

The Bucharest voting results on the CoCo-Guidelines

Public Draft of the CoCo-Guidelines

During the Insol Europe annual congress in Bucharest (28 September – 1 October) Professor Bob Wessels and Professor Miguel Virgós have presented their Public Draft on the (non binding) European Communication and Cooperation Guidelines for Cross-border Insolvency (“CoCo Guidelines”). These guidelines aim to provide liquidators in parallel insolvency proceedings some guidance when they have to communicate and cooperate with each other pursuant to the EC Insolvency Regulation. The Public Draft contains 18 Guidelines concerning for example, the non-binding nature of these rules, the professional requirements for liquidators, the language to use, how to handle costs of fee’s which relate to more than one estate, how cooperation should take place (with a checklist of an agreed protocol). The guidelines are inspired by other best practice rules, like UNCITRAL Model Law and the American Law Institute’s Principle of Cooperation in Transnational Insolvency cases. The present ‘Public draft’ is developed with the help of a group of practitioners, judges and academics from 10 jurisdictions.

Voting results

With their presentation in Bucharest, Prof. Wessels and Virgos, were seeking to ‘test’ the rules against the experience of the Insol Europe practitioners. During this presentation around 200 members of Insol Europe that were present have - by electronic votes - answered 17 questions regarding some of the CoCo Guidelines. The first electronic voting showed that most of these members had reasonably long experience in insolvency practice: 0-5 years (**12%**), 6-10 years (**24%**), 11-20 years (**38%**), 21-30 years (**18%**) and over 30 years (**8%**). Some of the interesting results will be discussed in this article. It concerns the following questions that are addressed by the guidelines.

What are the duties of the secondary liquidator re providing information?

According to the insolvency regulation, the main liquidator is dominant. The secondary liquidator should therefore assist the main liquidator. The secondary proceedings however are inflexible, as their purpose is limited to liquidate the local assets. In that respect Guideline 8 says that where a reorganization plan can be adopted in secondary proceedings that would give better value to creditors in main proceedings or reduce the overall debt, the liquidator in main proceedings and the court shall take advantage of the opportunity to promote the adoption of this plan.

User conditions for the text are applicable. Consult: www.bobwessels.nl

According to article 31 (3) the liquidator in the secondary proceedings must give the liquidator in the main proceedings the opportunity to submit proposals on the realization or use of the assets in the secondary proceedings. To facilitate the submission of these proposals, Guideline 8 says that a liquidator in any secondary proceedings should for this purpose provide information to the liquidator in the main proceedings. The secondary liquidator is encouraged to provide advice to the main liquidator on how to best to proceed.

Guideline 8 was generally supported by the voting members considering their answers on the questions re the following hypothetical case. An expensive service contract regarding a database that supports the monthly reviews on sales, stocks, etc. is concluded between a UK establishment and X Ltd. The contract concerns both the UK office as well as the Dutch parent's location. The secondary liquidator in the UK wants to terminate the contract as soon as possible. According to **84%** the secondary liquidator is obliged to inform the main liquidator. **87%** found that the secondary liquidator is allowed to provide his best advice to the main liquidator. However **43%** voted that the secondary liquidator is not allowed to directly send a copy to the court supervising the main proceedings.

54% found that the secondary liquidator should be able to charge a fee, when a main liquidator specifically asks explanation of certain element of UK law. This brings us to Guideline 11 re costs.

How to handle costs of fee's which relate to more than one state?

According to guideline 11 re costs, liquidators fee's are funded from the assets of its own proceedings. However as the brief explanation of Guideline 11 clarifies, the imputation of costs arising before secondary proceedings are opened, which relate to those proceedings, are to be borne by those proceedings when opened. In this respect during the CoCo break-out session it was mentioned that this guideline appears to come into conflict with domestic rules in e.g. Austria and Germany governing 'pre-insolvency' costs (not allowing these costs to be funded by the estate). Discussed was also the problem of a different fee structure, which for example is much higher in the UK than in many other European countries. The view could be taken, that the imputation of costs should be to the jurisdiction of the office-holder, as this does not prejudice the position of the office-holder who may claim as

a debtor of the estate in any proceedings. To that extent, the retention of Guideline 11.2 serves no purpose.

How should cooperation take place?

According to guideline 12 re cooperation, cooperation takes place, to the maximum extent permissible under national law, with other liquidators with the view to minimizing conflicts between parallel proceedings and maximizing prospects. Cooperation may be best attained by the way of an agreement or protocol that establishes decision making procedures. A protocol should include for the coordination of court approval for decisions and actions whenever required and for communications with creditors as required under any applicable law. **73%** agreed that INSOL Europe should establish a “Committee Model Protocol”. This committee can further develop the draft protocol that Prof. Virgos and Wessels have concluded.

Regarding the content of such a protocol it is interesting that **52%** voted that information to creditors of a main and a secondary proceeding should be sent by a separate and not a joint letter to the creditors. Also **66%** voted that the creditors meetings should be separate and not joint meetings.

Should the court co-appoint the main liquidator in secondary proceedings?

Article 16.3 of the CoCo guidelines advises the court to co-appoint the main liquidator in a secondary proceedings, because it would form an appropriate way of insuring cooperation between liquidators in different proceedings under the court supervision. Considering the discussion during the CoCo breakout session it is not surprisingly that **63%** were not in favor of such an appointment. During these sessions it was discussed that Guideline 16.3 may cause problems for some jurisdictions where strict licensing rules or different criteria for appointment (which seem to be the case as the IP break-out session showed) apply. But, according to the breakout session, that might not be a reason to remove it.

Article 16.5 says that the court should encourage liquidators to report periodically, as part of national reporting duties, on the way these guidelines and/or agreed protocols are applied, including any practical problems which have been encountered. **73%** was generally in favor of such a duty.

Should the cooperation of courts be implemented in the insolvency regulation?

Mutual communication and cooperation between courts is not explicitly provided in the insolvency regulation, however it is not excluded and flows generally from the rationale of the duty of mutual assistance and cooperation between member states as provided in article 10 of the EC treaty. In this regard, guideline 16 encourages the cooperation of courts to manage insolvency proceedings efficiently. **78%** agreed that the cooperation of courts should be implemented in the insolvency regulation.

Call for suggestions and comments

As secretary of this Insol Europe's Academic Wing CoCo-project, I repeat an earlier call from Prof. Wessels to send an email to wvannielen@ujlaw.nl, with further suggestions, examples and problems, to ameliorate or complement the present public draft. Upon request you will then also receive the formal report with the complete Bucharest voting results.

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