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II EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases

[Full Black Letter Text Without Commentary]

Guideline 1 Overriding Objective

1.1. These EU Cross-Border Insolvency Court-to-Court 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 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 involved the disclose information communicated in the meaning of EU JudgeCo Guideline 3.1.

Guideline 4 Court to Insolvency Administrator Communication

4.1. A court may communicate with an insolvency administrator 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 the disclose information communicated in the meaning of EU JudgeCo Guideline 4.1.

Guideline 5 Insolvency Administrator to Foreign Court Communication

5.1. A court may permit a duly authorised insolvency administrator to communicate with a foreign court directly, subject to the approval of the foreign court, or through an insolvency administrator 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 administrator in the other jurisdiction or the authorised representative of the foreign court should respond to the communication, provided that the insolvency administrator 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 administrator. 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 administrator if the communication is from a foreign insolvency administrator, 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 administrator 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 E-Communication to Court

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 Insolvency Administrator

In the event of a communication between the court and an authorised representative of the foreign court or a foreign insolvency administrator in accordance with EU JudgeCo Guidelines 3 and 6 by means of a telephone or video conference call or other electronic means, unless otherwise directed by the court:
(i) Counsel for all affected parties should be entitled to participate in person during the communication with advance notice of the communication being given to all parties in accordance with the Rules of Procedure applicable in each court;
(ii) The communication should be recorded and may be transcribed (a written transcript may be prepared from a recording of the communication which, with the approval of the court, can be treated as an official transcript of the communication);
(iii) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of the court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other court and to counsel for all parties in both courts subject to such directions as to confidentiality as the court may consider appropriate; and
(iv) The time and place for the communication should be to the satisfaction of the court. Personnel of the court other than judges may communicate fully with the authorised representative of the foreign court or the foreign insolvency administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the court.

Guideline 10 Joint Hearing

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:
(i) Each court should be able to simultaneously hear the proceedings in the other Court;
(ii) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the directions of that court, be transmitted to the other court or made available electronically in a publicly accessible system in advance of the hearing. Transmission of such material to the other court or its public availability in an electronic system should not subject the party filing the material in one court to the jurisdiction of the other court;
(iii) Submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other court to make submissions to it;
(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 Guidelines 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 administrator 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.

1. Introduction

1. These EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases represent procedural suggestions for aligning and increasing communications between courts in cross-border insolvency cases as well as cross-border communications in those cases between courts and insolvency administrators. They will be abbreviated to: EU JudgeCo Guidelines. The EU JudgeCo Guidelines are numbered 1-18 and are preceded by a Preamble which explains their function and contents. These EU Guidelines for Court-to-Court Communications in Cross-border Insolvency Cases are very closely based upon the Report *Global Principles for Cooperation in International Insolvency Cases*, in June 2012 presented to the American Law Institute (ALI) and International Insolvency Institute (III).[1] These Global Principles include a set of *Global Guidelines for Court-to-Court Communications in International Insolvency Cases.*[2] These, in turn, were closely following the text of the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ('ALI-Guidelines').[3]

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

3. At this juncture it must be mentioned that in May 2010 the German authors Busch, Remmert, Rüntz and Vallender (as of early 2014 these persons all are judges) have argued that the source of June 2012 Global Guidelines for Court-to-Court Communications in International Insolvency Cases, being the ALI Guidelines, should be seen as a valuable resource for cross-border judicial communications.[4] These authors conclude too that after a detailed analysis of these ALI Guidelines, it seems that also according to German domestic

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

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

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

4 See Peter Busch, Andreas Remmert, Stefanie Rüntz and Heiz Vallender, *Kommunikation zwischen Gerichten in Grenzüberschreitenden Insolvenzen. Was geht and was nicht geht,* NZI 2010, pp. 417-430; a shorter version in English is available via www.justiz.nrw.de/WebPortal_en/projects/ieei/documents/public_papers/presentations_prague_2010/court_to_court_communication.pdf. It has been translated by Judge Eberhard Nietzer. These documents can also be accessed via www.insolvenzrecht.jura.uni-koeln.de/6169.html.

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

4. On July 1, 2011 UNCITRAL adopted a text entitled 'The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective'. It is referred to below as UNCITRAL Judicial Perspective (2010). Its text has been developed in consultation with judges, insolvency professionals, UNCITRAL's Working Group V (Insolvency Law) and Member States, during international workshops and colloquia. The Judicial Perspective (2010) intends to offer general guidance, from a judge's perspective, on the issues relevant to deciding an application of a foreign (main or non-main) insolvency proceeding, based on the intentions of those who crafted the UNCITRAL Model Law on Cross-Border Insolvency and the experiences of its use in practice.[6] In developing these EU JudgeCo Guidelines, the UNCITRAL Judicial Perspective (2010) has been taken into account.

5 The authors refer to ALI Principles 6, 9(2)(b), 12 and 14.5.

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

2. EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases [Full Text, Including Preamble, and Commentary]

Preamble

1. These *EU Guidelines for Court-to-Court Communications in Cross-Border Insolvency Cases* comprise a set of eighteen guidelines. They are built on the June 2012 Global Guidelines for Court-to-Court Communications in International Insolvency Cases. These Global Guidelines were largely based of the American Law Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, which operate within the American Law Institute Principles of Cooperation in Transnational Insolvency Cases among Members of the North American Free Trade Agreement (NAFTA). Since their issuance in 2000, the landscape of international insolvency law has changed dramatically, providing or allowing for several forms of cross-border communication and coordination of insolvency proceedings pending in two or more jurisdictions, either by insolvency office holders and/or by courts. Under the application of the EU Insolvency Regulation it is a duty of insolvency office holders ('liquidators') to provide for cross-border coordination between main and secondary insolvency proceedings (Article 31 EU Insolvency Regulation). The EU JudgeCo Guidelines encapsulate the practical experiences of the global insolvency community which has worked with the original ALI Guidelines, and a systematic evaluation of the possibility of adapting the Global Guidelines so as to provide a standard statement of guidance and recommendations suitable for application in cross-border insolvency cases within the EU.

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

3. These EU JudgeCo Guidelines do not limit their character to a non-binding set of best practices. It is intended that a court which wishes to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. Originally, for the ALI Guidelines, the suggested adopting process, including its conditions, is the following:
(i) A court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter;
(ii) The adopting court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct;

(iii) The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances.
It is likely that, for most courts in the EU Member States, such a formal adoption process cannot be followed. Under certain legal systems of Member States it could however be possible (e.g. in Member States such as England, Germany, Italy and the Netherlands) that courts publish general (non-binding) guidelines, practice directions or opinions on how judges will treat certain (procedural) matters, indicating to practitioners how the court will treat certain cases. It may be the case too that these courts could consider issuing a statement that they will treat an international insolvency case – as far as local law permits – taking into account the EU JudgeCo Guidelines.
In general in cases where this would happen, 'approval', 'endorsement' or the mere practical use of the EU JudgeCo Guidelines should not bind a court, nor in the individual case at hand, not for possible future cases. Courts may choose not to use (parts of) the EU JudgeCo Guidelines at any time. However, in such a case it is recommended that parties will be notified of the court's intent not to use the guidelines so that the parties can get prepared for dealing with the changed situation.

4. The EU JudgeCo Guidelines assume that in cases where communication with other courts is needed, local procedures, including notice requirements, are employed. The EU JudgeCo Guidelines however do not address more detailed questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing). These items are intended to be governed by either the EU Insolvency Regulation or – which overwhelmingly will be the case – the provisions of procedural law in each jurisdiction involved.

5. As indicated in paragraph 3 above, it is evident that guidelines such as the EU JudgeCo Guidelines should fit in the overall system of procedural rules in a given Member State. However, in certain jurisdictions, one or more of the EU JudgeCo Guidelines will violate binding law, e.g. in Germany and Italy. In certain other jurisdictions, however, the laws or the procedural rules concerning courts are silent or would allow a court to take notice of these Guidelines. Apart from legal rules, the responses to the Questionnaire and discussions with many experts involved in the development of the texts show that in a large majority of jurisdictions there is no objection to court-to-court communication on cultural, economic or practical grounds.

6. The text of the June 2012 Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Insolvency Cases followed rather literally the original text of the ALI Court-to-Court Guidelines. Some small amendments were made or words added to make the English understandable for readers who use English only as their second or third language. Also headings to the individual guidelines were added. The *EU Cross-Border Insolvency Court-to-Court Guidelines* at hand have been drafted making use of terms or words which do align the text with for instance the terms used in the EU Insolvency Regulation.

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

8. In consultation with judges and other experts UNCITRAL has expressed that courts may adopt guidelines, such as the ALI-NAFTA Court-to-Court Guidelines and explained these Guidelines' function as '… to coordinate their activities, foster efficiency and ensure that stakeholders in each State are treated consistently. Such guidelines typically are not intended to alter or change the domestic rules or procedures that are applicable in any country, and are not intended to affect or curtail the substantive rights of any party in proceedings before the courts. Rather, they are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate effectively with one another, and may be adopted by courts for general use or incorporated into specific insolvency agreements", see UNCITRAL Practice Guide, para. 10.[7]

Guideline 1 Overriding Objective

1.1. These EU Cross-Border Insolvency Court-to-Court 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.

Commentary

The text of EU JudgeCo Guideline 1.1 has been taken from the introduction of the original ALI Guidelines. As originally considered, communications by judges directly with judges or administrators in a foreign state may raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Therefore these EU JudgeCo Guidelines encourage such communications while channelling them through transparent procedures.
Guideline 1.1 stipulates what is the prevailing opinion among many European insolvency judges and practitioners, i.e. that coordination and harmonisation of international insolvency proceedings are necessary.
Guideline 1.2 expresses a limit to their application which is inherent to both the EU JudgeCo Principles as well as the EU JudgeCo Guidelines.

The EU JudgeCo Guidelines allow courts in different Member States to directly communicate with each other. Communications may take the form of sending a letter or an email, a specific instruction to an administrator or in specific circumstances the appointment of an independent intermediary, see EU JudgeCo Principle 17. The need to ensure that any direct communication should be conducted in such a way that principles of fairness and due process are adequately observed is recognised in all discussions which have taken place. In particular the topic of direct 'judge-to-judge' cross-border communication has raised many questions.[8]

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[7] See UNCITRAL: Practice Guide on Cross-Border Insolvency Cooperation Adopted by UNCITRAL on 1 July 2009, see www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html.

8 See also William Trower, Court-to-Court Communication – The Benefits and the Danger, 4 International Corporate Rescue 2007, p. 111ff; Han Jongeneel, Cross-Border Co-operation for Courts and Administrators, in:

During several discussions three sub-queries have been addressed:
(i) Is direct 'judge-to-judge' cross-border communication simply to be considered as one of the alternatives in the range of means of communications or should it be used only as a 'last resort' (ultimum remedium)?;
(ii) Can these communications relate to substantial matters (either on a general level or on a case-specific basis)?; and
(iii) What are the rights of parties?
Although the views of the Review & Advisory Group or consultants and participants in discussions (judges, academics, practitioners) vary, in general the following conclusions can be drawn, which can be regarded as appropriate safeguards for direct 'judge-to-judge' cross-border communication in international insolvency cases:
(i) Direct judicial cross-border communication should occur only where such communication is necessary.
Direct Communications should be had whenever they are the best available alternative to other methods of communication. Safeguards should be in place with regard to such matters as whether or not the information given by a judge is regarded as 'evidence' in another Member State (and is he or she regarded as a 'witness' or 'an expert') and therefore regarding the status of the message of a judge.
(ii) Direct 'judge-to-judge' cross-border communication should relate to matters which do not concern the substantive merits of any dispute.
Such communications could relate to practical matters such as hours available, names of court staff responsible for setting up a hearing or order of dealing with certain procedural matters. These could include information regarding the recognition of a foreign proceeding, the recognition of an insolvency-annexed judgment, the clarification of matters related to recognition, the fact (and the date) a specific order has been issued or the fact that a liquidator indeed has started avoidance proceedings or has ask the court's approval for initiating a certain action, e.g. the sales of assets, or whether the court itself has been invited or is intending to develop a solution for an amicable settlement of a case between parties. However, everything must be done to ensure that a judge's integrity and impartiality are not compromised; any risk of a judge being regarded as biased should be avoided.
(iii) Direct judicial cross-border communication can only take place where there are sufficient procedural safeguards in place to ensure that parties have an opportunity to be heard on the application to communicate and (if appropriate) to attend (or be represented at) the occasion on which the communication takes place. In urgent circumstances, however notices to any interested party are not a pre-requisite to 'judge-to-judge' cross-border communication if the matter communicated is procedural rather than substantive and the parties will be notified immediately thereafter.

When in an individual case – prior to Court-to-Court cross-border communication – parties are notified, they should be accorded the following rights:
(i) The right to attend the hearing (and therefore in advance a right to receive a notice);
(ii) The right to present arguments or evidence or make submissions; and
(iii) The right to respond to an opponent.
See EU JudgeCo Principle 6 (Equality of arms).

Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 97-105.

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 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.

Commentary

Guideline 2.1 lays down a rule which underlines the nature of the EU JudgeCo Guidelines. Courts and insolvency administrators act according to and within the boundaries of their national procedural rules. Any cross-border communications can not promote nor harm existing domestic rules, procedures or ethics. An exception in the meaning of the first words of EU JudgeCo Guideline 2.1 could be an urgent matter popping up during the weekend or related to a case unfolding in different time zones. The exception should be interpreted narrowly and only apply in urgent circumstances. An example of 'urgency' could be where (as in the case of Barings Bank in 1995, or the Lehman Brothers case in 2008) the commercial realities created by international time zones necessitate swift action within a very limited time window in order to have an order of a court (e.g. placing the company in a provisional liquidation, or in administration, or Chapter 11) before the markets in the East have opened for business. The UK judge in the Barings case made him self available to issue the necessary first orders after the close of the normal day's business in London, and after the courts had closed. For these type of cases it is important to allow for the possibility that a court is left at liberty to respond to such urgent applications if a true need arises. However, it is acknowledged that in certain Member States it would be impossible to follow EU JudgeCo Guideline 2.1, as a court's action in such circumstances would violate applicable (procedural) law. This will not be the case in countries in which a court has a discretion in such urgent circumstances to give an order or to sign a protocol (such as England) or likewise in countries in which a court would have a discretion to take the necessary actions (such as Germany, see Section 21 German Insolvency Statute). In other countries a court may not have such a discretion, so taking an action would in such circumstances violate applicable (procedural) law. The courts which do have discretion based on their national law may take an action in urgent circumstances for the benefit of parties in other jurisdictions who would otherwise suffer loss of value through judicial refusal to issue a ruling or order without first notifying every concerned party and allowing them opportunity to be heard, while understanding that in other Member States such an action can not be taken. In addition, the exception mentioned can not prevent a court from refusing to take an action which would be manifestly contrary to the public policy of its forum state. See EU JudgeCo Principle 2 ('Public Policy').

As a background to Guideline 2.1, it should be acknowledged that in several jurisdictions (e.g. Germany, Hungary, Italy, and The Netherlands) 'adopting' non-binding rules, such as the EU JudgeCo Guidelines, requires an explicit provision in national legislature that a court is entitled to do so. In these states, the principle fact of 'adopting', as well as the process of 'adopting' with legally binding effect, is not possible, whether by a court order or by agreement. However, in the existing judicial culture in some countries, it may be possible to

communicate to another court that the EU JudgeCo Guidelines will be applied on an informal, legally non-binding basis. In these countries, but more generally in all Member States, courts may feel guided by ongoing developments within international insolvency practice and legislation[9], e.g. the final sentence of Recital 20 of the December 2012 amendments to the EU Insolvency Regulation, which reads as follows: 'In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law'.

It is generally accepted in European jurisdictions that all procedural rules for all insolvency cases should be known in advance, because of the need for legal certainty and for the protection of substantial and procedural rights of all parties involved. Nevertheless, given the wide variety of issues of any international insolvency case, the words 'in each individual case' and 'in whole or in part, with or without modifications' have been inserted in EU JudgeCo Guideline 2.2 to allow a court to exercise its full authority in each individual case and not to be bound by one or more of the Guidelines in other instances.

In practice, it may be expected that parties in certain cases will invite a court to apply or adopt one or more of the EU JudgeCo Guidelines. In the light of the developments referred to above EU JudgeCo Guideline 2.3 aims to have courts align their approach in applying the EU JudgeCo Guidelines in a consistent way. EU JudgeCo Principle 6 (Equality of Arms) and EU JudgeCo Principles 14 (Language), 16 (Communications between Courts) and 17 (Independent Intermediary) should ensure that all affected parties or their representatives are able to participate in the methods of communication as mentioned in these 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 involved the disclose information communicated in the meaning of EU JudgeCo Guideline 3.1.

Commentary

EU JudgeCo Guideline 3.1 provides that a court 'may' communicate with another court. It has been suggested that the word 'may' should be replaced by 'shall' as an expression of the duty of a domestic court to make contacts with a foreign court for the purpose of coordinating and aligning insolvency proceedings against the same debtor. This suggestion has not been followed. In the light of EU JudgeCo Principle 1 (International Status) neither the EU JudgeCo Principles nor the EU JudgeCo Guidelines intend to interfere with the independent exercise of the jurisdiction of a court. However, in Member States which have enacted the UNCITRAL Model Law, Article 25, utilising the mandatory form of drafting employed in the original text ('...the court shall cooperate ...'), any court in that state is subject to a duty to

[9] See from the Introduction and overview to the EU JudgeCo Principles para. 1.2.6 on Developments within the EU legislature and the European Judicial community.

cooperate 'to the maximum extent possible' with foreign courts or foreign representatives.[10] If, in a given case, the other court concerned is not subject to an equivalent obligation the qualifying words quoted within parentheses serve to absolve the court in the first state from any infringement of its duty where the second court, as a matter of discretion, declines to engage in a process of cooperation.

Communications relate to 'matters related to proceedings before it'. Consistent with the purpose and objective of communications in cross-border insolvency cases, the term 'matter' includes every fact or circumstance which is relevant for handling the proceedings. In some Member States an insolvency proceeding will be known by the court (its filing has been announced; it just has been filed or registered), but it is possible that the proceeding itself has not yet been 'opened'. Where in many cases the goals of any insolvency proceedings will be served by information gathering, cost-effective organisation of the proceedings and taking measure avoiding any detriment to the estate, it is of prime importance that Guideline 3.1 should be read in the widest sense. The choice of language should be made by applying EU JudgeCo Principle 14.

When a court has determined to contact another court on a matter related to proceedings before it, EU JudgeCo Guideline 3.1 does not cover the question: who to contact?[11] In addition, Guideline 3 does not cover communications concerning 'matters' with other addressees than a court, such as a foreign insolvency administrator, a creditor which has approached the court or a supervising agency in a certain sector. For these communications, see EU JudgeCo Guideline 4.

Communication with a court in another Member State in connection with matters relating to proceedings before it should be, according to the text of this Guideline, '… for the purposes of coordinating and harmonising proceedings before it with those in the other jurisdiction'. These purposes will include information gathering, sharing names and contact details of assisting staff, coordination of the courts' dockets, the requirements necessary to have an insolvency administrator appointed or the clarification of international jurisdictional issues to avoid jurisdictional conflicts.[12] They also could relate to the question whether an insolvency

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[10] In the United Kingdom, Article 25(1) of the Model Law has been enacted in modified terms using the words 'the court may cooperate to the maximum extent possible', thereby making it a matter for the court's discretion whether to do so in any given case: Cross-Border Insolvency Regulations 2006, S.I. 2006/1030, Sched. 1. Other EU Member States having enacted the Model Law use words such as '... the court shall cooperate to the maximum extent possible ...'. This is the case in Poland, Romania, Slovenia, Greece and Croatia.

[11] Within Europe certain systems provide assistance, such as the European Judicial Atlas or the European Judicial Network (http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm), or national courts' own databases.

[12] Compare The Hague Principles for Direct Judicial Communications (2013):

'8.7 Communications should always include the name, title and contact details of the sender.

8.8 Communications should be written in simple terms, taking into account the language skills of the recipient.

8.9 As far as possible, appropriate measures should be taken for the personal information of the parties to be kept confidential.

8.10 Written communications should be transmitted using the most rapid and efficient means of communication and, in those cases where it is necessary for confidential data to be transmitted, secured means of communication should be employed.

proceeding has been opened or terminated, whether an appeal against the opening is pending, whether distributions to creditors have been made and the level of their satisfaction. The term 'coordinating and harmonising proceedings' includes the coordination of possibly required preservation measures in the meaning of Article 38 EIR.

The flow of information between courts or between courts and administrators may be limited by confidentiality concerns. Some Member States do not consider insolvency proceedings (or only certain parts of these proceedings) 'public', which generally means that these proceedings are seen as taken place in 'private'. In such cases the court may not be at liberty to share all data of the case before her/him with a foreign court or a foreign administrator. The foreign court and the foreign administrator may under applicable law be treated as 'third parties' and, thus, be subject to the restrictions of local laws on disclosing information to third parties. To avoid such problems, the courts should obtain the consent of all parties involved to disclose all information considered necessary by the court to the foreign court. See EU JudgeCo Guideline 3.2.

Guideline 4 Court to Insolvency Administrator Communication

4.1. A court may communicate with an insolvency administrator 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 the disclose information communicated in the meaning of EU JudgeCo Guideline 4.1.

Commentary

Guideline 4.1 serves as an extension to EU JudgeCo Guideline 3.1, providing for a court to communicate with an insolvency administrator, appointed in insolvency proceedings pending in another Member State, or 'an authorised representative' of the court in that other Member State. For the same reasons, as expressed in the commentary to Guideline 3, the sharing and exchange of information between involved insolvency courts will serve the goals of many insolvency proceedings, including getting insight into the composition of the debtor's estate, the initiation of avoidance actions, contact with the foreign administrator in main insolvency proceedings to set a date for a creditors' meeting in a secondary proceeding (e.g. immediately after the creditors' meeting is held in the main insolvency proceedings) or more generally to support a court's supervisory role in monitoring a (temporary) insolvency administrator. In doing so, a court will be guided by rules of due process, including EU JudgeCo Principles 5 (Equality of Arms) and 9 (Non-discriminatory treatment).

For the same reasons a explained in the commentary to EU JudgeCo Guideline 3.2, EU JudgeCo Guideline 4.2 provides that a court should obtain the consent of all parties involved

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8.11 Written communications should always be acknowledged as soon as possible with an indication as to when a response will be provided.
8.12 All communications should be typewritten.
8.13 Ordinarily, communications should be in writing, save where the judges concerned are from jurisdictions with proceedings conducted in the same language'.

to disclose all information considered necessary by the court communicate to a foreign administrator.

Guideline 5 Insolvency Administrator to Foreign Court Communication

5.1. A court may permit a duly authorised insolvency administrator to communicate with a foreign court directly, subject to the approval of the foreign court, or through an insolvency administrator 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 administrator in the other jurisdiction or the authorised representative of the foreign court should respond to the communication, provided that the insolvency administrator can produce an authenticated copy of the court order by which he was appointed.

Commentary

Under reference to EU JudgeCo Principle 5 (Case management), it is recalled that, in several of the national laws of the Member States, the central role in managing an insolvency case is in the hands of an insolvency administrator, the debtor itself and/or his creditors. In such a situation, the role of the court may be limited to e.g. monitoring or supervising administrators' actions and/or solving legal disputes. In many jurisdictions, the insolvency administrator in its own right is authorised to act in as far as it is for the benefit of the estate and fits into the goal of the insolvency proceedings and does not violate the applicable domestic laws, including the insolvency laws. In addition, Articles 18, 31 and 32 of the EIR (Article 18 (Powers of the liquidator), Article 31 (Duty to cooperate and communicate information), and Article 32 (Exercise of creditors' rights)) provide the bases/the duty especially for main and secondary insolvency administrators to communicate and inform each other on matters related to the proceedings. As long as the insolvency administrator acts according to his task in these jurisdictions, acting in the best interests of creditors, there will not be an active role for a court. It may be the case that others, such as a creditors' committee, may be involved in cross-border communication. In other jurisdictions, the role of the court includes, for instance, an approval process to allow the insolvency administrator to communicate cross-border. EU JudgeCo Guideline 5.1 provides an extension to that approval process. In both situations, the underlying notion is that the court should consider to actively make the court in the other Member State aware of the specific position of an insolvency administrator. EU JudgeCo Guideline 3 supports this view.

Cross-border communication may be initiated by the insolvency administrator himself or at the initiative of the court. It may be the case that the experience in international insolvency cases of a court is limited. In many instances, a cross-border case will involve large sums of money and complex issues requiring urgent resolution. In such a situation, to fully understand the interests that are at stake, the court itself may want more information from the foreign representative, via general means of communication or through his or her legal counsel, and this could include briefs and evidence.[13]

Initiating Communications in one Member State is no guarantee that in the other Member State, a response (from the court, the insolvency administrator or an authorised representative

[13] UNCITRAL Judicial Perspective (2010), para. 22.

of that court) will be given. In the responses to the Questionnaire, mention is made from international practice that foreign courts, insolvency administrators and representatives are prepared to respond, provided that the insolvency administrator can produce an authenticated copy of the court order by which he was appointed, preferably in conjunction with the EU JudgeCo Principles, see e.g. Principle 16.2. See also Article 19 EIR (Proof of the liquidator's appointment). This experience has been laid down in EU JudgeCo Guideline 5.2.

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 administrator. 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 administrator if the communication is from a foreign insolvency administrator, subject to local rules concerning ex parte communications.

Commentary

This Guideline refers to so called 'rules for ex parte communications', which have their origin in American legal tradition of the so-called 'local rules' promulgated by courts which are part of procedural law.[14] In EU Member States receipt of communications and direct responses do generally not raise any concerns. However, the principle of due process should be observed and therefore these communications must be laid down in a memo for the files, see EU JudgeCo Guideline 13 (Service List).

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 administrator 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.

Commentary

EU JudgeCo Guideline 7 sets out three ways of communications. Guideline 7(i) and 7(ii) deal with the transmission of documents pertaining to the proceedings, either directly (7(i)) or via

[14] See Peter Busch, Andreas Remmert, Stefanie Rüntz and Heiz Vallender, op. cit, ,. NZI 2010, 417, 423.

the instruction of a person (7(ii)). Guideline 7(iii) relates to direct, verbal communications.[15] National procedural law will apply in these instances. Court-to-court direct communication via telephone or video conference (Guideline 7(iii)) is the subject of EU JudgeCo Guideline 8.

The words at the beginning of this EU JudgeCo Guideline ('To the fullest extent possible under any applicable law') indicate that an element of flexibility may be required when certain information to be communicated is of a non-public nature, either by law or by contract. Only in as far as applicable law so allows, documents containing this information are open for cross-border communication. The same applies to information containing data which is protected from disclosure by any applicable rules on privacy, cross-border data exchange or protection of computerised personal data or business secrecy. In addition, the application of EU JudgeCo Guidelines 7(i) and 7(ii) is based on the presumption that court proceedings are 'public', which in certain jurisdictions is not the case.[16]

Guideline 8 E-Communication to Court

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.

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[15] The Hague Principles for Direct Judicial Communications (2013) recommend in case of oral communications:
'8.14 Oral communications are encouraged where judges involved come from jurisdictions which share the same language.
8.15 Where the judges do not speak the same language, one or both of them, subject to an agreement between the two judges concerned, should have at their disposal a competent and neutral interpreter who can interpret to and from their language.
8.16 Where necessary, personal information concerning the parties should be anonymised for the purposes of oral communication.
8.17 Oral communications can take place either by telephone or videoconference and, in those cases where it is necessary that they deal with confidential information, such communications should be carried out using secured means of communication'.

[16] See Busch, Remmert, Rüntz and Vallender, op. cit., NZI 2010, 417, 424.

Commentary

EU JudgeCo Guidelines 8 (E-communication to Court) and 9 (E-communication to Insolvency Administrator) lay down procedural safeguards for cross-border communication.
The status of E-communication facilities in Europe can be taken from the November 2013 proposal to amend the European Small Claims Procedure and the European order for payment procedure.[17] Under the heading '*3.1.3. Improving the use of electronic means of communication, including for service of Documents'* it is submitted that 'electronic service is already in place in several Member States' and that for reasons of simplification, time and cost savings it is expected that the number of Member States taking advantage of these technological developments will continue to increase. Under the heading '*3.1.4. Imposing an obligation on courts to use videoconferencing, teleconferencing or other means of distance communication for the conduct of oral hearings and taking of evidence'* the proposal submits that '… in exceptional circumstances, where an oral hearing or the hearings of an expert or witness are necessary for rendering a judgment, the court or tribunal may organise an oral hearing. Oral hearings may be conducted through videoconferencing or other means of distance'. The proposed amendment '… will impose an obligation on courts and tribunals to always make use of distance means of communication such as videoconference or teleconference where an oral hearing is held. In order to safeguard the rights of the parties, an exception will be made for the party who expressly requests to be present in court. This amendment may require Member States to equip their courts with appropriate communication technology, where such technology is not yet in place. The technological possibilities at the Member States' disposal are varied, and include cost efficient Internet facilities'.
In Europe, therefore, it is appropriate to provide for guidance for these ways of communication.

EU JudgeCo Guidelines 8 and 9 are based on seeking a balance between two points of view: (i) in the early stage of a cross-border case it will seldom be the case that all the parties, affected by the proceedings, will have been identified or that it is necessary to involve 'all' parties in a communication, whilst (ii) the technical facilities and capacities (hearing room, facilities for enabling everybody to listen to the communications) may not be present or available on short notice. Therefore, EU JudgeCo Guidelines 8(i) and 9(i) only provide for a preliminary possibility for the court (possibly with the participation of insolvency administrators) to communicate prior to the participation of counsel, or the absence of counsel of parties, when this is directed by either of the two Courts. EU JudgeCo Guideline 8(i) should in practice mean that all parties will receive a notification and that it is up to them to decide whether they will participate in a communication session. In such a case EU JudgeCo Guideline 8(iii) and 9(iii) should ensure that these parties are informed about the contents and outcome of the communication. Participating in person, in the meaning of EU JudgeCo Guidelines 8(i) and 9(i) includes participation literally 'in person' or alternatively by remote participation by means of a conference call or videoconference.

[17] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Brussels, 19.11.2013, COM(2013) 794 final; 2013/0403 (COD).

The term ‘recorded’ in EU JudgeCo Guideline 8(ii) reflects that, of what has been said or discussed, an appropriate selection and a decision will either be written down by an assistant to the court or will be electronically copied (taped). In case different rules apply to recording and transcribing, it may be expected that the courts will ensure that no confusion will arise and/or contradictory decisions are taken.

The word ‘personnel’ in EU JudgeCo Guideline 8(iv) does not include the insolvency administrator when he is seen – according to applicable law – as a representative of the court. It is intended to refer to assistants to the judges or to the court who may function in order to arrange agendas and setting up and breaking off any means of communication. It is not necessary that ‘all’ the parties to the proceedings are present if the communication is limited to exchange of information and to orders preparing or directing the proceedings, e.g. fixing a date for a hearing. See EU JudgeCo Guideline 8(i).

Guideline 9 E-Communication to Insolvency Administrator

In the event of a communication between the court and an authorised representative of the foreign court or a foreign insolvency administrator in accordance with EU JudgeCo Guidelines 3 and 6 by means of a telephone or video conference call or other electronic means, unless otherwise directed by the court:
(i) Counsel for all affected parties should be entitled to participate in person during the communication with advance notice of the communication being given to all parties in accordance with the Rules of Procedure applicable in each court;
(ii) The communication should be recorded and may be transcribed (a written transcript may be prepared from a recording of the communication which, with the approval of the court, can be treated as an official transcript of the communication);
(iii) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of the court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other court and to counsel for all parties in both courts subject to such directions as to confidentiality as the court may consider appropriate; and
(iv) The time and place for the communication should be to the satisfaction of the court. Personnel of the court other than judges may communicate fully with the authorised representative of the foreign court or the foreign insolvency administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the court.

Commentary

EU JudgeCo Guideline 9 (E-communication to Insolvency Administrator) follows the same pattern as EU JudgeCo Guideline 8 (E-communication to Court). See the Commentary accompanying EU JudgeCo Guideline 8.
An authorised representative in the meaning of these Guidelines includes an independent intermediary in the meaning of EU JudgeCo Principle 17.

Guideline 10 Joint Hearing

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:
(i) Each court should be able to simultaneously hear the proceedings in the other Court;
(ii) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the directions of that court, be transmitted to the other court or made available electronically in a publicly accessible system in advance of the hearing. Transmission of such material to the other court or its public availability in an electronic system should not subject the party filing the material in one court to the jurisdiction of the other court;
(iii) Submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other court to make submissions to it;
(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 Guidelines 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.

Commentary

A hearing is an organised exchange of legal arguments by parties (insolvency administrators, creditors, and their counsel) either on preliminary questions arising in the cross-border case or upon its merits. A hearing in this sense in a common element in civil court proceedings in the EU Member States. The concept of a joint hearing, however, will be new to many of the European jurisdictions. In some, however, national procedural rules may allow 'any form of cooperation' (or similar wording) and therefore would be open enough to permit such a joint hearing. A joint hearing requires that either court can also question a person who has appeared before the other court or allow one or more persons to speak. It may be the case that a court provides assistance to another court on the basis of the Taking Evidence Regulation[18], but such assistance and possibly attending to an evidentiary hearing held by another court is not a joint hearing in the meaning of EU JudgeCo Guideline 10.

Respondents generally favour the possibility of arranging for joint hearings, but also voice obstacles in arranging for them, such as (i) national procedural law not allowing that (electronic) court files are publicly accessible for third parties (and: is the other court a third party?), (ii) national rules on data protection or existing treaties with rules on international judicial assistance in civil matters, (iii) poor or unavailable technical facilities, and – evidently – (iv) language. For the latter, see EU JudgeCo Principle 14. However, several cross-border insolvency cases, involving a number of jurisdictions, insolvency administrators and larger

[18] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

groups of creditors may benefit from using modern means of communication, especially video conferencing through the internet or, if appropriate, Skype or live streaming facilities. With the present pace of technological development, it may be expected that such cross-border e-meetings may be held more frequently.[19]

EU JudgeCo Guideline 10, sections (i)-(iv) aim at joint hearings involving one or more courts. There may be cases in which the court and its staff technically service a creditor's meeting. In such cases creditors from several jurisdictions are electronically attending and by doing so their permission to be in the video conference (hearing) is presupposed. In cases where such a meeting is jointly conducted with another court this results in the creditor being 'present' in the domestic meeting of the creditors who are only parties to the foreign proceedings but who are not parties of the domestic proceedings and who are, therefore, not originally entitled to attend the domestic meeting of the creditors. In such cases court should have discretion to grant access to individuals who are not members of the group with a legal right of attendance and so permit them to be present in the meeting of the creditors.[20]

When applying EU JudgeCo Guideline 10(ii), courts should consider whether evidentiary or written materials which need to be transmitted to the other court shall be the original documents or copies thereof. If the former, there may be concerns with respect to the preservation of the original copies when they are transmitted to other courts. It is advised in such a case to allow the transmission to be conducted by electronic means. Regarding matters of authentication, reference is made to EU JudgeCo Principle 15.

Under EU JudgeCo Guideline 10(iv), it may be helpful to establish said Guidelines under reference to the law applicable of one of the courts, as to allow the making of submissions and the rendering of decisions by the courts. Prior communications between the courts to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing in the absence of counsel is not only permitted, but necessary to warrant an efficient and effective joint hearing. Any 'presence' of representatives of the parties is required.

Finally, EU JudgeCo Guideline 10(v) permits court-to-court post-joint hearing communications. It should mirror the pre-joint hearing communications as laid down in EU JudgeCo Guideline 10(iv). The phenomenon of 'coordinated orders' will be new for most EU Member States' courts. There should not be an objection if these orders relate to the future coordination of the proceedings. EU JudgeCo Guideline 10(v) is limited to 'all procedural and non-substantive' matters relating to or flowing from the joint hearing, as it seems that

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[19] Outside the scope of these EU JudgeCo Guidelines is the matter of e-security and reliability of technical facilities. See however EU JudgeCo Principle 16.4., stressing that electronic communications between courts in different Member States should utilise technology which is commonly used and be reliable and secure.

[20] The view may be held that a video conference transmitted to a foreign country, i.e. a meeting of the creditors or an oral hearing in judicial proceedings which are in part held abroad, may affect the sovereignty of the other Member State. Busch, Remmert, Rüntz and Vallender, op. cit.,NZI 2010, 417, 425, however doubt that a video conference transmitted abroad will also violate the sovereignty rights of another country if the foreign insolvency court has agreed to the transmission. The practical solution is provided that the foreign court may beforehand and as part of permissible court-to-court communications (see Guideline 3) send the German court a list of questions which may also be of interest for the German proceedings. Under the principle that the German court legally is bound to investigate the facts on its own initiative, the boundaries for court action are wide.

coordinated orders will not be permitted when they contain issues of substantive insolvency law, unless it finds its basis in the principle of sincere cooperation between Member States, as acknowledged by the Court of Justice of the European Union in 2012.[21]

Joint hearings may be a cross-border facility available for courts with (nearly) the same working languages, such as English (courts from the UK, Ireland, Cyprus, and Malta), German (courts from Austria and Germany), French (courts from France and Belgium) or Dutch (courts from Belgium and the Netherlands). In other cases, two (or more) courts from different Member States have to use different languages in a joint hearing. Under the application of EU JudgeCo Guideline 10(i) the issue will arise how each court be able to understand (not only hear) the proceedings in the other court if it does not fluently speak the language used by the other court? In addition: how can the courts involved guarantee that no undue prejudice will result to any party which does not speak and understand both languages used in the courts having a joint hearing? For such a case EU JudgeCo Guideline 10(ii) can be resorted to: the use of interpreters for the hearings and translators for the evidentiary and written materials mentioned in this guideline. When two or more courts will require the presence of at least one interpreter in its courtroom because translations are needed, a practical obstacle will be – as in practice both interpreters speak at the same time – that simultaneous hearing of what is said in the other courtroom is not possible. As a consequence, if the interpreters do not speak at the same time, the joint hearing is likely to be very slow. It has been suggested that is such a case making translated transcripts of hearings subsequently available to the courts would be a more effective and more reliable alternative.

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.

Commentary

EU JudgeCo Guidelines 11 (Authentication of Regulations) and 12 (Orders) reflect the principle of '*forum regit processum*', generally meaning that a foreign court conducts the proceedings according to its own domestic rules, irrespective of the law applicable to the substance of the case. Following this principle, the 'receiving' court generally does not query these rules themselves nor the way in which a foreign court has conducted particular proceedings. EU JudgeCo Guidelines 11 and 12 relate to two aspects which guarantee the lawfulness of legal statements (in the broadest sense) relating to the foreign proceedings: (i) the recognition of the foreign rules of procedure and evidence, and (ii) the extent to which the lawfulness of foreign orders (decisions) is reviewed.

[21] '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', see CJEU 22 November 2012, Case C-116/11 (*Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak, V Christianapol sp. z o.o*).

Nearly all Member States will provide for their own rules concerning evidence, including documentary evidence originating from its jurisdiction of from outside this jurisdiction, and for their rules regarding evidence determining foreign law, including such evidence provided by an expert witness. Nearly always, these rules also provide for forms of certification as to the genuineness of the signature and official position of the attesting person or other foreign official. Where domestic laws do so allow, the court is recommended to accept as authentic the data mentioned in EU JudgeCo Guideline 11. In case of doubt the matter could be subject of court-to-court communication in the meaning of EU JudgeCo Guidelines 3, 6 and 8. In certain circumstances it may be required of a party appearing before a court that demands application of a foreign rule of law that he must give adequate proof of the existence of such foreign law, and of its meaning or substance. Notice may be taken of several solutions suggested by the Hague Conference of Private International Law to allow a court to get acquainted with foreign law, including the creation of 'Information Sheets & Country Profiles', creating a 'Network of Experts & Specialised Institutes', and allowing 'Direct Judicial Communications': see www.hcch.net/upload/wop/genaff_pd21ae2007.pdf.

The caveat in EU JudgeCo Guideline 11 '… except upon proper objection on valid grounds and then only to the extent of such objection' can be translated as the reservation of the right to invoke the principle of public policy. In many EU Member States this is one of the basic principles of the substantive and procedural laws of conflict of laws, and for judgments related to insolvency it is provided in Article 16 EIR.

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.

Commentary

In a general sense, an order is a judicial command or direction authoritatively given by a court or an individual (supervisory) judge, made or entered in writing. In the context of the EU Member States, to which the Insolvency Regulation applies, Articles 16, 17 and 25 EIR arrange for the recognition and legal effects of a great number of judicial decisions, such as the judgement opening main insolvency proceedings or judgments concerning a matter deriving directly from the insolvency proceedings and closely linked with them (e.g. an action to set aside a detrimental act)[22] or certain compositions. EU JudgeCo Guideline 12 has the effect that it introduces a rule that recognition of subsequent orders given by a court or a (supervisory) judge is automatic.[23]

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[22] See CJEU 12 February 2009, Case C-339/07 (*Seagon, acting as liquidator of Frick Teppichboden Süpermarkte GmbH v. Deko Marty België NV*).

[23] Which in matters towards non-EU Member States follows for instance from Section 343 *Insolvenzordnung* (Germany) or Article 222 *Ley Concursal* (Spain).

The wording 'reasonable objections on valid grounds' against a recognition in any individual case reflects the defense on the grounds of public policy.

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.

Commentary

Although respondents to the Questionaire generally felt EU JudgeCo Guideline 13 could serve useful purposes, objections were raised that, in certain EU Member States (e.g. Germany, Hungary, Italy), insolvency proceedings are treated as non-public proceedings in which information relating to the proceedings is only be given to the participants in such proceedings, but not to third parties. In such a procedural system, participants in foreign insolvency proceedings are regarded as 'third parties'. It may be the case, however, that inclusion of third parties may be arranged when all participants agree.[24]

Guideline 14 Limited Appearance in Court

The court may issue an order or issue directions permitting the foreign insolvency administrator 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.

Commentary

EU JudgeCo Guideline 14 governs the situation in which a foreign insolvency administrator, a creditor's representative or an authorised representative of the court can appear and be heard in their capacity. In many EU Member States, such a hearing will be in line with the goals of the applicable national insolvency law and/or the role of the court in insolvency proceedings.
The facility whereby an insolvency administrator or creditors' representative may be enabled to appear before a foreign court, in which insolvency proceedings relating to the same debtor (including related proceedings) are taking place, is a valuable safeguard against potential miscarriages of justice through de facto denial of due process and opportunity to be heard. In the absence of such assurance in relation to the act of intervening in the proceedings for the purpose of informing the court of relevant matters or to make representations on the merits, an insolvency administrator may be obliged to refrain from engaging in the proceedings, lest by so doing he renders himself, and thereby the entire estate for which he is responsible,

[24] As submitted for Germany by Busch, Remmert, Rüntz and Vallender, op. cit., NZI 2010, 417, 426.

amenable to the potentially unlimited jurisdiction of the foreign court. As with EU JudgeCo Guideline 12, the effect of EU JudgeCo Guideline 14 may be limited according to the system for recognition of the Insolvency Regulation, but effective in cases in which certain limitations may be imposed to which the foreign insolvency administrator or representative is subject, e.g. prior approval of the court or of the body of creditors.
EU JudgeCo Guideline 14 does not cover the appearance or the hearing of for instance a director of an insolvent company, which is the subject of foreign main insolvency proceedings or another private person, such as an accountant of that company. As per EU JudgeCo Guideline 3, a court may communicate with the other court that a specific person should be heard on matters which in advance can be send to the other court, to be put to that person.

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.

Commentary

Generally, EU JudgeCo Guidelines 15-17 provide the court with the power (i) to limit the extent of any stay or other orders made so as not to apply to applications brought before the court in the foreign jurisdiction (Guideline 15 Applications and Motions), (ii) to encourage court-to-court communications where the interests of justice so require for purposes of harmonising proceedings before the court with proceedings in another jurisdiction wherever there is commonality among the issues and/or parties in the proceedings (Guideline 16 Coordination of Proceedings), and (iii) provide mechanisms for the amendment, modification and extension to directions issued by the court under the EU JudgeCo Guidelines (Guideline 17 Directions).

EU JudgeCo Guideline 15, like EU JudgeCo Guidelines 12 and 14, is dependent on the domestic system for recognition or allowing such applications and motions. The laws in the foreign jurisdiction, in addition, may require certain formal provisions to be fulfilled, e.g. prior approval of the administrator in any parallel local insolvency proceeding or approval of the body of creditors. The interruptive effect that EU JudgeCo Guideline 15 sparks relates to the domestic court proceedings. Its background is section 362 of the U.S. Bankruptcy Code, providing for an 'automatic' stay, or a stay by way of law (*ex lege*). In some jurisdictions in the EU a 'stay' is unknown, in others it is available, either *ex lege* or at request, but its effect can not be discontinued by an order of the insolvency court (Germany) or only when certain requirements are met (the Netherlands).

The formulation of EU JudgeCo Guideline 15 has altered the original text of ALI Guideline 14. The words 'in the foreign jurisdiction' have been added in two places to ensure that this Guideline properly addresses the need to ensure that 'any stay of proceedings affecting the parties' does not unintentionally purport to affect applications or motions brought in a foreign 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.

Commentary

Court-to-court communications as envisaged in EU JudgeCo Guideline 16 do not relate to the coordination of the insolvency proceedings. These communications presently occur infrequently, but in the appropriate case its function may be beneficial for the effectiveness of the proceedings and/or for a better outcome for the creditors. Also of direct relevance to the goal of promoting effective co-operation in international insolvency cases are some very practical questions, including how best to resolve such issues as the different working languages of courts operating concurrently in different regions and time zones, matters concerning registrations in commercial or trade registers, or communication with civil or criminal courts in the other Member States. See EU JudgeCo Principle 14 (Language). In such situations, direct communication between courts may be impracticable, but it may be that some alternative means of achieving cooperation through one or more designated intermediaries could be established. See EU JudgeCo Principle 17 (Independent intermediary).

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.

Commentary

EU JudgeCo Guideline 17 relates to directions issued unilaterally by a court or directions as a result of an agreement between the courts involved. EU JudgeCo Guideline 17 emphasises the reservation that any action by a court must have a statutory basis as well as it underlines the deliberate flexibility of the Guideline itself and of the stipulations made on its basis. The Guideline presumes that not only a domestic court but also a foreign court applies these EU JudgeCo Guidelines. The Guideline leaves open the outcome of the court's notice of its intention to supplement, change, or abrogate directions under these Guidelines in the absence

of joint approval by both courts. It is submitted that, provided that due account is taken of the principles of mutual respect between courts and states, the EU JudgeCo Guidelines allow a court to supplement, change or abrogate as mentioned, as the other court will have the authority to do likewise with the same or other directions. It is clear that, where courts operate on an equal footing, unilateral changes do not bind the other court in any way. See also EU JudgeCo Guideline 18.

EU JudgeCo Guideline 17(1) does just generally describe the grounds for amending a direction ('to reflect the changes and developments from time to time in the proceedings before it and before the other court'). These grounds cover changes in factual circumstances, changes in applicable law as well as a different view held by a different opinion held by the successor of the judge in the court.

EU JudgeCo Guidelines 17(2) provides that the method to be used for making such modifications is that both courts enter into a new agreement, preferably one in which the modifications are shown.

EU JudgeCo Guideline 17(3) aims to overcome the gap between the existing agreement and the time a renewed agreement is concluded. In the interval period a certain measure may be urgent or also because the successor of the judge of the insolvency court has reservations towards court-to-court communications for legal or factual reasons. If entering into a modified agreement is, thus, not possible, giving the other court notice thereof according to Guideline 17(3) is a self-evident act of courtesy.[25]

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.

In many EU Member States EU JudgeCo Guideline 18 will be regarded as a matter of course. It expresses again that the application of the EU JudgeCo Guidelines is neither accompanied by a waiver of any sovereign powers nor by a limitation of the judicial powers of the involved courts nor by any restriction of the rights of the parties to any proceedings. The EU JudgeCo Guidelines are non-binding and do not obligate a court to proceed in a certain manner or to rule on any matter in a certain way.[26]

[25] As submitted for Germany by Busch, Remmert, Rüntz and Vallender, op. cit., NZI 2010, 417, 428.

26 Anecdotally, this Guideline has been nicknamed 'Fear Clause' (*Angstklausel*) by Busch, Remmert, Rüntz and Vallender, op. cit., NZI 2010, 417, 428.

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