guernsey) Ltd* (Judgment 36/2015) (6 July 2015) ('*Re X*').
53 Ibid., at paragraphs 8-9.
54 Ibid., at paragraph 10.
55 Idem.
56 Ibid., at paragraphs 11-12 and 17.
57 Ibid., at paragraphs 19-20.
58 Ibid., at paragraph 21, citing *Re Med Vineyards Limited* (Unreported, Royal Court 25 July 1995).
59 Ibid., at paragraph 25.
60 Ibid., at paragraph 37.
61 Ibid., at paragraphs 60-62, referring to the *Loi (1929) ayant rapport aux Débiteurs et à la Renonciation*.
62 Ibid., at paragraph 64.
63 Ibid., at paragraph 67.
64 Ibid., at paragraph 68.

be a 'step leap' too far for it to contain such a power.[65] Even if there were such a power, the court was not persuaded that it should be used, as other more appropriate avenues existed, such as through the making of a Letter of Request which would allow the local court to choose whether to apply its own or the requesting court's law.[66]

(ii) Re Baha Mar[67]

The application concerned recognition of Chapter 11 proceedings in the United States in respect of the Baha Mar Group of companies, most of whom were Bahamian entities, in which proceedings stays had been granted against execution of process and the debtor in possession granted authority to pursue post-petition financing for the group's project in the Bahamas, which had experienced a liquidity crisis caused by a dispute with the contractors.[68] The application, contested by the lenders, who had filed for the liquidation of the Bahamian entities, was made on the basis that the Bahamian court had inherent jurisdiction to recognise and issue stays in support of the United States proceedings or, alternatively, that powers under local legislation enabled it to do so.[69] In further support of this, the applicants also argued that the court had jurisdiction at common-law to recognise the foreign proceedings, it was appropriate to do so in support of the principle of universality and that it should exercise its discretion to grant the order sought.[70]

Consideration of *Singularis* arose in the context of deciding whether recognition at common-law had survived the enactment of the statute dealing with recognition and enforcement, which the respondents argued against.[71] The court was not persuaded that a statutory scheme limiting recognition and assistance to countries designated for those purposes could leave a common-law framework in parallel to deal with other countries, particularly where the guidance in *Singularis* suggests that a statute that can be said 'to occupy the field' must be held to impliedly exclude the common law.[72] Similarly, in the absence of an express savings clause, any limitation in the terms of recognition, such as the rule preventing assistance to foreign proceedings liquidating companies not established in that jurisdiction, could not be circumvented by the continued maintenance of a common-law regime not subject to that limitation.[73] If the court were wrong on the above point, it needed to also consider whether recognition and assistance could be provided at common-law in the terms sought.[74] In this context, despite the applicants' reliance on the principle of universality as expounded in *Cambridge Gas*, the court was not persuaded that the principle should extend to recognition of proceedings carried on outside the jurisdiction that might be at the expense of local creditors, particularly as they might have a not unreasonable expectation that proceedings in respect of locally incorporated companies should take place within the jurisdiction.[75]

Singularis was also referred to again in deciding whether a stay could be granted in appropriate circumstances in support of foreign proceedings by the local court exercising its inherent jurisdiction. Here, the court accepted the limitation in *Singularis*, holding that any powers could only be available, as necessary, to assist a foreign-office holder, but not to do anything their home law would not authorise.[76] In this light, the court was not persuaded that it had the power to impose a stay in the terms sought, nor that, if the power were available, it should do so without an undertaking or security for costs being provided.[77] Similarly, what powers local legislation provided could not be extended in the manner sought and such assistance might also, in the way it could impede enforcement by secured creditors of their rights, be contrary to public policy.[78]

(iii) Re Energy XXI[79]

The application involved the presentation by a company of a petition for its own winding up consequent on it entering, together with other companies in the group, Chapter 11 proceedings in the United States.

Notes

65 Ibid., at paragraph 80.
66 Ibid., at paragraphs 81-82, where the Guernsey court is not in fact persuaded that *Singularis* would bind it on this point, holding it not to have been an essential element of the *ratio*.
67 *Northshore Mainland Services Inc and Others v The Export Import Bank of China* (2015/COM/Com/00039) (31 July 2015).
68 Ibid., at paragraphs 5-8.
69 Ibid., at paragraph 12, referring to sections 253-255, Companies Winding Up Amendment Act 2011.
70 Ibid., at paragraph 16.
71 Ibid., at paragraph 18.
72 Ibid., at paragraph 37, referring to *Singularis*, at paragraph 28.
73 Ibid., at paragraphs 38 and 44.
74 Ibid., at paragraph 48.
75 Ibid., at paragraphs 58-59.
76 Ibid., at paragraph 72.
77 Ibid., at paragraphs 76 and 78.
78 Ibid., at paragraphs 79 and 82.
79 *In the matter of Energy XXI Limited* [2016] SC (Bda) 79 Com (18 August 2016).

There then followed an application for the recognition of the United States proceedings before the local court, by which a provisional liquidator had earlier been appointed with the task of protecting the interests of creditors while restructuring proceedings were taking place in the United States. The American proceedings were regarded for these purposes as main proceedings, to which the Bermudian procedure was intended to be ancillary.[80] Such parallel proceedings had a vintage in Bermuda, going back in practice to the late 1990s,[81] and normally involving the recognition of a restructuring plan without the need to institute a parallel scheme within the jurisdiction.[82] In this instance, much to the surprise of the court, the recognition application was challenged by shareholders as an abuse of process. They further sought to impugn the provisional liquidation proceedings on the basis they had been improperly opened. However, the court was able to easily dismiss these arguments, respectively, on the absence of the objectors' *locus standi* in the American proceedings (and hence in any proceedings to recognise the same) and the proper authority of the directors to bring the winding up petition.[83]

The court did consider, however, *Singularis* and its relationship with *Cambridge Gas* on further objections to recognition. Here, the shareholders asserted that the giving of recognition to a Chapter 11 plan that had occurred in *Cambridge Gas*, 'as if' a local scheme had been entered into, had been doubted by *Rubin* and *Singularis*. In particular, the imposition of a stay consequent to the appointment of a provisional liquidator was equivalent to the application of Bermudian legislation by analogy in support of foreign proceedings. This was not to be encouraged as it had the effect of worsening the creditors' position as compared to their position were a formal liquidation opened or a scheme approved under Bermudian law.[84] In response, the court's view was that the doubting, such as it was, was only in relation to the purported classification of insolvency judgments as an alternative category of judgment side-stepping the *in personam* and *in rem* rules at common-law.[85] Neither case involved the recognition of a foreign order approving a plan, but, in any event, could not be read so as to prevent recognition of an order (and imposition of a stay), where the objecting shareholders and the company whose shares were the subject of the plan had quite clearly been within the jurisdiction of the court making the order.[86]

(iv) Re C and J Energy[87]

In a fact pattern similar to *Re Energy XXI*, the court considered *Singularis* in the context of the doubts expressed in the previous case over the extent to which the recognition of a foreign order adopting a plan could be effective in the absence of parallel proceedings for a scheme in Bermuda.[88] For the court, the proper circumstances in which recognition could be forthcoming were where the parties had submitted to the jurisdiction of the foreign court. In such a situation, the court would be bound to assist using its common-law powers as far as it could, provided there were no good grounds for not doing so.[89] However, addressing the practice of opening a local provisional liquidation in aid of foreign proceedings, the court conceded that the usual practice of accelerating the proceedings, in order to bring them to a close once recognition of the foreign plan had been obtained, fell to be more precisely analysed.

For the court, *Singularis* had put an end to the simple practice of assuming that, if local proceedings (such as a scheme) could have been initiated, then the recognition of the foreign order would have the same effect as if the local procedure had been opened. Thus, an expedited liquidation, which could have been brought about as a result of a local scheme, could not simply be imposed through the process of recognising the plan adopted by the foreign order.[90] In light of *Singularis*, the court could not simply modify locally applicable statutory provisions to facilitate the recognition process. If no local procedure existed or was contemplated, a 'freestanding' power at common-law had to be found that would duplicate the effect to be achieved. However, in order to justify the short-circuiting of provisional liquidation, it was necessary to be able to find some authority in the statute itself that permitted this to happen.[91] The court was able to find the requisite authority in the rules that furnished a proviso to the requirement to summon meetings, that allowed for abridgement of time and that saved proceedings from invalidity in case of a formal defect. Using these rules, the court was able to tailor the provisional liquidation to reflect the decision reached in the United States proceedings and its effect.[92]

Notes

80 Ibid., at paragraphs 1-3.
81 Ibid., at paragraph 8, citing *Re ICO Global Communications (Holdings) Limited* [1999] Bda LR 69.
82 Ibid., at paragraph 9.
83 Ibid., at paragraphs 15-16 and 18-19.
84 Ibid., at paragraph 20.
85 Ibid., at paragraph 22.
86 Ibid., at paragraph 26.
87 *In the matter of C and J Energy Services Limited and another* [2017] SC (Bda) 20 Com (28 February 2017).
88 Ibid., at paragraph 14.
89 Ibid., at paragraph 16.
90 Ibid., at paragraphs 20 and 22.
91 Ibid., at paragraph 24.

Summary

It is true that *Singularis*, in the way it echoed *Rubin*, brought an end to an attempt to craft a different path for cross-border insolvency proceedings. Often, the measures the judges have sought to apply to such cases have been stimulated by the need to be practical and to afford all the help necessary in frequently complex cases to the task of the office-holders to trace and recover assets for the benefit of creditors. In an age when assets are extremely mobile and fraud, regrettably, happens, the artificiality of rules on jurisdiction and process could cause impediments to arise that facilitate avoidance of recovery. Occasionally, knowledge or advice on such impediments would be useful tools in the hands of those intent on evading the long-reach of the courts and the insolvency processes they seek to supervise. Nonetheless, the courts have long strived to be as accommodating and open as possible, views on public policy notwithstanding, in order to efficiently and effectively marshal assets and claims in aid of proceedings occurring elsewhere. Nowhere was this more true than in jurisdictions with a paucity of instruments on which help could be predicated, necessitating judicial inventiveness to achieve the same aims.

The cases that followed *Singularis* have each brought a little gloss to the decision in that case. The court in *Re X* accepts that powers must have a source and that applications by analogy must be properly grounded. Where such powers are coercive, the only proper grounding is a statute and a court cannot adapt powers that may exist in other contexts for use simply because it regards this as convenient. In *Re Baha Mar*, the same emphasis on the statute is seen in the court holding that common-law is displaced by the advent of a law that occupies the same space. Even if the common-law rules could survive, the strictures in *Singularis* apply on giving assistance only as necessary and not for purposes the home court could not authorise, thus avoiding the type of fishing for jurisdiction that might act to the detriment of litigants. *Re Energy XXI*, though accepting *Singularis* for the most part, however, also revisits it in deciding that its disapproval of *Cambridge Gas* does not preclude recognition of foreign orders where proper respect is paid to the rules on jurisdiction and venue. Similarly, *Re C and J Energy* reinforces the limitation in *Singularis* on recognition being a substitute for local proceedings, but also allows for the possibility that any local proceedings that are instituted can be conducted in a light-touch (and ancillary) manner so as not to impede restructuring occurring elsewhere.

In the last analysis, nonetheless, *Singularis* can only be seen as an unwelcome step back in the quest to find a workable solution for the difficulties of international insolvencies. For Fletcher, it is particularly regrettable that the courts have 'relinquished' their 'role as standard-bearer for the judicial resolution of obstacles to effective cross-border cooperation'.[93] In that light, cases accepting its terms, such as *Re X* and *Re Baha Mar*, can only serve to reinforce the view that judicial inventiveness has slowed down, if not come to a halt. All is not lost, however, if other cases, such as *Re Energy XXI* and *Re C and J Energy*, while respecting the strict tenets of *Singularis*, continue to explore methods of assistance that might achieve the ends sought. What is clear, however, is that the debate is by no means over: the decision in *Singularis* will continue to have an impact in the case law, because judges will continue to be required to fashion approaches to cross-border insolvency. Whether this is because of an absence of or lacunae in appropriate cross-border frameworks necessitating judicial inventiveness or because such frameworks require interpretation to adapt them to the ever-changing circumstances of cross-border insolvency, the role of judges is unlikely to disappear.

Notes

92 Ibid., at paragraph 24.
93 I. Fletcher, *The Law of Insolvency* (5th edn, London: Sweet and Maxwell, 2017), in the Preface, at viii.

INSOL Global Insolvency Practice Course
Co-operation and Co-ordination in Practice

Hypothetical Case Study - Global Petroleum Corporation[1]

An important note to participants: ***The purpose of this case study is to provide participants with an opportunity to experiment in the negotiation and identification of core elements that may be incorporated in a cross-border insolvency protocol. It is not intended that you seek to "solve" the problems identified in the case study, nor is it necessary to develop a restructuring plan / strategy. The output we are seeking – which is the task to be undertaken during our session together (not before!) – is a robust discussion of the terms of the protocol that can be agreed during the live negotiation. And – importantly – the process is intended to be fun and good-humoured!***

I. Company Overview

Global Petroleum Corporation ("GloboPetro") is a diversified energy company incorporated in Delaware (U.S.), whose many divisions and affiliates (the "Group") operate throughout the world. Its three primary business segments—upstream operations, downstream operations, and research and development—are carried on by separate affiliates.

The upstream segment, which explores for and extracts petroleum, is primarily conducted through GP Drilling S.A. ("GPD"), a Brazilian corporation. GPD's operations are distributed across Latin America, but center in Brazil, where GPD maintains vast proven reserves and accounts for 25% of total national oil production. All of GPD's drilling and exploration blocks are governed by concession agreements with the Brazilian government through 2025–2030, terminable by the government upon certain enumerated events.

The downstream segment, which refines, transports and markets petroleum, is primarily conducted through GP Refining Corp. ("GPR"), a Delaware corporation. GPR refines and markets products at 25 refineries in North America, Europe and the Asia-Pacific region. Its network can process 3 million barrels of crude per day, and its massive

[1] GloboPetro is a fictional company, and this case study is not intended to reflect any particular existing companies.

inventory of refined products is the Group's largest assets. Its four largest oil refineries, located in Mississippi (U.S.), constitute a large portion of GPR's PP&E value.

The R&D segment, which develops technology to support the upstream and downstream businesses and to sell to third parties, is primarily conducted through GP Tech Ltd. ("GPT"), a UK corporation. GPT is largely based in Europe. GPT's IP is another valuable asset on the Group's balance sheet: it holds over 10,000 active patents and receives $300 million per year in licensing revenues from third parties.

Although GPD, GPR and GPT each have separate purposes, their operations are inextricably intertwined.

II. The Present Situation

The Group is nearly out of cash and faces insolvency.

In 2015, one of GPD's Campos Basin rigs exploded, killing 50 workers and rupturing the well pipes. GPD, GloboPetro and other entities in the Group face tens of billions of dollars in fines and costs from civil and criminal litigation pending in Brazil. Amid this litigation, Brazil terminated all of GPD's concessions, depriving GPD of the overwhelming majority of its revenue.

GPD has filed for bankruptcy under Brazilian Bankruptcy Law No. 11101/05 ("BBL"). GloboPetro and GPR will soon file for bankruptcy under chapter 11 of the U.S. Bankruptcy Code. GPT, too, has recently commenced a U.K. insolvency proceeding, and an administrator has been appointed in the U.K. GPR's Mississippi refineries or GPT's patents could be sold to pay for GloboPetro's mounting legal costs. The Group's largest single asset is still its substantial store of refined petroleum products.

III. The Need for Cooperation

At issue is how the separate estates of GloboPetro, GPD, GPR and GPT will coordinate the sales of inventory, the Mississippi refineries and the GPT patents. Each entity will likely claim a stake in the worldwide GloboPetro operations. With assets spread across jurisdictions, the business will require administration in multiple fora, each with different—and possibly conflicting—rules.

A quick sales process is crucial because a major investor from Omaha has submitted a 90-day cash offer at a 20% premium to market for GPT's IP, GPR's oil inventory and GPR's refineries, provided that the Group can deliver these assets free and clear of liens. Separately, a major global oil services company is willing to offer a competitive price for GPT's IP alone. When considering the sale, it will be necessary for the companies to agree on how to sell their globally integrated assets and to divide the proceeds among creditors in the various proceedings, as each business segment contributed to the final product. For instance, the production of GPR's inventory

depended on the inputs of each major GloboPetro affiliate: GPD provided some of the crude oil, GPR refined it, and GPT made the technology that made both drilling and refining possible.

The Group's capital structure also represents a challenge for the concurrent proceedings. Much of the Group's debt consists of GloboPetro's bank loans, guaranteed by each of the three affiliates. Apart from this debt, however, each of GPD, GPR and GPT has entered into term loans with banks in their respective countries. GPT's separate debt was issued by a U.S.-based bank and is secured by GPT's rights in GloboPetro's IP and "products and proceeds thereof" (a phrase whose interpretation is subject to doubt).

GPD also owes substantial unpaid debts to its former workers, its local trade creditors and Brazilian tax authorities, and many of these claims would be entitled to priority under Brazilian law. Recent media quoted the Brazilian Attorney General promising to defend the rights of GPD's local creditors.

Additionally, GloboPetro faces major liability related under the GPR workers' multiemployer pension plan. Based on GPR's union contract, both GPR and GloboPetro must maintain defined-benefit pensions for their workers and retirees. Once GPR and GloboPetro file for bankruptcy, both will face withdrawal liability (i.e., their share of the multiemployer plan's underfunded vested benefits). Moreover, under U.S. pension law, GPD and GPT may also be jointly and severally liable for the withdrawal based on their common ownership under GloboPetro. Given the separate insolvency proceedings, a protocol must address the pension withdrawal liability, in addition to the other issues.

A single U.S. counsel is leading negotiations on behalf of both GloboPetro and GPR, although any sale it agrees to must be approved by independent committees of GloboPetro's and GPR's boards. Each of the entities have retained separate local counsel. The newly appointed administrator of GPT has previously suggested that U.K. administrators cannot easily fulfil their fiduciary duties if they become subject to orders of foreign courts.

Issues for Protocol Negotiation

Roles

GPD (Brazil)

1. GPD counsel
2. Attorney General of Brazil

GPT (U.K.)

3. GPT administrator
4. IP lender counsel

GloboPetro and GPD (U.S.)

5. GloboPetro and GPD counsel
6. Counsel to admin agent for GloboPetro bank debt

INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

Co-operation and co-ordination in practice

Fellows of INSOL:
Scott Atkins, INSOL President – Norton Rose Fulbright
Richard Pedone – Nixon Peabody
Timothy Graulich – Davis Polk

Topics

- Why do we need cooperation & coordination?
- Sources of obligation
- International protocols

Some fun:

- Protocols in action: Interactive case study of Global Petroleum Corporation Inc.

1. Why do we need cooperation & coordination?

- Modified universalism
  - Single court; aided by cooperation of all other jurisdictions
  - Commitment to common principles to regulate & manage cross-border insolvencies
  - Reciprocity & procedural fairness in overall treatment of creditors: collectivity

2. Sources of obligation to cooperate & coordinate

- UNCITRAL Model Law on Cross Border Insolvency (1997) (**Model Law)**
- EU Regulation on Insolvency
- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation
- International statements of principle
- Domestic laws & rules

UNCITRAL Model Law

- Chapter IV: Cooperation with Foreign Courts & Representatives
  - **Article 25**: Court-to-Foreign Court & court to Foreign Representative communication & cooperation
  - **Article 26**: Local representative cooperation & communication with Foreign Court & Foreign Representative
  - **Article 27**: Forms of cooperation & coordination & role of the court

UNCITRAL Model Law

- Chapter V: Concurrent proceedings
  - **Article 28**: Commencement of a local proceeding after recognition of a FMP
  - **Article 29**: Coordination of concurrent foreign and local proceedings & role of court
  - **Article 30**: Coordination of more than one foreign proceeding regarding the same debtor and role of court to facilitate coordination

EU Regulation (Recast)

- Importance of co-operation between office-holders & courts & application of international guidelines (**Recital 48**)
- Encouragement to use agreements & protocols (**Recital 49**)
- Court & office-holder coordination (**Recital 50**)
- Mandatory co-operation
  - between national courts (**Article 42**)
  - between courts & office-holders, main & secondary office-holders (**Article 43**)

UNCITRAL Practice Guide on Cross-border Insolvency

- Ties in to Article 27
- Key plank to accelerate judicial support for court-to-court cooperation and coordination
- Rich source of guidance and potential for harmonization: illustrative not prescriptive – extensive court endorsement

Guidelines for Communication and Cooperation Between Courts

- **CoCo Guidelines**: European Communication & Cooperation Guidelines for Cross-Border Insolvency (**2007**)
- **Global Principles**: ALI & III Global Principles for Cooperation in International Insolvency Cases (**2012**)
- **EU JudgeCo Principles**: EU Cross-border Insolvency Court-to-Court Cooperation Principles (**2014**)

New approach: Guidelines for Communication and Cooperation Between Courts

- Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Matters (2016) (**JIN Guidelines**)
- Judicial Insolvency Network Modalities of Court-to-Court Communication (2019) (**JIN Modalities**)

- The United States Bankruptcy Court for the District of Delaware
- The United States of Bankruptcy Court for the Southern District of Texas
- The United States of Bankruptcy Court for the Southern District of New York
- The United States of Bankruptcy Court for the Southern District of Florida
- The Chancery Division of England & Wales
- The Eastern Caribbean Supreme Court
- The Supreme Court of British Columbia
- The Commercial List of Users' Committee of the Superior Court of Justice - Ontario
- The Grand Court of the Cayman Islands
- The Supreme Court of Singapore
- The Seoul Bankruptcy Court
- The Supreme Court of Bermuda
- The District Court Midden-Nederland (the Netherlands)
- The Federal Court of Australia
- The Supreme Court of New South Wales
- Brazil

Guidelines for Communication and Cooperation Between Courts

Adoption of the JIN Guidelines and JIN Modalities:

- **Singapore Guidelines**: Supreme Court of Singapore Guidelines for Communication & Cooperation between Courts in cross-border insolvency matters and modalities of Court to Court communication (2020)

- **Australian Federal Court Guidelines**: Federal Court of Australia Cross-Border Insolvency Practice Note: Cooperation with foreign Courts or foreign representatives (2020)

3. International protocols

- What are they?
- Variations in form and scope
- Common provisions
- Effect: legally binding or good faith?

Kelly, Re Halifax Investment Services Pty Ltd (in liq) (No 5) [2019] FCA 1341

- Federal Court of Australia held that it could make a request to the New Zealand High Court for there to be a joint hearing in relation to a pooling application for funds the subject of Australian and New Zealand liquidations.

  Note: The joint hearing was ultimately held by the Federal Court of Australia and the High Court of New Zealand between 30 November 2020 and 9 December 2020.

Re Latam Finance Limited (unreported, 24 August 2020, FSD 105, 106 and 154 of 2020)

- Grand Court of the Cayman Islands approved a protocol for mutual cooperation and assistance and direct communications between itself and courts in New York, Colombia and Chile concerning a Chapter 11 restructure of an entity under the US Bankruptcy Code which was based on the ALI-III Guidelines.

Nortel Networks Corporation (2015) ONSC 2987

- 130 subsidiaries in 100 countries
- Joint US & Canadian trial to allocate US$7.3 billion, conducted pursuant to a protocol
- Protocol approved in CCAA and Ch.15 proceedings with aims of:
  - Harmonization and coordination of proceedings
  - Orderly and efficient administration of proceedings
  - Honouring integrity and independence of courts
  - Promoting international cooperation and respect for comity among courts, debtors & creditors

Judge Gross:

“This Court is convinced that where, as here, operating entities in an integrated multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds of those assets in an enterprise-wide insolvency, adopting a pro rata allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.”

May 12, 2015 Opinion, Page 60

Judge Gross:

“There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe”

May 12, 2015 Opinion, Page 61

Case Study: Global Petroleum Corporation

- Allocation of teams and roles
- 15 minutes reading and discussion among teams to plan approach to protocol
- 15 minutes to negotiate protocol terms
- 15 minutes to seek approval of protocol