(xviii) Olympia & York European Holdings Limited,

(xix) Olympia & York Realty Credit Corp.,

(xx) Olympia & York Resources Credit Corp.,

(xxi) Olympia & York Resources Corporation,

(xxii) O & Y Energy Holdings Limited,

(xxiii) O & Y Forest Products Holdings Limited,

(xxiv) Olympia & York Realty Corp.,

(xxv) O & Y Equity (Canada) Ltd.,

(xxvi) O & Y (U.S.) Development Canada Ltd.,

(xxvii) Olympia & York SF Holdings Corporation,

(xxviii) GWU Investments Limited, and

(xxix) 857408 Ontario Inc. (formerly Olympia & York CC Limited).

Appendix F — Protocol

Protocol in Re Commodore Electronics Limited between United States Bankruptcy Court for the Southern District of New York and the Supreme Court of the Supreme Court of The Bahamas and Reasons for Decision, Supreme Court of the Bahamas (Case No. 473/1994; May 27, 1995).

Commodore Electronics Limited ("CEL") and Commodore International Limited ("CIL") (CEL and CIL being collectively referred to as "Commodore") are both the subject of liquidations in the Supreme Court of the Commonwealth of the Bahamas ("Supreme Court"). The CEL liquidation has been continued under supervision by order of the Supreme Court, and CIL is being liquidated under order of the Supreme Court, with Franklyn R. Wilson and Macgregor N. Robertson having been appointed by the Supreme Court as the joint liquidators ("Liquidators") in both liquidations.

Certain creditors of CEL and CIL filed involuntary chapter 7 petitions against CEL and CIL in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"), as to which the Liquidators filed motions for abstention and petitions for relief ancillary to foreign proceedings.

Thereafter, the petitioning creditors and other major creditors organized as an informal committee which was subsequently elected to be the Creditors' Committee for the purposes of the Bahamian bankruptcy proceedings (the "Committee").

The Bankruptcy Court has not yet acted upon the motions referenced above, but for the reasons set forth hereinafter, the Liquidators and the Committee desire to resolve the motions pending in the Bankruptcy Court on the basis hereafter set forth.

It is the intention of the parties to record herein their mutual agreement that the liquidation proceedings under Bahamian law shall continue unabated and that the Bankruptcy Court in the United States shall enter an Order for Relief in the involuntary chapter 7 proceeding of CIL and CEL (which the Liquidators shall convert to cases under chapter 11) for reason and good cause, more particularly set forth hereinafter.

It is the further purpose of the parties to memorialize and acknowledge that while dual proceedings are pending in the Bahamas and the United States, the parties will respect the independent non-delegable duties imposed by the laws of the respective countries, to wit: upon the Liquidators under Bahamian law; upon the debtor in possession under United States law; and upon the Committee under the legal systems of both countries.

Because it is the intention of the Liquidators to serve function customarily held by a debtor in possession under chapter 11 of the United States Bankruptcy Code and for, the same Committee to serve formally under Section 1103 of the United States Bankruptcy Code and applicable provisions of Bahamian law, it is necessary without altering the powers or duties of those parties to harmonize their work in order that they can fulfill their respective duties.

In the view of the Liquidators, facts previously unknown to the Liquidators have emerged in the nearly seven months since the commencement of the CEL and CIL liquidations, the following respects included:

(1) Over the last seven months, approximately 32 liquidations or insolvency proceedings involving Commodore subsidiaries have been initiated in 17 foreign jurisdictions involving the appointment of some liquidators not subject to the Liquidator's control and some of which are under the Liquidator's control.

(2) The Liquidators are now engaged in selling substantial assets of CEL and certain of its subsidiaries, involving approximately 10 corporate entities in different nations, not all of which are under the Liquidators' control.

(3) By virtue of the foregoing, the intervention of other courts in other jurisdictions is now avoidable.

(4) By virtue of the Liquidators' continuing investigation and other matters which have come to the attention of the Liquidators, they have had an opportunity to scrutinize the acts, conduct, property, and affairs of Commodore, its subsidiaries and their former officers, directors, and management and other insiders in the many jurisdictions in which Commodore carried on business. As a consequence, the Liquidators have determined that claims against officers, directors, and management, and other insiders ultimately may be available to the Liquidators, of which some may be pursued most effectively in courts of the United States. A factor which the Liquidators have taken into account is that the directors and officers liability insurance policy was issued by companies operating in the United States. Foreseeing such a possibility at the outset of the liquidations that litigation might ultimately be necessary in the United States, the Liquidators advised the parties in their papers filed in Bankruptcy Court that they would consent to the entry of an order for relief under chapter 11 if they were to determine that relief under chapter 11 were in the best interests of the Liquidators and creditors. It now appears to the Liquidators that their obtaining the powers of a debtor in possession through chapter 11 cases in the Bankruptcy Court will offer advantages to the estates of CIL and DEL, in view of the understanding reached with the Unofficial Committee of Unsecured Creditors ("Committee"), as described herein.

(5) Initially, the Liquidators were concerned that parallel proceedings in the United States would invite the possibility that two different fiduciaries (the Liquidators in The Bahamas and different ones in the United States) would be attempting to sell the same assets at the same time. The passage of time has afforded the Liquidators an opportunity to work with the Committee which has indicated a willingness to cooperate with the Liquidators in their efforts to sell assets and to coordinate its duties under Section 1103 of the Bankruptcy Code so as to maximize benefits to creditors.

(6) The Liquidators apprehend that Commodore's chief executive office was located in the United States prior to the commencement of the liquidation proceedings. Accordingly, the Liquidators apprehend the likelihood that their applications for ancillary relief and abstention in the United States may be denied, or overturned on appeal if initially granted in the Bankruptcy Court. In such event, the possibility exists that fiduciaries other

than the Liquidators could be appointed in the United States, thus presenting the potential of disrupting the efficient and effective liquidation of the estates of CEL and CIL. The advent of this Protocol obviates the possibility of adverse consequences to the estates of CEL and CIL resulting from the unfavorable outcome of litigation in the United States regarding ancillary relief and abstention.

In light of the foregoing changed circumstances, among others, and subject to approval by the Supreme Court and the Bankruptcy Court, the Liquidators and the Committee together have proposed this Protocol both to resolve the contemplated litigation and to provide a framework for the efficient and effective administration of the bankruptcy cases for CEL and CIL in both the United States and The Bahamas.

The Liquidators and each member of the Committee hereby agree, subject to entry of orders by the Bankruptcy Court and the Supreme Court approving this Protocol, as follows:

A. The Liquidators shall convert the involuntary chapter 7 cases of CEL and CIL to cases under chapter 11 of the Bankruptcy Code immediately following the courts' approval of this Protocol.

B. The Committee intends that proceedings in the United States be conducted under chapter 11 without the appointment of an examiner trustee and with the Liquidators' constituting the corporate governance and exercising the rights, powers, and duties of debtors in possession.

C. The Supreme Court alone shall govern the Liquidator's tenure in office, the conduct of the liquidation proceedings under Bahamian law, the retention and compensation of the Liquidators and their Bahamian professionals, and the hearing and determination of matters arising in the liquidation proceedings under Bahamian law. Subject to order of the Supreme Court, the liquidations in the Supreme Court shall be continued under court supervision and the Supreme Court, with Messrs. Wilson and Robertson continuing as Liquidators.

D. The Bankruptcy Court alone shall govern the conduct of the chapter 11 cases, the compensation of the Committee's professionals in the United States and the hearing and determination of matters arising in the chapter 11 cases. Should the Liquidators deem it appropriate that the estates of Commodore be substantively consolidated with one another or with those of some or all of their subsidiaries, the Liquidators may commence appropriate proceedings in the Bankruptcy Court, and creditors or parties in interest also may commence such proceedings regarding substantive consolidation in the Bankruptcy Court. Should the Liquidators deem it appropriate, the Liquidators may, at the request of foreign representatives such as those in Japan, the Netherlands, and New Zealand, bring actions in courts in the United States on behalf of such foreign representatives.

E. The Liquidators and the Committee recognize that the conduct of cases involving the same debtors in two courts simultaneously intertwines the two proceedings, presenting the possibility of prejudice to the interest of the Liquidators and creditors unless the proceeding, in the two courts are harmonized. Accordingly, it is the intention of the Liquidators and the Committee that the assets of the estate be liquidated and distributed and that the cases be administered in as economical and efficient, manner as may appear practicable under the circumstances, with one court deferring to the judgment of the other where feasible and the subject matter of a particular matter, action, proceeding, contested matter or adversary proceeding being determined in one court only, where feasible. Proceeding in accordance with the terms and intent of this Protocol shall be deemed consistent with the appropriate conduct of the chapter 11 cases of CEL and CIL and the liquidation proceedings under Bahamian law.

F. The cases of CEL and CIL in the United States shall proceed under chapter 11, with the Liquidators having the rights, powers, and duties of debtors in possession.

G. A proof of claim timely filed in either the Supreme Court or the Bankruptcy Court will be deemed timely filed in both courts. On consent of the Liquidators and the Committee, claims filed in either court may be finally allowed or compromised in either court under the procedures applicable in such court with the same force and effect as though such claim had been finally allowed or compromised in both courts. In the event that the Liquidators and a creditor do not agree on the disposition of such creditor's claim, the Liquidators may reject the claim under Bahamian law or may object to the allowance of such claim in the Bankruptcy Court, provided, however, that if the allowance of such claim is governed principally by the law of the United States or any of its states, then the Liquidators will bring the objection in the Bankruptcy Court. If the allowance of a disputed claim is governed principally by the laws of any nation other than the United States, the Liquidators may, but are not required to, bring such, objection in the Supreme Court. Nothing in Protocol shall be deemed to bind a creditor to the Liquidator's selection of a forum for an objection to claim. Nothing in this Protocol shall be deemed to bind a creditor to the Liquidator's selection of a forum for an objection to claim. Nothing herein shall limit the right of creditors or of the Committee to object to claims under 11 U.S.C. § 502(a).

H. Deloitte & Touche and Fullbright & Jaworski L.L.P. shall be retained as accountants and attorneys for the Liquidators in the United States. The retention by the Liquidators of any professionals resident in the United States, including Deloitte and Fulbright, will be approved by the Bankruptcy Court under 11 U.S.C. § 327. Except for the Liquidators' Bahamian professionals, the Liquidators may retain any professionals not resident in the United States with the approval of the Bankruptcy Court or with the consent of the Committee. The compensation of professionals for the Liquidators shall be determined and paid by order of the Supreme Court.

I. The Committee shall become the official committee of unsecured creditors of CEL and CIL under 11 U.S.C. 1103. Kaye, Fialkow, Richmond & Rothstein ("KFR&R") and Dupuch & Turnquest ("D&T") shall be retained as attorneys for the Committee in the United States and The Bahamas. The retention by the Committee of any professionals resident in the United States, including KFR&R will be approved by the Bankruptcy Court under 11 U.S.C. § 327, nunc pro tunc to July 8, 1994. The retention by the Committee of any professionals resident in The Bahamas will, if required, be approved by the Supreme Court, *nunc pro tunc* to July 15, 1994. The Committee may retain any professionals not resident either in the United States or The Bahamas with the approval of the Bankruptcy Court or with the consent of the Liquidators. The compensation of the professionals for the Committee shall be determined and paid pursuant to order of the Bankruptcy Court with respect to professionals resident in the United States and by order of the Supreme Court with respect to professionals resident in the Bahamas. The Liquidators may apply to the Supreme Court for compensation by the estates of CEL and CIL for the services and disbursements of D&T on behalf of the Committee rendered after July 8, 1994 but prior to the approval of this Protocol. KFR&R may apply to the Bankruptcy Court for compensation by the estates of CEL and CIL for the services and disbursements of KFR&R rendered after July 8, 1994 but prior to the approval of this Protocol. The Committee's professionals may apply thereafter for an order of interim compensation to be paid as often and in such manner as the Bankruptcy Court, or the Supreme Court in the case of the Bahamian professionals, may allow. On the approval of this Protocol, the Committee and the Liquidators shall agree upon guidelines for the conduct of the Committee in the liquidation proceedings under Bahamian law and the Liquidators will thereupon apply to the Supreme Court for recognition of the Committee in The Bahamas.

J. The time for the filing of the schedule of assets and liabilities, the statement of affairs, and the list of executory contracts shall be extended to forty-five days after the entry of the order for relief in chapter 11, without prejudice to such other applications for extensions as the Liquidators may determine to file.

K. The Liquidators shall file monthly operating reports with the United States Trustee, with the first report to be filed for both the months of December, 1994, if required, and January, 1995, by February 15, 1995. Operating reports shall be served on counsel for the Committee. The estates of CEL and CIL shall be

subject to the payment of fees to the United States Trustee under 28 U.S.C. § 1930(a)(6) only on account of disbursements made from bank accounts maintained by the Liquidators in the United States.

L. Should the Liquidators consider it appropriate to commence insolvency or other similar proceedings in respect of the remaining subsidiaries of CEL or CIL not already in liquidation, they may commence such proceedings in such courts in such courts in such nations as they deem appropriate, provided, however, that the Liquidators shall, or they shall cause the debtor to, commence parallel proceedings for such debtor in the Bankruptcy Court under chapter 11 if it appears to the Liquidators that such debtor holds substantial assets, conducted substantial business, or is incorporated in the United States, in which event the Liquidators and the Committee shall apply to the Bankruptcy Court for an order in relation to such debtor appointing the Liquidators to serve in such cases and otherwise under substantially the same terms as the terms of this Protocol as they may be relevant. Absent circumstances requiring immediate action, the Liquidators shall give the Committee five (5) days' prior notice of the commencement of insolvency or other similar proceedings in respect of subsidiaries of CEL or CIL.

M. Without limiting the generality of paragraph "E" above but provided that such actions are taken in accordance with Bahamian law, including the making of such orders of the Supreme Court as may be required after any required notice to the Committee or hearing or opportunity for the Committee to be heard, the Liquidator shall be authorized, without specify approval of the Bankruptcy Court, to

1. deposit funds of the estates of CEL and CIL in accounts or investments outside of the United States;

2. with the consent of the Committee, borrow funds or pledge or charge any assets of CEL or CIL;

3. cause CEL or CIL without the approval of any court, to sell or dispose of any assets outside the ordinary course of business for a consideration in any one case, in the judgment of the Liquidators, of less than $250,000 or, with the consent of the Committee, of more than $250,000 but less than $1,000,000;

4. with the consent of the Committee, lend monies of the estates or CEL or CIL to any of their subsidiaries, with or without security.

5. with regard to subsidiaries which are not debtors in bankruptcy cases in the United States and are not the subject of bankruptcy or liquidation proceedings in any other nation, cause such subsidiaries without the consent of the Committee to take such actions as the Liquidators may deem appropriate, except for any transaction or settlement outside of the ordinary course of business involving, in any one case in the judgment of the Liquidators, greater than $500,000;

6. cause CEL or CIL to commence material legal proceedings, provided that any settlement be subject to approval as may be required by the Bankruptcy Court, in the case of litigation pending in the United States, or the Supreme Court in the case of litigations pending elsewhere. In the case of litigation pending other than in the United States or The Bahamas, any settlement shall be subject to approval as may be required by the Supreme Court. It is the express understanding of the parties that they will work together to maximize recoveries from the exercise of avoiding powers and other rights available under the Bankruptcy Code (including without limitation insider preference actions) the laws of The Bahamas, and the laws of such nations or states of the United States as may be applicable provided that no such avoiding powers, actions or other rights or claims available under the Bankruptcy Code or other applicable state law may be settled or otherwise compromised without the prior approval by the Bankruptcy Court and, if required, by the Supreme Court. The rights of the Liquidators and the Committee under the Bankruptcy Code and Bahamian law to investigate causes of action and claims belonging to the CIL and CEL estates will be exercised jointly in a manner designed to harmonize the administration of the cases.

Both the Committee and the Liquidators shall maintain confidentialities as the Liquidators may request or as may be appropriate under the circumstances. The exchange of opinions or information between the Liquidators and the Committee or their respective professionals shall not be deemed a waiver or any applicable privileges, including the attorney-client and work product privileges.

N. It is expected that upon reasonable request all books, records, reports and opinions of experts other than those of legal counsel will be exchanged by and between the Liquidators and the Committee in connection with the sale of assets and litigation unless the Bankruptcy Court or the Supreme Court orders otherwise, subject to appropriate confidentialities.

O. Neither this Protocol nor any actions taken pursuant hereto is intended to nor shall it have any affect on the rights of creditors, the Liquidators, or the estates of CEL and CIL under 11 U.S.S. § 508(a). Neither this Protocol nor any actions taken pursuant hereto are intended to nor shall they in any manner prejudice or affect the powers, rights, claims and defenses of (i) the Liquidators, CEL, CIL, their estates or any of their creditors under applicable law, including the law of The Bahamas and the Bankruptcy Code or (ii) the Committee in its capacity as a Creditors' Committee under Section 1103 of the Bankruptcy Code.

P. Property of the estates of CEL or CIL which is not administered in the Bankruptcy Court shall not be deemed abandoned under 11 U.S. C. § 554 if such property is administered by the Supreme Court.

Q. The Committee consists of The Prudential Insurance Company of America, Daewoo Telecome, Inc. Microsoft Corp., SCI Systems, Datatech Enterprises, Co., Acer, Inc., Seagate Technology, Inc., Anchor National Life Insurance Co., Credito Intaliano, and Speedy Tech.

R. The term "consent of the Committees" means that (a) the Committee has indicated its consent in writing or (b) the Liquidators have given the Committee not less than five (5) business days' written notice of a contemplated action and the Committee has not indicated its objection in writing within such five (5) day period. Notice to the Committee is sufficient if given to KFR&R. Notice to the Liquidators is sufficient if given to Fulbright & Jaworski L.L.P.

S. To the extent that they are referred to as Liquidators exercising powers granted to them hereunder as debtor in possession, the reference to Liquidators shall refer to the debtor in possession.

T. Nothing in this Protocol is intended to nor shall it affect, impair, limit, extend or enlarge the jurisdiction of the Supreme Court or the Bankruptcy Court.

U. Should questions arise as to the operations of the estates of CEL or CIL or as to the administration of their cases in The Bahamas or the United State pursuant to the terms or intent of this Protocol, the court to which the issue is addressed may hear and determine the matter after notice to the Liquidators and the Committee and, if the issue is addressed to the Bankruptcy Court, to the United States Trustee.

..... Franklyn R. Wilson, as joint liquidator of CEL and CIL

..... Macgregor N. Robertson, as joint liquidator or CEL and CIL

UNOFFICIAL COMMITTEE OF UNSECURED CREDITORS

By: ..... Chairman on behalf of its Members

Appendix — In the Matter of Commodore Electronics Limited and In the Matter of the *International Business Companies Act*, 1989 (No. 2 of 1990) and In re Commodore International Limited and In re the *International Business Companies Act*, 1989 (No. 2 of 1990)

Dated:

Nassau, Bahamas

and

New York, New York

December 8, 1994

COMMONWEALTH OF THE BAHAMAS ..... No. 473

IN THE SUPREME COURT 1994

Equity Side

Appearances: Mr. P. L. Adderley for the Official Liquidators

Mesdames C. Lashley and Y. McCartney for the Unofficial Creditors Committee

Mr. R.D. Seligman for Transpacific Company Ltd.

Mr. M.O. Glinton for the Past Directors and Officers of the Companies

Decision

SAWYER, J.:

By order dated 15th June, 1994, (in action No. 473 of 1994 by the Chief Justice) and 24th June, 1994 (in action No. 581 of 1994 by Osadebay, J.,) respectively, the voluntary winding up of Commodore Electronics Limited ("CEL") was continued under the supervision of the court and Commodore International Limited ("CIL") was ordered to be compulsorily wound up. I shall refer to those two proceedings collectively as "the Bahamian proceedings".

The official liquidators are the liquidators for both CEL and CIL in the Bahamian proceedings.

Subsequent to the winding-up orders in the Bahamian proceedings, the liquidators have apparently made a number of applications to the court and have submitted written reports on the progress of the liquidation.

By a summons filed March 07, 1995, the liquidators seek the approval of the court "to implement the terms of an agreed protocol filed herein and entered into between the Liquidators and the Unofficial Creditors Committee of unsecured creditors of Commodore Electronics Ltd., and Commodore International Limited for the conduct or dual bankruptcy proceedings in respect of both companies by the Supreme Court of The Bahamas and the Bankruptcy Court of the Southern District of New York, New York one of the United States of America" ("the Bankruptcy Court").

Prior to hearing counsel on the substantive application I heard and determined a summons filed the same day asking me to hear this application in open court rather than in chambers.

I took the view that the companies winding up Rules are not mandatory in directing that applications, other than those specified in rule 4(1)(a) and (b) must be heard in chambers since normally matters which can be heard in chambers can usually also be heard in open court unless there are compelling reasons for holding the hearing in cameral. I also had in mind the House of Lords decisions in *Scott v. Scott*, [1913] A.C. 417, as well as cases like *Badische etc. v. Levinstein*, 24 Ch. D. 156 at p. 159 and *McPherson v. McPherson*, [1936] A.C. 177.

I therefore adjourned the hearing of the summons into open court especially as I understood that there are a number of liquidation/bankruptcy proceedings in a number of countries (17) in which some 32 companies which are related to CEL and/or CIL are involved.

The protocol for which this court's approval is sought is annexed to this decision as attachment 1 for case of reference.

Mr. Adderley, as I understood him and without attempting to repeat verbatim here all of his submissions, submits that the grant of approval by this court to the implementation of that protocol does not amount to a divestment of this court's jurisdiction over the subject matter of the Bahamian proceedings nor would it amount to the approval of any infringement on the sovereignty of The Bahamas. Further, he submits, the approval of this court is not to a fiat accompli but is intended to permit the liquidators to harmonise the Bahamian proceedings with parallel proceedings before the Bankruptcy Court.

Mr. Seligman, again as I understood him and without repeating here verbatim all of his submissions, says inter alia, that if approval is granted to the protocol before Transpacific's Company Limited's ("TPC") claim is dealt with his clients would be put in the same position as Barclays Bank plc. ("Barclays") found itself in *In Re Maxwell Communications Corporation pls. (No. 2) Barclays Bank plc, v. Hoffman and others*, [1992] BCC 757.

In that case Barclays sought an injunction to restrain the administrators of Maxwell Communications Corporation plc ("MCC") as well as MCC itself from taking proceedings in the U.S. Bankruptcy Court to recover, as a preference a payment of some U.S. $30 million made by MCC to Barclays shortly before the administrators were appointed to MCC. The U.S. $30 million was derived from the proceeds of sale of an American asset of MCC. Barclays argued that, according to English notions of international law the U.S. court did not have subject-matter jurisdiction and that it would be so unjust for the U.S. court to assume jurisdiction over a transaction which occurred almost entirely within the United Kingdom, that Barclays should be protected by injunction. Both Hoffman, J., (as he then was) and the Court of Appeal in England refused the injunction.

In this case, Mr. Seligman refers to the U.S. $9.5 million which was repaid to TPC approximately one year before the winding-up orders were made, particularly in light of the fact that TPC is owned by a former director of the companies.

I accept that on the one hand, under Bahamian law the relevant period for deciding whether a payment was or was not a fraudulent preference under the *Bankruptcy Act* is three months prior to the winding-up and that the intention or motive for the payment is an important consideration in determining whether the payment was a fraudulent preference (see e.g. *Re Land Development Association, Kent's case* (1888), 39 Ch. D. 259; *In Re G Stanley and Company Ltd.*, [1925] Ch. 148; *Peat v. Gresham Trust Ltd.*, [1934] A.C. 252; *Re Kushler (M) Ltd.*, [1934] Ch. 248 at 252; *Sharp v. Jackson*, [1899] A.C. 419 and *Buckley's* case [1899] 2 Ch. 725) while on the other, that under the United States law, there are two relevant periods to be considered — one of 90 days and the other of one year before the date of the filing of the petition — if such creditor at the time of such transfer was an insider. Further, it appears that the motive/intention of the debtor in making the payment is not as important in U.S. law as it is in English and Bahamian law.

In addition, the provisions of section 137-160 of the *Companies Act* (No. 18 of 1992) deal with by Insider Trading with regard to public companies.

In particular s. 151 of the *Companies Act* provides that a director or officer or a body corporate is an insider of a subsidiary or a parent affiliated companies. Whether that would or would not bring into question the nature of the payment to TPC, is a matter I leave open as it has not been argued before me.

Mr. Seligman says too that until TPC's claim has been dealt with by the liquidators they should not be empowered to enter the protocol.

In addition, Mr. Seligman submits that it would be improper and unfair to TPC to be subjected to even the possibility of having to litigate its claim in the Bankruptcy Court.

I take the view that even if I do not approve the protocol, that will not necessarily mean that TPC will not then have to instruct counsel to look after its interests in any proceedings before the Bankruptcy Courts and that if such approval is not forthcoming it may then be in the interests of the unofficial creditors' committee to proceed with the involuntary bankruptcy proceedings in the Bankruptcy Court. In such a case, I do not think that to refuse approval of the protocol would be in any one's interest.

There is no evidence, eg., that the debt which was partially repaid to TPC, was incurred in The Bahamas and indeed the *International Business Companies Act* forbids International Business Companies from doing business in The Bahamas (apart from the necessary "business" of occupying suitable premises etc.).

There is no evidence that the assets from which the TPC was paid were generated in The Bahamas. There is evidence that the promissory notes and other documents evidencing the debt to TPC contained provisions to the effect that they were to be subject to the laws of The Bahamas.

Be that as it may, the main concern of this court, as of the English Court in the BCCI proceedings (Bank of Credit and Commerce International SA [1992] 2 BCLC 570 at p. 577) is that all creditors should be able to benefit from all sums which the liquidators may be able to collect, not just Bahamian creditors and I am not prepared to put a "ring fence" around either the assets or the creditors to be found in any one jurisdiction as opposed to another jurisdiction.

In principle I see nothing harmful in courts of different countries exercising their jurisdiction in their respective countries in such a way as to ensure that a winding-up of a large international business concern is a fair to all concerned — especially the unsecured creditors — as it is humanly possible to do especially where what is being sought is in no way contrary to the public policy of The Bahamas or so offensive to our sense of justice and fairplay that it ought not to be respected.

In this case, the idea behind the protocol, as I understand the terms of it, is not to subordinate the courts of one jurisdiction to the courts of another but to recognise the legitimate jurisdiction of each court over the subject-matter within its jurisdiction and to encourage the liquidators who will also become the debtors in possession if the protocol is approved, to so manage the affairs of the companies in the United States and the liquidation in The Bahamas as to maximise the benefits to all creditors and to minimise conflicts which could arise on the adoption of a confrontational attitude between courts each of which are undoubtedly exercising their legitimate jurisdiction.

While I accept that the *Bankruptcy Act* of The Bahamas is no an exact replica of the *English Insolvency Act* 1986, there is an authority which supports what is intended to be done in this case which pre-dates the *1986 Act*. That is the case of *In re P. Macfadyen and Co. Ex parte Vizianagram Company, Limited*, [1908] 1 K.B. 675.

The effect of the decision in that case which has not been overruled was that

> Where a firm is bankrupt in England and abroad, and has English and foreign assets and English and foreign creditors, the Court has jurisdiction to sanction an agreement between the trustee in bankruptcy in England and the official assignee abroad for pooling all the assets and distributing them rateably amongst the English and foreign creditors, notwithstanding that the *Bankruptcy Act*, 1883, contains no express provisions authorizing such a scheme.

There is no application before me as there was in the *Macfayden & Co's* case and as in *Maxwell's* case for an injunction or for a stay of the proceedings in the Bankruptcy court. Indeed, certain creditors had already commenced involuntary bankruptcy proceedings in the Bankruptcy Court before this court, as well as the Bankruptcy Court, was asked to approve the protocol and as the unofficial creditors committee should be taken as being concerned to maximise the collection of what is due to the creditors as a whole, I am of the view that the implementation of the protocol would be for the benefit of all parties interested (except perhaps TPC) and in those circumstances as I find nothing illegal about the protocol and on its face it appears to be a common sense business arrangement, thus the liquidators were right to come to court to ask for its approval — even though it is "nunc pro tunc" to the protocol.

Mr. Glinton, who adopted Mr. Seligman's submission drew attention to a number of Australian and New Zealand cases, inter alia, in which it was held that schemes of arrangement under the particular statutory provisions should have been brought before the court before being presented to the creditors for approval.

Unless I have misread those cases, in most if not all of them, the subject company was continued as a going concern and these were applications for "down sizing" as it might now be called or for a reduction of capital which required the input of the creditors if it was to be approved by the court. Here there are winding-up orders which have, for the purposes of Bahamian law, brought the companies to an end, except for the purposes of the winding-up. The creditors are therefore the only ones — or at least, the main group of persons/companies whose interests is to be considered. It therefore follows that if they have agreed to the protocol, there is no need for this court to second-guess them as to what has been done.

There is one other matter with which I would deal and that it is the issue of the standing of the former directors of the companies in opposing the application.

Upon the winding-up, whether under the supervision of the court or compulsorily, the liquidators became the "brain and hands" of the companies and the directors automatically cease to function as such. Unless, therefore they are creditors of the companies in their own right they can have nothing to do with the actual liquidation proceedings apart from when their assistance or attendance at court is required under the provisions of the *Companies Act*. That being so, I hold that they have no standing to oppose this application.

In the result, I will make an order authorising the liquidators to enter into the protocol nunc pro tunc.

The costs of TPC as well as the liquidators on this application will come out of the estates of the companies. I make no order as to the costs of the past directors as I have found that they had no standing to intervene in this matter.

Dated the 27th day of March A.D., 1995

J.A. Sawyer

Appendix G — United States Bankruptcy Court Southern District of New York

Cross-Border Insolvency Protocol between the United States and Israel in Re Nakash: United States Bankruptcy Court for the Southern District of New York; (Case No. 94 B 44840: May 23, 1996) and District Court of Jerusalem; (Case No. 1595/87 — May 23, 1996).

In re	:	Chapter 11 Case No. 94 B 44840 (BRL)
JOSEPH NAKASH,	:	
Debtor	:	
:	:	