



**INSOL**  
INTERNATIONAL

GLOBAL INSOLVENCY  
PRACTICE COURSE

# Co-operation and co-ordination in practice

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# Topics

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- 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?

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- 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

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- 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

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- 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

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- 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)

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- 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

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- 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

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- **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

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- 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 Bankruptcy Court for the Southern District of Texas
- The United States Bankruptcy Court for the Southern District of New York
- The United States 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

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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

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- 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

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- 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)

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- 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

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- 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

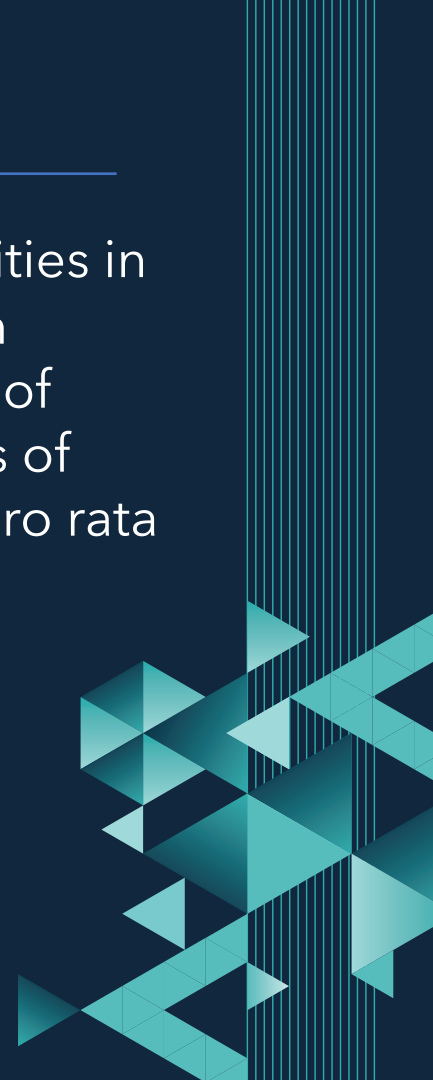


## Judge Gross:

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"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



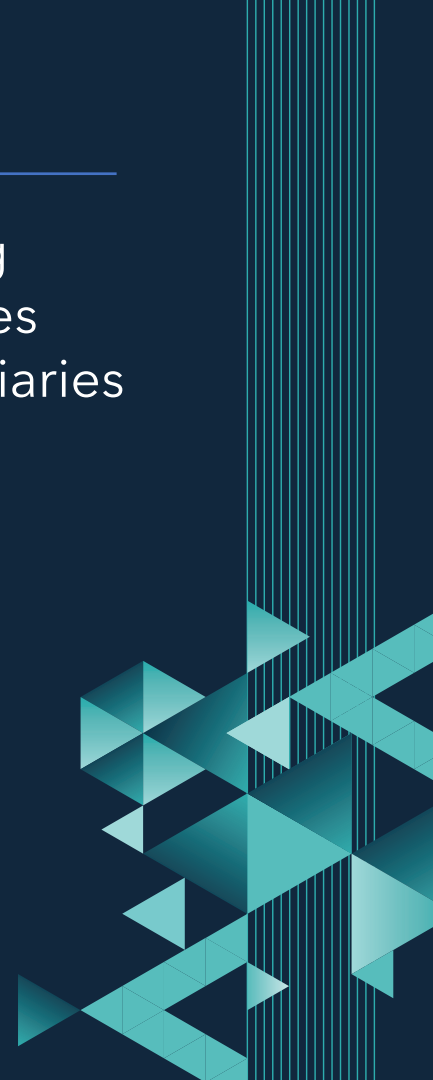


## Judge Gross:

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“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

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- 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

