

# FEDERAL COURT OF AUSTRALIA

## Practice Note No 29

### Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives

The *Cross-Border Insolvency Act 2008* (Cth) (the Act) provides in s 6 that, subject to the Act, the *Model Law on Cross-Border Insolvency* of the United Nations Commission on International Trade Law (UNCITRAL) (the Model Law), with the modifications set out in Pt 2 of the Act, has the force of law in Australia. The English text of the Model Law is set out in Schedule 1 to the Act.

Chapter IV of the Model Law, comprising articles 25–27, provides for cooperation with foreign courts and foreign representatives in the cross-border insolvency matters that are referred to in Article 1 of the Model Law.

Articles 25 and 27 of the Model Law, as modified by s 11 of the Act, and as presently relevant, provide:

#### *Article 25*

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

1. In matters referred to in article 1, **the court shall cooperate** to the maximum extent possible with foreign courts or foreign representatives, either directly or through a registered liquidator (within the meaning of section 9 of the *Corporations Act 2001*).
2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

#### *Article 27*

#### *Forms of cooperation*

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

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) [*The enacting State may wish to list additional forms or examples of cooperation*]. [Section 18 of the Act provides that no additional forms or examples of cooperation are added.]

The form or forms of cooperation appropriate to each particular case will depend on the circumstances of that case. As experience and jurisprudence in this area develop, it may be possible for later versions of this Practice Note to lay down certain parameters or guidelines.

Cooperation between the Court and a foreign court or foreign representative under article 25 will generally occur within a framework or protocol that has previously been approved by the Court, and is known to the parties, in the particular proceeding. Ordinarily it will be the parties who will draft the framework or protocol. In doing so, the parties should have regard to:

- the *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases* published by The American Law Institute and The International Insolvency Association (available at [www.ali.org/doc/Guidelines.pdf](http://www.ali.org/doc/Guidelines.pdf)); and
- the Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings (available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/5Insolvency.html](http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html), by clicking the link under the heading “35th Session, 17-21 November 2008, Vienna” (last item).

**M E J BLACK**

**Chief Justice**

2 March 2009