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SECTION ON BUSINESS LAW

COMMITTEE J - INSOLVENCY AND CREDITORS' RIGHTS

Committee J
Cross-Border Insolvency Concordat

**Adopted by the Council of the Section on Business Law
of the International Bar Association**

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of the International
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Madrid, Spain
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**INTRODUCTION TO THE CROSS-BORDER
INSOLVENCY CONCORDAT**

Committee J of the International Bar Association is pleased and proud to have sponsored the development of the Cross-Border Insolvency Concordat. The Concordat is one of the most significant

initiatives in international insolvency and reorganizations in many years.

Our Committee is highly appreciative of the work that so many Members of our Committee have put into the analysis and development of the concepts that form the basis of the Concordat. Under the Co-Chairs of our Subcommittee on the Cross-Border Insolvency Concordat, Mike Sigal of New York and Christoph Staubli of Zurich, Country Teams were organized in over twenty countries from all around the world. Through presentations at Committee J Conferences and Meetings, several hundred members of our Committee have been able to participate in the deliberations on the Concordat. The Committee also acknowledges a deep debt of gratitude to several distinguished international jurists who participated in the development and, more latterly, in the actual application of the Concordat to an existing cross-border reorganization between two of Committee J's member countries.

The Concordat is intended to an evolving work that will be altered and modified to reflect the experiences that members of the international insolvency community gain from working with its concepts and applying it in practice. We are aware of the benefits to be derived from the application of the principles of the Concordat within the work of the United Nations Commission on International Trade Law (UNCITRAL) prospective Model Law on Cross-Border Insolvency. We are also considering provisions based on the Concordat model that would be suitable for application in the case of cross-border insolvencies involving financial institutions and the potential development and use of the Concordat for model provisions in commercial documentation in international transactions.

Committee J welcomes comments and suggestions on the provisions of the Cross-Border Insolvency Concordat and on measures that could be used to increase the effectiveness of the Concordat in meeting our Committee's goals of achieving increased levels of co-ordination and harmonization among Committee J's member countries in cross-border and multinational insolvencies and reorganizations.

Madrid, Spain
May 31, 1996

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INTRODUCTION TO THE COMMITTEE J CROSS-BORDER INSOLVENCY CONCORDAT

Flexibility in the rules appears to be indispensable in international bankruptcy. The situations which arise are so varied that any one rigid rule cannot solve all of them satisfactorily. ... Neither the theory of territoriality nor the theory of ubiquity can cope adequately with the divergent situations.

Professor Kurt H. Nadelmann¹

The Cross-Border Insolvency Concordat is a framework for harmonizing cross-border insolvency proceedings. There exists today no uniform statute or treaty adopted by commercial nations dealing with the policy and commercial problems that arise in cross-border insolvencies. Yet cross-border insolvencies are increasing both in number and size, as well as in complexity. The Concordat attempts to aid in filling this gap in international law.

International commerce will be encouraged if the insolvency bench and bar develop a set of general guidelines, a "concordat, which may be used in developing solutions to individual cross-border insolvencies. The purpose of the Concordat is to suggest generalized principles, which the participants

or courts could tailor to fit the particular circumstances and then adopt as a practical approach toward dealing with the process.

To be supportive of international commerce, any insolvency regime must be reasonably predictable, fair and convenient. Supporting international commerce is a worthy goal, because, as some have noted, countries which trade together rarely make war upon one another. International commerce will be furthered by an understanding in the international business community that general principles exist which, in the event of business crisis, are recognized as an underpinning to harmonize insolvency proceedings.

These principles should reflect respect for the legitimate private expectations of the parties transacting business with the debtor, including their reasonable reliance upon laws of particular jurisdictions. However, legislation reflecting a particular jurisdiction's policies regarding such matters as priorities among claims must be given due weight where jurisdictionally appropriate, as should regulatory laws governing businesses such as banking or insurance.

The Concordat has been prepared to provide a framework of general principles for addressing cross-border insolvencies. The Concordat deals with some of the important conceptual issues that arise in cross-border insolvencies. Some principles have been framed in the alternative, reflecting among other things extensive comment from many countries.

It is important to note what the Concordat is not. The Concordat is not intended to be used as, or as a substitute for, a treaty or statute. The Concordat is not a rigid set of rules; indeed, it is expected to change as it is used. Rather, the Concordat is an interim measure until treaties and/or statutes are adopted by commercial nations. It is intended, in the absence of an applicable treaty or statute, to guide practitioners in harmonizing cross-border insolvencies. The Concordat, as modified by counsel to fit the circumstances of any particular cross-border insolvency, could be implemented by court orders or formal agreements between official representatives or informal arrangements, depending upon the rules and practices of the particular fora involved.

COMMITTEE J CROSS-BORDER INSOLVENCY CONCORDAT

PRINCIPLE 1

IF AN ENTITY OR INDIVIDUAL WITH CROSS-BORDER CONNECTIONS IS THE SUBJECT OF AN INSOLVENCY PROCEEDING, A SINGLE ADMINISTRATIVE FORUM SHOULD HAVE PRIMARY RESPONSIBILITY FOR COORDINATING ALL INSOLVENCY PROCEEDINGS RELATING TO SUCH ENTITY OR INDIVIDUAL.

Commentary: In most cases, an enterprise will have its nerve center and many of its assets in one country. In the usual circumstance that country is the most appropriate forum for the administrative center of its insolvency. Having a primary administrative forum presents the possibility of many benefits enhancing control of assets, increasing business values, and ensuring fair treatment of creditors. Predictability of the "natural" administrative forum will also be most supportive of international commerce.

The Concordat is designed to provide principles useful where any of several procedural situations occurs. While in most cases the establishment of a single main proceeding will be the best way to achieve the common goals of most national insolvency regimes, there may well be circumstances in which more than one plenary case is maintained. For example, plenary proceedings might proceed in two jurisdictions, with or without an administrative protocol, and with or without limited proceedings in yet other jurisdictions. In all of these circumstances the Concordat provides principles intended to assist in coordination. The Concordat also provides principles applicable in any forum whether one, or several, plenary or limited proceedings are pending. These include the analysis of appropriate choice of law in litigated matters such as claim resolution and voiding rules.

PRINCIPLE 2

WHERE THERE IS ONE MAIN FORUM:

- (A) ADMINISTRATION AND COLLECTION OF ASSETS SHOULD BE COORDINATED BY THE MAIN FORUM.
 - (B) AFTER PAYMENT OF SECURED CLAIMS AND PRIVILEGED CLAIMS, AS DETERMINED BY LOCAL LAW, ASSETS IN ANY FORUM OTHER THAN IN THE MAIN FORUM SHALL BE TURNED OVER TO THE MAIN FORUM FOR DISTRIBUTION.
 - (C) COMMON CLAIMS ARE FILED IN AND DISTRIBUTIONS ARE MADE BY THE MAIN FORUM. COMMON CREDITORS NOT IN THE MAIN FORUM MUST FILE CLAIMS IN THE MAIN FORUM BUT (TO THE EXTENT ALLOWABLE UNDER THE PROCEDURAL RULES OF THE MAIN FORUM) MAY FILE BY MAIL, IN THEIR LOCAL LANGUAGE AND WITH NO FORMALITIES OTHER THAN REQUIRED UNDER THEIR LOCAL INSOLVENCY LAW.
 - (D) THE MAIN FORUM MAY NOT DISCRIMINATE AGAINST NON-LOCAL CREDITORS.
 - (E) FILING A CLAIM IN THE MAIN FORUM DOES NOT SUBJECT A CREDITOR TO JURISDICTION FOR ANY PURPOSE, EXCEPT FOR CLAIMS ADMINISTRATION SUBJECT TO THE LIMITATIONS OF PRINCIPLE 8 AND EXCEPT FOR ANY OFFSET (UNDER VOIDING RULES OR OTHERWISE) UP TO THE AMOUNT OF THE CREDITOR'S CLAIM).
 - (F) A DISCHARGE GRANTED BY THE MAIN FORUM SHOULD BE RECOGNIZED IN ANY FORUM.
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Commentary: International commerce is encouraged to the extent that participants may rely upon the expectation that if they engage in transactions with a multinational enterprise, and an insolvency proceeding is commenced in any nation with which the enterprise has a connection, that participant will not suffer discriminatory treatment based solely upon nationality or domicile. While a creditor may be subject to the inconvenience of an insolvency proceeding in another country, that risk is part of engaging in business with a multinational enterprise. But the risk of discriminatory treatment should not be a business. Nor should the risk that the creditor's preinsolvency claim will be unanticipated jurisdiction, unilaterally chosen by the entity or individual commencing insolvency proceedings, be a risk of doing such business.

To promote economy, and in light of modern communications technology, the main forum should have the ability to serve process worldwide, but a defendant should be permitted to object to jurisdiction of the main forum without submitting to jurisdiction, and to raise other objections to the forum. Similarly, the filing of a claim in a particular jurisdiction subjects the creditor to insolvency jurisdiction, but only as exercised by the court ultimately found appropriate to hear a matter, which may not be the main forum, and only with respect to its claim and offsets.

PRINCIPLE 3

- A. IF THERE IS MORE THAN ONE FORUM, THE OFFICIAL REPRESENTATIVES APPOINTED BY EACH FORUM SHALL RECEIVE NOTICE, AND HAVE THE RIGHT TO APPEAR IN, ALL PROCEEDINGS IN ANY FORA. IF REQUIRED IN A PARTICULAR FORUM, AN EXEQUATUR OR SIMILAR PROCEEDING MAY BE UTILIZED TO IMPLEMENT RECOGNITION OF THE OFFICIAL REPRESENTATIVE. AN OFFICIAL REPRESENTATIVE SHALL BE SUBJECT TO JURISDICTION IN ALL FORA FOR ANY MATTER RELATED TO THE INSOLVENCY PROCEEDINGS, BUT APPEARING IN A FORUM SHALL NOT SUBJECT HIM/HER TO JURISDICTION FOR ANY OTHER PURPOSE IN THE FORUM STATE.
- B. TO THE EXTENT PERMITTED BY THE PROCEDURAL RULES OF A FORUM, EX PARTE AND INTERIM ORDERS SHALL PERMIT CREDITORS OF ANOTHER JURISDICTION AND OFFICIAL REPRESENTATIVES APPOINTED BY ANOTHER JURISDICTION THE RIGHT, FOR A REASONABLE PERIOD OF TIME, TO REQUEST THE COURT TO RECONSIDER THE ISSUES

COVERED BY SUCH ORDERS.

- C. ALL CREDITORS SHOULD HAVE THE RIGHT TO APPEAR IN ANY FORUM TO THE SAME EXTENT AS CREDITORS OF THE FORUM STATE, REGARDLESS OF WHETHER THEY HAVE FILED CLAIMS IN THAT PARTICULAR FORUM, WITHOUT SUBJECTING THEMSELVES TO JURISDICTION IN THAT FORUM (INCLUDING WITH RESPECT TO RECOVERY AGAINST A CREDITOR UNDER VOIDING RULES OR OTHERWISE IN EXCESS OF A CREDITOR'S CLAIM).
- D. INFORMATION PUBLICLY AVAILABLE IN ANY FORUM SHALL BE PUBLICLY AVAILABLE IN ALL FORA. TO THE EXTENT PERMITTED, NON-PUBLIC INFORMATION AVAILABLE TO AN OFFICIAL REPRESENTATIVE SHALL BE SHARED WITH OTHER OFFICIAL REPRESENTATIVES.

Commentary: If more than one plenary forum is presiding over insolvency proceedings of a multinational entity or individual, coordination of both the administration and claims processing is essential. The goals of Principle 1 are still important, and they can be achieved only if the Official Representatives are in constant communication, work together to coordinate the process, and have the respect of all relevant jurisdictions. All should be aware of proceedings in all courts, and where necessary should be heard if judicial resolution of a matter is required.²

Where more than one plenary forum exists, it appears to be an equitable corollary that any Official Representatives should be subject to plenary jurisdiction in every such forum. If creditors must respond in that forum, the Official Representatives must surely be required to respond in that forum. However, the Official Representatives should not be subject to jurisdiction for any purpose unrelated to representation of the estate.

Interim orders must often be made on short notice, especially in the first stages of insolvency proceedings. Because of the greater complexity of cross-border proceedings, such orders should be made subject to "come-back" procedures, so that any affected party may request the court to reconsider the matter when the situation has stabilized and the facts are clearer. In that way, courts will be given sufficient time and sufficient input to consider carefully the consequences of orders having cross-border ramifications. In addition, parties who are uncertain of the court's intentions regarding the cross-border reach of their orders, and who are not otherwise subject to the jurisdiction of the court, should be free to obtain clarification of such issues without being subjected to jurisdiction for other purposes.

Because the guiding principle of this Concordat is that all common creditors should be treated as creditors of a single world-wide estate, even though the estate is administered by more than one forum, as a matter of fairness all creditors should have a right to be heard (where a forum permits creditors to speak) on administrative matters in which they have an interest without submission to jurisdiction of the administrative forum for any purpose other than administrative matters and claims administration. No creditor not otherwise found in the administrative forum state, or whose claim is not connected to the forum state, should, as a result of administrative participation, lose its rights to jurisdictional and other international law arguments with respect to an adversary proceeding against the creditor.

PRINCIPLE 4

WHERE THERE IS MORE THAN ONE PLENARY FORUM AND THERE IS NO MAIN FORUM:

- (A) EACH FORUM SHOULD COORDINATE WITH EACH OTHER, SUBJECT IN APPROPRIATE CASES TO A GOVERNANCE PROTOCOL.
- (B) EACH FORUM SHOULD ADMINISTER THE ASSETS WITHIN ITS JURISDICTION, SUBJECT TO PRINCIPLE 4(F).

- (C) A CLAIM SHOULD BE FILED IN ONE, AND ONLY ONE, PLENARY FORUM, AT THE ELECTION OF THE HOLDER OF THE CLAIM. IF A CLAIM IS FILED IN MORE THAN ONE PLENARY FORUM, DISTRIBUTION MUST BE ADJUSTED SO THAT RECOVERY IS NOT GREATER THAN IF THE CLAIM WERE FILED IN ONLY ONE FORUM.
- (D) EACH PLENARY FORUM SHOULD APPLY ITS OWN RANKING RULES FOR CLASSIFICATION OF AND DISTRIBUTION TO SECURED AND PRIVILEGED CLAIMS.
- (E) CLASSIFICATION OF COMMON CLAIMS SHOULD BE COORDINATED AMONG PLENARY FORA. DISTRIBUTIONS TO COMMON CLAIMS SHOULD BE PRO-RATA REGARDLESS OF THE FORUM FROM WHICH A CLAIM RECEIVES A DISTRIBUTION.
- (F) ESTATE PROPERTY SHOULD BE ALLOCATED (AFTER PAYMENT OF SECURED AND PRIVILEGED CLAIMS) AMONG, OR DISTRIBUTIONS SHOULD BE MADE BY, PLENARY FORA BASED UPON A PRO - RATA WEIGHING OF CLAIMS FILED IN EACH FORUM. PROCEEDS OF VOIDING RULES NOT AVAILABLE IN EVERY PLENARY FORUM SHOULD BE

ALTERNATIVE A: ALLOCATED PRO - RATA AMONG ALL PLENARY FORA FOR DISTRIBUTION.

ALTERNATIVE B: ALLOCATED FOR DISTRIBUTION BY THE FORUM WHICH ORDERED VOIDING.

- (G) IF THE ESTATE IS SUBJECT TO LOCAL REGULATION THAT INVOLVES AN IMPORTANT PUBLIC POLICY (SUCH AS A BANKING OR INSURANCE BUSINESS), LOCAL ASSETS SHOULD BE USED FIRST TO SATISFY LOCAL CREDITORS THAT ARE PROTECTED BY THAT REGULATORY SCHEME (SUCH AS BANK DEPOSITORS AND INSURANCE POLICY HOLDERS) TO THE EXTENT PROVIDED BY THAT REGULATORY SCHEME.

Commentary: As suggested with respect to Principle 1, estate assets and business values are more likely to be preserved and enhanced if administration is centered in a single forum. If there are multiple insolvency proceedings and no main forum and if assets are located in several plenary fore or outside of any plenary forum, the same objectives may be met if the relevant fore agree upon a governance protocol.

Where more than one plenary proceeding exists, creditors should have the ability to choose the forum most advantageous or convenient for the creditor. If all creditors have the choice, all are provided equal treatment. Therefore, the holder of a claim should be permitted to file it in any plenary forum.

The choice of law applicable to the underlying validity of the claim is not affected by the choice of where it is filed -- under this Concordat the same choice of law rules will apply in every forum. However, the creditor may feel that one forum is more hospitable than another, and a privileged creditor may fare better under one distribution system rather than another.

Privileged claims, which reflect national policy choices, should be recognized by permitting distributions to those claims in each forum to be made according to its rules. Where a particular country has no assets for distribution and allocated a portion of estate assets for distribution to privileged creditors, the country may distribute such assets to privileged creditors first.

Certain industries, such as banking and insurance, involve regulation that implements important public policies. Under the Concordat, these are respected.³

To promote fairness, which in turn promotes commerce, distribution of estate assets, domestic or multinational, should generally be made pro-rata among creditors of the same class, wherever located. However, where more than one plenary forum has been found appropriate, each should be permitted to make distributions pursuant to its own procedural law. Therefore, each must be allocated an appropriate portion of estate property.

Estate property should be allocated (after satisfaction of secured claims and payment of privi-

leged claims in any jurisdiction in which estate property is located) such that it is distributed on a pro-rata basis among plenary fore based upon claims filed. Claims in comparable classes in each jurisdiction should be valued on a comparative basis, and then the assets, or their proceeds, should be allocated among each jurisdiction based upon claims filed.

PRINCIPLE 5

A LIMITED PROCEEDING SHALL, AFTER PAYING SECURED AND PRIVILEGED CLAIMS, AS DETERMINED BY LOCAL LAW, TRANSFER ANY SURPLUS TO THE MAIN FORUM OR ANOTHER APPROPRIATE PLENARY FORUM.

Commentary: In many situations, it may be useful, where a plenary insolvency proceeding is pending on one jurisdiction, to commence a proceeding in another jurisdiction to serve limited objectives, such as collection of assets, where there is no need for a second comprehensive proceeding. In some countries there exist defined statutory vehicles for limited proceedings, such as “secondary proceedings” recognized in the Council of Europe Convention and the draft EU Convention and “ancillary proceedings” in the United States. In many countries, the only available vehicle is a plenary proceeding. However, it appears that in most countries a plenary proceeding may be tailored by the presiding judge to effect limited objectives. The Concordat favors the exercise of discretion, where available, to limit proceedings. This will avoid conflict with plenary proceedings in other jurisdictions and will reduce the coat of cross-border cases.

In any limited proceeding, the court should make every effort to coordinate with courts presiding over plenary proceedings. However, the court in a limited proceeding has authority to collect assets in its jurisdiction, and distribute such assets to secured and privileged creditors. To effect the equality goal of the Concordat and most insolvency regimes, the Concordat provides that surplus assets or proceeds should then be transferred to an appropriate plenary proceeding which handles distribution to common claims.

PRINCIPLE 6

SUBJECT TO PRINCIPLE 8, THE OFFICIAL REPRESENTATIVES MAY EMPLOY THE ADMINISTRATIVE RULES OF ANY PLENARY FORUM IN WHICH AN INSOLVENCY PROCEEDING IS PENDING, EVEN THOUGH SIMILAR RULES ARE NOT AVAILABLE IN THE FORUM APPOINTING THE OFFICIAL REPRESENTATIVE.

Commentary: Where it is found appropriate that administrative supervision of a cross-border insolvency be exercised in more than one country, it should also be appropriate that administrative rules applicable in a particular forum be available for use by the Official Representative to enhance the assets of the estate. For example, if the entity in insolvency proceedings is a party to executory contracts in a nation whose insolvency law permits rejection of executory contracts that are burdensome, the Official Representative should be enabled to use such procedures for the benefit of all creditors. Thus, an Official Representative appointed in Country A could, subject to Principle 8, use a rejection power available in Country B (the main forum) even if Country A’s laws provide no such power. Where appropriate, an exequatur or similar proceeding would be used in Country B.

However, the Official Representative is not permitted to use such rules in an unexpected manner. If the pre-insolvency entity was a party to executory contracts to be performed in a country in which rejection is not permissible, the rejection procedure of another country may not be used. Again, international commerce is hindered if parties entering into contracts with multinational entities are concerned that unexpected unilateral use by such entities of favorable law will occur in the event of insolvency. Application of principles of international law may determine whether use of administrative procedures is appropriate.

PRINCIPLE 7

SUBJECT TO PRINCIPLE 8, THE OFFICIAL REPRESENTATIVES MAY EXERCISE VOIDING RULES OF ANY FORUM.

Commentary: Many nations provide rules for negating transactions which occur within a defined period before the onset of insolvency proceedings. The purpose of these laws is usually to prevent the preference by the pre-insolvency entity of some creditors over others, or to prevent the overpayment of some creditors caused by exchanges for unequal value, so creditors not so preferred are treated equally by having all claims considered based on facts existing at the filing date (or as they should have existed a. of that date had the voidable transactions not occurred).

The Official Representative should be permitted to use any provisions available to it to maximize recoveries, provided the use of such remedy is consistent with principles of international law.⁴

PRINCIPLE 8

- A. EACH FORUM SHOULD DECIDE THE VALUE AND ALLOWABILITY OF CLAIMS FILED BEFORE IT USING A CHOICE OF LAW ANALYSIS BASED UPON PRINCIPLES OF INTERNATIONAL LAW. A CREDITOR'S RIGHTS TO COLLATERAL AND SET-OFF SHOULD ALSO BE DETERMINED UNDER PRINCIPLES OF INTERNATIONAL LAW.
 - B. PARTIES ARE NOT SUBJECT TO A FORUM'S SUBSTANTIVE RULES UNLESS UNDER APPLICABLE PRINCIPLES OF INTERNATIONAL LAW SUCH PARTIES WOULD BE SUBJECT TO THE FORUM'S SUBSTANTIVE LAWS IN A LAWSUIT ON THE SAME TRANSACTION IN A NON-INSOLVENCY PROCEEDING. THE SUBSTANTIVE AND VOIDING LAWS OF THE FORUM HAVE NO GREATER APPLICABILITY THAN THE LAWS OF ANY OTHER NATION.
 - C. EVEN IF THE PARTIES ARE SUBJECT TO THE JURISDICTION OF THE PLENARY FORUM, THE PLENARY FORUM'S VOIDING RULES DO NOT APPLY TO TRANSACTIONS THAT HAVE NO SIGNIFICANT RELATIONSHIP WITH THE PLENARY FORUM.
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Commentary: A multinational corporation or corporate group may have transactions in many countries with citizens or domiciliaries of many other countries, involving assets or debt in many countries. The parties to these transactions will have reasonable expectations with respect to the law applicable to such transactions.

When such an enterprise fails, the established rules of international law should apply to claims, collateral, set-off rights, and lawsuits among the participants in the insolvency proceeding. Thus, substantive laws applicable to claims resolution and to lawsuits must be decided based upon on the relevant facts. So should issues of jurisdiction and venue. While the interests of creditors are relevant, those interests are served by the application of laws providing for procedural fairness, not by the application of substantive laws or voiding rules on an unexpected basis.

If there is a main forum, it will usually be an appropriate forum for litigation if it applies international law principles, particularly choice of law principles, to any adversarial litigation pending before it.⁵ The issue could be by more complex where there are multiple administrative fore. In each case, an evaluation must be made based upon the applicable principles of international law, including giving due consideration to relevant insolvency law, as to what law should apply.

Voiding rules raise special issues. Such laws invalidate an otherwise legal transaction. Thus, a forum should have a clear interest in order for its voiding rules to apply. This is consistent with the overall principle that international commerce will be supported if otherwise valid commercial transactions are not disturbed unless a jurisdiction has a clear interest in doing so.

PRINCIPLE 9

A COMPOSITION IS NOT BARRED BECAUSE NOT ALL PLENARY FORA HAVE LAWS WHICH PROVIDE FOR A COMPOSITION AS OPPOSED TO A LIQUIDATION, OR A COMPOSITION CANNOT BE ACCOMPLISHED IN ALL PLENARY FORA, AS LONG AS THE COMPOSITION CAN BE EFFECTED IN A NON-DISCRIMINATORY MANNER.

Commentary: Not all nations have insolvency laws which provide for a composition. The policy decision whether to permit a composition is based upon a socio-economic view as to whether society benefits from maintaining the debtor as an on-going enterprise rather than liquidating it. The rules that govern the requirements to be satisfied in order to achieve a composition will differ from nation to nation and, thus, it is possible that a composition would be achievable in some, but not all, administrative fora.

In such an instance, if it appears that a composition is in the interests of the creditors, or other constituencies, such as employees or regulatory authorities, of countries which permit a composition, it is essential that the Official Representatives and courts coordinate their actions so that the objectives of all relevant nations may, to the extent possible, be realized. There appears to be no bar to a composition where creditors in any forum in which a vote is permitted in fact vote by the requisite majority of that forum in favor of the composition.

PRINCIPLE 10

TO THE EXTENT PERMITTED BY THE SUBSTANTIVE LAW OF A FORUM, COURTS OF THAT FORUM WILL NOT GIVE EFFECT TO ACTS OF STATE OF ANOTHER JURISDICTION USED TO INVALIDATE OTHERWISE VALID PRE-INSOLVENCY TRANSACTIONS.

Commentary: Insolvency laws are designed to protect the integrity of commerce. They do so by allocating the assets of a failed enterprise in a manner which attempts to weight claims arising from different-non-insolvency law bases in an equitable manner. While preferences and priorities reflecting a particular nation's political decisions are also part of many insolvency statutes, these are usually quite limited and are known in advance to the participants in commercial activity relating to that nation.

The reasonable commercial expectation of the parties should not be upset by ad hoc intervention, post-insolvency, of the executive of a nation by use of any act of state. For example, the pre-insolvency obligations of a private entity should not be invalidated by sovereign cuts after the onset of insolvency proceedings.

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GLOSSARY OF TERMS

This Glossary of Terms is included for convenience and does not have independent significance. These terms may be tailored to conform to the applicable terms of those jurisdictions involved in any particular cross-border insolvency in which the Concordat is utilized.

Administrative Rules. The rules of insolvency law, excluding voiding rules, governing the conduct of a plenary proceeding.

Common Claim. A claim which is neither a secured claim nor a privileged claim.

Composition. A proceeding with the goal of rehabilitating the business of the entity or individual that is involved in insolvency proceedings, possibly with new owners, including arrangement, suspension of payment, reconstruction, reorganization, or similar processes, with distributions to creditors

and/or shareholders or other equity holders of cash, property and/or obligations of, or interests in, the rehabilitated business.

Discharge. A court order or provision of an instrument effecting a composition releasing a debtor from all liabilities that were, or could have been, addressed in the insolvency proceeding, including contracts that were modified as part of a composition.

Distribution. Allocation of estate property among creditors and/or shareholders or other equity interests.

Insolvency Proceeding/Forum. Any proceeding over which a court or other official forum presides with respect to the insolvency of an entity or individual, which may be a plenary or limited proceeding.

International Law. The laws governing relations among parties of diverse nationalities.

Limited Proceeding. An insolvency proceeding that is not a plenary proceeding. Limited proceedings include secondary and ancillary proceedings.

Liquidation. A proceeding with the goal of selling the debtor's business, either as a going concern or otherwise, with distribution of proceeds to creditors.

Main Forum/Proceeding. The exclusive or primary plenary forum/proceeding.

Non-Local Creditors. Creditors who are neither nationals nor domiciliaries of the forum in question.

Official Representative. A representative of the entity or individual that has commenced insolvency proceedings, or the estate created thereby, or its or his/her creditors, which may include an administrator, liquidator, trustee, supervisor or debtor-in-possession.

Plenary Forum/Proceeding. A forum or insolvency proceeding which addresses, on a plenary basis, administrative matters, including, on the one hand, operation or liquidation of the debtor's business or assets, and, on the other hand, the filing, processing and allowance of claims and distribution to creditors.

Privileged Claim. A claim that, pursuant to statutory or other law, or pursuant to ranking rules, is given a preference or priority over common claims, including a public law claim arising from the public law of a nation.

Ranking Rules. The rules by which claims and equity interests are ranked.

Secured Claim. A claim that is a valid charge upon or interest in collateral to the extent of the value of the collateral.

Voiding Rules. Rules relating to voidness, voidability or enforceability of claims or pre-insolvency transactions.

(Footnotes)

¹ *Solomons v. Ross and International Bankruptcy Law* 9 Mod. L.R. 154, 167 - 168 (1946).

² Official Representatives will most often seek to appear to press claims of the creditors in their country or to assert an interest in assets. However, Official Representatives should be heard on any matter of interest to their position.

³ See, *In re Norske Lloyd Ins. Co.*, 242 N.Y. 148 (1926); *In re Ocana*, 151 B.R. 670 (S.D.N.Y. 1993); see also, Art. 1(1) of the Council of Europe Convention and Art. 1(2) of the draft EU Convention.

⁴ Some jurisdictions and the draft EU Convention are not as flexible in that they require the voiding rules of the law of the State in which proceedings are opened to apply. The Concordat considers this approach overly narrow, but is cognizant of this approach.

⁵ The parties may not alone determine the substantive law applicable to a transaction. For example, if payments alleged to be fraudulent conveyances were made in connection with a contract governed by Singaporean law, the determination whether the payments are voidable is not necessarily made under Singaporean law. The appropri-

ate law for evaluating voidability depends upon an analysis of all the circumstances of the payments, including the designation of Singaporean law in the contract, which may be relevant to the parties' expectations and intent. Where, as a result of the insolvency, the laws of another country may be relevant despite the intent of the parties, the basis for its application should also be examined.