

GENERAL PRINCIPLES

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 in 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.

PROCEDURAL PRINCIPLES

Topic A. The Structure of an International Bankruptcy Case

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

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 case.

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.

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.

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 materials 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, to the proved 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 honour 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

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 received 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.

RECOMMENDATIONS FOR LEGISLATION OR INTERNATIONAL AGREEMENT

Recommendation 1: Model Law

Each of the NAFTA countries should adopt the Model Law on Cross-Border Insolvency.

Recommendation 2: Automatic Stay

The NAFTA countries should provide 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 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 on national citizenship, residence, or domicile. The provisions should also make such a plan under domestic law 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.