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# EU Cross-Border Insolvency Court-to-Court Cooperation Principles

*Black Letter Text Without Commentary*

*Subjects covered:*

EU Cross-Border Insolvency Court-to-Court Cooperation Principles

EU Cross-Border Insolvency Court-to-Court Communications Guidelines



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# 1. Preface

1. This publication presents a set of 26 EU Cross-Border Insolvency Court-to-Court Cooperation Principles ('EU JudgeCo Principles') and 18 EU Cross-Border Insolvency Court-to-Court Communications Guidelines ('EU JudgeCo Guidelines'). The EU JudgeCo Principles will strengthen efficient and effective communication between courts in EU Member States in insolvency cases with cross-border effects. They have been produced by a team of scholars of Leiden Law School and Nottingham Law School (led by professors Jan Adriaanse and Paul Omar and myself) in a period of two years (2013-2014) in collaboration with some fifty experts, including 25 judges representing just as many different countries. The publication only contains the black letter text. For a more extended version, with introduction and commentaries, please consult [www.eujudgeco.eu](http://www.eujudgeco.eu) or [www.tri-leiden.eu](http://www.tri-leiden.eu).

2. The EU Cross-Border Insolvency Court-to-Court Cooperation Principles are a sign of the time, in that they promote international cooperation in the insolvency area, achieving greater and timely coordination among countries in multinational business reorganisations or restructurings. They, in short, include principles on their non-binding status and their objectives, case management of courts and the equal treatment of creditors and principles about the judicial decisions itself, on its reasoning and for instance on providing a stay or moratorium. Several principles relate to the course of the proceedings, such as notifications and authentication of documents, and principles on the outcome of judicial cooperation, for instance cross-border sales, assistance to a reorganisation or rules for binding creditors to an international reorganisation plan.

3. The EU JudgeCo Principles try to overcome present obstacles for courts in EU Member States such as formalistic and detailed national procedural law, concerns about a judge's impartiality, uneasiness with the use of certain legal concepts and terms, and, evidently language. The texts further build on existing experience and tested resources, especially in cross border cases in North America, but set into an EU insolvency law context. These Principles include a set of very practical EU JudgeCo Guidelines to facilitate communications in individual cross-border cases. The project was funded by the European Union and the International Insolvency Institute (III) ([www.iiiglobal.org](http://www.iiiglobal.org)).

4. The draft texts have been tested on their suitability in practice by said experts as well as during training and discussion sessions with over 100 judges, with positive results. Evidently, the proof will be in the concrete use in practice of the EU JudgeCo Principles. In the near future within the European Union judicial cooperation and communication will be a cornerstone in the efficient and effective administration of insolvency cases, as will be laid down in the amendments to the Insolvency Regulation. Insolvency judges understand the challenges international business is bringing to them and I am confident that the principles will significantly contribute to the architecture of European insolvency law and an efficient and trustworthy role of courts therein. The EU JudgeCo Principles and Guidelines certainly can serve as a significant guide.

Prof. Dr. Bob Wessels

Em. Professor International Insolvency Law  
Leiden University  
*December 2014*





## **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.



**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 Communications 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.





**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;





**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.



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