

**Court to Court Communication Protocols**  
**Comments at 7<sup>th</sup> Judicial Seminar on Commercial Litigation – 25 February 2022**  
**Justice Ashley Black, Supreme Court of New South Wales**

*The role of court to court communications in insolvency matters*

I will comment on the role of court to court communication in the context of cross-jurisdictional insolvency matters, with particular focus on its place in jurisdictions which have adopted the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”), which include several of the jurisdictions represented at this conference.

The need for court to court communication has long been recognised in cross-border matters, including multi-jurisdictional commercial disputes, maritime matters and cross-border insolvency matters.<sup>1</sup> In a 2010 paper, the former Chief Justice of the Supreme Court of New South Wales, Spigelman CJ, put the case for such communications as follows, while recognising that the position was then still controversial:

“Subject to the obligation to ensure a fair trial and to obey the principles of natural justice applicable in any jurisdiction, such communication should not, in this day and age, be regarded as unusual. There is a complete disconnect between the willingness and ability of commercial corporations to operate and interact across borders in a seamless manner, on the one hand, and the restrictions that are still imposed upon public authorities, both regulatory and judicial, from acting in a similar manner. The freedom of commercial communications stands in marked contrast with the distrust of, and inhibitions upon, communications between public authorities.

Anything that can be interpreted as impacting upon the sovereignty of a jurisdiction, by reason of the intrusion of any manifestation of the sovereign power of another jurisdiction, is subject to restrictions that have been abolished with respect to private actors, including state owned commercial actors. Direct court to court communication in the context of cross border insolvency is a particular manifestation of the new sense of international collegiality that has emerged amongst judges of different

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<sup>1</sup> As to the scope for cooperation in maritime matters, see Supreme Court of Singapore, “Malaysia and Singapore Implement Protocols on Court-to-Court Communication and Cooperation in Admiralty, Shipping and Cross-Border Corporate Insolvency Matters”, Media Release, 5 October 2021; M Davies, “Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity” (2018) 66 *Am J Comp L* 101; S Chong, “When Worlds Collide: The Interaction between Insolvency and Maritime Law”, Keynote Address at the 2nd Meeting of the Judicial Insolvency Network, 22 September 2018.

nations, who now meet in many different multilateral, regional and bilateral contexts.”<sup>2</sup>

The need for communication between parties and Courts in different jurisdictions is heightened in cross-border insolvency matters where companies and corporate groups often have operations and assets in different jurisdictions, commonly structured with business units that operate internationally and are not correlated with corporate entities incorporated in the particular jurisdictions. Where corporate groups are structured in that way, there is a real risk of loss of value if creditors in each jurisdiction seize the assets in that jurisdiction, destroying the value which may exist in the wider international business, and a real risk of wasted costs in multiple insolvency proceedings. Both the Nortel and Lehman Brothers insolvencies involved issues of that kind.

Courts dealing with cross-border insolvencies often need to address questions as to any distribution of assets across jurisdictions and the provision of assistance to insolvency practitioners appointed in other jurisdictions, at least to the extent that national law will permit, without the need to commence a full parallel insolvency proceeding. These questions arise and will need to be addressed whether or not the jurisdiction adopts a philosophy of “modified universalism”<sup>3</sup>, including under the Model Law (adopted in Australia by the *Cross-Border Insolvency Act 2008 (Cth)*), or implements a similar approach through the general law<sup>4</sup> or adopts a more territorial approach.

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<sup>2</sup> JJ Spigelman, “Cross Border Issues For Commercial Courts: An Overview”, Paper delivered at the Second Judicial Seminar on Commercial litigation, Hong Kong, 13 January 2010; for other commentary, see S Jackson & R Mason, “Developments in Court to Court Communications in International Insolvency cases” (2014) 37(2) *UNSW LJ* 507.

<sup>3</sup> See the observation of Lord Hoffman in *Re HIH Casualty & General Insurance Ltd* [2008] 1 WLR 852 at [30], the high point of that approach in the United Kingdom, pointing to the “golden thread” of English cross-border insolvency law that “English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all company’s assets are distributed to its creditors under a single system of distribution”; *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] AC 508 at 518; [2006] 3 WLR 689; [2006] UKPC 26; and the observation of Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers* [ [2015] AC 1675; [2015] 2 WLR 971; [2014] UKPC 36 at [19] that “the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers”; see also A Walters, “Modified Universalism and the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law” (2019) 93 *Am Bank LJ* 47.

<sup>4</sup> J Harris, “Understanding Cross-Border Insolvency in the Hong Kong Context” (2017) *Hong Kong LJ* 55.

The Model Law itself commits the courts of an adopting jurisdiction to cooperation and communication between courts, although there is still a question as to how far that can affect substantive matters. Articles 25-32 of the Model Law deal with cooperation and communication of proceedings in more than one country. Article 25 provides that:

- “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 [person or body administering a reorganization or liquidation].
- 2 The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.”

Article 26 then deals with cooperation and direct communication between insolvency practitioners and foreign courts or foreign representatives. Article 27 provides that cooperation referred to in articles 25 and 26 may be implemented by any “appropriate means” and gives examples including appointment of a person or body to act at the direction of the court; communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor’s assets and affairs; approval or implementation by courts of agreements concerning the coordination of proceedings; and coordination of concurrent proceedings regarding the same debtor.

Professional groups have formulated several versions of guidelines for such communications<sup>5</sup> and, most recently, judges from several jurisdictions did so in the form of the Judicial Insolvency Network (“JIN”) Guidelines, issued in 2016 and since adopted by several Courts present here. Paragraph A of the Introduction provides that the overarching objective of the Guidelines is:

“to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction (“Parallel Proceedings”) by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted.”

Paragraph C of the Introduction notes that:

“In particular, these Guidelines aim to promote:

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<sup>5</sup> See, for example, American Law Institute, “Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases”, 30 March 2012.

- (i) the efficient and timely coordination and administration of Parallel Proceedings;
- (ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders' interests are respected;
- (iii) the identification, preservation, and maximisation of the value of the debtor's assets, including the debtor's business;
- (iv) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;
- (v) the sharing of information in order to reduce costs; and
- (vi) the avoidance or minimisation of litigation, costs, and inconvenience to the parties in Parallel Proceedings.”

The JIN Guidelines adopt a relatively conservative approach to the manner of such communications, contemplating the development of a protocol for communications with party involvement.<sup>6</sup> Guideline 2 notes that:

“Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order, following an application by the parties or pursuant to a direction of the court if the court has the power to do so.”

The Guidelines also contemplate the parties will ordinarily be present for communications between Courts and Guideline 8 provides that:

In the event of communications between courts, other than on administrative matters, unless otherwise directed by any court involved in the communications whether on an ex parte basis or otherwise, or permitted by a protocol, the following shall apply:

- (i) In the normal case, parties may be present.
- (ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications.
- (iii) The communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.

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<sup>6</sup> For comment as to the content of such protocols, see ED Flaschen & RJ Silverman, “Cross-Border Insolvency Protocols” (1998) 33 *Tex Int'l L* 1998; S Atkins, “International Cooperation and Coordination in Cross-Border Insolvency” in KE Lindgren (ed), *International Commercial Litigation and Dispute Resolution*, pp 177-212.

- (iv) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.
- (v) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.”

Happily, this approach falls short of the vision of at least one American commentator that court to court communication would be used not only for the exchange of information between courts but also for “negotiation” by which one court may offer a “deal” to the other, as the basis on which the other court would take a narrower role.<sup>7</sup>

The promise of the JIN Guidelines has been recognised in academic and other commentary. Professor Westbrook has observed, for example, that direct communication between courts was once “regarded by many as radical and dangerous” and has since become routine and that:

“Most recently, the creation of the Judicial Insolvency Network (JIN) and its Guidelines further extend those initiatives. A special virtue of the JIN initiative comes from the fact that the establishment of personal relationships among commercial judges from different countries is a key to success in multinational cases. In that regard, not the least important benefit of the JIN Guidelines is the likelihood that they will tend to produce early direct communication by judges (with due notice to all) and will incentivize professionals to act quickly as well.”<sup>8</sup>

In a 2019 paper, Justice Steven Chong in turn observed that “just as an approach of judicial apathy or antagonism to parallel foreign proceedings will no doubt stymie the liquidation process, so conversely can an enlightened approach of judicial communication, cooperation and comity streamline it into an efficient and coordinated exercise” and suggested that judges:

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<sup>7</sup> JL Westbrook, “International Judicial Negotiation” (2003) 38 *Tex Intn'l LJ* 567 at 581-582.

<sup>8</sup> For academic discussion of the JIN Guidelines, see C Watters, “Guidelines for Cooperation and Communication Between Courts on Cross-Border Insolvency Matters: Too Far or Not Far Enough?” (2017) 38 *Comp Law* 169; B Nathan & P Gross, “Impact of Cross-Border Court-to Court Communications on U.S. Creditors’ Rights” (2017) *Business Credit* 1; PH Zumbro & O Nasab, “Two Is Company, but Three Is a (Better) Crowd: The Southern District of New York Joins Delaware and Singapore in Adopting Cross-Border Insolvency Guidelines” (2017) 11:1 *Insolvency & Restructuring Int'l* 21; JL Westbrook, “Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court” (2018) 96 *Tex L Rev* 1473 at 1494; A Walters, “Modified Universalism and the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law” above, 109; E Lee and EC Ip, “Judicial Diplomacy in the Asia-Pacific: Theory and Evidence from the Singapore Initiated Transnational Judicial Insolvency Network” (2020) *JCLS* 389.

“take the lead and the initiative in order to develop soft law norms that can guide the international insolvency community towards a common understanding of how parallel insolvency proceedings might be conducted”.<sup>9</sup>

An Australian commentator has since observed that:

“These JIN Guidelines represent the first time that a common framework has been developed by judges, for judges, to communicate and coordinate with each other in cross-border insolvency matters on a global level. In this regard, key areas that the JIN Guidelines encourage cooperation in include the sharing of orders, judgments and other court papers relating to the parallel proceedings; the recognition of foreign court orders without further proof; the giving of notice of proceedings in one jurisdiction to parties in proceedings in another jurisdiction; and even the conduct of joint hearings where appropriate.”<sup>10</sup>

The JIN has also produced a protocol titled “Modalities of Court-to-Court Communication” which addresses the practicalities of initiating, receiving and engaging in court communication.

#### *Limits to the scope of court to court communication*

There are of course limits to when court to court communication will be necessary and to what it can properly achieve.

For example, a substantive question often arises in cross-border insolvency as to which of competing proceedings will be treated as a primary proceeding and which will be treated as a secondary proceeding. Under the Model Law, the framework to address the issue of which proceeding has priority is by categorisation of proceeding as a “foreign main proceeding”, taking place in the jurisdiction where the insolvent company has its centre of main interests, or a “foreign non-main proceeding” essentially a secondary proceeding<sup>11</sup> and the same result may be reached at general law where a jurisdiction is not party to the Model Law<sup>12</sup>. The Model Law also allows a national court to grant relief to assist a foreign proceeding, including interim relief

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<sup>9</sup> Justice Steven Chong, “The Judicial Insolvency Network: A Ready Response in an Imperfect World”, paper delivered at World Enforcement Conference, 22 January 2019.

<sup>10</sup> C Symes, “Cross-Border Insolvency in Australia is Bringing About International Judicial Collegiality: Cooperation with Foreign Courts and Foreign Representatives is Now Mandatory and Contemporary” (2020) 36 AJCL 103.

at an early stage or final relief after recognition of a foreign proceeding as a foreign main proceeding or foreign non-main proceeding.<sup>13</sup>

At least in common law jurisdictions, the question which proceeding has primacy would not be resolved by (or only by) agreement between the judicial officers of the two courts, although it could potentially be resolved by agreement between the parties to the different proceedings or determined by substantive applications in the relevant jurisdictions, each applying their own substantive law. However, court to court communication can promote a common recognition by the judicial officers in both jurisdictions of the need for parties in those jurisdictions to address that question early in the insolvency proceedings, rather than leaving each jurisdiction to proceed with a

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<sup>11</sup> There are many Australian examples of recognition of foreign insolvency proceedings under the Model Law: *Tucker, Re Aero Inventory (UK) Ltd v Aero Inventory (UK) Ltd (No 2)* (2009) 181 FCR 374; [2009] FCA 1481 (recognition of a proceeding in the United Kingdom as a foreign main proceeding and entrusting the administration or realisation of assets located in Australia to foreign representatives); *Katayama v Japan Airlines Corp* (2010) 79 ACSR 286; [2010] FCA 794 (recognition of a proceeding in Japan as a foreign main proceeding); *Akers (as Joint Foreign Representative) v Saad Investments Co Ltd (in Official Liquidation) (a Co Registered in the Cayman Islands)* (2010) 190 FCR 285; 276 ALR 508; [2010] FCA 1221 (recognition of a proceeding in the Cayman Islands as the foreign main proceeding); *Backman v Landsbanki Islands hf* [2011] FCA 1430 (recognition of an Icelandic insolvency proceeding as the foreign main proceeding); *Cussen v Bank of Nauru* [2011] FCA 1009 (recognition of a proceeding in Nauru as a foreign main proceeding); *Lawrence v Northern Crest Investments Ltd (in liq)* [2011] FCA 925 (recognition of a proceeding in New Zealand as a foreign main proceeding); *Raithatha v Ariel Industries PLC* (2012) 212 FCR 139; 303 ALR 433; [2012] FCA 1526 (recognition of a proceeding in the United Kingdom for a creditor's voluntary winding up as a foreign main proceeding); *Asafuji (in his capacity as Foreign Representative of Sanko Steamship Co Ltd) v Sanko Steamship Co Ltd (No 2)* [2012] FCA 1314 (recognition of a Japanese reorganisation proceeding as a foreign main proceeding); *Crumpler v Global Tradewaves Ltd (in liq)* [2013] FCA 1127 (recognition of a foreign proceeding in the British Virgin Islands as a foreign main proceeding and orders made for a person resident in Sydney to be summoned for examination); *Yakushiji v Daiichi Chuo Kisen Kaisha Star Bulk Carrier Co* [2015] FCA 1170 (recognition of Japanese civil rehabilitation proceeding as foreign main proceeding); *Kim v SW Shipping Co Ltd* [2016] FCA 428 (recognition of South Korean rehabilitation proceedings as foreign main proceeding); *Abate, in his capacity as liquidator of Onix Capital SA* [2017] FCA 751 (recognition of liquidation of Chilean incorporated company); *Re Senvion GmbH (No 2)* (2019) 140 ACSR 20; [2019] FCA 1732 (recognition of German restructuring); *Didyasarin v Thai Airways International Public Co Ltd* [2020] FCA 1154 (recognition of Thai restructuring); *Frege (in his Capacity as Foreign Representative of Greensill Bank AG) v Greensill Bank AG (No 2)* [2021] FCA 510 (recognition of German insolvency administration); *Didyasarin v Thai Airways International Public Co Ltd (No 3)* [2021] FCA 1092 (substitution of new foreign representative).

<sup>12</sup> J Harris, "Understanding Cross-Border Insolvency in the Hong Kong Context" above.

<sup>13</sup> For recent Australian examples of interim relief, *Frege in his Capacity as Foreign Representative of Greensill Bank AG v Greensill Bank AG* (2021) 151 ACSR 73; [2021] FCA 330; *Re Michele Bottiglieri Armatore SpA* [2021] FCA 795.

full insolvency proceeding without regard to the state of the insolvency proceedings in the other jurisdiction(s).

Court to court communication will often not be necessary in making orders to assist a foreign insolvency, where it will be readily apparent that a court should grant the necessary relief. In a much less common case, where interim relief is sought in one court which may subvert the conduct of primary insolvency proceedings in another court, court to court communication may have a role in at least identifying the areas in which the problem arises and ensuring that both courts are aware of it.

Even in jurisdictions that have adopted the Model Law, court to court communication will not assist, for example, in bridging a gap in a jurisdiction's substantive law, where that law does not permit a step which would or might assist in advancing a cross-border insolvency. An obvious example is the enforcement of foreign judgments where the English courts have controversially held that the Model Law does not permit an English court to enforce a foreign money judgment where the foreign court did not have personal jurisdiction over the defendant.<sup>14</sup> This issue would be addressed if jurisdictions adopt the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, which seeks to extend the assistance provisions under the Model Law to enforcement of a foreign judgment in these circumstances. Until a jurisdiction adopts that approach in its substantive law, there is little prospect that court to court communication between the Judges could

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<sup>14</sup> *Rubin Re Euro Finance SA* [2013] 1 AC 236; [2012] UKSC 46; for commentary, see L Aitken, "Modified universalism': Confined, or confirmed?" (2015) 41 *Aust Bar Rev* 27; N Perram, "Issues in Recognition and Enforcement of Foreign Insolvency Judgments – An Australian Perspective", Paper for the Judicial Insolvency Network Conference, Singapore, 10-11 October 2016; JAE Pottow, "The Dialogic Aspect of Soft Law in International insolvency: Discord, Digression and Development" (2019) 40 *Mich J Int'l L* 479; G McCormack & W Yee, "The UNCITRAL Model law on Cross-Border insolvency Comes of Age: New Times or New Paradigms" (2019) 54 *Tex Int'l L J* 273; JA Churchill Jr, "Please Recognize Me: The United Kingdom Should Enact the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments" (2020) 46 *Brook J Int'l L* 215.



resolve the difference in substantive law. Again, the parties could potentially agree that they will be bound by proceedings in one jurisdiction, although they may be less likely to do so if the two jurisdictions approach that question in different ways.

Judges could potentially encourage but likely not require them to do so.

A similar issue arises in restructurings where English law will likely not recognise a restructuring of a debt in a jurisdiction which is not the governing law of the debt.<sup>15</sup>

Again, where this is a matter of substantive law, discussion between the Judges in the two jurisdictions cannot resolve it, although the parties may again agree to be bound by a decision in a particular jurisdiction. Court to court communication would also likely not resolve an issue as to the scope of public policy exceptions to recognition of a foreign judgment under the Model Law or where a jurisdiction would, as a matter of substantive law, impose a limitation on the distribution of assets to another jurisdiction.<sup>16</sup>

The JIN Guidelines sensibly recognise these limitations and could not and do not seek to affect the substantive law of the jurisdictions which adopt them. Paragraph 4 of the Guidelines recognises, inter alia, that they do not “confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.” Paragraph 5 in turn recognises that these

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<sup>15</sup> *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399; *Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802; the position in Australia was left open in the context of a scheme of arrangement in *Re Glencore Nickel Pty Ltd* (2003) 44 ACSR 210; [2003] WASC 18 and *Gibbs* was not followed in Singapore in *Pacific Andes Resources Development Ltd* [2016] SGHC 210; see K Ramesh, “The Gibbs Principle – A Tether on the Feet of Good Forum Shopping” (2017) *SAC LJ* 42; J Westbrook, “Comity and Choice of Law in Global Insolvencies” (2019) 54 *Tex Int’l L J* 259.

<sup>16</sup> *Akers v Deputy Commissioner of Taxation* (2014) 311 ALR 167; [2014] FCAFC 57, holding that the recognition of the Cayman Islands liquidation as the foreign main proceeding under the Model Law should be limited to permit the Australia Taxation Office to take enforcement action against the company’s Australian assets.

Guidelines are procedural in nature and do not affect a party's substantive rights and claims.

### *Joint hearings*

Recent court to court communications guidelines such as the JIN Guidelines also recognise the possibility of joint hearings; for example, Annexure A to the JIN Guidelines deals with that matter. The Nortel case is a well-known example of a joint hearing between the courts in the United States and Canada, which shared broadly similar substantive and procedural law and were in the same time zone. A joint hearing has recently also occurred in proceedings in Australia and New Zealand, which again share similar substantive law and are in similar time zones, in the Halifax matter.<sup>17</sup> The conduct of the joint hearing was described by the Federal Court of Australia (Markovic J) in her first instance judgment (at [24]-[27]) as follows:

“... this proceeding and the NZ Proceeding were case managed concurrently and the interlocutory application filed in this Court and the originating application filed in the High Court NZ were heard concurrently. The hearing was facilitated by the use of video conferencing technology with each Court sitting in its own jurisdiction over a period of seven days.

The parties were represented by the same solicitors and counsel in each proceeding (save that there was an additional member of the Liquidators' counsel team who only appeared in the NZ Proceeding) and relied on the same evidence and submissions in each proceeding. Where a witness was cross-examined, he gave an oath or affirmation in each proceeding. Rulings on objections were made by each Court depending on the location of cross-examining counsel. For example, if there was an objection to a question asked in cross-examination by counsel physically situated in

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<sup>17</sup> *Re Kelly (as joint and several liquidators of Halifax Investment Services Pty Ltd & Ors (No 5))* (2019) 139 ACSR 56; [2019] FCA 1341 (contemplating that order could be made but not then making it); *Kelly (in his capacity as joint and several liquidator of Halifax Investment Services Pty Ltd (in liq) v Loo* (2021) 390 ALR 669; [2021] FCA 531; *Re Halifax New Zealand Ltd (in liq)* [2021] NZHC 1113; *Loo, Re Halifax Investment Services Pty Ltd (in liq) v Quinlan (liq)* [2021] FCAFC 1986. The joint hearing in these matters was initiated by a request for assistance made by the Australian court to the New Zealand court under s 581 of the *Corporations Act 2001* (Cth) rather than under the Model Law, where the Halifax Australian and Halifax New Zealand companies were separate legal entities. Implicitly, the Australian Court was not troubled by a concern previously raised by Justice Barrett that its participation in a “joint” hearing (or, more precisely, two hearings heard at the same time) with a foreign court could compromise the “institutional integrity” of the court as protected by Ch III of the Australian Constitution: R Barrett, “Thoughts on Court-to- Court Communication in Insolvency Cases” (2009) 17 *Insolv LJ* 205.

the High Court NZ, Venning J sitting in that Court ruled on the objection and the ruling was, in effect, adopted by this Court. No party opposed this approach.

The Liquidators submit that it is important to all parties to avoid, so far as possible, inconsistency in the directions and/or judicial advice to be given by this Court and the High Court NZ and that the Courts have recognised this to be the case. They say that an “obvious tool” available for avoiding inconsistency is for the Courts to deliberate together and urged that to occur. In their oral closing submissions, the Liquidators went so far as to suggest that this Court and the High Court NZ might produce or adopt a joint or common set of reasons, drawing an analogy to judges delivering the reasons of an appellate court.

The defendants each supported the notion that the two Courts would deliberate together to achieve, so far as possible, consistency in the judicial advice and/or directions to be given.”

The High Court of New Zealand (Venning J) similarly described (at [7]-[9]) the process for that joint hearing:

“The relief sought in the application for directions and advice before the Federal Court and the originating application before the High Court of New Zealand (HCNZ) is identical in all relevant respects, as are the parties. The Federal Court and the HCNZ agreed to jointly conduct the hearings to determine the applications in both sets of proceedings.

Although the Courts initially contemplated sitting together, with one week in Sydney and one week in New Zealand, ultimately, with the COVID-19 pandemic, the hearings were conducted jointly by VMR link. Counsel were physically present in either Sydney, Australia or Auckland, New Zealand but appeared before both Courts. Witnesses who were required for cross-examination on their affidavits were sworn or affirmed in both proceedings. Both the Federal Court and the HCNZ received the same submissions and heard the same evidence.

All parties agreed that the Federal Court and the HCNZ could discuss issues during deliberations. Markovic J and I have settled and are agreed on the principal issues raised in the two sets of proceedings. But the ultimate decision in each proceeding and the reasons for decision in relation to those issues are each Court’s own.”

The joint hearings in that matter went one step further in the conduct of joint hearing of appeals, which was described by the Full Court of the Federal Court of Australia (at [17]) as follows:

“With the consent of the parties, the application in this Court and the appeal in the Court of Appeal of New Zealand (Kós P, Cooper and Goddard JJ) were heard concurrently. The parties were represented by the same counsel (with one additional member of counsel appearing in the New Zealand appeal) and relied on the same written and oral submissions in both proceedings. The parties consented to the members of this Court conferring with the members of the Court of Appeal of New Zealand and we have done so. It is appropriate to confirm that this judgment is our own judgment.”

Probably only a small minority of matters would be suitable for joint hearings, and they are more likely to be effective where time differences between the jurisdictions are limited and courts have similar substantive and procedural rules. These practical limits still leave open a real possibility of joint hearings between several of the jurisdictions represented here. There can be, in an appropriate case, a real advantage in a joint hearing where two courts will have to decide essentially the same issues, since the fact that two judges will hear the same evidence and the same submissions likely increases the prospect of a common result, although it does not guarantee that result.