

## **Towards A Next Step in Cross-border Judicial Cooperation**

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## Towards A Next Step in Cross-border Judicial Cooperation

### Introduction

In the first issue of this year's *Insolvency Intelligence* I touched upon what I regard as the themes of great interest for the coming years in Europe: a development to create EU-wide harmonised rules for business rescue and the strengthening of the model of communication and cooperation in cross-border insolvency cases.<sup>1</sup> On the latter topic I presented a short description of a project aiming at developing a set of non-binding rules for cross-border court-to-court cooperation in insolvency cases within the EU. The project, jointly developed by Leiden Law School and the Nottingham Law School, is funded by the European Commission and the International Insolvency Institute (III).<sup>2</sup> For the Commission, the research fits in the EU's project in the 'Civil Justice' Programme in order to contribute to the strengthening of the area of Freedom, Security and Justice in Europe.<sup>3</sup> After a period of over a year of study and consultation with a Review & Advisory Group, consisting of over forty academics and practitioners, including some twenty judges from all over Europe, in July 2014 the Final Public Draft of the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines*. In our work we have called them JudgeCo Principles and JudgeCo Guidelines. These principles and guidelines will be non-binding, to be applied in cross-border communication and cooperation in insolvency cases between courts within the European Union. These Principles and Guidelines will further develop court-to-court communication and coordination matters. The need for this development within the context of the European Union is clear: presently there have been several instances of cross-border judicial cooperation, without (at least for the continental EU Member States) any clear guidance on how to set up and conduct cross-border cooperation and how to take into account parties' legitimate interests.<sup>4</sup> Examples are the *BenQ* case, the *PIN* AG case, a case mentioned by one of our experts (court-to-court communication between Luxembourg and Hungary) or in the matter of *Lehman Brothers*. The Principles and Guidelines are now ready to be tested throughout Europe. Nottingham Law School professor Paul Omar and I will provide in two or

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<sup>1</sup> Bob Wessels, 'Themes of the Future: Rescue Businesses and Cross-border Cooperation', in: 27 *Insolvency Intelligence* 2014, pp. 4-9.

<sup>2</sup> The International Insolvency Institute (III) is a non-profit, limited-membership organization (around 300 members worldwide) dedicated to advancing and promoting insolvency as a respected discipline in the international field. Its primary objectives include improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings. See [www.iiiglobal.org](http://www.iiiglobal.org).

<sup>3</sup> The so-called Stockholm programme. On 11 March 2014 the European Commission presented its vision for the future EU justice policy until 2020, as a logical successor to the European Council's Stockholm Programme which ends in December 2014. In its Press Release 'Towards a true European area of Justice: Strengthening trust, mobility and growth', the Commission identifies three key challenges. See the Communication on the EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union (COM [2014] 144 final of 11 March 2014; [http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_144\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_144_en.pdf)). The Communication also sets the tone for the preferred approach to 'insolvency'. See my blog at <http://bobwessels.nl/?s=justice+agenda>.

<sup>4</sup> See Bob Wessels, *The Role of Courts in Solving Cross-border Insolvency Cases*, in: 24 *Insolvency Intelligence* 2011, p. 65-73.

three cities in Europe training for some sixty judges in working with these non-binding legal texts.<sup>5</sup>

### Building further on existing soft law

As the core basis for our work we took existing examples of soft law. Although not commonly known, in every day practice two sets of soft law in the area of cross-border communication exist. First of all, the European Communication and Cooperation Guidelines For Cross-border Insolvency (also: CoCo Guidelines), which have been endorsed by INSOL Europe during its Annual Congress in October 2007 in Budapest, Romania. The CoCo Guidelines initiative was jointly chaired by professor Miguel Virgós (University Autonomá, Madrid, Spain) and myself. These Guidelines have received attention both in legal literature as well as from judges and practitioners, and were for instance taken into account in the June 2009 Global Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies.<sup>6</sup> Further steps to promoting court-to-court communication were taken in June

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<sup>5</sup> The Principles are 26 in number, contained in a document of (at present) some 65 pages. The Guidelines contain 18 Guidelines; in all, a document of some 25 pages. If you are interested, you can provide observations and comments on our website, [www.tri-leiden.eu](http://www.tri-leiden.eu).

<sup>6</sup> See Bob Wessels and Miguel Virgós, European Communication and Cooperation Guidelines for Cross-Border Insolvency, INSOL Europe, 2007. See [www.insol-europe.org](http://www.insol-europe.org), or [www.bobwessels.nl](http://www.bobwessels.nl), weblog, document 2007-09-doc1. These Guidelines are explained in e.g. Bob Wessels and Miguel Virgós, Accommodating Cross-border Coordination: European Communication and Cooperation Guidelines For Cross-Border Insolvency, in: International Corporate Rescue, Vol. 4, Issue 5, 2007, 250ff. The European Communication & Cooperation Guidelines for Cross-border Insolvency of 2007 aim to provide rules to be applied by insolvency administrators within their duties to communicate and cooperate in cross-border insolvency instances to which the EU Insolvency Regulation is applicable. Their reception has been welcomed by scholars (e.g. Mario Hortig, *Kooperation von Insolvenzverwaltern*, Schriften zum Insolvenzrecht, Diss. Köln, Band 25, Baden-Baden: Nomos 2008: ‘... it is to be expected that the Guidelines will develop to the European standard of cooperation’, at 258), and insolvency practitioners (Stephen J. Taylor, The Use of Protocols in Cross Border Insolvency Cases, in: Pannen (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, 678ff (‘highly laudable initiative’, at 681); Lars Westpfahl, Uwe Goetker, Jochen Wilkens, *Grenzüberschreitende Insolvenzen*, Köln: RWS Verlag, 2008 (‘extremely helpful’, p. 125); Louise Verrill, The INSOL Europe Guidelines for Cross Border Communication, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, 39ff (‘[it is] important for the professions to be aware of and understand the need to adopt the CoCo Guidelines’, at 45). See also Andreas Geroldinger, *Verfahrenskoordination im Europäischen Insolvenzrecht. Die Abstimmung von haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2010, p. 31, qualifying the CoCo Guidelines as a first and by all means very promising attempt (*Ein erster durchaus vielversprechender Versuch*). See also Paul H. Zumbro, Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool, in: 11 Business Law International no. 2, May 2010, 157ff, at 167 (‘The CoCo Guidelines reflect best practices both inside and outside Europe’); Patrick E. Mears and Timothy S. McFadden, Court-to-Court Communications, Reform of European Regulation, ABI Journal, October 2012, at 33ff. For an in depth analysis of the CoCo Guidelines, see Olaf Benning, *International Prinzipien für grenzüberschreitende Insolvenzverfahren*, Schriften zum Verfassungsrecht, Band 45, Frankfurt: Peter Lang 2013, stressing another aspect, in that the CoCo Guidelines also can be used to trace European or even global principles for cross-border insolvency proceedings (‘... um Europaweit oder sogar weltweit geltenden Prinzipien für grenzüberschreitende Insolvenzverfahren zu ermitteln’), at 83.

2012, when the American Law Institute (ALI) and International Insolvency Institute (III) Global Principles for Cooperation in International Cases ('Global Principles') were published. These Global Principles include Global Guidelines for Court-to-Court Communications in International Insolvency Cases and were drafted by professor Ian Fletcher (University College London) and myself.<sup>7</sup>

Evidently, the proposed texts have been greatly influenced by the responses received from the Review & Advisory group to two questionnaires, received in July and in October 2013. The questionnaires contain a selection of the (June 2012) Global Principles, mentioned earlier. The chosen method to develop the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines has been a systematic evaluation of the possibility of adapting the June 2012 Global Principles<sup>8</sup> into an EU-context, as the project's ultimate aim is to provide a standard (legally non-binding) statement of Principles and Guidelines suitable for application within the framework of the EU Insolvency Regulation.

### The specific EU context

This specific EU context is generally reflected in six areas: (1) consistency with international norms, (2) goals of the EU, (3) the existence of national procedural law, (4) the existing Insolvency Regulation, (5) ongoing case law, and (6) developments within the EU legislature and the European Judicial community. I will explain these areas below.

#### (1) Consistency with international norms

Consistency with available international norms is of utmost importance, as Björn Laukemann has argued recently, referring to the 2012 Harmonisation report of Fletcher and me<sup>9</sup>, submitting that consistency with international norms and EU Principles as well as a fair balance between diverging interests among creditors or between a sufficient degree of legal certainty and regulatory flexibility within a economic context doubtlessly provide significant direction for further harmonisation approaches.<sup>10</sup> During the development of the Global Principles many of the publications related to 'insolvency', by such organisations as UNCITRAL, EBRD, the World Bank and INSOL Europe have been taken into account.<sup>11</sup> It has been an integral part of the evaluation to identify core values and principles that respondents of the Review & Advisory Group to two questionnaires (sent out during 2013) are aware of and which they feel should be considered in the evaluation of the present texts or in a proposal for a revised or a new 'Principle' or 'Guideline'. Such consistency should

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<sup>7</sup> For the Global Guidelines, see [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=85](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=85), or <http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm>. See Ian F. Fletcher and Bob Wessels, Shaping Rules for Coordination in International Corporate Insolvency Cases through Dialogue, in: European Company Law 7, issue 4 (2010), pp. 149-153.

<sup>8</sup> See for the method adopted the June 2012 Global Principles Report, par. 1.4.2.

<sup>9</sup> See I.F. Fletcher and Bob Wessels, Harmonization of Insolvency Law in Europe, Report 2012 Netherlands Association for Civil Law / *Preadvies 2012 uitgebracht voor de Vereniging voor Burgerlijk Recht*, Deventer: Kluwer 2012.

<sup>10</sup> Björn Laukemann, Structural Aspects of Harmonization in European Insolvency Law, Liber Amicorum professor Gilberte Closset-Marchal, 2013, 347ff, at 358.

<sup>11</sup> See for some ten sources the Global Principles Report, p. 22.

enhance certainty in European insolvency practice and stability in the furthering of the EU JudgeCo Principles and Guidelines.<sup>12</sup>

## (2) Goals of the EU: Judicial cooperation

Within the EU the theme cross-border judicial communication and cooperation is developed for the area ‘Freedom, Security and Justice’. This requires a proper functioning of the internal market on the basis that cross-border insolvency proceedings should operate efficiently and effectively resulting in the goal that the Principles and the Guidelines should be efficient and effective, whilst actively aiming at the strengthening of confidence in the functioning of the European judicial area. This is a challenge, as it is acknowledged by several respondents in the JudgeCo project that in some Member States the quality of judges is mediocre, the court’s infrastructure and available means are poor, the knowledge of the Insolvency Regulation is insufficiently developed, the experience to deal with international insolvency cases or the mastering of a second language (for instance English, German or French) is lacking<sup>13</sup>, whilst the awareness of the impact of international business is not often understood.<sup>14</sup>

## (3) Existence of national procedural law

Article 81 paragraph 2 of the Treaty on the Functioning of the EU (TFEU) provides that in developing judicial cooperation in civil matters having cross-border implications, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: ‘... (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.’ Several of the Global Principles aim to set non-binding rules related to matters regarding businesses that in many EU Member States form an integral part of national procedural law, many times in domestic legislation regarding civil procedure or insolvency procedural rules. In legal literature, however, it is questioned whether Article 81(2)(f) TFEU may form the basis for an alignment of the civil procedural rules of the Member States irrespective of the national or international character of the litigation at hand.<sup>15</sup> Where many of these rules not only apply to businesses, but also to

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<sup>12</sup> In the June 2012 Global Principles Report (at p. 55) it is furthermore explained that it has benefited from the experiences gained in (non-insolvency related) cross-border activities in the area of law and the recommendations made by judges and experts in some fifty jurisdictions, as well as the materials that have led to the ‘Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards’, included in Direct Judicial Communications, an emerging guidance from the Hague Conference on Private International Law, 2013.

<sup>13</sup> In general on this subject: Astrid Sadler, Practical Obstacles in Cross-border Litigation and Communication Between (EU) Courts, in: [www.erasmuslawreview.nl](http://www.erasmuslawreview.nl) (volume 5, Issue 3 (2012)).

<sup>14</sup> It should be added that several respondents have also criticized the quality of persons acting in a role as insolvency office holder, their understanding of the Insolvency Regulation, their lack of expertise and poor quality to deal with foreign insolvency office holders and/or courts.

<sup>15</sup> For this view, see C.H. van Ree, Harmonisation of Civil Procedure: An Historical and Comparative Perspective, in: Xandra E. Kramer and C.H. van Ree (eds.), Civil Litigation in a Globalised World, T.M.C. Asser Press, The Hague, 2012, 39ff., submitting that business will regard these as obstacles in their decisions where to produce, market or sell their products and services. Strong support for the view that differences in national procedural rules function as trade obstacles can be found by Hon. J.J. Spigelman (retired in 2010 as Chief Justice of New South Wales, Australia), see J.J. Spigelman, Transaction costs and international litigation, (2006) 80

natural persons (consumers) the respondents to the survey have been asked to take this observation into account.

#### (4) The existing European Insolvency Regulation

The EU Insolvency Regulation, now twelve years in force, is binding in its entirety and is directly applicable in the Member States in accordance with the Treaty establishing the European Union (see Article 47 EIR). It is therefore nonsensical to test the possible application of Global Principles that would contradict the mandatory, binding rules contained in the Regulation or those matters that clearly belong to the national domain of local procedural or insolvency law of the Member States. For this reason out of the 37 Global Guidelines ten have been analysed and selected that would most certainly be against the text of the Regulation or domestic law. These are Global Principles 7 (Recognition), 12 (Adjustment of Distributions), 13 (International Jurisdiction), 14 (Alternative Jurisdiction), 24 (Control of Assets), 26 (Cooperation), 32 (Avoidance Actions), 33 (Information Exchange), 34 (Claims) and 35 (Limits on Priorities). These Global Principles were left out of further study and research.

#### (5) Ongoing case law

New case law applying the EU Insolvency Regulation or judgments from national (higher) courts have also been taken into account. An example is provided by the judgment of 22 November 2012 of the Court of Justice of the European Union in the matter of *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak, V Christianapol sp. z o.o.* (Case C-116/11). Following the approval of a rescue plan (*procédure de sauvegarde*) by the French court in Meaux, the Polish court ‘... asked the Tribunal de commerce de Meaux whether the insolvency proceedings in France, which were main proceedings for the purposes of the Regulation, were still pending. The answer given by the French court did not provide the necessary clarification. The referring court then consulted an expert.’ The Polish court (*Sąd Rejonowy Poznań-Stare Miasto w Poznaniu*) then decided to stay the proceedings pending before it and to refer questions to the Court of Justice of the EU for a preliminary ruling, which led to the judgment that Article 27 of the EIR must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose: ‘... It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation’.<sup>16</sup>

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Australian Law Journal, 438ff; J.J. Spigelman, Cross-Border Insolvency: Co-operation or conflict? (2009) 83 Australian Law Journal, 44ff.

<sup>16</sup> From the Court’s arguments:

“59 As observed by the referring court, the fact remains that the opening of secondary proceedings, which, under Article 3(3) of the Regulation, must be winding-up proceedings, risks running counter to the purpose served by main proceedings, which are of a protective nature.

60 It should be noted that the Regulation provides for a certain number of mandatory rules of coordination intended to ensure, as expressed in recital 12 in the preamble thereto, the need for unity in the Community. In that system, the main proceedings have a dominant role in relation to the secondary proceedings, as stated in recital 20 in the preamble to the Regulation.

Therefore, the principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings to address the challenge (i) to have regard to the objectives of the main insolvency proceedings, and (ii) to take account of the scheme of the Regulation, which aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings. The introduction to the EU JudgeCo Principles and Guidelines only signals the challenge for such a court to communicate with the liquidator in the main proceedings and to ensure that he will cooperate. The challenge resulting from the judgment for cross-border court-to-court cooperation is addressed in the JudgeCo Principles.<sup>17</sup>

#### (6) Developments within the EU legislature and the European Judicial community

On 12 December 2012 the European Commission published a Proposal for a Regulation amending the EU Insolvency Regulation [COM(2012) 744], which includes a Report on the application of the EIR [Com(2012) 743].<sup>18</sup> This latter Application Report summarises experiences reported by all Member States in the course of 2012, and provides (at page 14): ‘... The duties to cooperate and communicate information under Article 31 of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings’.

In the Proposal itself, in Recital 20 to the EIR, it is expressed that main insolvency proceedings and secondary proceedings can only contribute to the effective realisation of the total assets if all the concurrent proceedings pending are coordinated. Then follows (the words underlined are new in comparison to the existing text):

‘(20) ... The main condition here is that the various liquidators and the courts involved must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. In particular, the liquidator should be able to propose a restructuring

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<sup>61</sup> The liquidator in the main proceedings thus has certain prerogatives at his disposal which allow him to influence the secondary proceedings in such a way that the protective purpose of the main proceedings is not jeopardised. (...)

<sup>62</sup> The principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which, ..., aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings’.

<sup>17</sup> The JudgeCo project has taken into account developments in applying Article 31 EIR in court cases, the use of the CoCo Guidelines, scholarly literature regarding ‘liquidator-to-liquidator’ communication and cooperation and initiatives to harmonise professional and ethical requirements for insolvency office holders. In the JudgeCo project, however, only those matters which have a bearing on court-to-court cooperation can be taken into account. The EU JudgeCo Guidelines relate to court-to-court cooperation; they do not address cross-border cooperation between courts and liquidators.

<sup>18</sup> [http://ec.europa.eu/justice/civil/commercial/insolvency/index\\_en.htm](http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm).

plan or composition or apply for a suspension of the realisation of the assets in the secondary insolvency proceedings ...’

The Proposal is infused by the strengthening of the paradigm of communication and cooperation in cross-border cases. Examples are an extended draft Article 31 (Cooperation and communication between liquidators)<sup>19</sup>, a new Article 31a (Cooperation and communication between courts)<sup>20</sup>, and a new article 31b (Cooperation and communication between liquidators and courts).<sup>21</sup> Articles 31 and 31a explicitly provide that cross-border cooperation between liquidators may take the form of an agreement or a protocol, whilst

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<sup>19</sup> Extended Article 31 - Cooperation and communication between liquidators:

“1. The liquidator in the main proceedings and the liquidators in the secondary proceedings shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. Such cooperation may take the form of agreements or protocols.

2. In particular, the liquidators shall:

(a) immediately communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;

(b) explore the possibility of restructuring the debtor and, where such possibility exists, coordinate the elaboration and implementation of a restructuring plan;

(c) coordinate the administration of the realisation or use of the debtor’s assets and affairs; the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings.”

<sup>20</sup> New Article 31a - Cooperation and communication between courts

“1. In order to facilitate the coordination of main and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint a person or body acting on its instructions.

2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. Cooperation may be implemented by any appropriate means, including

(a) communication of information by any means considered appropriate by the court;

(b) coordination of the administration and supervision of the debtor’s assets and affairs;

(c) coordination of the conduct of hearings,

(d) coordination in the approval of protocols.”

<sup>21</sup> New Article 31b - Cooperation and communication between liquidators and courts

“1. In order to facilitate the coordination of main and secondary insolvency proceedings opened with respect to the same debtor,

(a) a liquidator in main proceedings shall cooperate and communicate with any court before which a request to open secondary proceedings is pending or which has opened such proceedings and

(b) a liquidator in secondary or territorial insolvency proceedings shall cooperate and communicate with the court before which a request to open main proceedings is pending or which has opened such proceedings,

2. The cooperation referred to in paragraph 1 shall be implemented by any appropriate means including the means set out in Article 31a (3) to the extent these are not incompatible with the rules applicable to each of the proceedings.”

cooperation between courts could include in the approval of protocols.<sup>22</sup> Finally, in a new recital 20a it is stressed that the amended Insolvency Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated and the various liquidators and courts concerned are under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor (Article 42b of the Proposal). In the Proposal the final sentence of Recital 20 reads as follows:

‘In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law’.<sup>23</sup>

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22 There is an upcoming tendency to use protocols, in short: agreements between appointed insolvency officeholders to communicate and coordinate parallel pending insolvency proceedings, including group insolvencies. A cross-border agreement in international insolvency cases is ‘... an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest.’ The quoted description is taken from the Practice Guide on Cross-Border Insolvency Cooperation, which was adopted on 1 July 2009 by UNCITRAL, the United Nations Committee on International Trade Law. See Bob Wessels, Cross-border insolvency agreements: what are they and are they here to stay?, in: N.E.D. Faber, J.J. van Hees, N.S.G.J. Vermunt, *Overeenkomsten en insolventie*, Serie Onderneming en Recht, deel 72, Deventer: Kluwer 2012, 359ff; Moritz Becker, *Kooperationspflichten in der Konzerninsolvenz*, Köln: RWS Verlag Kommunikationsforum GmbH 2012, 109ff. Obvious questions for further research include: (i) Which law governs a protocol? Is Regulation no 593/2008 on the law applicable to contractual obligations (Rome I) applicable? Do parties have the freedom to choose applicable law? How does that relate to mandatory rules for instance on transparency of proceedings, protecting rights of creditors or a stay of proceedings? (ii) What is the legal character of a protocol? Is it substantial and/or procedural; a mix of private law and public law; can it bind courts? (iii) Protocol-parties: do all parties in an insolvency proceeding have permission to agree on a protocol? Must a court approve that an insolvency office holder will be bound by a protocol? What if this permission misses? What are the consequences of not using a protocol? (iv) Treatment of creditors: does the protocol, agreed between insolvency office holders and approved by courts ‘bind’ creditors? Do they still have additional rights? What is the effect on third parties? What if creditors aren’t pleased with the use or the content of a protocol? (v) Could these protocols include mediation and arbitration provisions and is not it time to start thinking about to establish a global ‘mediation and arbitration institute in matters of rescue and insolvency’? See e.g. Allen L. Gropper, The Arbitration of Cross-Border Insolvencies, in: 86 American Bankruptcy Law Journal 2012, 201ff.; Edna Sussman and Jenifer L. Gorski, Capturing the benefits of Arbitration for Cross Border Insolvency Disputes, in: Arthur W. Rovine (ed.), Contemporary Issues in International Arbitration and Mediation, Leiden – Boston: Martinus Nijhoff Publishers 2013, 158ff. On mediation, see Hon. James H. Peck, Settlement Talks in Chapter 11 After “WaMu”: A Plan Mediator’s Perspective, in: 22 American Bankruptcy Institute Law Review, Winter 2014, Number 1, 65ff.

<sup>23</sup> On 5 February 2014 the European Parliament (ordinary legislative procedure: first reading) adopted the ‘European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7 0413/2012 – 2012/0360(COD))’. Compared to the European Commission’s December 2012 proposal, there are quite some differences. Over 60 amendments to the Commission’s proposal have been

In the light of these developments, it has been submitted that, within the EU, there is an open attitude towards ‘best practices’ such as those under review in the JudgeCo-project. Indeed, an endorsement to take into account the Global Principles follows from Commission Staff Working Document, where it is stated: ‘In order to ensure the coordination of proceedings opened in several Member States, the Regulation obliges insolvency practitioners to communicate information and cooperate with each other. Several guidelines for practitioners on cooperation and communication in cross-border insolvencies have been developed by associations of practitioners [51]’.<sup>24</sup>

These developments have led to the question to the respondents in the JudgeCo project to allow themselves a forward-looking vision anticipating the challenges the judiciary in general faces.

### Importance of soft law

By applying the six elements as set out above, the EU JudgeCo Principles – although being a non-binding statement – are in line with the European context as set out and with international developments and other attempts at developing modes of international cooperation in the area of international insolvency.

So what, you may think, this is all non-binding soft law! I respectfully disagree. A strong signal of the practical use and guidance the 2012 Global Principles provide has been given by the Supreme Court of The United Kingdom (Conjoined Appeals in (1) *Rubin & Anor v Eurofinance SA & Ors* and (2) *New Cap Reinsurance Corp Ltd & Anor v Grant and others*) [2012] UKSC 46 (24), that did support its arguments on ‘...the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings ... and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties) ...’ and then referred to our 2012 Global Principles report.<sup>25</sup>

The Global Principles also contribute to the development of American law. The United States Court of Appeals for the Third Circuit (*in Re ABC Learning Centres*) on 23 August 2013 has made references to Global Principle 1, and cites that it elaborates ‘... the overriding objective [is to] enable courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor’s global assets, preserving where appropriate the debtors’ business, and furthering the just

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made; the European Parliament supports the suggested extension to the system of cross-border communication and cooperation. Early June 2014, the Council reached a general approach on the proposal for a Regulation amending Council Regulation No 1346/2000 on insolvency proceedings (10284/14). This general approach will constitute the basis for negotiations with the European Parliament in order to agree the final text of the regulation, to be expected at the end of 2014, see [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/143119.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/143119.pdf).

<sup>24</sup> Impact Assessment, SWD(2012) 416 final, at 24. Footnote [51] reads: ‘The most recent example are the Global Principles for Cooperation in international insolvency cases from the American Law Institute and the International Insolvency Institute, elaborated by Ian Fletcher and Bob Wessels (2012)’.

<sup>25</sup> ‘... It is ultimately derived from the civil law concept of a trader’s domicile, and was adopted in substance in the draft EEC Convention of 1980 as a definition of the debtor’s centre of administration: see ... American Law Institute, *Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012), Principle 13, pp 83 et seq.’

administration of the proceeding.’ Another part of the Global Principles report is cited too: ‘[T]he emphasis must be on ensuring that the insolvency administrator, appointed in that proceeding, is accorded every possible assistance to take control of all assets of the debtor that are located in other jurisdictions. Id. at cmt. to Global Principle 24.’<sup>26</sup>

## Conclusion

The court cases mentioned demonstrate the usefulness of soft law, providing not only food for thought but also guidance for courts. Unrelated to insolvency, in its method and result I regard the JudgeCo project briefly described above as an instrument of choice in solving international commercial disputes in which a new concept of ‘judicial comity’ is evolving, providing a framework of ground-rules for establishing and developing judicial dialogue both in a general context and in relation to a specific case.<sup>27</sup> In the light of history in England & Wales, cooperation between judges and academics as we have experienced in the JudgeCo project is truly remarkable.<sup>28</sup>

Direct and indirect court-to-court communication may enhance international collegiality that has emerged amongst judges in cross-border insolvency cases, a form of judicial globalisation that will lead to the development of more cross-border methodologies such as protocols. This is of considerable interest to EU Member States that already have adopted (e.g. Poland, Romania, UK, Slovenia and Greece) or are considering adopting the UNCITRAL Model Law on Cross-Border Insolvency 1997, whose Article 27 provides a non-exhaustive list of how cooperation may be implemented, including through communication between courts and office-holders as well as cooperation through co-ordinating concurrent proceedings. The *EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines* (or:

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<sup>26</sup> U.S. Court of Appeals for the Third Circuit (in *re ABC Learning Centres Ltd.*, No. 12-2808 (3rd Cir. 2013)). In the commentaries of Craig M. LaChance, Third Circuit Holds Chapter 15 Relief Extends to Assets Managed by Australian Receivership, *ABI Journal* November 2013, 55ff, and Maja Zerjal, *ABC Learning: The ABC of Chapter 15 is to Rely on Its Plain Meaning*, in: 2014 *International Corporate Rescue*, 37ff, the unique inclusion of soft law into a judicial decision remains unnoticed. In general soft law doesn’t do well before courts, see J. Klabbers, *The Undesirability of Soft Law*, in: 1998 *Nordic Journal of International Law* Vol. 67, 381ff, although from a recent study – in competition law – it follows that the EU Court is open for ‘soft instruments of governance’, see Oana Andreea Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union: An Introduction*, available via <http://ssrn.com/abstract=2356227>.

<sup>27</sup> As set out in the 2012 Global Principles report, according to Slaughter, judicial comity has four strands: (i) respect for a foreign court in its ability to apply the law honestly and competently, (ii) the entitlement, in the global task of judging foreign courts, to adjudicate those matters where local interests are closely involved, (iii) the strong judicial role in protecting individual rights, (iv) a greater willingness to clash with other courts when necessary, ‘as an inherent part of engaging as equals in a common judicial enterprise’, see A. Slaughter, *A Global Community of Courts*, 44 *Harvard International Law Journal* 2003, p. 191ff, at 206. See further the June 2012 Global Principles Report, p. 38ff. For various ways of judicial cooperation see Marco Bronkers, *The relationship of the EC courts with other international tribunals: non-committal, respectful or submissive?*, in: *Common Market Law Review* 44: 601-627, 2007; C.W.A. Timmermans, *Voorrang van het Unierecht door multilevel rechterlijke samenwerking*, in: *Sociaal-Economische Wetgeving* 2012-2, p. 50ff, and Pauline Koskelo, *The Need for a Common Judicial Culture in Europe – a Matter for Judges and Lawyers*, Address IBA Northern Europe Conference, Helsinki 3-4 September 2009, at [www.kko.fi/47788.htm](http://www.kko.fi/47788.htm).

<sup>28</sup> See Lord Neuberger of Abbotsbury, *Judges and Professors – Ships Passing in the Night?*, in: 77 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 2013, 233ff.

JudgeCo Principles and Guidelines), in its final form, will indeed symbolise a next step in cross-border judicial cooperation in insolvency cases and contribute to an efficient and effective administration of insolvency cases.

Below follows the black letter texts of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (draft; as per July 2014). It is evident that these are a product of participative discussion with a Review & Advisory Group, with the following members:

- Edward Bailey, Circuit Judge, Central London Civil Justice Centre, London, UK
- Inese Belicka, Judge, Zemgale Regional Court, Latvia
- Catherine Bridge, Counsel, EBRD, London, UK
- Hon. Sam Bufford, Distinguished Scholar in Residence, The Dickinson School of Law, Penn State Law; former United States Bankruptcy Judge in the Central District of California, Los Angeles, USA
- Pedro Caetano Nunes, Judge, Lisbon Civil Court, Portugal
- Andrea Csöke, Supreme Court of the Republic of Hungary, Hungary
- Monica Detesanu, Insolvency Judge, Brasov Court, Romania
- Eric Dirix, Justice of the Supreme Court Belgium, University of Leuven, Belgium
- Miodrag Dordevic, Supreme Court of the Republic of Slovenia, Slovenia
- Hon. James Farley, Senior Counsel to McCarthy Tetrault LLP, Toronto, formerly Judge Ontario Superior Court, Toronto, Canada
- Mary Finlay Geoghegan, Judge, High Court of Ireland, Ireland
- Jacqueline Frima, Head of the Insolvency Department, District Court of Rotterdam, The Netherlands
- Jasnica Garašić, Professor at the University of Zagreb, Croatia
- Patricia Godfrey, Nabarro LLP, London, UK
- Karin Guillaume, Vice-President of the Tribunal of Luxembourg, Luxembourg
- Daniel Guyder, Partner, Allen & Overy LLP, New York, USA
- Burkhard Hess, Professor at the Ruprecht-Karls-University, Heidelberg, Germany
- Anna Hrycaj, Judge, Regional Court Poznan, Poland
- Pekka Jaatinen, Senior Partner, Castrén & Snellman Attorneys Ltd, Finland
- Rosa Jansen, Chair of the Board of the Netherlands Training Centre for the Judiciary (“SSR”); Chair of the Steering Committee of the European Judicial Training Network, The Netherlands
- Kersti Kerstna-Vaks, Judge, Tartu Country Court, Estonia
- Rostislav Krhut, Insolvency Judge, Regional Court of Ostrava, Czech Republic
- Hristina Kirilova, Senior associate, Kambourov & Partners, Attorneys at Law, Sofia, Bulgaria
- Tuula Linna, Professor at the University of Lapland, Finland
- Ivan Mangatchev, Assistant Professor at the New Bulgarian University, Sofia, Bulgaria
- Nora Marinescu, BWSP Gobert & Partners, Budapest, Hungary
- Lecia Mattam, Judge, High Court for Commercial Law, Vienna, Austria
- Mincke Melissen, Senior Judge Court of Appeal Amsterdam, The Netherlands
- Mikael Mellqvist, President of the District Court in Visby, Gotland
- Mr Justice Alastair Norris, Justice of the High Court, London, UK
- Luciano Panzani, President of the Tribunal of Torino, Italy
- Marta Pertegás, First Secretary, Hague Conference on Private International Law, The Hague, The Netherlands
- Martin Prager, Partner, Pluta, Munich, Germany
- Susan Power Johnston, Weinstein & Riley, New York, USA
- Stathis Potamitis, Partner, Potamitis Vekris, Athens, Greece
- Fatima Reis Silva, Judge, Lisbon Commerce Court, Portugal
- Andreas Remmert, Justice of the Federal Court of Justice, Germany
- Ilse Renap, Judge of the Court of Appeal, Antwerp, Belgium
- Ignacio Sancho, President of the Commercial Division, Court of Appeal, Barcelona, Spain
- Rutger Schimmelpenninck, Partner, Houffhoff Buruma, Amsterdam, The Netherlands
- Hon. Elizabeth Stong, U.S. Bankruptcy Court, Eastern District of New York, USA
- Stephen Taylor, Isonomy, London, UK

- Heinz Vallender, Head of the Cologne Bankruptcy Court, Judicial District Court of Cologne; Professor at the University of Cologne, Germany; Chair, INSOL Europe Judicial Wing, Germany
- Jean-Luc Vallens, Judge of the Commercial Court, Strasbourg, France; Adjunct Professor at the University of Strasbourg, France
- Francisco de Borja Villena, Judge, Juzgado de lo Mercantil, Barcelona, Spain
- John Verrill, Partner, Chadbourne & Parke, London, UK

The EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases are preceded by the following introduction:

1. These EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases represent procedural suggestions for increasing communications between courts in cross-border insolvency cases as well as cross-border communications in those cases between courts and insolvency administrators. They will be abbreviated to: JudgeCo Guidelines. The Guidelines are numbered 1-18 and preceded by a Preamble which explains their function and contents. The EU Guidelines for Court-to-Court Communications in Cross-border Insolvency Cases are very closely based upon the Report *Global Principles for Cooperation in International Insolvency Cases*, in June 2012 presented to the American Law Institute (ALI) and International Insolvency Institute (III).<sup>29</sup> These Global Principles include a set of *Global Guidelines for Court-to-Court Communications in International Insolvency Cases*.<sup>30</sup> These, in turn, were closely following the text of the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ('ALI-Guidelines').<sup>31</sup> In national law reviews commentary and/or translations of the Global Principles and the Global Guidelines have been published in Germany<sup>32</sup>, China and Australia (both forthcoming).

Below, the individual *EU Guidelines for Court-to-Court Communications in Cross-border Cases Guidelines* are examined sequentially with supporting Commentary. These comments mainly flow from responses to the Questionnaires received from the Review & Advisory in September 2013, whilst revisions were included as a result of assessment and discussion of earlier drafts. It should be noted that in general there was a rather large consent to both the function and the contents of the June 2012 Global Guidelines for Court-to-Court Communications in International Insolvency Cases to be used in an European context.

2. At this juncture it must be mentioned that in May 2010 the German authors Busch, Remmert, Rüntz and Vallender (as of early 2014 these persons all are judges) have argued

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<sup>29</sup> These *Global Principles* were drafted by Professors Ian F. Fletcher (University College London, UK) and Bob Wessels (University of Leiden, the Netherlands). See for the full text <http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm>. Also referred to as: (June 2012) Global Principles Report. The Global Principles build further on the American Law Institute's Principles of Cooperation among the member-states of the North American Free Trade Agreement (the "ALI NAFTA Principles").

<sup>30</sup> See for its text June 2012 Report, p. 134ff. As such these were again closely following the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ('ALI-Guidelines') that were included as Appendix B within the ALI Principles of Cooperation among the NAFTA Countries (the ALI-NAFTA Principles), originally adopted by the ALI in May 2000.

<sup>31</sup> These ALI-Guidelines were included as Appendix B within the ALI Principles of Cooperation among the NAFTA Countries (the ALI-NAFTA Principles), originally adopted by the ALI in May 2000.

<sup>32</sup> See Christoph Paulus, *Globale Grundsätze für die Zusammenarbeit in grenzüberschreitenden Insolvenzen und Globale Richtlinien für die gerichtliche Kommunikation*, in: *Recht der Internationalen Wirtschaft (RIW)*, Heft 4/2014, pp. 194-211.

that the source of June 2012 Global Guidelines for Court-to-Court Communications in International Insolvency Cases, being the ALI Guidelines, should be seen as a valuable resource for cross-border judicial communications.<sup>33</sup> These authors conclude also that after a detailed analysis of these ALI Guidelines, it seems that also according to German domestic (procedural) law much more cross-border communication is possible than hitherto expected. Their assessment was made within the context of the authors' reading of three points of departure, laid down in the German Insolvency Act (*Insolvenzordnung*), being Articles 1 (Objectives of the insolvency proceeding), 5(1) (Principles of the Insolvency Proceeding; the insolvency court shall investigate ex officio all circumstances relevant to insolvency proceedings), and 21(1) (The insolvency court shall take all measures appearing necessary in order to avoid any detriment to the financial status of the debtor for the creditors until the insolvency court decides on the request). In the light of these points of orientation, and tested against German domestic law, the authors come to the result that, out of 17 ALI Guidelines, more than half of these can be accepted unconditionally and four of them in a modified form. Four ALI Guidelines can not be accepted, as these do not align with German procedural law, and therefore should not be taken into account in any protocol.<sup>34</sup> In developing the commentary to the individual JudgeCo Guidelines, the German analysis has been very instructive.

3. On July 1, 2011 UNCITRAL adopted a text entitled "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective". It is referred to below as UNCITRAL Judicial Perspective (2010). Its text has been developed in consultation with judges, insolvency professionals, UNCITRAL's Working Group V (Insolvency Law) and member States, during international workshops and colloquia. The Judicial Perspective (2010) intends to offer general guidance, from a judge's perspective, on the issues relevant to deciding an application of a foreign (main or non-main) insolvency proceeding, based on the intentions of those who crafted the UNCITRAL Model Law on Cross-Border Insolvency and the experiences of its use in practice.<sup>35</sup> In developing the JudgeCo Guidelines, the UNCITRAL Judicial Perspective (2010) has been taken into account.

## 2. Text of the EU JudgeCo Guidelines: preamble

1. These *EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases* comprise a set of eighteen guidelines. They are build on the June 2012 Global Guidelines for Court-to-Court Communications in International Insolvency Cases. These Global Guidelines were largely based of the American Law Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, which operate within the American

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33 See Peter Busch, Andreas Remmert, Stefanie Rüntz and Heiz Vallender, *Kommunikation zwischen Gerichten in Grenzüberschreitenden Insolvenzen. Was geht and was nicht geht*, NZI 2010, pp. 417-430; a shorter version in English is available via [www.justiz.nrw.de/WebPortal\\_en/projects/ieei/documents/public\\_papers/presentations\\_prague\\_2010/court\\_to\\_court\\_communication.pdf](http://www.justiz.nrw.de/WebPortal_en/projects/ieei/documents/public_papers/presentations_prague_2010/court_to_court_communication.pdf). It has been translated by Judge Eberhard Nietzer. These documents can also be accessed via [www.insolvenzrecht.jura.uni-koeln.de/6169.html](http://www.insolvenzrecht.jura.uni-koeln.de/6169.html).

34 The authors refer to ALI Principles 6, 9(2)(b), 12 and 14.34.

35 For the text of the Judicial Perspective, which dates from the second half of 2010, see A/CN.9/WG.V/WP.97 and A/CN.9/WG.V/WP.97/Add.1 and /Add.2 ([www.uncitral.org](http://www.uncitral.org)) and [http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial\\_Perspective\\_ebook-E.pdf](http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf)

Law Institute Principles of Cooperation in Transnational Insolvency Cases among Members of the North American Free Trade Agreement (NAFTA). Since their issuance in 2000, the landscape of international insolvency law has changed dramatically, providing or allowing for several forms of cross-border communication and coordination of insolvency proceedings pending in two or more jurisdictions, either by insolvency office holders and/or by courts. The EU JudgeCo Guidelines encapsulate the practical experiences of the global insolvency community which has worked with the original ALI Guidelines, and a systematic evaluation of the possibility of adapting the Global Guidelines so as to provide a standard statement of guidances and recommendations suitable for application within the EU in cross-border insolvency cases.

2. The following *EU Cross-Border Insolvency Court-to-Court Guidelines* intended to function within the context of the *EU Cross-Border Insolvency Court-to-Court Principles*, a non-binding statement, drafted in a manner to be used in the various civil-law as well as common-law jurisdictions in the EU. Accordingly these *EU Cross-Border Insolvency Court-to-Court Guidelines* do not intend to interfere with the independent exercise of jurisdiction by a national court involved, nor with the national and EU laws to which courts of the Member States are bound (JudgeCo Principle 1). The aim of these *EU Cross-Border Insolvency Court-to-Court Guidelines* ('JudgeCo Guidelines') is to enhance coordination and harmonization of insolvency proceedings that involve more than one Member State through communications among the jurisdictions involved. The JudgeCo Guidelines are meant to permit an efficient communication and a rapid cooperation in a developing insolvency case with cross-border effects, while ensuring due process to all concerned. At the same time they aim to allay many of the concerns typically entertained by litigants in such cases and to introduce a process which is transparent and clearly fair.

3. These JudgeCo Guidelines do not limit their character to a non-binding set of best practices. It is intended that a court which wishes to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. Originally, for the ALI Guidelines, the suggested adopting process, including its conditions, is the following:

- (i) A court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter;
- (ii) The adopting court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct;
- (iii) The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances.

It is likely that, for most courts in the EU Member States, such a formal adoption process cannot be followed. It could however be possible (e.g. in Member States such as Italy and the Netherlands) that courts publish general (non-binding) guidelines or opinions on how judges will treat certain (procedural) matters, indicating to practitioners how the court will treat certain cases. It may be the case that these courts could consider issuing a statement that they will treat an international insolvency case – as far as local law permits – taking into account the JudgeCo Guidelines.

4. The JudgeCo Guidelines assume that in cases where communication with other courts is needed, local procedures, including notice requirements, are employed. The JudgeCo Guidelines however do not address more detailed questions about the parties entitled to such

notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing). These items are intended to be governed by either the EU Insolvency Regulation or – which overwhelmingly will be the case – the provisions of procedural law in each jurisdiction involved.

5. As indicated in paragraph 2 above, it is evident that guidelines such as the JudgeCo Guidelines should fit in the overall system of procedural rules in a given Member State. However, in certain jurisdictions, one or more of the JudgeCo Guidelines will violate binding law, e.g. in Germany and Italy. In certain other jurisdictions, however, the law or the procedural rules concerning courts are silent or would allow a court to take notice of the Guidelines. Apart from legal rules, the responses to the Questionnaire and discussions with many experts involved in the development of the texts show that in a large majority of jurisdictions there is no objection to court-to-court communication on cultural, economic or practical grounds.

6. The text of the June 2012 Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Insolvency Cases followed rather literally the original text of the ALI Court-to-Court Guidelines. Some small amendments were made or words added to make the English understandable for readers who use English only as their second or third language. Also headings to the individual guidelines were added. The June 2012 Global Guidelines however do express that outside the original area of application (NAFTA: Canada, Mexico, USA) its goals and content is generally appreciated and be seen as guidance for courts confronted with the matters in these Guidelines. The *EU Cross-Border Insolvency Court-to-Court Guidelines* have been drafted making use of the comments received by the Review & Advisory Group and of terms or words which do align the text with for instance the terms used in the EU Insolvency Regulation.

7. The JudgeCo Guidelines, set out below, are presented as a flexible tool to manage cooperation and communication in each individual case. They are not presented as to be static, but in each individual cross-border insolvency case they should be available and open for adaptation, modification and tailoring to fit the circumstances of individual cases.

8. In consultation with judges and other experts UNCITRAL has expressed that courts may adopt guidelines, such as the ALI-NAFTA Court-to-Court Guidelines and explained these Guidelines' function as "... to coordinate their activities, foster efficiency and ensure that stakeholders in each State are treated consistently. Such guidelines typically are not intended to alter or change the domestic rules or procedures that are applicable in any country, and are not intended to affect or curtail the substantive rights of any party in proceedings before the courts. Rather, they are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate effectively with one another, and may be adopted by courts for general use or incorporated into specific insolvency agreements", see UNCITRAL Practice Guide, para. 10.<sup>36</sup>

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<sup>36</sup> See UNCITRAL: Practice Guide on Cross-Border Insolvency Cooperation Adopted by UNCITRAL on 1 July 2009, see [www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2009PracticeGuide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html).

**EU Cross-Border Insolvency Court-to-Court Cooperation Principles**  
[Full Black Letter Text Without Commentary] [Draft July 2014]

**Principle 1 (GP 3(i), (ii) and (iv)) International Status**

Nothing in these EU JudgeCo Principles is intended to:

- (i) Interfere with the independent exercise of jurisdiction by a national court involved, including in its authority or supervision over an insolvency administrator;
- (ii) Interfere with the national rules or ethical principles by which an insolvency administrator is bound according to applicable national law and professional rules; or
- (iii) Confer substantive rights, to interfere with any function or duty arising out of any applicable law and professional rules or to encroach upon any local law.

**Principle 2 (GP 3(iii)) Public Policy**

Nothing in these EU JudgeCo Principles is intended to prevent a court from refusing to take an action which would be manifestly contrary to the public policy of the forum state.

**Principle 3 (GP 1) Overriding Objective**

3.1. These EU JudgeCo Principles embody the overriding objective of enabling courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtor's business, and furthering the just administration of the proceeding.

3.2. In achieving the objective of Principle 3.1, due regard should be given to the interests of creditors, including the need to ensure that similarly ranked creditors are treated equally. Insolvency administrators should act fairly and proportionately in charging fees or costs. Due regard should also be given to the interests of the debtor and other parties in the case, so far as national law permits, and to the international character of the case.

3.3. All parties in an international insolvency case should further the overriding objective of Principle 3.1 and should conduct themselves in good faith in dealing with courts, insolvency administrators and other parties in the case.

3.4. Courts and insolvency administrators should cooperate in an international insolvency case with the aim of achieving the objective of Principle 3.1.

3.5. In the interpretation of these EU JudgeCo Principles due regard should be given to their international origin and to the need to promote good faith and uniformity in their application.

**Principle 4 (GP 2) Aim**

4.1. The aim of these EU JudgeCo Principles is to facilitate the coordination of the administration of international insolvency cases involving the same debtor, including where appropriate through the use of a protocol.

4.2. These Principles aim to promote in particular:

- (i) The orderly, effective, efficient and timely administration of proceedings;
- (ii) The identification, preservation and maximisation of the value of the debtor's assets, including the debtor's business, on a global basis;
- (iii) The sharing of information in order to reduce costs; and
- (iv) The avoidance or minimisation of litigation, costs and inconvenience to the parties in the proceedings.

4.3. These Principles aim to promote in each separate international insolvency case its administration with a view to:

- (i) Ensuring that creditors' interests are respected and that creditors are treated equally;
- (ii) Saving expense and reducing costs;
- (iii) Managing the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors and to the number of jurisdictions involved; and
- (iv) Ensuring that the case is dealt with effectively, efficiently and timely.

#### **Principle 5 (GP 4) Case Management**

5.1. Actively managing an international insolvency case involves coordination and harmonisation of proceedings with those in other states, except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be necessary in the circumstances.

5.2. If a court is managing the international insolvency case, it:

- (i) Should seek to achieve disposition of the international insolvency case effectively, efficiently and timely, with due regard to the international character of the case;
- (ii) Should manage the case to the maximum extent possible in consultation with the parties and the insolvency administrators involved and with other courts involved;
- (iii) Should determine the sequence in which issues are to be resolved, preferably laid down in an overall schedule for all stages of the proceeding;
- (iv) May hold status conferences regarding the international insolvency case.
- (v) Should arrange for the proper information to the insolvency administrator and/or the creditors about the coordination and harmonisation of the international insolvency case.

5.3. If an insolvency administrator is managing the international insolvency case, it:

- (i) Should seek to achieve disposition of the international insolvency case effectively, efficiently and timely, with due regard to the international character of the case;
- (ii) Should manage the case in consultation with the parties and the insolvency administrators involved and with courts involved;
- (iii) Shall hold status conferences regarding the international insolvency case;
- (iv) Should arrange for the determination of the sequence in which issues are to be resolved, preferably laid down in an overall schedule for all stages of the proceeding;
- (v) Will inform the court and/or the creditors about the coordination and harmonisation of the international insolvency case.

#### **Principle 6 (GP 5) Equality of Arms**

6.1. All judicial orders, decisions and judgments issued in an international insolvency case are subject to the principle of equality of arms, without any conditions, so that there should be no substantial disadvantage to a party concerned. Accordingly:

(i) Each party should have a full and fair opportunity to present evidence and legal arguments and each party shall receive reasonable time to do so;

(ii) Each party should have a full and fair opportunity to comment on the evidence and legal arguments presented by other parties.

6.2. For the purpose of deciding a dispute, the court should inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure.

6.3. Where the urgency of a situation calls for a court to issue an order, decision or judgment on an expedited basis, the court should so far as national law permits ensure:

(i) That reasonable notice, consistent with the urgency of the situation, is provided by the court or the parties to all parties who may be affected by the order, decision or judgment, including the major unsecured creditors, any affected secured creditors, and any relevant supervisory governmental authorities;

(ii) That each party may seek to review or challenge the order, decision or judgment issued on an expedited basis as soon as reasonably practicable, based on local law;

(iii) That any order, decision or judgment issued on an expedited basis is temporary and is limited to what the debtor or the insolvency administrator requires in order to continue the operation of the business or to preserve the estate for a limited period, appropriate to the situation. Such order, decision or judgment will contain a 'come back' clause to allow objections to be heard on a timely basis. The court should then hold further proceedings to consider any appropriate additional relief for the debtor or the affected creditors, in accordance with Principle 6.1.

#### **Principle 7 (GP 6)**

#### **Decision and Reasoned Explanation**

7.1. Upon completion of the parties' presentations relating to the opening of an insolvency case or the granting of recognition or assistance in an international insolvency case, the court should promptly issue its order, decision or judgment.

7.2. In cases where the court decides ex officio regarding the scheduling of proceedings, it should take into consideration parties' submissions on scheduling; all parties should cooperate and consult with one another concerning the scheduling of proceedings.

7.3. The court may issue an order, decision or judgment orally, which should be set forth in written or transcribed form as soon as possible.

7.4. The order, decision or judgment should identify:

(i) The name of the court and the number of the case;

(ii) The name and address (including email address) of the parties and of their counsels;

(iii) Any order previously made on any related subject;

(iv) The period, if any, for which it will be in force;

(v) Any appointment of an insolvency administrator and supervisory judge;

(vi) Any determination regarding costs;

(vii) The issues to be resolved;

(viii) The timetable for the relevant stages of the proceedings, including dates and deadlines;

(ix) The date showing the place and time of rendering the order, decision or judgment;

(x) The name of the judge(s) involved, and

(xi) The possibility of opposition or appeal to the order, decision or judgment and the period in which an opposition or an appeal must be made.

7.5. If the order, decision or judgment is opposed or appealed, the court should set forth the legal and evidentiary grounds for the decision.

**7.6. To the maximum extent possible, courts should encourage their orders, decisions or judgments to be published as soon as possible.**

**Principle 8 (GP 8) Stay or Moratorium**

**8.1. Insolvency cooperation may require a stay or moratorium at the earliest possible time in each State where the debtor has assets or where litigation is pending relating to the debtor or the debtor's assets.**

**8.2. The stay or moratorium should impose reasonable restraints on the debtor, creditors, and other parties.**

**8.3. If the local law does not provide an effective procedure for obtaining relief from the stay or moratorium, then a court should exercise its discretion to provide such relief where appropriate and to the extent possible under national law. Exceptions to the stay or moratorium should be limited and clearly defined.**

**8.4. A court should encourage publication of its decision to render a stay or a moratorium as soon as possible.**

**8.5. The decision to render a stay or a moratorium should be open to appeal.**

**Principle 9 (GP 11) Non-Discriminatory Treatment**

**Subject to EU JudgeCo Principle 2, a court is not allowed to discriminate against creditors or claimants based on the nature, the nationality, residence, registered seat or domicile of the claimant or on the nature of the claim.**

**Principle 10 (GP 16) Modification of Recognition**

**1. Where main insolvency proceedings are pending in another State, the court that is deciding whether to open secondary proceeding may postpone its decision where it becomes aware of evidence which warrants such action. Such evidence may include evidence that (i) there was fraud in the opening of the foreign main insolvency case, or that (ii) the foreign main insolvency case was opened in the absence of international jurisdiction as provided in Article 3 of the EIR.**

**2. Where main insolvency proceedings are pending in another State, the court that has opened secondary proceeding may postpone a hearing where it becomes aware of evidence in the meaning of paragraph 1 or may in such a case revoke its decision if national law allows such revocation.**

**Principle 11 (GP 18) Reconciliation of Stays or Moratoriums in Parallel Proceedings**

**Where there is more than one insolvency case pending with respect to a debtor, each court should minimise conflicts between the applicable stays or moratoriums.**

**Principle 12 (GP 19) Abusive or Superfluous Filings**

**Where there is more than one insolvency case pending with respect to a debtor, and the court determines that an insolvency case pending before it is not a main proceeding and that the forum state has little interest in the outcome of the proceeding pending before it, the court should consider to dismiss the insolvency case, if dismissal is permitted under its law and no undue prejudice to creditors will result.**

**Principle 13 (GP 20)            Court Access**

**13.1. An insolvency administrator representing a foreign main insolvency proceeding should have direct access to any court in any other Member State necessary for the exercise of its legal rights.**

**13.2. An insolvency administrator representing a foreign main insolvency proceeding should have the same access to any court in any other Member State as a domestic administrator has or would have had were domestic proceedings opened.**

**Principle 14 (GP 21)            Language**

**14.1. Where there is more than one insolvency case pending with respect to a debtor, the insolvency administrators and courts involved should determine the language in which communications should take place with due regard to convenience and the reduction of costs. Notices should indicate their nature and significance in the languages that are likely to be understood by the recipients.**

**14.2.**

**With due regard to local law and available resources, courts:**

**(i) Should permit the use of languages other than those regularly used in local proceedings in all or part of the proceedings, if no undue prejudice to a party will result.**

**(ii) Should accept documents in the language designated by the insolvency administrators without translation into the local language, except to the extent necessary to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties.**

**(iii) Should promote the availability of orders, decisions and judgments in languages other than those regularly used in local proceedings, if no undue prejudice to a party will result.**

**Principle 15 (GP 22)            Authentication**

**Where authentication of documents is required, courts should permit the authentication of documents on any basis that is rapid and secure, including via electronic transmission, unless good cause is shown that they should not be accepted as authentic.**

**Principle 16 (GP 23.1 – 23.3)            Communications between Courts**

**16.1 Courts before which insolvency cases are pending should, if necessary, communicate with each other directly or through the insolvency administrators to promote the orderly, effective, efficient and timely administration of the cases.**

**16.2. Such communications should utilise modern methods of communication, including electronic communications as well as written documents delivered in traditional ways.**

**16.3. The EU JudgeCo Guidelines for Court-to-Court Communication, presented as an Annex to these EU JudgeCo Principles, should be employed.**

**16.4. Electronic communications should utilise technology which is commonly used and be reliable and secure.**

**16.5. If courts are to manage an international insolvency case, they should consider the use of one or more protocols to manage the proceedings with the agreement of the parties, and approval by the courts concerned.**

**Principle 17 (GP 23.4 – 23.5)      Independent Intermediary**

**17.1. Courts should consider the appointment of one or more independent intermediaries within the meaning of Principle 17.2, to ensure that an international insolvency case proceeds in accordance with these EU JudgeCo Principles. The court should give due regard to the views of the insolvency administrators in the pending insolvency cases before appointing an intermediary. The role of the intermediary may be set out in a protocol or an order of the court.**

**17.2. An intermediary:**

- (i) Should have the appropriate skills, qualifications, experience and professional knowledge, and should be fit and proper to act in an international insolvency proceeding;**
- (ii) Should be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest;**
- (iii) Should be accountable to the court which appoints him or her;**
- (iv) Should be compensated from the estate of the insolvency case in which the court has jurisdiction.**

**Principle 18 (GP 25)      Notice**

**18.1. If an insolvency case appears to include claims of known foreign creditors from a State where an insolvency case is not pending, the court should assure that sufficient notice is given to permit those creditors to have a full and fair opportunity to file claims and participate in the case.**

**18.2. The court should encourage the publication of such notices in the Official Gazette (or equivalent publication, including any internet-registry) of each State concerned.**

**18.3. For the purposes of notification within the meaning of Principle 18.1, a person or legal entity is a known foreign creditor if:**

- (i) The debtor’s business records establish that the debtor owes or may owe a debt to that person or legal entity; and**
- (ii) The debtor’s business records or bookkeeping establish the address of that person or legal entity.**

**Principle 19 (GP27)      Coordination**

**19.1. Where there are parallel proceedings, each insolvency administrator should obtain court approval for any action affecting assets or operations in that forum if required by local law, except as otherwise provided in a protocol approved by that court.**

**19.2. An insolvency administrator should seek prior agreement from any other insolvency administrator in relation to matters concerning proceedings or assets in that administrator’s jurisdiction, except where emergency circumstances make this unreasonable.**

**19.3. A court should consider whether the insolvency administrator in a main proceeding, or his or her agent, should serve as the insolvency administrator or co-administrator in secondary proceedings to promote the coordination of the proceedings.**

**19.4. Courts should encourage insolvency administrators to report periodically, as part of national reporting duties, on the way these Principles and/or agreed Protocols are applied, including any practical problems which have been encountered.**

**Principle 20 (GP28)      Notice to Administrators**

The court shall ensure that an insolvency administrator receives prompt and prior notice of a court hearing or the issuance of a court order, decision or judgment that is relevant to or potentially affects the conduct of proceedings in which that administrator has been appointed.

**Principle 21 (GP29)                      Cross-Border Sales**

**21.1.** When there are parallel insolvency proceedings and assets are to be disposed of (whether by sale, transfer or some other process), courts, insolvency administrators, the debtor and other parties should cooperate in order to obtain the maximum aggregate value for the assets of the debtor as a whole, across national borders.

**21.2.** Where required to act, each of the courts involved should make orders approving disposals of the debtor's assets that will produce the highest overall value for creditors.

**Principle 22 (GP30) Assistance to Reorganisation**

If in another Member State a main insolvency proceeding is opened, which concerns a reorganisation with respect to the debtor, the court should conduct any parallel secondary proceeding in a manner that is consistent with the reorganisation objective in the main proceeding.

**Principle 23 (GP31)                      Post-Insolvency Financing**

Where there are parallel proceedings, especially in reorganisation cases, insolvency administrators and courts should cooperate to obtain necessary post-insolvency financing, including through the granting of priority or secured status to such lenders, with due regard to local law.

**Principle 24 (GP36)                      Plan Binding on Participant**

**24.1.** If a Plan of Reorganisation is adopted in a main insolvency proceeding and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon the debtor and the creditors who participate in the main proceeding.

**24.2.** For this purpose, participation includes:

- (i) Filing a claim;**
- (ii) Voting on the Plan; or**
- (iii) Accepting a distribution of money or property under the Plan.**

**Principle 25 (GP37)                      Plan Binding: Personal Jurisdiction**

If a Plan of Reorganisation is adopted in a main insolvency proceeding and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon any unsecured creditor who received adequate individual notice and over whom the court has jurisdiction in ordinary commercial matters under the local law.

**Principle 26 (GP no equivalent)      Apply EU JudgeCo Principles by way of analogy**

**26. Courts and insolvency administrator should communicate and cooperate with each other in those international cases which do not fall under the application of the EU Insolvency Regulation and should apply the EU JudgeCo Principles by way of analogy.**





transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both courts subject to such directions as to confidentiality as the courts may consider appropriate; and

(iv) The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the courts.

#### **Guideline 9**

#### **E-Communication to Insolvency Administrator**

In the event of a communication between the court and an authorised representative of the foreign court or a foreign insolvency administrator in accordance with EU JudgeCo Guidelines 3 and 6 by means of a telephone or video conference call or other electronic means, unless otherwise directed by the court:

(i) Counsel for all affected parties should be entitled to participate in person during the communication with advance notice of the communication being given to all parties in accordance with the Rules of Procedure applicable in each court;

(ii) The communication should be recorded and may be transcribed (a written transcript may be prepared from a recording of the communication which, with the approval of the court, can be treated as an official transcript of the communication);

(iii) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of the court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other court and to counsel for all parties in both courts subject to such directions as to confidentiality as the court may consider appropriate; and

(iv) The time and place for the communication should be to the satisfaction of the court. Personnel of the court other than judges may communicate fully with the authorised representative of the foreign court or the foreign insolvency administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the court.

#### **Guideline 10**

#### **Joint Hearing**

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(i) Each court should be able to simultaneously hear the proceedings in the other Court;

(ii) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the directions of that court, be transmitted to the other court or made available electronically in a publicly accessible system in advance of the hearing. Transmission of such material to the other court or its public availability in an electronic system should not subject the party filing the material in one court to the jurisdiction of the other court;

(iii) Submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other court to make submissions to it;



