

## Judicial Cooperation in Cross-Border Insolvencies

An outline of some relevant issues and literature

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### A. The Context

The importance of judicial cooperation is increasing as the universality principle gains prominence in the treatment of cross-border insolvencies, the growing number of which is a natural consequence of globalization. The reason for the growing importance of cooperation is that the universality ideal, by which insolvency cases are resolved in one proceeding under the rule of one law, is seldom achievable. Rather, this unitary ideal is often disrupted by the commencement of parallel proceedings. Even though such parallel proceedings are usually restricted in their territorial scope they all serve the same purpose: dealing with the insolvency of one debtor who happens to have assets in more than one jurisdiction. Thus, the concept of cooperation is designed to bridge the gap between different sets of proceedings. By means of cooperation, sharing of information and mutual procedural adjustments the actors involved can minimize the loss of efficiency and the higher costs resulting from the multiplicity of cases.

A special form of judicial cooperation is direct communication between courts. It has become prominent in particular through so-called protocols. These are agreements in the course of multiple proceedings which are designed to overcome certain legal or factual obstacles and which are often entered into through the active participation of judges. Like cooperation in general, direct court-to-court-communication is not a tool in itself but is aimed at improving the efficiency of a debtor's insolvency case which is – for jurisdictional or other reasons – split up into more than one proceeding.

Whereas there is global unanimity with respect to the need and practicability of co-operation of administrators, discord exists when it comes to the inclusion of judges in this scheme. Probably due to the divergent understanding of the role of judges in general and the accordingly different self-assessment of the individual judges,<sup>1</sup> there is a division between the Common Law world and the Civil Law world (with individual exceptions, of course). Generally speaking, the former is in favour of direct communication,<sup>2</sup> and the latter in opposition to, or at least reluctant to embrace, it.<sup>3</sup>

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<sup>1</sup> For these differences see generally, Gouron / Mayali / Padoa Schippoa / Simon (ed.), *Europäische und amerikanische Richterbilder*, 1996. Whereas especially in the Common Law world the judge has always been a law maker, his continental European colleague and the one following this model has always been a “servant of the statute” or even just its “mouth-piece”.

<sup>2</sup> For a general overview see Farley / Leonard / Birch, *Cooperation and Coordination in Cross-Border Insolvency Cases* (paper delivered on the INSOL conference in May 2006; will be posted on the website of International Insolvency Institute: [www.iiglobal.org](http://www.iiglobal.org)) (for a short description of the contents see Annex A).

<sup>3</sup> For a general exception see art. 31 of the ALI / UNIDROIT Principles of Transnational Civil Procedure, available at: <http://www.unidroit.org/english/principles/civilprocedure/main.htm>; for a special exception regarding the European Insolvency Regulation see Paulus, *Europäische Insolvenzverordnung*, 2006, Art. 31 par. 12.

## B. Possible Questions for Approaching the Issues

In order to stimulate discussion the following questions might be worthwhile to consider. Note, however, they are neither meant to direct the participants into a particular direction nor are they all-encompassing.

### I. Need for judicial cooperation?

Probably the first and most fundamental question which needs to be answered when discussing any kind of judicial cooperation in the context of cross-border insolvencies is: what are the peculiarities of this field of law that justifies – or even makes it desirable – to promote the cooperation of the judiciary? After all, in numerous other areas of judicial activity such as litigation which might have impact on (or roots in) various jurisdictions, nobody has ever discussed the need for judicial cooperation. For the sake of clarification, it appears helpful to make the following situational distinctions:

1. There is just one insolvency proceeding pending in jurisdiction A. However, due to special pre-insolvency circumstances the director of the debtor becomes subject to a law suit relating to criminal, tax, personal liability, or other affairs in jurisdiction B. The subject of the law suit is related to the exercise of her functions as director.

If the court of jurisdiction B finds out that it needs information or help from the insolvency court in jurisdiction A, is judicial cooperation permissible at all? If so under what circumstances? And through what channels? Would it make a difference if the law suit relates to private law matters or to criminal law? How are issues such as the distribution of the burden of proof, the pendency of a law suit, *res indicata*, or even questions of the respective conflict of law to be taken into account?

2. There is just one insolvency proceeding. However, some of the assets are located in a jurisdiction other than the one where the proceeding has been commenced.

Judicial cooperation comes into play here only, if at all, with respect to supporting issues;<sup>4</sup> there are no two potentially conflicting procedural and substantive interests or concerns at stake as in the preceding case category. Does this enhance judicial cooperation? Is the answer to this question to be made dependent on an investigation into the avoidance rules in case the respective asset is (or might be) subject to an avoidance claim? Assuming the country in which the respective asset is located follows the insolvency regime of territoriality – does that exclude any judicial cooperation?

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<sup>4</sup> In a very recent case, the Privy council decided in a case relating to a New York Chapter 11 proceeding, a Cayman based company, and a Isle of Man company that judicial assistance can be provided also without opening a secondary proceeding *Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors*, available at: [www.bailii.org/uk/cases/UKPC/2006/26.html](http://www.bailii.org/uk/cases/UKPC/2006/26.html).

3. There are two (or more) insolvency proceedings which all deal with the insolvency of one debtor (parallel proceedings).

Is there anything that makes this case different from the one addressed under the first bullet-point? In other words: is there anything special with insolvency proceedings (or insolvency law) which allows a different solution? Is it of any significance in this respect that the two proceedings deal with the insolvency of just one debtor (or a coherent group of debtors respectively) whereas in the first case group different issues are at stake regarding different persons? Is the concept of universality dependent on judicial cooperation? Does a 'territorialistic' approach<sup>5</sup> exclude *per se* judicial cooperation? Does the (economic) argument that judicial cooperation leads to a better result for the creditors in general justify circumventing legal obstacles or even prohibitions?

## II. Relationship between the desirability of judicial cooperation and the existing law

Probably all jurisdictions provide for some methods of judicial cooperation; however, they are often slow and complicated in that diplomatic channels have to be included, or even used. In light of this, is it possible to "circumvent" legislative intent by using other tools of cooperation? Does the law allow it – implicitly or explicitly? Does the silence of the law in this respect amount to prohibition or permission? Does the legislator's intent to combat forum-shopping influence in any way the desirability and feasibility of judicial cooperation and – even more – direct communication?

If judicial cooperation is considered to take place – which substantive issues such as public policy,<sup>6</sup> burden of proof, avoidance rules, protection of the domestic creditors, or other rights granted to a party by the Constitution or a Human Rights Convention are to be observed? Which procedural rules such as the right to be heard, neutrality of the judge,<sup>7</sup> taking evidence, etc. are to be observed? Which technical devices shall, and which can, be used in the event of direct communication? In case there are no adequate communication tools available at the court – would it be permissible to switch to the office of, e.g., the administrator?

## III. Direct Communication, Protocols

In the event judicial cooperation appears to be helpful or even desirable<sup>8</sup> – shall this cooperation include direct communication between the judges involved?<sup>9</sup> Or shall this form or cooperation be restricted to the non-judicial stakeholders like the administrators?

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<sup>5</sup> For arguments in favor of this approach see LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 Cornell L.Rev. 696 (1999) (for a short description of the contents see Appendix A).

<sup>6</sup> Imagine, e.g., the situation that the other proceeding is an insolvency proceeding which is said to be in fact an expropriation tool (a claim which is raised by some, e.g., in the Russian Yukos case).

<sup>7</sup> For this concern in particular see *Felixstowe Dock and Railway Co. v. U.S. Lines Inc.* [1989] Q.B. 360 (1987); *Re T & N Ltd* [2005] B.C.C. 982 (for a short description of these cases see Annex B).

<sup>8</sup> As to the desirability, cf. *Lernout & Hauspie Speech Products N.V. v. Stonington Partners, Inc.*, 268 B.R. 395 (U.S. D. Del., 2001); reversed 310 F.3d 118 (U.S. 3<sup>rd</sup> Cir., 2002; on remand 301 B.R. 651 (U.S. Bankr. D. Del., 2003) (for a short description of the case see Annex B).

<sup>9</sup> For a strong plea in favor of such direct communication see Westbrook, International Judicial Negotiation, 38 Tex. Int'l L.R. 567 (2003); *idem*, The Duty to Seek Cooperation in Multinational Insolvency Cases, in: Sarra (ed.), Annual Review of Insolvency Law 2004, 187 (see for a short description of the contents Annex A)

If direct communication between the judges should take place – can this be done on an *ad hoc*-basis<sup>10</sup> or must it be dependent on the adherence to prescribed rules?<sup>11</sup> If such rules are seen to be essential, do they have to be introduced through the national legislative power or would it be sufficient if they were acknowledged by, e.g., an implicit recognition through the Supreme Court of the respective country?

A particular form of direct inter-court communication is to enter into an agreement which is usually called a protocol.<sup>12</sup> In an increasing number of cases judges participate – to a certain extent – in the negotiation process and co-sign it accordingly.<sup>13</sup> Does the general Civil Law approach<sup>14</sup> permit or exclude such active participation?<sup>15</sup> Is the answer hereto dependent on the contents of the respective protocol? Who has to take the initiative? Can this be the judge?

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<sup>10</sup> In the Cenargo case a phone call saved the positive outcome of the proceeding (for a short description of this case see Annex B).

<sup>11</sup> There exists a model for such rules: *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, see: [www.iiiglobal.org/members/committee\\_c.html](http://www.iiiglobal.org/members/committee_c.html). These Guidelines are designed to formalize the otherwise Civil Law judges irritating freedom of their Common Law counterparts in their communication efforts. The Guidelines, therefore, present a path which is on each of its steps clearly defined and bordered (they are translated also into French, German, Italian, Korean, Portuguese, and Spanish - further translations are to come).

<sup>12</sup> For a comprehensive list of protocols see: [www.iiiglobal.org/international/protocols.html](http://www.iiiglobal.org/international/protocols.html).

<sup>13</sup> In the very first protocol – re Maxwell – the judges did not communicate directly with each other; for a general description of the Maxwell case see, e.g., Flaschen / Silverman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation Insolvency*, in: J.Ziegel (ed.), *Current Developments in international and Comparative Corporate Insolvency Law*, 1994, 621 seq.; Westbrook, *The Lessons of Maxwell Communications*: 64 *Fordham L.R.* 2531 seq. (1996); Göpfert, *In Re Maxwell Communications – ein Beispiel einer „koordinierten“ Insolvenzverwaltung in parallelen Verfahren*, *ZZP Int* 1 (1996), 269; Paulus, „Protokolle“ – ein anderer Zugang zur Lösung grenzüberschreitender Insolvenzfälle, *ZIP* 1998, 977.

<sup>14</sup> There are at least two protocols which have on one side a Civil Law jurisdiction (Switzerland; AIOC case) or a mixed jurisdiction (Israel; Nakash case) (for a short description of the contents of these protocols, see Annex C).

<sup>15</sup> Examples of a great reluctance are, e.g.: Eidenmüller, *Der nationale und der internationale Insolvenzverwaltungsvertrag*, *ZZP* 114, 2001, 3; Wittinghofer, *Der nationale und internationale Insolvenzverwaltungsvertrag*, 2004 (for a short description of the contents see Annex C).

## Annex A

*Westbrook, International Judicial Negotiation, 38 Tex. Int'l L.R. 567 (2003)*

Prof. Westbrook observes that Court-to-Court communication (CCC) is not a specific insolvency related issue but might and does arise in other cross-border litigations as well. With respect to insolvency-related CCC he distinguishes between cooperation where two fully-fledged insolvency proceedings exist and the situation where there is only one insolvency proceeding but where in another jurisdiction a claim is subject to a law suit which does (or should) form part in the insolvency proceeding. With respect to the latter situation the US courts tend to defer to the foreign insolvency proceeding. However, they tend to apply quite strict conditions (namely that the conditions requested are fulfilled by the foreign proceeding or administrator or court), he reports, referring to two parallel proceedings from the first Appellate decision (3d Circuit, 2002; see below “Lernout”). In this case, the Appellate judges refused to uphold an anti-suit injunction and instead “encouraged strongly” the lower court to make at least the attempt to enter into a direct communication with the Belgian Court.

*Westbrook, The Duty to Seek Cooperation in Multinational Insolvency Cases, in: Sarra (ed.), Annual Review of Insolvency Law 2004, 187*

In this article, Prof. Westbrook continues the discussion of the previous article because the lower court rejected in the subsequent decision the “strong recommendation” of the Court of Appeal to enter into communications with the foreign court on very specious grounds. Westbrook argues that there exists already at this point of time a duty of cooperation and justifies this allegation on five policy grounds. namely (i) potential unknown benefit of communication; (ii) potential resolution of misunderstandings about foreign law; (iii) communication and cooperation could lead to a negotiated result; (iv) court communication might provoke a more reliable response; (v) communication and cooperation serves international interests.

*LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 Cornell L.Rev. 696 (1999)*

In his article, Prof. LoPucki casts doubts on the alleged advantages of the “modern” universalistic attitude in cross-border insolvency law on the basis that it induces forum-shopping. Therefore, he proposes what might be called a modified territorialistic approach i.e., despite the splitting up into several territorial proceedings he considers direct communication between the stakeholders highly desirable. See also his article: *The Case For Cooperative Territoriality in International Bankruptcy, 98 Mich L. Rev. 2216 (2000)*.

*Farley / Leonard / Birch, Cooperation and Coordination in Cross-Border Insolvency Cases (paper delivered on the INSOL conference in May 2006; will be posted on the website of International Insolvency Institute: [www.iioiglobal.org](http://www.iioiglobal.org)).*

The authors present a description of the status quo in judicial co-operation on a rather general level. However, they put emphasis on the desirability of this institution and describe in more details the history of protocols and the more prominent Canadian cases in which the ALI Guidelines on direct judicial communication have been applied (e.g. Re Matlack; Re PSINet; Mosaic Group Inc.; Systech Retail Systems Corp.; Archibald Candy Corporation).

## Annex B

*Felixstowe Dock and Railway Co. v. U.S. Lines Inc.*; [1989] Q.B. 360 (1987).

*Re T & N Ltd*; [2005] B.C.C. 982.

The reason given in both cases was the fear (whether justified or not is irrelevant) that such communication would possibly amount to pre-judging future proceedings in England which were likely to come before court in (more or less) the same matter. It was, thus, the need to protect their neutrality and to prevent right at the outset becoming seen as biased or unduly influenced. In the second decision, the following sentence deserves quotation: “Inter-court communications could have a vital role to play in major cross-border insolvencies ... But in considering an application for inter-court communications the court must necessarily proceed on a case-by-case basis, balancing the desirability of inter-court communications against other relevant factors.”

In the case called *Cenargo* (reported extensively by Susan Moore in an article reprinted on the website of the International Insolvency Institute: [www.iiiglobal.org](http://www.iiiglobal.org) under “Committees”) a phone call between the English and the US judge terminated a long battle between lawyers and other stakeholders (leading to all sorts of injunctions and contempt of court accusations) after a Chapter 11 proceeding had been commenced in the US and – two weeks thereafter – an administration proceeding in England.

*Lernout & Hauspie Speech Products N.V. v. Stonington Partners, Inc.*, 268 B.R. 395 (U.S. D. Del., 2001); reversed 310 F.3d 118 (U.S. 3<sup>rd</sup> Cir., 2002; reprinted on the International Insolvency Institute website as quoted supra); on remand 301 B.R. 651 (U.S. Bankr. D. Del., 2003) [For this case, see also the two articles by Prof. Westbrook described in Annex A].

Lernout was a Belgium company which had merged with two US companies. One year later, it filed two bankruptcy proceedings on (allegedly) the same day – one Chapter 11 in the US, one Concordat in Belgium. The dispute in question arose from a creditor’s claim the ranking of which was unclear as to whether it was determined by Belgian or US bankruptcy law. Whereas the first decision applied the US law, the Court of Appeal remanded and expressed instead the “strong recommendation” to the Bankruptcy Judge to enter into direct communication with the Belgium officials (both administrators and court). In the third decision, the lower court refused to follow this recommendation on rather specious grounds without having made any attempt to communicate.

## Annex C

*Eidenmüller, Der nationale und der internationale Insolvenzverwaltungsvertrag, ZZP 114, 2001, 3; Wittinghofer, Der nationale und internationale Insolvenzverwaltungsvertrag, 2004.*

Both authors advocate the promotion of what they call “administration contract” but express strong reservation when it comes to the inclusion of judges. This attitude is explicable only as the product of differing philosophies: whereas the Common Law judiciary – in particular, in equity-related matters – understands statutory (so far) uncovered areas in the law as permission to rule, their Civil Law counterparts understand them as a prohibition in the sense that action by the Judge has not been explicitly permitted.

In Re *AIOC Corporation*: (available at: [www.iiiglobal.org/international/protocols.html](http://www.iiiglobal.org/international/protocols.html))

This Protocol in this case contains the terms of an agreement between the Chapter 11 Trustee (the Trustee) and the Swiss Bankruptcy Office (SBO) as regards the conduct of bankruptcy proceedings pertaining to AIOC Corporation and AIOC Resources AIG. In April 1996, involuntary petitions were filed in the US Bankruptcy Court for the Southern District of New York. In August 1996, involuntary petitions were filed in the District Court for the canton of Zug, Switzerland. By the Protocol, the Trustee and the SBO agree to “work together in good faith to effect an orderly and equitable liquidation of the Resources Group” (para. I.C.). It appears that there were assets of the Resources Group in Switzerland, Grand Cayman, South Africa, Brazil, Japan, Sweden, England and Germany (Schedule 1).

The terms were agreed in the light of the principles proposed in the IBA's Cross Border Insolvency Concordat (para. I.D.). Amongst the key provisions, the parties to the Protocol (the Parties) agree to establish a coordinated claims reconciliation process, a coordinated litigation strategy, a coordinated strategy to marshal and liquidate any remaining assets and a coordinated mechanism for distributing assets to creditors consistent with both US and Swiss law (para. I.E.) The Parties further agree “to have any and all claims recognized in both the Resources Chapter 11 Case and the Swiss Proceedings without the need for additional filings by any creditor that has not filed a claim in both proceedings”. The Protocol goes on to elaborate on the details of this arrangement, but unfortunately, pages 6 and 7 of the Protocol are missing from the .pdf file available on the website cited above. It has not yet been possible to locate a complete scan elsewhere. The scan resumes on page 8 with a provision that nothing in the Protocol “shall prevent the Bankruptcy Court and the Swiss Court from refusing to approve or take an action required by this agreement if such action were manifestly contrary to public policy”.

Paragraph III.A. provides that the Parties “will jointly oversee and administer the orderly winddown of Resources” and III.B. that each party “shall attempt in good faith to obtain the consent of the other Party prior to” taking certain actions such as disposing of shares or seeking consolidation or merger. Re non Bank claims, paragraph III.E.1. makes the Parties' responsible for the claims reconciliation process for claims filed in their respective jurisdictions. Re Bank claims, paragraph III.E.2. assigns primary responsibility for the claims reconciliation process of the banks that filed in the US to the Trustee, irrespective of whether such claims had also been filed in the Swiss proceedings. The SBO is allocated primary responsibility in relation to claims by banks that had filed a claim in the Swiss

proceedings only. III.E.3. sets out procedures for fixing and allowing claims, while paragraph IV. outlines the Parties' approach to a coordinated litigation strategy. Paragraph V. provides that the Trustee will have primary responsibility for the winddown of Non Swiss Subsidiaries, and shall seek consent from the SBO in relation to certain acts such as disposing of shares and assets, and commencing insolvency proceedings or litigation. Paragraph VI. is a similar provision by which primary responsibility for the winddown of Swiss Subsidiaries is granted to the SBO. VI.B. authorizes the Trustee to commence parallel insolvency proceedings in the US in relation to Swiss Subsidiaries should the SBO commence insolvency proceedings in relation to them, and the Trustee deem it necessary. VII. relates to AIOC Corporation and states that the Trustee can act independently of the SBO as regards that entity, save that it shall provide notice prior to taking certain measures including seeking merger with Resources or any Swiss subsidiary, anything that would have a material adverse effect of Resources or any Swiss subsidiary, or converting the Corp. Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code.

In re Joseph Nakash: (available at: [www.iiiglobal.org/international/protocols.html](http://www.iiiglobal.org/international/protocols.html))

Joseph Nakash (“the Debtor”) was a citizen of the United States with diverse business interests worldwide. In December 1993, the Official Receiver of the State of Israel (“the Receiver”), acting as liquidator of the North American Bank Ltd (NAB), obtained a judgment against the Debtor in the District Court of Jerusalem amounting to some \$160 million. The Receiver subsequently commenced bankruptcy proceedings in the Tel Aviv District Court, after which the Debtor commenced Chapter 11 bankruptcy proceedings in the US Court.

A particularly comprehensive and detailed protocol was arrived at by the Examiner in the US Chapter 11 proceedings (“the Examiner”), the Receiver, the US Bankruptcy Court for the Southern District of New York (“the US Court”) and the District Court of Jerusalem, Israel (“the Israeli Court”). Interestingly, the order by which the Examiner was appointed specifically directed him “to develop a protocol for harmonizing and coordinating proceedings concerning the Debtor before the Courts of the United States and the State of Israel”. The Israeli District Court of Jerusalem had also expressed support for the development of an agreement between the interested parties and the relevant US and Israeli Courts. The US Court considered the Protocol in the light of written objections to it, a Letter of Request from a Judge of the Israeli District Court and oral argument from, among others, the Examiner, the Receiver and the Debtor.

The stated objectives of the Protocol include the “[h]armonization and coordination of proceedings concerning the Debtor before the Courts of the United States and the State of Israel”; the “[p]romotion of the orderly and efficient administration of proceedings involving the Debtor”; the “[i]dentification, preservation and maximization of value of the Debtor’s world-wide assets for the collective benefit of the Debtor’s world-wide creditors, the Debtor and other parties in interest”; and the “[c]oordination of activities and sharing of information in order to reduce the costs involved and to avoid duplication of efforts.”

The first paragraph of the Protocol establishes a theme that subsequently recurs several times. It states that the US and Israeli Courts are independent and sovereign, but that, while exercising independent jurisdiction and authority, they “will seek to cooperate and



coordinate with each other in good faith”. The subsequent paragraphs note the parties’ agreement that the US Court shall have primary authority over actions (eg investigations, marshalling actions, discovery) in the US whereas the Israeli Court will have primary authority over such actions in Israel (paragraphs 2 and 3). The non-primary court in these instances agrees “to respect the jurisdiction of [the primary court] to the maximum extent it is lawfully able to do so”. For actions to be taken outside the US and Israel, the parties agree to apply to both the Israeli Court and the US Court. The Courts undertake that “to the maximum extent they are lawfully able to do so, [they will] seek to coordinate their efforts in order to avoid conflicting rulings whenever possible”. The Israeli and US Courts further express their desire “(to the extent they are lawfully able to do so) that, to the extent practical and feasible under the circumstances, they should endeavor to consult with each other through the Official Receiver and the Examiner and/or via telephonic conference in order to attempt to coordinate their efforts and avoid conflicting rulings.” Paragraph 6 entitles the parties to seek emergency relief “without being required to seek concurrent relief from the other Court, provided that in all such situations” the applicant party shall use its reasonable best efforts as promptly as practicable to obtain the other Court’s ex post facto approval of the relief.

Paragraph 7 notes that because the Receiver’s investigation into the Debtor’s assets has already begun, for reasons of “continuity, efficiency and expense” that investigation should continue and the Examiner should not begin an independent investigation. Paragraphs 9 and 10 provide for cooperation and consultation between the Examiner and the Receiver in the course of the latter’s investigation as well for information-sharing, and procedures in the event that the Examiner disagrees with the Receiver’s proposed course of action.

By Paragraphs 11 and 12, the US and Israeli Courts grant relief to the Receiver and the Examiner respectively from the stays applied by each countries’ bankruptcy legislation so as to permit them to continue their investigations. Paragraphs 17 and 18 are to the same effect in relation to marshalling actions, as is paragraph 22 in relation to actions by the Receiver further to previously filed involuntary petitions. Paragraph 13 provides that the Receiver shall only pursue marshalling actions in a way that is consistent with the Protocol. Paragraph 14 provides for consultation and cooperation between the Receiver and the Examiner in relation to the former’s marshalling actions. Paragraph 15 directs that any interest of the Debtor in property targeted by the Receiver after the commencement of the Debtor’s Chapter 11 case “shall be subject to the concurrent jurisdiction of the US Bankruptcy Court and the Courts of Israel and all assets so attached shall be preserved and maintained in situ for the benefit of all creditors of the Debtor wherever located.” It also requires the consent of both the Receiver and the Examiner prior to execution against assets.

Paragraphs 19-21 provide for the sharing of non-public information with the Examiner in confidence so as to “facilitate the full and cooperative exchange of information”. The Examiner agrees to preserve the confidentiality of that information save for in certain circumstances including in the case of a court order to disclose it or where the information relates to improper conduct (paragraph 20).

Paragraph 24 provides that in the event that the Israeli courts approve involuntary petitions filed with it, the parties “shall use their best efforts in good faith to encompass the resultant

Israel bankruptcy case...within the ambit of this [Protocol]”. Paragraphs 25-28 set out arrangements in respect of fees, costs and expenses and the estates that shall bear them.

By paragraph 29, the Israeli Court recognizes the Examiner as the emissary of the US Court and grants leave for the Examiner to appear and be heard in the Courts of Israel in respect of all matters relating to the Debtor. Paragraph 30 grants the same rights to the Receiver in the US Court.

Paragraph 34 reiterates that “nothing contained [in this Protocol] shall be construed to increase, decrease or otherwise affect in any way the independence, sovereignty or jurisdiction of the relevant national courts, expressly including “their ability to provide appropriate relief on an ex parte or ‘limited notice’ basis”.