

American Law Institute
and the **International Insolvency Institute.**

Joint project:

Principles for Cooperation in International Insolvency Cases
Manifesto of Aims and Objectives

Reporters:

Professor Ian Fletcher, Herbert Smith Professor of International Commercial Law, University College
London, England

Professor Bob Wessels, Professor of Commercial Law, Vrije University, Amsterdam, The Netherlands

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1. Background

In February 2006 the American Law Institute appointed us as Reporters of the project *Principles for Cooperation in International Insolvency Cases* (hereinafter referred to as the “*Global Principles Project*”), approved by the Institute’s Council in December 2005. The origins of this Project are in the ALI’s Transnational Insolvency Project, conducted between 1995 and 2000, for which the Reporter was Professor Jay L. Westbrook. The objective of that Project was to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA countries of the United States, Canada and Mexico. The Project involved the analysis of domestic and international aspects of insolvency in all three NAFTA countries. The analysis led to the creation of the *Principles of Cooperation among the NAFTA Countries* (the “*NAFTA Principles*”) which was published as a separate volume in the four volume text of the Transnational Insolvency Project (2003).

The *NAFTA Principles* consist of substantive principles for cooperation in international cases and procedural recommendations for cooperation in international cases. The *NAFTA Principles* include (in Appendix 2) the text of the widely-publicized *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (the “*Guidelines*”) which represent procedural suggestions for increasing communications between courts and between insolvency administrators in cross-border cases. The *NAFTA Principles*, together with the *Guidelines*, were approved at the Annual Meeting of the American Law Institute in May 2000. Since then, in a sustained collaboration between the American Law Institute and the International Insolvency Institute (III), the *Guidelines* have been translated into 13 languages to date with further translations in progress. Internationally, the III has circulated the *Guidelines* to virtually every significant commercial or bankruptcy court in the major economies of the world. In their original and translated versions, the *Guidelines* provide an internationally-accessible standard for communications between courts and insolvency administrators in different countries. The ALI has published the *Guidelines* in bilingual editions so that the original authentic English version appears in every copy of the *Guidelines* that is distributed.

The *Guidelines* in general codify experiences and practices resulting from some fifteen cross-border cases in which courts in different jurisdictions have mutually aligned their approaches, their communication, their supervision and their completion of a cross-border insolvency case (whether based on a Protocol or not). The Canadian Justice Farley, *ABI Journal*, March 1998, already submitted the necessity of an approach and a settlement of international insolvency court cases comprising direct communication in the form of ‘real time litigation’ (as distinct from ‘autopsy litigation’ within which it ‘... doesn’t matter much whether the case is dealt with this month or next year’). Judges, mainly in US and Canada, have applied the *Guidelines* in several cases. Most of these cases can be found on <<www.iiiglobal.org>>. The *Guidelines* are in accordance with the Ontario Superior Court of Justice’s Rules of Civil Procedure not a static document, but to be used as a tool to be adapted and modified to fit the circumstances of individual cases, ‘... and to change and to evolve as experience is gained from working with them.’ They were adopted by the Supreme Court of British Columbia (Canada) in Autumn 2004 and endorsed by the Uniform Law Conference of Canada, an institution devoted for over 80 years to promoting uniformity in Canadian provincial legislation.

They relate e.g. the *Matlack* case (2001), within which the Ontario Court in its initial order ‘.....seeks and requests the aid and recognition of all Courts and judicial, regulatory or administrative bodies in Canada and the United States Bankruptcy Court for the District of Delaware and all other Courts and judicial, regulatory and administrative bodies of the United States to aid and assist this Court in carrying out the terms of this Order’. The Ontario Superior Court’s final order provided ‘..... that a Cross-Border Insolvency Protocol between this Court and the United States Bankruptcy Court

substantially in the form attached as Schedule 'C' to this order and the Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases developed by the American Law Institute in the form attached as Schedule '1' to the Cross-Border Insolvency Protocol be and the same are hereby approved but shall not become effective until they have been approved by the United States Bankruptcy Court for the District of Delaware.' Other cases include *PSI Net* (2001), *Systech Retail Systems Corp.* (2003) *Androscoggin Energy LLC* (U.S. Bankruptcy Court District of Maine, 12 January 2005).

The next stage

Having laid the groundwork for a wider dissemination of the *NAFTA Principles* and their accompanying *Guidelines*, the ALI and III considered that it would be timely and appropriate to undertake a systematic evaluation of the possibility of adapting them so as to provide a standard statement of principles suitable for application on a global basis in international insolvency cases. Hence, the *Global Principles Project* was conceived and approved as a joint venture between ALI and III.

2. Objectives of the Global Principles Project

The first objective of the project is to establish the extent to which it is feasible to achieve a worldwide acceptance of the *NAFTA Principles* together with the *Guidelines*, either in their existing form or, if necessary, with modifications or variations. That will entail a systematic consultation exercise, conducted with the help of experts from a wide range of jurisdictions and legal traditions drawn from around the world and able to pronounce authoritatively on the suitability of applying the *Principles* (or conversely, any obstacles to doing so) from the perspective of each country and legal system with which they have direct personal experience.

Secondly, in addition to exploring the degree of global consensus that can be achieved in relation to the original ALI *Principles* (together with the *Guidelines*) we believe this Project provides an appropriate vehicle with which to explore what can now be attained in terms of global standards to be applied in the transnational insolvency process. A number of issues which have an important bearing upon the overall quality and efficiency of the international insolvency "process" were either not directly addressed in the context of the earlier Project which yielded the *NAFTA Principles*, or were there dealt with on a somewhat tentative basis. These include the principles and procedures to be applied where insolvency occurs within multinational corporate groups (the subject of Procedural Principles 23 and 24 of the *NAFTA Principles*). Further issues which we believe to be in need of study and development are the conflict of laws aspects of insolvency, including choice of law rules and the principles relating to the exercise of jurisdiction, together with the elaboration of internationally tenable definitions of some of the fundamental terms and concepts employed in the standardised principles. Also of direct relevance to the goal of promoting effective co-operation in international cases are some very practical questions, including how best to resolve such issues as the different working languages of courts operating concurrently in different regions and time zones. In such situations, direct communication between courts may be impracticable, but it may be that some alternative means of achieving cooperation through one or more designated intermediaries could be established.

Thirdly, we consider it to be both appropriate and necessary to take account of the considerable volume of work that has already been carried in this field in recent years. A number of projects and studies which either directly or indirectly relate to insolvency matters have been conducted by such organisations as the Asian Development Bank, the World Bank, the IMF, the European Bank for Reconstruction and Development, UNCITRAL, UNIDROIT and the ALI and III, and by other bodies of experts (for example, the *Principles of European Insolvency Law 2003*, and the *Draft European Guidelines for Co-operation between Liquidators*). Collectively these documents amount to a striking demonstration of the globalisation of commercial activity in the present era, and the raised awareness internationally of the need to address the issues associated with insolvency in a cross-border context.

3. The Impact of Globalization and the Need for Co-ordination

Some of the central issues addressed in the original *NAFTA Principles* (including recognition, relief, and cooperation) have since 2000 found their way into national or federal legislation. In the USA, since 17 October 2005, Chapter 15 US Bankruptcy Code is in place. It enacts virtually all of the provisions of the 1997 UNCITRAL Model Law on Cross-Border Insolvency and thereby encapsulates several of the ALI's Principles. In Great Britain amended version of the Model Law became effective as of 4 April 2006. Other countries have also enacted legislation within which the Model Law, and hence some aspects of the ALI Principles, are reflected. These countries include Mexico, Japan, Poland, Romania, South-Africa and Spain. Within the projected time frame for the project it is envisaged that more countries will follow, including Argentina, Australia, Canada, Colombia, Ecuador, India, Italy, New Zealand and Pakistan.

Since 2002 a significant contribution to the process of international insolvency has been made by the EU Insolvency Regulation. Several topics dealt with in ALI's *Principles* now are applicable on a compulsory basis in 24 of the 25 EU Member States. These topics include e.g. cooperation in parallel proceedings, recognition, access to court, information and communication, claims filing and avoidance actions.

In 2004 the United Nations Committee on International Trade Law (UNCITRAL) published its *Legislative Guide on Insolvency Law*, which forms a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features. As a novelty the Guide contains certain recommendations regarding applicable law in international insolvency cases. Like ALI's *NAFTA Principles*, the *Legislative Guide* contains considerations and suggestions with regard to group consolidation.

Hence, as an integral part of the *Global Principles Project*, we believe it would be a challenging but valuable task – indeed a necessary one - to identify such core values and principles as can be discovered from a comparative analysis of the available texts, evaluated in the context of the consultative debate among the participating experts.

4. Proposed Method of the Project

As outlined above, the aim is to have the Advisory Group reappraise the *NAFTA Principles* from the perspective of a wide and diverse array of national insolvency systems and legal traditions, in order to test the feasibility of their being endorsed as the embodiment of “global best practice” or “world standard” in the matters addressed therein. This stage of the project will be approached in an open-minded spirit, aiming at transparent and open debate, to ensure that any aspects of the *Principles* which may give rise to difficulties of transposition into the legal culture of any particular country or region can be properly and sensitively considered. If any particular issue cannot be resolved on the basis of a text of universal application acceptable to all, an accommodation may be sought by means of a proviso to allow the main principle to operate subject to certain necessary local modifications. In the course of this process, the extant array of internationally generated texts mentioned in sections 2 and 3 above will be studied with a view to ascertaining additional, complementary principles of law and practice which are considered to command general support. In this way it is hoped that the final text embodying the *Global Principles* will obtain the approbation of governmental authorities, domestic and international organisations, practitioners, and (most importantly) courts in their approach to the conduct of international insolvency matters in the future.

During the *Global Principles Project* the somewhat profuse array of texts will be analysed and assessed with the following aims:

- to describe how the ALI Principles are reflected in the texts or the recommendations of the agencies mentioned or of the legislative texts from the countries mentioned ;
- to describe, analyse and select topics from these texts for the feasibility of their being reflected in an expanded re-statement of the *ALI Principles* designed to be applicable as a “global standard”; and
- to describe, analyse and select any topics in the *ALI Principles* which are not already covered by these texts, for the feasibility of their being endorsed as the embodiment of a “global best practice” or “world standard” in the matters addressed therein.

5. Timing and Execution

It is not anticipated that there would be many actual physical meetings of the Advisory Group, although it seems appropriate to take advantage of the fact that a number of members of the Advisory Group are likely to gather for the III’s Annual Conference in New York in June 2007. The ALI is currently investigating the technological feasibility of using web-based or virtual meetings of the participants in the Advisory Group to consider and discuss the Principles to avoid the need for outside travel expenses. The following timeline is proposed for the completion of the Project within approximately 2-3 years:

June 2006: First meeting International Advisory Group (New York)

June-November 2006 Circulation of working documents to members of Advisory Group

November 2006: Report to ALI Board on Status and Progress

January 2007: First draft work in progress to International Advisory Group for comments

March 2007: Report to ALI Board on Status and Progress

June 2007: General meeting with International Advisory Group

November 2007: Report to ALI Board on Status and Progress

March 2008: Reporters' finalisation of tentative draft
Report to ALI Board on Status and Progress

May 2008: Circulate final tentative draft to International Advisory Group

June 2008: Final draft for discussion by the International Advisory Group

Sept.-Oct. 08: Finalise text/manuscript

May 2009: Final approval through ALI's processes

Further information:

Professor Ian Fletcher	T	++ 44 207 679 1417 or
		++ 44 207 679 1473 (Secretary)
	E	i.f.fletcher@ucl.ac.uk
Professor Bob Wessels	T	++ 31 78 639 00 28
	E	bwessels@bobwessels.nl