THE AMERICAN LAW INSTITUTE

TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES

PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES

This material is excerpted from The American Law Institute's *Principles of Cooperation Among the NAFTA Countries,* which was published as part of ALI's Transnational Insolvency project along with three other volumes: *International Statement of United States Bankruptcy Law, International Statement of Canadian Bankruptcy Law*, and *International Statement of Mexican Bankruptcy Law*. This excerpt does not include the Comments to the Principles, the Reporters' Notes, or the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, among other material.

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SECTION I

INTRODUCTION

The Transnational Insolvency Project arose in response to the increasing number of bankruptcies of multinational economic enterprises, a natural consequence of the globalization of trade and finance. It has become apparent that traditional legal doctrines and procedures are inadequate for the task of managing a general default across national borders.[1] Because bankruptcy law[2] is highly technical, the Institute's traditional strengths and institutional structures, combining legal scholarship with the practical expertise of bench and bar, make it well suited to address these problems. Because of the complexities involved, it makes sense to consider regional solutions. The creation of the North American Free Trade Agreement (NAFTA) established a nearly ideal "natural experiment" for discovering regional solutions that might be adaptable for use elsewhere.

The Project's goal was to develop principles and procedures for managing the general default of an economic enterprise having its center of interests in a NAFTA country and having assets, creditors, and operations in more than one NAFTA country.[3] The Institute's usual structure was adapted to this international project by appointing Reporters and establishing Advisory Committees in each of the NAFTA countries. The Reporters and Advisers included many of the leading experts in bankruptcy law in each of the three countries. The Reporters worked together closely throughout. The Advisers met separately and together, as needs required.

The indispensable first step for such a project was to achieve among all participants an understanding of the insolvency laws of each of the other countries involved. In addition, achievement of the Project's goals required the education of judges and lawyers in the bankruptcy laws of the NAFTA countries so they could function effectively in transnational cases and could apply the procedures to be developed in the Project. To serve both these purposes, Phase I of the Project was devoted to approval of international statements of the bankruptcy laws of each of the NAFTA countries. All three have been completed and approved.[4] These Statements will be published in Spanish and English. They are truly "international statements" in that they result from an extensive process of review, interrogation, and revision in each Advisory Committee; thus, they have been shaped to speak to an international audience. As to each country, they represent a summary of its bankruptcy laws approved by judges, lawyers, and academics widely recognized as experts in the field.

The goal of Phase II of the Project was to develop a set of agreed principles governing multinational bankruptcy cases and to offer useful approaches to managing such cases based on those principles. It is evident to anyone knowledgeable about bankruptcy law in the three NAFTA countries that their laws reflect a number of common values. Discussions in the course

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[1] The importance of creating new, cooperative procedures to govern such cases is reflected in the European Union Regulation on Insolvency Proceedings, Official Journal of European Communities 160 (June 30, 2000) [hereinafter "EU Regulation"].

[2] "Bankruptcy" or "insolvency" law governs collective proceedings for the adjustment or collection of debts on behalf of all creditors and other interested parties. In worldwide English-language usage, "insolvency" is perhaps the more common term for such proceedings where a business debtor is involved, but in North America "bankruptcy" is at least as often used for business proceedings as well as those involving consumers.

[3] Although the focus of this Project is to achieve the closer cooperation that should be available within a regional trading group, creation of a closed "club" within NAFTA with respect to insolvency matters is not the intention of this Project. See text infra at Section II, preceding Topic A.

[4] See International Statement of United States Bankruptcy Law [hereinafter "U.S. Statement"]; International Statement of Canadian Bankruptcy Law [hereinafter "Canadian Statement"]; International Statement of Mexican Bankruptcy Law [hereinafter "Mexican Statement"].

of the Project revealed a wide measure of agreement on the principles and procedures that will advance the achievement of those common values in multinational cases. The very reason that a regional effort like this Project could go beyond various global initiatives, like the UNCITRAL Model Law,[5] was the fact that the other countries involved, and their laws, were known factors and were not greatly different from one another. At the same time, the participants in the Project were well aware that this field is in an early stage of development and that various practical factors limit the extent to which full integration of procedures can be achieved. The aim therefore was to propose approaches that would go as far in promoting beneficial cooperation as would be presently possible, with an eye toward further progress as experience built expertise and mutual confidence.

Two words often heard in discussions of international private-law reform are "cooperation" and "harmonization." Harmonization refers to efforts to change the laws of each country to be more substantively similar to those of other countries. Such efforts necessarily proceed very slowly. Cooperation encompasses a variety of approaches to make legal systems work together better in addressing multinational problems, without necessarily making the systems more similar. The term "coordination" is sometimes used to mean a limited harmonization aimed at making two different systems work better together, without being fully harmonized. This Project is directed primarily at cooperation, but in its Legislative Recommendations seeks a measure of coordination as well.

The recommendations that follow are divided into three sections. The first and broadest consists of General Principles that reflect the common values of the bankruptcy laws of the three countries as applied to multinational cases. The second section sets forth Procedural Principles, which are practical approaches to cooperation within the existing legal competence of the courts without new legislation or treaties. The third section advances Recommendations for new legislation or international agreements that will go beyond current law to permit a substantially higher level of cooperation.

The General Principles represent the policy bases for cooperation in multinational bankruptcy cases. As broad statements of policy, they provide the underpinnings for the specifics of the Procedural Principles and the longer-term goals of the Legislative Recommendations. They are also useful for filling in the details of the procedures and recommendations. Many cases will arise that do not fit squarely within a Procedural Principle and its accompanying examples. The General Principles are meant to illuminate the larger propositions behind the Procedural Principles, so they will serve to suggest appropriate solutions to such cases. The General Principles would also inform the drafting process that would transform the Legislative Recommendations into the specific language of a statute or international agreement.

The Procedural Principles are more specific. They attempt to address key points in a multinational case within the NAFTA and to suggest mechanisms and even rules for cooperation in such cases. They are accompanied by examples of their application to specific facts, but the examples are only illustrative and are not meant to exclude application of a Procedural Principle to different facts where appropriate. There is equally no intention to create negative inferences from any Illustration.

The Procedural Principles are distinguished from the Legislative Recommendations by the fact that they can generally be implemented under present law. In some cases, a Procedural Principle may be applicable under existing law in two of the three NAFTA countries, but not the

[5] See infra note 9.

third.[6] These instances are noted. Otherwise, it is the opinion of the three Committees of expert Advisers that each of the Procedural Principles may properly be applied, and should be applied, by the courts of each NAFTA country under current law in each country. That conclusion does not mean that the Procedural Principles necessarily reflect established law or even current practice in each country. In many cases, they do represent existing law and practice, but in many others they reflect the best or preferred practice *permitted* under current law. In this emerging field, there are many points where current practice is undeveloped, unclear, or inconsistent; to that extent, the Project has adopted the approaches that will best serve the General Principles within the limits of existing law and the best interpretation of that law. Thus, the Procedural Principles reflect both the approaches now being used in the leading cases and the best practices that can and should be used under existing law in future cases.

The Legislative Recommendations do not include specific statutory language for the obvious reason that their enactment would require different codifications in each NAFTA country. Instead, they set forth the central goal to be achieved and leave it to the legislators and their staffs to provide the specifics. On the other hand, the Institute would strongly recommend joint drafting efforts for such legislation to ensure smooth cooperation and accurate translation. Some or all of the Recommendations might be better achieved in the form of a treaty or a NAFTA agreement.

One of the most difficult judgments in an international project of this sort is how complete a consensus of experts must be to justify including a proposition as a rule or best practice. The Institute wants to accomplish as much as possible, yet the credibility of the Project rests upon an accurate claim that its recommendations represent a consensus of leading experts from each of the NAFTA countries. On the whole, the text that follows reflects such a consensus. The Project has not adopted a General Principle, Procedural Principle, or Legislative Recommendation that was substantially opposed by the experts from any one country. The result represents a truly trans-NAFTA consensus among experts, not always reflecting unanimous agreement, but avoiding divisions along national lines.

The "exclusion" section below notes some of the principal issues that are not addressed because of the difficulty in achieving consensus at the present time or because of the lack of sufficient experience with the problem in question. The latter point deserves to be emphasized: in a developing field, it is necessary to be careful not to codify approaches that will prove impractical when particular issues actually emerge in future cases.

Overall, the Project has conscientiously attempted to draw a proper balance between advancing common values in a spirit of cooperation to the maximum extent possible, while being cautious to restrict its proposals to those that are realistic at the current stage of development of legal relationships within the NAFTA. The participants, representing all three NAFTA countries, have been conscious of the important differences in their legal systems and their economic interests, as well as the values they hold in common. They are keenly aware of the various reasons that participants in the bankruptcy systems of the three countries might be wary of cooperation with the other legal systems and of the various historical obstacles to complete trust and cooperation that continue to exist even among three nations so closely aligned. They have balanced those good reasons for caution with the conviction that the interests of all three countries require a willingness to trust and experiment if the goals of the NAFTA are to be achieved.

[6] In particular, because Mexico is a civil-law country, it may require legislation as to some of the procedures suggested where the two common-law countries can rely on case-law development under existing legislation.

The Reporters have developed the Phase II text jointly and the Advisers from the three countries, together with the Institute's Members Consultative Group, have met together to discuss it, suggest revisions, and approve the final results. The resulting text was recommended for approval by the Council of the Institute in December, 1999, and was approved by the Institute at its Annual Meeting in May, 2000.

The text that follows first provides an overview of the problems and opportunities presented by the general default of multinational companies.[7] It then sets forth the General Principles, Procedural Principles, and Recommendations for Legislation or International Agreement, in each case accompanied by commentary explaining the text and the reasons for it. Appendix A contains key definitions. Some conceptual and technical points have been developed or expanded in the Reporters' Notes found at the end of the main text rather than in the text itself in circumstances when it appeared that textual elaboration of the material would interrupt the flow of the discussion. The existence of relevant Reporters' Notes is signaled in boldface in the footnotes.

[7] From the beginning, it was agreed that the Project would deal only with default by legal persons, such as corporations, and not with the defaults of natural persons, which implicate a host of related laws like those governing personal exemptions, discharge from debts, marital property, and domestic relations.

SECTION II
OVERVIEW

[Intentionally omitted.]

SECTION III

GENERAL PRINCIPLES

This Section sets forth those principles of transnational bankruptcy that are generally agreed among experts in all three NAFTA countries. In general terms, they are also applicable to non-NAFTA bankruptcy proceedings.

General Principle I: Cooperation

Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the debtor's worldwide assets and furthering the just administration of the proceeding.

General Principle II: Recognition

A. The bankruptcy of a debtor in one NAFTA country should be recognized and given appropriate effect under the circumstances in each of the other NAFTA countries.

B. Recognition should be granted as quickly and inexpensively as possible, with a minimum of legal formalities.

General Principle III: Moratorium

Bankruptcy cooperation requires a moratorium (stay) at the earliest possible time in each country where the debtor has assets. The moratorium must impose reasonable restraints on the debtor, creditors, and other interested parties.

General Principle IV: Information

A. Cooperation should include, as a minimum, free exchange of information obtained in each proceeding concerning assets and claims.

B. A recognized foreign representative should be entitled to use all available legal means to obtain information about the debtor's assets in each jurisdiction.

General Principle V: Sharing of Value

Where a court has recognized the representative of a foreign proceeding in another NAFTA country, it should be prepared to approve the sharing of the value of the debtor's assets on a worldwide basis.

General Principle VI: National Treatment

There should be no discrimination against claimants based on nationality, residence, or domicile.

General Principle VII: Adjustment of Distributions

A creditor should not be able to use distributions in multiple countries to recover in any country more than the percentage recovered by other creditors of the same class in that country.

SECTION IV

PROCEDURAL PRINCIPLES

Generally, Procedural Principles are solutions to cross-border problems that can and should be put into effect under existing law in each country. Each Procedural Principle represents either existing practice in a NAFTA country or best *permitted* practice. "Best permitted practice" is a phrase reflecting the fact that the field of cross-border bankruptcy is just emerging in its modern form, so that existing law and practice in a given country in some respects may be undeveloped, unclear, or inconsistent. A particular Procedural Principle may be regarded in these Principles as applicable in a given country if it is permitted under existing law, even though the current practice in that country may be undeveloped, unclear, or inconsistent as to the subject matter of that Principle. In that case, application of the Procedural Principle in that country is viewed as the best interpretation of existing law in that country. On the other hand, if existing law in a given NAFTA country is found to be inconsistent with a Procedural Principle, then the inconsistency is mentioned as an exception to the Principle in the Country Notes that accompany that Principle. Where there is such an inconsistency, achievement of the goals underlying that Procedural Principle in that country may require a change in the law by statute or international agreement.

As a consequence, a particular Procedural Principle may represent existing practice in one country, may represent permitted and best practice in a second country, and may not be permissible under current law in a third country. Although each of these results may be found in any of the three countries as to a particular Procedural Principle, the two common-law countries will apply the principles through judicial discretion and common-law evolution under existing statutes, while the Mexican courts now have the principles stated in the Model Law, which are very consistent with the jurisprudence stated here. For the most part, however, these Procedural Principles can be implemented under existing law in all three countries.

It may sometimes be true that a Procedural Principle is generally consistent with existing law in a NAFTA country, but might be inconsistent as applied in a certain circumstance. Although these Principles cannot identify every such instance, some important exceptions of that sort are also noted in the Country Notes.

Because the Procedural Principles are approved for use under existing law, one approach to using the work of the Project would be for courts or administrators to announce at the start of a NAFTA bankruptcy proceeding that they would generally follow these General and Procedural Principles. The courts involved may enter an order adopting these principles for use in a particular case, subject to applicable law. Another approach is court approval of an administrator's decision to follow these principles in administering a case.

Topic A. The Structure of an International Bankruptcy Case

[Intentionally omitted.]

Topic B. Initiation

Subtopic 1. Recognition

Procedural Principle 1: Recognition Within the NAFTA

When a bankruptcy proceeding is pending in a NAFTA country, each of the NAFTA countries should grant recognition to that proceeding and its administrator. Only in the rare case where recognition would be manifestly contrary to public policy in the recognizing country should recognition be denied.

Procedural Principle 2: Prompt Action

Recognition of a proceeding in another NAFTA country should be granted as quickly as possible.

Procedural Principle 3: Revocation of Recognition

Recognition may be revoked or modified if it is clearly shown there was fraud in the opening of the foreign proceeding or in obtaining its recognition in the recognizing court.

Subtopic 2. Stay

Part A. Single Full Bankruptcy Proceedings

Procedural Principle 4: Stay Upon Recognition

A. Unless a stay already exists because of a domestic bankruptcy case concerning the same debtor, recognition of a main proceeding should lead immediately to the grant of a stay or moratorium restraining collection actions by creditors and constraining use or disposal of assets by the debtor. In a reorganization case, the stay should usually permit the continued operation of the debtor's business in the ordinary course.

B. Where there is no domestic bankruptcy proceeding pending in the recognizing country and the recognizing country has followed recognition of a main proceeding with issuance of a stay substantially equivalent to the stay in a domestic bankruptcy in the same sort of proceeding in the recognizing country, the stay in the main proceeding should cease to have effect as to conduct taking place in the recognizing country and, conversely, the stay in the recognizing country should have no effect as to conduct in the country of the main proceeding.

Part B. Parallel Proceedings

Procedural Principle 5: Reconciliation of Stays

A. Where there are parallel proceedings, each NAFTA court should attempt to minimize conflict between bankruptcy stays.

B. Where there are parallel proceedings and a main proceeding in a NAFTA country has been recognized in a second NAFTA country, any moratorium or similar order

issued in the recognizing country shall apply to conduct in a third country only insofar as the conduct is not within the jurisdiction of the main proceeding.

Part C. Abusive Proceedings

Procedural Principle 6: Abusive Filings

When a non-main proceeding is filed in a NAFTA country and the court in that country determines that country has little interest in its outcome as compared to the country that is the center of the debtor's main interest, the court should i) dismiss the bankruptcy case, if dismissal is permitted under its law and no legitimate interests would be damaged by dismissal; or ii) ensure that the bankruptcy stay arising from the non-main proceeding has no effect outside that country.

Subtopic 3. Court Access

Procedural Principle 7: Court Access

A recognized foreign representative should be granted direct access to any NAFTA court necessary for the exercise of its legal rights. A recognized foreign representative of a main proceeding should be granted such access to the same extent as a domestic administrator. In addition, the foreign representative of a main proceeding should have the power to initiate a domestic bankruptcy proceeding concerning the debtor.

Subtopic 4. Information and Communication

Procedural Principle 8: Information and Communication

An administrator, debtor, or creditor filing a bankruptcy or seeking recognition of a foreign bankruptcy should be required to provide full disclosure of all relevant information about the existence and status of each bankruptcy or similar proceeding pending in other jurisdictions as to the same or a related debtor at the time of filing. Administrators or debtors in possession should be required to inform the court of any material development in any such foreign proceeding.

Procedural Principle 9: Obtaining Information

A recognized foreign representative should be permitted to use all legal methods of obtaining information that would be available to a creditor or to an administrator in a domestic bankruptcy proceeding.

Procedural Principle 10: Communications

To the maximum extent permitted by domestic law, courts considering bankruptcy proceedings or requests for assistance from foreign bankruptcy courts should communicate with each other directly or through administrators. To the maximum extent, such communications should take advantage of modern methods of communication including telephone, telefacsimile, teleconferencing, and electronic mail, as well as written documents delivered in traditional ways. Any such communications should at all times follow procedures consistent with domestic law as to such matters.

Topic C. Administration

Subtopic 1. Single Full Bankruptcy Proceedings

Procedural Principle 11: Control of Assets

In the absence of a domestic bankruptcy of the same debtor, the recognized foreign representative should be given legal control, and assistance in obtaining practical control, of all domestic assets of the debtor to the same extent as would a domestic administrator, subject to supervision by the domestic court.

Procedural Principle 12: Asset Transfers

In the absence of a domestic bankruptcy of the same debtor, if there is no unfair prejudice to domestic creditors, a recognized foreign representative should be allowed by court order to remove assets to another jurisdiction when appropriate to the purposes of the bankruptcy proceeding.

Procedural Principle 13: Notice

When a bankruptcy proceeding is likely to include claims from another NAFTA country where no parallel proceeding is pending, the court should make such special orders concerning the giving of notice to foreign creditors, to the extent permitted by governing law, as will afford them a fair chance to file claims and participate in the bankruptcy.

Subtopic 2. Parallel Proceedings

Procedural Principle 14: Cooperation

A. The administrators in parallel proceedings should cooperate in all aspects of the case. Such cooperation is best obtained by way of an agreement or "protocol" that establishes decisionmaking procedures, but many decisions may be made informally as long as the essentials are agreed.

B. A protocol for cooperation among proceedings should include, at a minimum, provisions for coordinated court approvals of decisions and actions when required and for communication with creditors as required under each applicable law. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Procedural Principle 15: Coordination

Where there are parallel proceedings, each administrator should obtain court approval of any action affecting assets or operations in a particular jurisdiction if approval is required under the laws of that jurisdiction, except as provided in a protocol approved by that court. Each administrator should seek agreement in advance from other administrators as to questions affecting their proceedings or assets in their countries, except where emergency circumstances forbid.

Procedural Principle 16: Notice Among Administrators

Notice of any court hearing or the making of any order by a court should be given to each of the administrators at the earliest possible time, if the hearing or order is relevant to that administrator. Notice and approval should always be in advance of such an action if possible or if required by applicable law.

Procedural Principle 17: Cross-Border Sales

When there are parallel proceedings and assets are to be sold, each domestic administrator should seek to sell assets in cooperation with the other administrators to produce the maximum value for the assets of the debtor as a whole, across national borders. Each domestic court should approve sales that will produce such value.

Procedural Principle 18: Assistance to Reorganization

The existence of a main proceeding that is a reorganization proceeding in a NAFTA country is a compelling reason for courts in the other two NAFTA countries to cooperate by conducting parallel domestic proceedings in a manner as consistent with the reorganization objective in the main proceeding as is possible under the circumstances.

Procedural Principle 19: Post-Bankruptcy Financing

Where there are parallel proceedings, especially in reorganization cases, administrators and courts should cooperate to obtain necessary post-bankruptcy financing, including the granting of priority or secured status to reorganization lenders insofar as permitted under applicable law.

Procedural Principle 20: Avoidance Actions

Where there are parallel proceedings, administrators should attempt to agree upon a common position concerning the avoidance of any pre-bankruptcy transactions involving the debtor.

Procedural Principle 21: Information Exchange

Administrators in parallel proceedings should make available to each other on a timely basis all information they have concerning claims, including a list of all claims and claimants, whether the claims are asserted as secured, priority, or general claims, and whether they are approved, disputed, or disapproved.

Procedural Principle 22: Claims

Where there are parallel proceedings, claims allowed in one NAFTA proceeding should be accepted in each of the other NAFTA proceedings, except as to distinct factual and legal issues arising under the other country's distribution rules.

Subtopic 3. Corporate Groups

Procedural Principle 23: Coordination with Subsidiaries

It should be permissible to file bankruptcy for a subsidiary in the same jurisdiction as the parent's bankruptcy, and to have either procedural or substantive consolidation under applicable law, absent a proceeding involving the subsidiary in the country of its main interests. Where the subsidiary is in a parallel proceeding in the country of its main interests, coordination between the two proceedings should achieve the benefits of consolidation where possible.

Procedural Principle 24: Principles as Applied to Subsidiaries

The principles of coordination and cooperation should include parallel proceedings involving a subsidiary of a foreign parent debtor to the same extent as with parallel proceedings involving the debtor, although certain decisions, such as allocation of value, may be differently determined because of the need to honor the corporate form.

Topic D. Resolution

Subtopic 1. Distribution

Procedural Principle 25: Limits on Priorities

A claim should never be given a priority in an international distribution beyond what it would enjoy in a strictly territorial system.

Subtopic 2. Binding Effect of Plans

Part A. Introduction

[Intentionally omitted.]

Part B. A Single Full Bankruptcy Proceeding

Procedural Principle 26: Plan Binding on Participant

Where a Plan of Reorganization is adopted in a main proceeding in any NAFTA country and there is no parallel proceeding pending within the NAFTA region, that Plan should be final and binding upon the debtor and upon every creditor who participates in any way in the main proceeding. For this purpose, participation includes i) filing a claim; ii) voting; or iii) accepting a distribution of money or property under a Plan.

Procedural Principle 27: Plan Binding: Personal Jurisdiction

Where a Plan of Reorganization is adopted in a main proceeding in any NAFTA country and there was no parallel proceeding within the NAFTA region, that Plan should also be final and binding as to the claims against the debtor of every unsecured creditor (a) who was given adequate individual notice of the case and (b) who would be considered within the jurisdiction of the courts in ordinary commercial matters under the law of the country of the main proceeding, with respect to the type of claims asserted by that creditor.

SECTION V

RECOMMENDATIONS FOR LEGISLATION OR INTERNATIONAL AGREEMENT

This section states recommendations for legislative action or international agreement with respect to various issues that would be better coordinated legally with the assistance of statute or agreement. These recommendations do not explore important details that must be addressed in the recommended legislation. Development of such legislation is left to a future project.

Recommendation 1: Model Law

Canada and the United States should adopt the Model Law on Cross-Border Insolvency.

Recommendation 2: Automatic Stay

The NAFTA countries should provide by law that a bankruptcy case that is a main proceeding in any of them will produce an automatic stay under domestic law in all three countries.

Recommendation 3: Notice

Each NAFTA country should adopt legislation or regulations providing for individual notice to creditors with foreign addresses and specifying adequate information in such notices.

Recommendation 4: Priority Claims

Each country should adopt parallel legislation granting national treatment with respect to priority claims under their respective priority systems, except that treatment of tax and other public-law claims should be the subject of an international agreement.

Recommendation 5: Binding Effect of Plans

The NAFTA countries should adopt provisions requiring approval of main-proceeding reorganization plans by courts in non-main proceedings despite a lack of compliance with rules for approval of such plans under domestic law if a) the plan distribution will include significant value from assets or operations from outside the approving country; b) the plan has been approved under the voting requirements of the law of the main proceeding; c) creditors and other interested parties from the approving country have had a fair and reasonable opportunity to participate in the main proceeding; and d) the plan does not discriminate unfairly on the basis of national citizenship, residence, or domicile. The provisions should also make such a plan final and binding in the approving country on the rights of all parties interested in the debtor's affairs to the same extent as it is under the law of the main proceeding.

Recommendation 6: Adoption of Procedural Principles

With certain exceptions, each NAFTA country should adopt legislation that would permit the implementation of those Procedural Principles that cannot be implemented under existing law in that country.

Recommendation 7: Authentication

Where authentication of documents is required, the NAFTA countries should establish methods to permit very rapid authentication and secure transmission of faxes and other electronic communications relating to cross-border insolvencies within the NAFTA on a basis that permits their acceptance as official and genuine by ministries and courts.

APPENDIX A

Definitions

"Administrator" refers to the person or entity that the bankruptcy law in a country places in charge of a bankrupt's property, including trustees, liquidators, sindicos, administrators, monitors, interim trustees, court-appointed trustees, Mexican debtors in conciliations, and debtors in possession.

"Ancillary proceeding" refers to a proceeding other than a full domestic bankruptcy proceeding designed to provide assistance to a foreign bankruptcy proceeding.

"Bankruptcy proceeding" refers to a collective proceeding for the adjustment, collection, or payment of debts of a legal person on behalf of all creditors and other interested parties and includes proceedings often called "insolvency proceedings." It includes any proceeding under the Bankruptcy and Insolvency Act or the Company Creditors Arrangement Act in Canada, under La Ley de Concursos Mercantiles in Mexico, and under the Bankruptcy Code in the United States.

"Coordination" refers to a limited harmonization aimed at making two different systems work better together, without being fully harmonized. See Harmonization.

"Creditor" refers to someone with a claim against a debtor, but also includes other persons with an interest in the proceeding, such as co-owners and others claiming property interests in the debtor's property.

"Debtor" in most contexts refers to a legal person who is the subject of a bankruptcy or insolvency proceeding.

"Debtor in possession" refers to the person or persons entitled to operate the affairs of a debtor under either a Chapter 11 reorganization in the United States or a concurso mercantil in Mexico, and includes a Mexican debtor in conciliation in Mexico.

"Domestic assets" refers to assets within the territorial jurisdiction of a court, usually a recognizing court.

"Foreign representative" refers to an administrator acting in a foreign proceeding.

"Foreign creditor" as to any jurisdiction refers to a creditor whose address as maintained in the business records of the debtor is outside that jurisdiction.

"General Principles" refers to the general policy bases for cooperation in multinational bankruptcy cases.

"Harmonization" refers to efforts to change the laws of two or more countries to be more substantively similar to each other.

"Insolvency proceeding" refers to a bankruptcy proceeding as defined above.

"Legislative Recommendations" refers to recommendations for new legislation or international agreements that will go beyond current law to permit a substantially higher level of cooperation and integration.

"Local creditor" refers to a person who has an interest with an important and specific connection to a jurisdiction, a definition that includes a creditor secured in assets located in that jurisdiction or another person with a property (in rem) interest in assets located in the domestic jurisdiction, regardless of that person's nationality, residence, or domicile.

"Main proceeding" refers to a full domestic bankruptcy case brought in the country that is the center of the main interests of a debtor.

"Non-main proceeding" refers to a full domestic bankruptcy case pending in a country other than the country that is the center of the debtor's main interests; an ancillary proceeding is not a non-main proceeding.

"Parallel proceedings" refers to full liquidation or reorganization cases pending in two or three countries involving the same bankrupt; an ancillary proceeding is not a parallel proceeding.

"Priorities" (or "privileges" or "preferences") refers to rights to a distribution in a bankruptcy proceeding prior to or with preference over the rights of other creditors.

"Proceeding" refers to bankruptcy or insolvency proceedings, including a bankruptcy "case" in the United States.

"Procedural Principles" refers to mechanisms and guidelines for cooperation in multinational cases that are consistent with existing law in the NAFTA countries, except as noted.

"Reorganization case" refers to a reorganization under the CCAA or BIA in Canada, a concurso mercantil in Mexico, and a proceeding in Chapter 11 or 12 in the United States.

"Recognizing court" refers to the court that is requested to recognize or cooperate with another NAFTA court; it will often be the "non-main" jurisdiction requested to recognize or cooperate by the "main" jurisdiction.

"Sindico" refers to an administrator appointed under La Ley de Quiebras y Concurso mercantil in Mexico.

"Mexican debtor in conciliation" refers to the person or persons entitled to control the property and affairs of a debtor under a concurso mercantil in Mexico.