We Can Work It Out: Cross-border Judicial Cooperation in Insolvency Cases in the EU

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The title of this contribution is inspired by the 1965 Lennon & McCarthy's song:
Try to see it my way
[……]
While you see it your way
[……]
We can work it out

Introduction

1. Early 2014 I touched upon what I regard as a theme of great interest for the coming years in Europe: the strengthening of the model of communication and cooperation in cross-border insolvency cases.[1] 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 Union and the International Insolvency Institute (III).[2] For the European Union, the research fits seamlessly 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.[3]

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1 B. Wessels, "Themes of the Future: Rescue Businesses and Cross-border Cooperation", *Insolvency Intelligence*, vol. 27, n° 7, 2014, pp. 4-9.

2 The JudgeCo project is co-funded by the Civil Justice Programme of the European Union and by the International Insolvency Institute (III). 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 restructuring. See www.iiiglobal.org.

3 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 ended 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). The Communication also sets the tone for the preferred approach to 'insolvency'. See my blog at http://bobwessels.nl/ ?s=justice+agenda.

2. After a period of nearly two years of research, study, analysis, discussion and consultation with a Review & Advisory Group consisting of over forty academics and practitioners, including some twenty judges from all over Europe, in February 2015 *EU Cross-Border Insolvency Court-to-Court Cooperation Principles*, including a set of *EU Cross-Border Insolvency Court-to-Court Communication Guidelines*, have been published. In our work we have called them EU JudgeCo Principles and EU JudgeCo Guidelines. These principles and guidelines are non-binding rules, 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.[4] 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 the matter of *Lehman Brothers*. The EU JudgeCo Principles and Guidelines are now ready to be tested throughout Europe. The black letter text of the EU JudgeCo Principles and the EU JudgeCo Guidelines are listed in an annex to this contribution.[5]

Section 1. Building further on existing soft law

A. Existing soft law

3. 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.[6]

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4 See B. Wessels, "The Role of Courts in Solving Cross-border Insolvency Cases", *24 Insolvency Intelligence* 2011, pp. 65-73.

5 The 26 Principles are contained in a document with explanatory commentary of some 80 pages. The Guidelines contain 18 Guidelines; in all, a document of some 25 pages. I have served as principle drafter of the JudgeCo Principles and Guidelines, with the assistance of professor Paul Omar (Nottingham Law School). If you are interested, please visit www.tri-leiden.eu or www.bobwessels.nl, weblog: 2015-02-docxx.

6 See B. Wessels and M. Virgós, *European Communication and Cooperation Guidelines for Cross-Border Insolvency*, INSOL Europe, 2007. See www.insol-europe.org, or www.bobwessels.nl, weblog,

B. Promote court-to-court communication

4. Further steps to promote court-to-court communication were taken in June 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.[7]

5. 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

document 2007-09-doc1. These Guidelines are explained in B. Wessels and M. Virgós, "Accommodating Cross-border Coordination: European Communication and Cooperation Guidelines for Cross-Border Insolvency", *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. M. 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 (S.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); L. Westpfahl, U. Goetker, J. Wilkens, *Grenzüberschreitende Insolvenzen*, Köln, RWS Verlag, 2008 ("*extremely helpful*", p. 125); L. Verrill, "The INSOL Europe Guidelines for Cross Border Communication" in B. Wessels and P. 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 A. 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 P.H. Zumbro, "Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool", *11 Business Law International* no. 2, May 2010, 157ff, at 167 ("The CoCo Guidelines reflect best practices both inside and outside Europe"); P.E. Mears and T.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 O. 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 Principien für grenzüberschreitende Insolvenzverfahren zu ermittlen*"), at 83.

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

adapting the June 2012 Global Principles 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.

Section 2. The specific EU context

6. This framework is generally reflected in six areas: (A) consistency with international norms, (B) goals of the EU, (C) the existence of national procedural law, (D) the existing Insolvency Regulation, (E) ongoing case law, and (F) developments within the EU legislature and the European judicial community. I will explain these areas below.

A. 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[8], 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 an economic context, doubtlessly provides significant direction for further harmonisation approaches.[9] 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.[10] It has been an integral part of the evaluation within the EU context 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 enhance certainty in European insolvency practice and stability in the furthering of the EU JudgeCo Principles and Guidelines.[11]

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8 See I.F. FLETCHER and B. 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.

9 B. LAUKEMANN, "Structural Aspects of Harmonization in European Insolvency Law", *Liber Amicorum professor Gilberte Closset-Marchal*, 2013, 347ff, at 358.

10 See for some ten sources the Global Principles Report, p. 22.

11 In the JudgeCo project we have also taken into account 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.

B. Goals of the EU: judicial cooperation

Within the EU the theme cross-border judicial communication and cooperation has been 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[12], whilst the awareness of the impact of international business is not often understood.[13]

C. 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.[14] Where many of these rules do not only apply to businesses, but also

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12 In general, on this subject: A. Sadler, "Practical Obstacles in Cross-border Litigation and Communication Between (EU) Courts", www.erasmuslawreview.nl (volume 5, Issue 3 (2012)).

13 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.

14 For this view, see C.H. van Ree, "Harmonisation of Civil Procedure: An Historical and Comparative Perspective" in X.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 *Australian Law Journal*, 438ff; J.J. Spigelman, "Cross-Border Insolvency: Co-operation or conflict?", (2009) 83 *Australian Law Journal*, 44ff.

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

D. The existing European Insolvency Regulation

The Insolvency Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Union (art. 47 EIR). It is therefore nonsensical to test the possible application of Global Principles that would contradict the 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 contradict 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.

E. 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). In short, this is the case: 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 keep 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*."[15]

[15] 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.*

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 (opened in another Member State), 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.

In the matter of *Burgo Group v Illochroma SA (*Case C-327/13), the Court of Justice of the EU, by its judgment of 4 September 2014, had to decide in a case in which a French court had opened main insolvency proceedings for all the companies of the Illochroma group, including Illochroma SA, incorporated in Belgium. The aim of the main insolvency proceedings was a winding up of the group. On 4 November 2008, Burgo Group (incorporated in Italy) presented the French liquidator with a statement of liability in the amount of 359.778.48 EUR, but the liquidator rejected this claim as it was filed too late. Burgo Group then requested the opening of secondary proceedings in respect of Illochroma in Belgium, but Illochroma SA and the liquidator contended that, since Illochroma has its registered office in Belgium, it cannot be regarded as an 'establishment' within the meaning of article 2 (h) of the Insolvency Regulation, with the argument that secondary proceedings are restricted to establishments without legal personality. On this specific point, the Court of Justice considered (in short) that it is possible to have an 'establishment' in the country in which the debtor has its registered office. Where the basis of the Insolvency Regulation is the interaction of main and secondary proceedings, within which the main proceeding is the dominant proceeding, it can be argued (as Burgo Group did) that the right to request the opening of secondary proceedings operates as a corrective to the principle that insolvency proceedings should have a universal scope and that the appointed liquidators are under a duty to cooperate with each other (art. 31 EIR). Or is opening of secondary proceedings just an option for the Court? The Court takes the latter view: the Insolvency Regulation must be interpreted to the effect that, "… *where the main*

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.

61 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. […]

62 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."

insolvency proceedings are winding-up proceedings, whether the court before which the action seeking the opening of secondary insolvency proceedings has been brought, may take account of criteria as to appropriateness is governed by the national law of the Member State within the territory of which the opening of secondary proceedings is sought". However, when establishing the conditions for the opening of secondary proceedings, Member States must comply with EU law and, in particular, its general principles, as well as the provisions of that regulation (and it refers to the Bank Handlowy case, cited above). Also in this case, it should be understood that secondary proceedings do not operate as an isolated incident. The court will need some insight and information regarding the main insolvency proceedings pending in another Member State.

This introduction to the EU JudgeCo Principles only signals the challenge for a court (in both cases mentioned) to communicate with the liquidator in the main proceedings and to ensure that he provides information to the court, allowing the court to make a balanced decision, and more generally, that he will cooperate. The challenge resulting from these judgments for cross-border court-to-court cooperation is addressed in these principles.[16]

F. 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].[17] 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 in roman type are new in comparison to the existing text):

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16 In the JudgeCo project, account has been taken of the 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 aim to address cross-border cooperation between courts and liquidators.

17 http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.

"(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* …"

The proposal is infused by the strengthening of the paradigm of communication and cooperation in cross-border cases. Since the date of the proposal (December 2012) until the finalisation of this report (December 2014), this paradigm has not substantially changed in the discussions the Commission has had with the European Parliament[18] and the Council.[19] Two years after issuing its proposal, on 5 December 2014, the new text of the Insolvency Regulation has been published ('Amended Insolvency Regulation').[20] Examples of the extension of communication and cooperation in cross-border cases in Europe are article 41 (Cooperation and communication between insolvency practitioners, generally extending the present article 31 EIR)[21], a new article 42

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18 See for related documents http://bobwessels.nl/2014/02/2014-02-doc2-european-parliament-adopts-changes-to-commissions-proposal-to-amend-the-insolvency-regulation/.

19 See for related documents http://bobwessels.nl/2014/06/2014-06-doc11-ministers-of-justice-council-on-amendments-european-commission-to-eu-insolvency-regulation/.

20 See http://bobwessels.nl/2014/12/2014-12-doc4-text-new-eu-insolvency-regulation-available/. Recital 20, quoted in the text, is recital 45 in the Amended Insolvency Regulation, but it is similar to the text in the 1346/2000 Regulation ("*…Main insolvency proceedings and secondary proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings. The main condition here is that the various insolvency practitioners 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 insolvency practitioner in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time…*"), mind that the term 'liquidator' is replaced throughout the full new text of the Amended Insolvency Regulation by 'insolvency practitioner'. In this Report this change of term has been followed.

21 Article 41 – Cooperation and communication between insolvency practitioners:
"*1. The insolvency practitioner in the main proceedings and the insolvency practitioner or practitioners in secondary proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings. Such cooperation may take any form, including the conclusion of agreements or protocols.*
2. In implementing the cooperation set out in paragraph 1, the insolvency practitoners shall:
(a) as soon as possible 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 insolvency practitioner in the secondary proceedings shall give the insolvency practitioner in the main proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings.

(Cooperation and communication between courts)[22], and a new article 43 (Cooperation and communication between insolvency practitioners and courts).[23] Finally, in a new recital 48, 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 insolvency practitioners and courts concerned shall cooperate and communicate with each other (art. 56-58 Amended Insolvency Regulation). The final sentence of recital 45 (of the Amended Insolvency Regulation) reads as follows:

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3. Paragraphs 1 and 2 shall apply mutatis mutandis to situations where, in the main or in the secondary insolvency proceedings or in one of the territorial insolvency proceedings concerning the same debtor and opened at the same point in time, the debtor remains in possession of his assets."

22 Article 42 – Cooperation and communication between courts:
"*1. In order to facilitate the coordination of main and territorial or 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 an independent person or body acting on its instructions, provided that this is not incompatible with the rules applicable to them.*
2. In implementing the cooperation set out in paragraph 1, the courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.
3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern
(a) coordination in the appointment of the insolvency practitioners;
(b) communication of information by any means considered appropriate by the court;
(c) coordination of the administration and supervision of the debtor's assets and affairs;
(d) coordination of the conduct of hearings;
(e) coordination in the approval of protocols, where necessary."

23 Article 43 – Cooperation and communication between insolvency practitioners and courts:
"*1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened with respect to the same debtor,*
(a) an insolvency practitioner 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;
(b) an insolvency practitioner in territorial or secondary 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, and
(c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary proceedings is pending or which has opened such proceedings;
in each case to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interests.
2. The cooperation referred to in paragraph 1 may be implemented by any appropriate means such as those set out in Article 42 (3)."

"*In their cooperation, insolvency practitioners 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 organisations active in the area of insolvency law, and in particular relevant guidelines prepared by UNCITRAL.*"

7. 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 EU JudgeCo project. Indeed, an endorsement to take into account the Global Principles follows from the Commission Staff Working Document (Impact Assessment, SWD (2012) 416 final), p. 24), 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].*" 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).*"

8. These developments have led to the question to the respondents to our questionnaires to allow themselves a forward-looking vision anticipating the challenges the judiciary in general will face in the near future. By applying these six aspects, the EU JudgeCo Principles and Guidelines – 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.

9. 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 supported 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.[24]

10. 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 insol-*

[24] *"… 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."*

vency 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 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."[25]

Section 3. EU Cross-Border Insolvency Court-to-Court Cooperation Principles

General Rules

11. The mentioned court cases 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.[26] In the light of history in England and Wales, cooperation between judges and academics as we have experienced in the JudgeCo project is truly remarkable.[27]

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25 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 C.M. LaChance, "Third Circuit Holds Chapter 15 Relief Extends to Assets Managed by Australian Receivership", *ABI Journal* November 2013, 55ff, and M. Zerjal, "ABC Learning: The ABC of Chapter 15 is to Rely on Its Plain Meaning", 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", 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 O.A. 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.

26 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 M. Bronkers, "The relationship of the EC courts with other international tribunals: non-committal, respectful or submissive?", *Common Market Law Review* 44: 601-627, 2007; C.W.A. Timmermans, "Voorrang van het Unierecht door multilevel rechterlijke samenwerking", *Sociaal-Economische Wetgeving* 2012-2, p. 50ff, and P. 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.

27 See Lord Neuberger of Abbotsbury, "Judges and Professors – Ships Passing in the Night?", 77 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 2013, 233ff.

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

Principle 1. 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 practitioner;

(ii) Interfere with the national rules or ethical principles by which an insolvency practitioner 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. 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. Overriding Objective

3.1. These EU JudgeCo Principles embody the overriding objective of enabling courts and insolvency practitioners 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 practitioners 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 practitioners and other parties in the case.

3.4. Courts and insolvency practitioners 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. 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. 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. Dependent on national law case management is provided by an insolvency practitioner, a court or in a form of cooperation between these two.

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 practitioners 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 practitioner and/or the creditors about the coordination and harmonisation of the international insolvency case.

5.3. If an insolvency practitioner is managing the international insolvency case, s/he:

(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, the insolvency practitioners 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. 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 practitioner reasonably 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. 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 practitioner 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. 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. 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 10. 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 11. Modification of Recognition

11.1. 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.

11.2. 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 12. 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. Court Access

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

Principle 14. Language

14.1. Where there is more than one insolvency case pending with respect to a debtor, the insolvency practitioners and the 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 practitioners without translation into the local language provided that (a) any such document is accompanied by a short description, written in the local language and signed by or on behalf of the insolvency practitioners, confirming in generic terms the nature of the document being filed and provided also that (b) if having considered such description the court concludes that a translation of part or all of such document is required in

order to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties, it may require the insolvency practitioners to provide the same on such terms as the court may think fit;

(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. 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. Communications between Courts

16.1. Courts before which insolvency cases are pending should, if necessary, communicate with each other directly or through the insolvency practitioners 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. For such communications the EU JudgeCo Cross-Border Insolvency Court-to-Court Communication Guidelines 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. 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 practitioners 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. Notice to Creditors

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. Coordination

19.1. Where there are parallel proceedings, each insolvency practitioner 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 practitioner should seek prior agreement from any other insolvency practitioner in relation to matters concerning proceedings or assets in that practitioner's jurisdiction, except where emergency circumstances make this unreasonable.

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

19.4. Courts should encourage insolvency practitioners 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. Notice to Insolvency Practitioners

The court shall ensure that an insolvency practitioner 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 practitioner has been appointed.

Principle 21. 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 practitioners, 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. 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. Post-Insolvency Financing

Where there are parallel proceedings, especially in reorganisation cases, insolvency practitioners 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. 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. 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. Apply EU JudgeCo Principles by way of Analogy

Courts and insolvency practitioners 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.

Section 4. Guidelines for interpretation

Guideline 1. Overriding Objective

1.1. These EU Cross-Border Insolvency Court-to-Court Communications Guidelines ('EU JudgeCo Guidelines') embody the overriding objective to enhance coordination and harmonisation of insolvency proceedings that involve more than one state through communications among the jurisdictions involved.

1.2. The EU JudgeCo Guidelines function in the context of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles ('EU JudgeCo Principles') and therefore do not intend to interfere with the independent exercise of jurisdiction by national courts.

Guideline 2. Consistency with Procedural Law

2.1. Except in circumstances of urgency, prior to a communication with another court, the court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its state.

2.2. Where a court intends to apply these EU JudgeCo Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted in each individual case or proceedings before they are applied.

2.3. Coordination of EU JudgeCo Guidelines between courts is desirable and officials of both courts may communicate in accordance with EU JudgeCo Guideline 9 (iv) with regard to the application and implementation of the EU JudgeCo Guidelines.

Guideline 3. Court-to-Court Communication

3.1. A court may communicate with another court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonising proceedings before it with those in the other jurisdiction.

3.2. A court should obtain in advance the consent of all parties affected by these communications before disclosing the information communicated in the meaning of EU JudgeCo Guideline 3.1.

Guideline 4. Court to Insolvency Practitioner Communication

4.1. A court may communicate with an insolvency practitioner in another jurisdiction or an authorised representative of the court in that jurisdiction in connection with the coordination and harmonisation of the proceedings before it with the proceedings in the other jurisdiction.

4.2. A court should obtain in advance the consent of all parties involved to disclose information communicated in the meaning of EU JudgeCo Guideline 4.1.

Guideline 5. Insolvency Practitioner to Foreign Court Communication

5.1. A court may permit a duly authorised insolvency practitioner to communicate with a foreign court directly, subject to the approval of the foreign court, or through an insolvency practitioner in the other jurisdiction or through an authorised representative of the foreign court on such terms as the court considers appropriate.

5.2. If the conditions of Guideline 5.1 are met, the foreign court, the insolvency practitioner in the other jurisdiction or the authorised representative of the foreign court should respond to the communication, provided that the insolvency practitioner can produce an authenticated copy of the court order by which he was appointed.

Guideline 6. Receiving and Handling Communication

A court may receive a communication from a foreign court or from an authorised representative of the foreign court or from a foreign insolvency practitioner. The court should respond directly if the communication is from a foreign court (subject to EU JudgeCo Guideline 8 in the case of two-way communications). The court may respond directly or through an authorised representative of the court or through a duly authorised insolvency practitioner if the communication is from a foreign insolvency practitioner, subject to local rules concerning ex parte communications.

Guideline 7. Methods of Communication

To the fullest extent possible under any applicable law, a communication from a court to another court may take place by or through the court:

(i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(ii) Directing counsel or a foreign or domestic insolvency practitioner to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the court to the other court in such fashion (as may be appropriate) and providing advance notice to counsel for affected parties in such manner as the court considers appropriate; or

(iii) Participating in two-way communications with the other court by telephone or video conference call or other electronic means, in which case EU JudgeCo Guideline 8 should apply.

Guideline 8. Court-to-Court E-Communication

In the event of a communication between the courts 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 either of the two courts:

(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 between the courts should be recorded and may be transcribed (a written transcript may be prepared from a recording of the communication which, with the approval of both courts, should 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 either 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 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 Foreign Insolvency Practitioner or Foreign Court Representative

In the event of a communication between the court and an authorised representative of the foreign court or a foreign insolvency practitioner 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 practitioner 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 a 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 system, accessible by the parties involved in the hearing in advance of such 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 submis-

sions is appearing, unless the representative is specifically given permission by the other court to make submissions to it;

(iv) Subject to EU JudgeCo Guideline 8 (ii), the court should be entitled, so far as the national law permits, to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish rules for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing; and

(v) Subject to EU JudgeCo Guideline 8 (ii), the court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both courts and to coordinate and resolve any procedural or non-substantive matters relating to the joint hearing.

Guideline 11. Authentication of Regulations

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognise and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 12. Orders

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates. The court should also accept that such orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders.

Guideline 13. Service List

The court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the court in the other jurisdiction ('Non-Resident Parties'). All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

Guideline 14. Limited Appearance in Court

The court may issue an order or issue directions permitting the foreign insolvency practitioner or a representative of creditors in the proceedings in the other jurisdiction or an authorised representative of the court in the other jurisdiction to appear and be heard by the court without thereby becoming subject to the jurisdiction of the court.

Guideline 15. Applications and Motions

15.1. The court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the court, not apply to applications or motions brought by such parties before the court in the foreign jurisdiction or that relief be granted to permit such parties to bring such applications or motions before the court in the foreign jurisdiction on such terms and conditions as it considers appropriate.

15.2. Court-to-court communications in accordance with EU JudgeCo Guidelines 7 and 8 hereof may take place if an application or motion brought before the court affects or might affect issues or proceedings in the court in the other jurisdiction.

Guideline 16. Coordination of Proceedings

16.1. A court may communicate with a court in another jurisdiction or with an authorised representative of such court in the manner prescribed by these EU JudgeCo Guidelines for the purposes of coordinating and harmonising proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other court wherever there is commonality among the issues and/or the parties in the proceedings.

16.2. The court should, absent compelling reasons to the contrary, so communicate with the court in the other jurisdiction where the interests of justice so require.

Guideline 17. Directions

17.1. Directions issued by the court under these EU JudgeCo Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other court.

17.2. Any directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both courts.

17.3. If either court intends to supplement, change, or abrogate directions issued under these EU JudgeCo Guidelines in the absence of joint approval by

both courts, the court should give the other courts involved reasonable notice of its intention to do so.

Guideline 18. Powers of the Court

Arrangements contemplated under these EU JudgeCo Guidelines do not constitute a compromise or waiver by the court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the court or before the other court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the orders made by the court or the other court.