PROPOSAL FOR CONSULTATIVE DRAFT OF

Model International Insolvency Co-operation Act for Adoption by Domestic Legislation With or Without Modification

Prepared by members of SBL Committee J (Creditors' Rights, Insolvency, Liquididation and Reorganisations)

Subcommittee on International Co-operation in Bankruptcy Proceedings

Introduction

The concept of a Model International Insolvency Co-operation Act (MIICA') received its initial impetus at the meeting of SBL Committee J (Creditors' Rights, Insolvency, Liquidation and Reorganisations) during the IBA Biennial Conference in New York in September 1986. Subsequently, Country Groups comprised of Committee J members were established in several countries and these groups, through their Country Chairmen, reported on the concept at the SBL's London Conference in September 1987. The discussion and consideration given to the concept in New York and in London led to the development of the Model International Insolvency Co-operation Act. No other organisation or country is drafting and proposing such a model provision.

The 'Consultative Draft of MIICA for Adoption by Domestic Legislation With or Without Modification' is a model statute, proposed for adoption in jurisdictions throughout the world, that provides mechanisms by which courts may assist and act in aid of insolvency proceedings being conducted in other jurisdictions. The fundamental principle underlying MICCA is universality which envisions a single administration of the insolvent debtor's estate, providing protection of the estate and an equitable distribution of assets among both domestic and foreign creditors in liquidation, or equitable administration in a reorganisation or rehabilitation administration in a reorganisation or rehabilitation proceeding. It is contemplated that the Consultative Draft of MICCA may be adopted with considerable modification in order to be effectively integrated with existing domestic legislation in some countries.

An initial draft of MICCA was submitted to designated Country Chairmen for comment in February 1988 and was revised as of 1 July 1988 in response to these comments. Thereafter, at the meeting of Committee J during the IBA's Biennial Conference in Buenos Aires in September 1988, additional comments on MICCA and the prospects for its adoption were submitted in reports given by Country Chairmen. A few additional revisions to MICCA were agreed, resulting in the third draft dated 1 November 1988. In Buenos Aires, Committee J determined to submit MICCA to the Councils of the International Bar Association and the Section on Business Law for approval at their meetings in Helsinki, 9 and 10 June 1989, prior to commending the task of implementing jurisdictional adoption to designated members of Committee J. We are happy to report that the third draft of MICCA which follows was approved by both Councils.

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Third Draft
1 November 1988

MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT

Section 1. In all matters of insolvency, including bankruptcy, liquidation, composition, reorganisation or comparable matters, a Court, in accordance with the provisions of this Act,

(a) shall recognise a foreign representative of the debtor or estate, provided that such foreign representative complies with the orders of such Court;

(b) shall act in aid of and be auxiliary to foreign proceedings pending in the courts of all countries that provide substantially similar treatment for foreign insolvencies as that provided by this Act; and

(c)shall act in aid of and be auxiliary to foreign proceedings pending in the courts of all other countries, if the Court is satisfied that:

(i) the court or administrative agency having jurisdiction over the foreign representative is a proper and convenient forum to supervise administration of the property of the debtor; and

(ii) the administration of the property of the debtor in the pertinent jurisdiction by the foreign representative is in the overall interests of the creditors of the debtor.

Section 2.

(a) A foreign representative may commence a case ancillary to a foreign proceeding by filing a petition under this Act for purposes of:

(i) obtaining an order to turn over to the foreign representative any property of the debtor or the estate in this jurisdiction;
(ii) staying or dismissing any action or proceeding concerning the debtor or estate in this jurisdiction;
(iii) obtaining testimony or production of books, records or other documents relating to an insolvency;
(iv) obtaining recognition and enforcement of a foreign judgment or court order; or
(v) obtaining any other appropriate relief.

The Court may exercise such additional powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

(b) Upon the commencement of an ancillary case, any currently pending related insolvency proceedings in this jurisdiction shall be consolidated with such ancillary case.

Section 3. In the event that ancillary proceedings pursuant to Section 2 are unavailable or denied, a foreign representative of the estate in a foreign proceeding concerning a person, may commence an insolvency proceeding against such person in this jurisdiction in accordance with the provisions of the applicable laws of this jurisdiction.

Section 4.

(a) In any case commenced ancillary to a foreign proceeding as provided in Section 2, a Court shall apply the substantive insolvency law of the foreign court having jurisdiction over the foreign proceeding, unless after giving due consideration to principles of private international law and conflict of laws, the Court determines that it must apply the substantive insolvency law of this jurisdiction.

(b) A Court shall apply the substantive insolvency law of this jurisdiction in any insolvency proceeding brought by a foreign representative as provided in Section 3.

Section 5. An appearance in a Court by a foreign representative in connection with a petition or request under this Act does not submit such foreign representative to the jurisdiction of any Court in this jurisdiction for any other purpose.

Section 6.

(a) 'Foreign representative' means a person who, irrespective of designation, is assigned under the laws of a country outside of this jurisdiction to perform functions in connection with a foreign proceeding that are equivalent to those performed by a trustee, liquidator, administrator, sequestrator, receiver, receiver-manager or other representative of a debtor or an estate of a debtor in this jurisdiction.

(b) 'Foreign proceeding' means an insolvency proceeding, whether judicial or administrative, in a foreign country, provided that the foreign court or administrative agency conducting the proceeding has proper jurisdiction over the debtor and its estate.

Section 7. Any treaty or convention governing matters of insolvency cooperation, which has been ratified by this country and the country in which a foreign proceeding is pending, shall override this Act with regard to such matters between such countries, unless the treaty or convention shall otherwise provide.

Third Draft
1 November 1988

OFFICIAL COMMENT TO MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT

Statement of General Principles

The ultimate goal of model legislation for international insolvency cooperation is universality which envisions a single administration providing protection of the insolvent debtor's estate from dismemberment, and an equitable distribution of assets among both domestic and foreign creditors in liquidation, or the equitable administration of the estate in a reorganisation, composition or rehabilitation proceeding. Insofar as possible, such universality should be the guiding principle of all efforts toward international insolvency cooperation, for it alone is truly compatible with the realisation of equal treatment of all creditors, debtors, assets and liabilities, and the swift and effective administration of the estate. Within the parameters of this overarching principle, mechanisms must be provided for the recognition of foreign representatives, the stay of local proceedings, the production of documents and testimony, the integration of asset distribution and other forms of ancillary relief. In a world of increasing global integration and growth of true multinational business entities, these principles are the indispensable elements in attaining equity and fairness in international insolvency proceedings.

Statutory comments

Section 1.

Purposes. The purposes of Section 1 are to provide assurance and predictability that the foreign representative will be recognised by the Court; to require the foreign representative to comply with orders of the Court; to ensure that the Court will aid foreign proceedings in countries where a form of the model act (or similar legislation) has been adopted; and to encourage the Court to aid foreign proceedings in other countries, where the model act has not been adopted, provided that only two limited and very basic qualifications are satisfied.

Sources. Subsection 1(a) is derived from principles found in provisions of the laws of England (case law) and the United States Bankruptcy Code §304(a) and §306. Subsections 1(b) and (c) are similar in form to §29(2)(a) and (b) of the Australian Bankruptcy Act. The specific qualifications enumerated in Subsections 1(b) and (c) are similar to those in §§316(5)(a) and (b) of the provisions of international insolvencies included in two recent bankruptcy bills introduced, but not adopted, in Canada (the 'Canadian Bill'). The omission of a third qualification in the Canadian Bill was based upon comments in Report of the Canadian Committee — Special Project on Internatonal Cooperation in Bankruptcy Proceedings, IBA/SBL Committee J, 1987 (the 'Canadian Report') at pp 46-47.

Explanation. Section 1 supplies a foundation for the entire model act and its principle of universality by providing for recognition of foreign representatives, and by providing that the Court shall act in aid of and by auxiliary to foreign proceedings in all matters of insolvency. The scope of matters is sufficiency broad to include debtor rehabilitation as well as liquidation. The terms 'in aid of' and

'auxiliary to' clearly set forth the ideal role of the Court in relation to foreign proceedings, and the recognition of the foreign representative establishes the point of entry into the Court for that foreign proceeding and its representative. Subsection 1(a) requires the Court to recognise foreign representatives so that, even though the Court may have discretion in responding to the requests of the foreign representative, that representative is assured of recognition in order to place the request before the Court. The sole qualification to such recognition is that the foreign representative must comply with any Court orders; the Court could withdraw recognition if the foreign representative did not so comply.

Subsection 1(b) requires the Court to act in aid of and be auxiliary to courts in countries which have adopted the model act. This reciprocity provision will provide an incentive for countries to adopt the model act, or substantially similar treatment, so that its representatives will have a basis for depending upon the receipt of aid in those jurisdictions which have likewise adopted the model act.

Subsection 1(c) provides that the Court shall provide aid to courts of countries which have not adopted the model act, but which satisfy two fundamental qualifications: that the foreign proceeding is a proper and convenient forum and that administration in that proceeding is in the overall interests of the general body of creditors of the debtor. Such qualifications in no way provide special consideration for local parties, but rather establish a basic threshold of fairness and equity which is central to the concept of international insolvency cooperation. Certain additional factors which would arguably provide the Court with greater discretion to deny aid to the foreign proceeding, such as those found in United States Bankruptcy Code §304 and Canadian Bill §316(5), have not been included in the model act. Such omission is in response to commentaries received from a number of jurisdictions which criticise the United States provisions for giving too much discretion to the Court by enumerating multiple factors which the Court may consider, and thus allowing many alternatives for determining to deny aid to foreign proceedings.

Section 1 generally raises the issue of whether a Court would act in aid of and by auxiliary to foreign proceedings with regard to recognition and enforcement of foreign revenue (tax) or penal claims that are not currently recognised or enforced in many jurisdictions. The resolution of the issue must be left to the individual jurisdictions adapting to model act for adoptions.

Section 2.

Purposes. The purposes of Section 2 are to provide the framework for aid to a foreign proceeding by establishing the mechanism of a case ancillary to a foreign proceeding, in which the foreign representative may seek several types of relief; to set forth four of the most commonly sought types of assistance which foreign representatives may request; to ensure flexibility by allowing the foreign representative in an ancillary case to obtain any other appropriate relief in addition to the four enumerated types of aid; and to provide that any separate related proceedings pending in the jurisdiction shall be consolidated with the ancillary case.

Sources. Section 2 is similar conceptually and in form to §304 of the United States Bankruptcy Code, which similarly provides for cases ancillary to foreign proceedings without the commencement of separate bankruptcy proceedings. The model act deviates significantly from §304, however, by omitting the six factors to be considered by the Courts in determining whether to grant ancillary judicial assistance. No such factors are set forth in Section 2 of the model act. Such omission responds to the criticism of some bankruptcy practitioners that §304, as currently enacted, provides too much discretion to the Court by setting forth such criteria. Instead, the model act enumerates the types of aid which the foreign representative may seek in the ancillary case, once the Court has determined to act in aid of the foreign proceeding in accordance with limited guidelines set out in Section 1. The specific types of relief listed are derived from the comments of bankruptcy practitioners in response to the Special Project on International Cooperation and Bankruptcy Proceedings, IBA Committee J, 1987, and from certain statutory and other sources. Subsections 2(a), (b) and (c) are similar to types of relief enumerated in the Canadian Bill at §316(3). Subsection 2(d) is derived from the Federal Statute on Private International Law Tenth Chapter: Bankruptcy and Composition Law of Switzerland, Articles 159 ff, and was stressed, along with Subsection 2(a) by the Switzerland Commentary on the Special Project on International Cooperation and Bankruptcy Proceedings, IBA/SBL Committee J, 1987.

Explanation. Whereas some statutes provide that foreign representatives may 'seek orders', others provide that foreign representatives may 'obtain recognition of foreign decrees', or may 'seek necessary relief'. Such provisions do not provide a flexible framework within which foreign representatives may obtain aid of many types and in many different forms, depending upon the needs which are generated by the foreign proceeding. The United States model of the 'case ancillary to a foreign proceeding', provides just such a flexible mechanism within which the foreign representative may then take any number of actions and seek any number of different types of relief depending upon the particular needs of the estate. In addition, the concept of an 'ancillary case' reemphasises the universality principle by distinguishing this special type of case allowed for the particular purposes of aiding and being auxiliary to the foreign proceeding which remains the dominant and central administration for the debtor's estate. The enumeration of types of relief to be sought provides a starting point, based largely upon comments of bankruptcy practitioners with regard to the goals which foreign representatives are likely to bring to the ancillary case. The four enumerated types of relief will cover a very significant portion of the actions sought in ancillary cases, but Subsection 2(a)(v) provides the additional flexibility to foreign representatives to seek any other kind of appropriate relief. The last sentence of Subsection 2(a) provides the Court with full powers to provide relief and act in aid of the foreign representative and the foreign proceeding; however, this provision is not intended to provide the Court with discretion to favour local creditors or other local parties in interest. Subsection 2(b) is based upon the recognition that creditors or other parties in interest may commence either involuntary insolvency proceedings or related judicial or administrative proceedings in the recognising jurisdiction, prior to the commencement of a case ancillary to a foreign proceeding. A foreign representative had the discretion to either allow such action to proceed, or to commence a case ancillary to the foreign proceeding, in which case, under the terms of Subsection 2(b), the separate proceeding brought by the creditor or other party in interest shall be consolidated with the ancillary case. Upon such consolidation with the ancillary case, the separate proceeding will be fully integrated into a single administration of the estate, and will be

governed by the provisions of the model act. It is the intent of this provision to allow consolidation of any future actions similarly brought, following commencement of the ancillary cases.

Section 3.

Purposes. The purposes of Section 3 are to provide a further means for foreign representatives to enter the Court and seek relief, if the ancillary case is unavailable or is denied by the Court; and to ensure the broadest possible access of the foreign representative to the Court by allowing a full proceeding to be commenced in accordance with the laws of the Court's jurisdiction in the event that such proceeding is deemed necessary.

Sources. The United States Bankruptcy Code §303(b)(4) similarly allows a foreign representative to commence full proceedings in the United States. The Canadian Report at p.46 strongly recommends such a provision and commends the United States Bankruptcy Code for so providing.

Explanation. The primary thrust of the model act is toward a central administration of the estate in one jurisdiction with ancillary cases in other jurisdictions as necessary. However, in the event that the Court declines to act in aid of a foreign proceeding and refuses to allow an ancillary case (under the provisions of Section 1(c)), this Section provides the foreign representative with an alternative course in which a full proceeding may be commenced against the debtor in accordance with the domestic provisions of the applicable statute of the jurisdiction. Section 3 has been drafted to clearly indicate the necessity of the foreign representative first considering and seeking to obtain ancillary relief under Section 2, and only in the event that it is unavailable, proceeding to initiate a full proceeding under Section 3. This construction further buttresses the universality principle and the emphasis which the model act places upon a central administration.

Section 4.

Purposes. The purposes of Section 4 are to provide guidance to the Court with regard to the applicable substantive insolvency law for proceedings under the model act; to distinguish between the ancillary case and the full proceedings, by providing that the substantive insolvency law of either the foreign or local jurisdiction may be applied in an ancillary case whereas the substantive insolvency law of the local jurisdiction is applicable to the full proceedings; to encourage recognition of the law of the foreign jurisdiction insofar as possible in ancillary cases, but to provide for the possibility that such law may be improper in the local jurisdiction and thus not subject to being utilised; and to further confirm that a full proceeding initiated by the foreign representative is subject to the substantive insolvency law of the local jurisdiction and that such law will be applicable law for the full proceeding.

Sources. Subsection 4(a) reflects a principle noted in the English Commentary to the Special Project on International Cooperation and Bankruptcy Proceedings, IBA/SBL Committee J, 1987 regarding Section 426 of the Insolvency Act 1986 of England. Subsection 4(b) sets forth the generally accepted principle of utilising local substantive law when the benefits of a full local proceeding are sought by the person initiating the proceeding.

Explanation. It is clear that if a foreign representative has been denied the assistance of the Court in initiating an ancillary case, and has initiated a full bankruptcy proceeding under the laws of the local jurisdiction, then the applicable substantive law should be that of the local jurisdiction. In an ancillary case, the issue of applicable substantive law is more complex. Ideally, following the principle of universality in its purest form, the substantive law of the foreign court would govern the entire proceedings, including ancillary cases, whereas procedural matters would presumably be governed in the ancillary cases by the procedural law of the recognising jurisdiction. However, the constraints of public policy or strongly supported local bankruptcy principles in the Court's own jurisdiction, may require that this basic principle be modified and, in some instances, that local substantive law be applied. The intention of the model act is that the Court should, whenever possible in ancillary cases, apply the substantive insolvency law of the jurisdiction of the foreign proceeding, and that the application of local substantive insolvency law should only occur in isolated and infrequent instances when the application of the substantive insolvency law of the foreign proceeding would violate public policy.

Section 5.

Purposes. The purpose of Section 5 is to allow the foreign representative to appear in the Court for the limited purposes of obtaining ancillary relief, without the fear of being subject to the jurisdiction of the Court for other purposes.

Sources. Section 5 is patterned closely after United States Bankruptcy Code §306.

Explanation. In order to encourage foreign representatives to seek relief by initiating cases ancillary to the foreign proceeding, or, if necessary, to initiate a full proceeding, this section provides protection of foreign representatives from the Court assuming jurisdiction for other purposes. Such protection is limited to actions of the foreign representative prior to the commencement of the ancillary proceeding, and is not intended to prevent subjecting the foreign representative to claims or counterclaims validly raised after commencement of the ancillary proceeding. The intention of the model act is not only to provide access to the Court for the foreign representative, but to provide an efficient, equitable and safe mechanism for the foreign representative to use, in order to encourage a central administration of the estate and to foster the principle of universality. The protections which this section affords the foreign representative are important aspects of this effort.

Section 6.

Purposes. The purposes of Section 6 are to define 'foreign representative' and 'foreign proceeding' clearly; to frame such definitions with sufficient flexibility to cover the various types of proceedings and the various roles which administrators may play under the laws of a variety of jurisdictions; and to allocate to the Court responsibility for determining that there is proper jurisdiction in the foreign proceeding.

Sources. The definition set forth in Section 6(a) is closely patterned after §316(1) of the Canadian Bill. The definition set forth in Section 6(b) is derived in part from United States Bankruptcy Code §101(22).

Explanation. It is the intention of the model act to include within the term 'foreign representative' at Subsection 6(a) all of those persons who perform substantially equivalent functions in a foreign insolvency. Note, for instance, that the breadth of this definition allows it to include such unique concepts as the 'debtor-in-possession' under the provisions of the United States Bankruptcy Code.

Subsection 6(b) defines 'foreign proceeding' with sufficient breadth to include all types of judicial and administrative proceedings that exist in

jurisdiction throughout the world. 'Foreign proceeding' does not include private non-judicial receiverships or similar actions that are not under the control of a judicial or administrative body. To meet the definition of 'foreign proceeding' under the model act, the foreign court or agency conducting the proceedings must have proper jurisdiction. Determination that proper jurisdiction exists, and therefore that the proceeding is a 'foreign proceeding' under the terms of the model act must be made by the Court. An underlying assumption of the model act is that the Court, guided by a forum non-conveniens approach, would concede jurisdiction to the foreign court or administrative agency in a jurisdiction having greater contacts with the debtor and its estate. In making its jurisdictional determination, the Court should be accorded maximum flexibility so that, for instance, it may consider whether improper forum selection or 'shopping' has occurred in the choice of forum made by the debtor.

Section 7.

Purposes. The purposes of Section 7 are to recognise that treaties or conventions may be adopted and ratified to govern the subject matter of the model act, and to provide that in such instance, the treaty or conventions shall override the model act with regard to international insolvency matters between the ratifying countries.

Sources. Section 7 was drafted in response to comments of bankruptcy practitioners, some of whom advocate the adoption and ratification of treaties or conventions to effect international insolvency cooperation, and some of whom simply seek to clarify the relation of such treaty and the model act in those instances in which a treaty or convention is ratified following the enactment of the model act.

Explanation. Section 7 provides that if a treaty or convention is effected with regard to international insolvency cooperation, it will override the model act with regard to such matters between the ratifying countries. This new provision explicitly recognises that bilateral or multilateral treaties or conventions may be effected as alternative means for establishing arrangements concerning international insolvency cooperation between countries. Enactment of the model act is not to be construed as prohibiting or deterring the adoption and ratification of such treaties or conventions; on the contrary, Section 7 explicitly addresses the issue of how to reconcile the later ratification of such a treaty by a country which has previously adopted the model act.

Miscellaneous comments

1. Meaning of 'insolvency'. The term 'insolvency' has been used in the title of the model act, and thoughout its text and official comment, to mean all of those various proceedings under all types of law and in various jurisdictions worldwide, applicable to actions regarding financial failure generally, including insolvency, bankruptcy, reorganisation, composition, rehabilitation and any other such proceeding by whatever name.

2. Venue. A provision governing venue with respect to cases commenced ancillary to a foreign proceeding has not been included in the model act. It is presumed that venue will be determined by the Court in accordance with the applicable laws of the Court's jurisidiction.

3. Effects of multi-jurisdiction distribution. Although no marshalling provision has been included in the model act, the principles of universality and single insolvency administration dictate an equitable worldwide distribution. Thus, if a creditor receives payment or other satisfaction of a claim in a foreign proceeding, such creditor should not receive any payment in the Court's jurisdiction until other holders of claims who are entitled to share equally with such creditor, have received payment equal in value to the consideration already received by the creditor in the foreign proceeding. This comment is derived substantially from United States Bankruptcy Code §508(a). □

International Liner Cargo Shipping Amendments to Australia's Trade Practices Act

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Shipping conferences — radical changes

Proposed legislation introduced into the Australian House of Representatives on 8 March 1989 will make radical changes to shipping conferences. At the present time, such conferences are largely exempt from the Trade Practices Act.

How long will the present position remain?

A conference agreement made before the commencement of the Act will be covered by the present position for six months after the Act's commencement. Virtually every conference agreement will require renegotiation to comply with the new law. It would be wise for parties to utilise present legal exemptions to commence negotiations of new agreements at an early date. Possibly, in some cases, only by doing this can there be any reasonable