Co-funded by the
Civil Justice Programme
of the European Union

Co-funded by the
International Insolvency Institute

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

Final Public Draft (extended version); June 2014

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This publication has been produced with the financial support of the Civil Justice Programme of the European Union. The contents of this publication are the sole responsibility of Leiden University and/or Nottingham Trent University and can in no way be taken to reflect the views of the European Commission.

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[June 2014]

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Preface [follows]

I EU Cross-Border Insolvency Court-to-Court Cooperation Principles
[Full Black Letter Text Without Commentary]

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

Nothing in these EU JudgeCo Principles is intended to:
(i) Interfere with the independent exercise of jurisdiction by a national court involved, including in its authority or supervision over an insolvency administrator;
(ii) Interfere with the national rules or ethical principles by which an insolvency administrator is bound according to applicable national law and professional rules; or
(iii) Confer substantive rights, to interfere with any function or duty arising out of any applicable law and professional rules or to encroach upon any local law.

Principle 2 (GP 3(iii)) Public Policy

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

Principle 3 (GP 1) Overriding Objective

3.1. These EU JudgeCo Principles embody the overriding objective of enabling courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtor's business, and furthering the just administration of the proceeding.
3.2. In achieving the objective of Principle 3.1, due regard should be given to the interests of creditors, including the need to ensure that similarly ranked creditors are treated equally. Insolvency administrators should act fairly and proportionately in charging fees or costs. Due regard should also be given to the interests of the debtor and other parties in the case, so far as national law permits, and to the international character of the case.
3.3. All parties in an international insolvency case should further the overriding objective of Principle 3.1 and should conduct themselves in good faith in dealing with courts, insolvency administrators and other parties in the case.
3.4. Courts and insolvency administrators should cooperate in an international insolvency case with the aim of achieving the objective of Principle 3.1.
3.5. In the interpretation of these EU JudgeCo Principles due regard should be given to their international origin and to the need to promote good faith and uniformity in their application.

Principle 4 (GP 2) Aim

4.1. The aim of these EU JudgeCo Principles is to facilitate the coordination of the administration of international insolvency cases involving the same debtor, including where appropriate through the use of a protocol.
4.2. These Principles aim to promote in particular:
(i) The orderly, effective, efficient and timely administration of proceedings;

(ii) The identification, preservation and maximisation of the value of the debtor's assets, including the debtor's business, on a global basis;
(iii) The sharing of information in order to reduce costs; and
(iv) The avoidance or minimisation of litigation, costs and inconvenience to the parties in the proceedings.
4.3. These Principles aim to promote in each separate international insolvency case its administration with a view to:
(i) Ensuring that creditors' interests are respected and that creditors are treated equally;
(ii) Saving expense and reducing costs;
(iii) Managing the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors and to the number of jurisdictions involved; and
(iv) Ensuring that the case is dealt with effectively, efficiently and timely.

Principle 5 (GP 4) Case Management

5.1. Actively managing an international insolvency case involves coordination and harmonisation of proceedings with those in other states, except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be necessary in the circumstances.
5.2. If a court is managing the international insolvency case, it:
(i) Should seek to achieve disposition of the international insolvency case effectively, efficiently and timely, with due regard to the international character of the case;
(ii) Should manage the case to the maximum extent possible in consultation with the parties and the insolvency administrators involved and with other courts involved;
(iii) Should determine the sequence in which issues are to be resolved, preferably laid down in an overall schedule for all stages of the proceeding;
(iv) May hold status conferences regarding the international insolvency case.
(v) Should arrange for the proper information to the insolvency administrator and/or the creditors about the coordination and harmonisation of the international insolvency case.
5.3. If an insolvency administrator is managing the international insolvency case, it:
(i) Should seek to achieve disposition of the international insolvency case effectively, efficiently and timely, with due regard to the international character of the case;
(ii) Should manage the case in consultation with the parties and the insolvency administrators involved and with courts involved;
(iii) Shall hold status conferences regarding the international insolvency case;
(iv) Should arrange for the determination of the sequence in which issues are to be resolved, preferably laid down in an overall schedule for all stages of the proceeding;
(v) Will inform the court and/or the creditors about the coordination and harmonisation of the international insolvency case.

Principle 6 (GP 5) Equality of Arms

6.1. All judicial orders, decisions and judgments issued in an international insolvency case are subject to the principle of equality of arms, without any conditions, so that there should be no substantial disadvantage to a party concerned. Accordingly:
(i) Each party should have a full and fair opportunity to present evidence and legal arguments and each party shall receive reasonable time to do so;

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

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

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

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

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

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

Principle 7 (GP 6) Decision and Reasoned Explanation

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

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

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

7.4. The order, decision or judgment should identify:

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

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

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

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

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

(vi) Any determination regarding costs;

(vii) The issues to be resolved;

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

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

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

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

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

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

Principle 8 (GP 8) Stay or Moratorium

8.1. Insolvency cooperation may require a stay or moratorium at the earliest possible time in each State where the debtor has assets or where litigation is pending relating to the debtor or the debtor's assets.
8.2. The stay or moratorium should impose reasonable restraints on the debtor, creditors, and other parties.
8.3. If the local law does not provide an effective procedure for obtaining relief from the stay or moratorium, then a court should exercise its discretion to provide such relief where appropriate and to the extent possible under national law. Exceptions to the stay or moratorium should be limited and clearly defined.
8.4. A court should encourage publication of its decision to render a stay or a moratorium as soon as possible.
8.5. The decision to render a stay or a moratorium should be open to appeal.

Principle 9 (GP 11) Non-Discriminatory Treatment

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

Principle 10 (GP 16) Modification of Recognition

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

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

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

Principle 12 (GP 19) Abusive or Superfluous Filings

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

Principle 13 (GP 20) Court Access

13.1. An insolvency administrator representing a foreign main insolvency proceeding should have direct access to any court in any other Member State necessary for the exercise of its legal rights.
13.2. An insolvency administrator representing a foreign main insolvency proceeding should have the same access to any court in any other Member State as a domestic administrator has or would have had were domestic proceedings opened.

Principle 14 (GP 21) Language

14.1. Where there is more than one insolvency case pending with respect to a debtor, the insolvency administrators and courts involved should determine the language in which communications should take place with due regard to convenience and the reduction of costs. Notices should indicate their nature and significance in the languages that are likely to be understood by the recipients.
14.2.
With due regard to local law and available resources, courts:
(i) Should permit the use of languages other than those regularly used in local proceedings in all or part of the proceedings, if no undue prejudice to a party will result.
(ii) Should accept documents in the language designated by the insolvency administrators without translation into the local language, except to the extent necessary to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties.
(iii) Should promote the availability of orders, decisions and judgments in languages other than those regularly used in local proceedings, if no undue prejudice to a party will result.

Principle 15 (GP 22) Authentication

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

Principle 16 (GP 23.1 – 23.3) Communications between Courts

16.1 Courts before which insolvency cases are pending should, if necessary, communicate with each other directly or through the insolvency administrators to promote the orderly, effective, efficient and timely administration of the cases.
16.2. Such communications should utilise modern methods of communication, including electronic communications as well as written documents delivered in traditional ways.
16.3. The EU JudgeCo Guidelines for Court-to-Court Communication, presented as an Annex to these EU JudgeCo Principles, should be employed.
16.4. Electronic communications should utilise technology which is commonly used and be reliable and secure.
16.5. If courts are to manage an international insolvency case, they should consider the use of one or more protocols to manage the proceedings with the agreement of the parties, and approval by the courts concerned.

Principle 17 (GP 23.4 – 23.5) Independent Intermediary

17.1. Courts should consider the appointment of one or more independent intermediaries within the meaning of Principle 17.2, to ensure that an international insolvency case proceeds in accordance with these EU JudgeCo Principles. The court should give due regard to the views of the insolvency administrators in the pending insolvency cases before appointing an intermediary. The role of the intermediary may be set out in a protocol or an order of the court.
17.2. An intermediary:
(i) Should have the appropriate skills, qualifications, experience and professional knowledge, and should be fit and proper to act in an international insolvency proceeding;
(ii) Should be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest;
(iii) Should be accountable to the court which appoints him or her;
(iv) Should be compensated from the estate of the insolvency case in which the court has jurisdiction.

Principle 18 (GP 25) Notice

18.1. If an insolvency case appears to include claims of known foreign creditors from a State where an insolvency case is not pending, the court should assure that sufficient notice is given to permit those creditors to have a full and fair opportunity to file claims and participate in the case.
18.2. The court should encourage the publication of such notices in the Official Gazette (or equivalent publication, including any internet-registry) of each State concerned.
18.3. For the purposes of notification within the meaning of Principle 18.1, a person or legal entity is a known foreign creditor if:
(i) The debtor's business records establish that the debtor owes or may owe a debt to that person or legal entity; and
(ii) The debtor's business records or bookkeeping establish the address of that person or legal entity.

Principle 19 (GP27) Coordination

19.1. Where there are parallel proceedings, each insolvency administrator should obtain court approval for any action affecting assets or operations in that forum if required by local law, except as otherwise provided in a protocol approved by that court.
19.2. An insolvency administrator should seek prior agreement from any other insolvency administrator in relation to matters concerning proceedings or assets in that administrator's jurisdiction, except where emergency circumstances make this unreasonable.
19.3. A court should consider whether the insolvency administrator in a main proceeding, or his or her agent, should serve as the insolvency administrator or co-administrator in secondary proceedings to promote the coordination of the proceedings.
19.4. Courts should encourage insolvency administrators to report periodically, as part of national reporting duties, on the way these Principles and/or agreed Protocols are applied, including any practical problems which have been encountered.

Principle 20 (GP28) Notice to Administrators

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

Principle 21 (GP29) Cross-Border Sales

21.1. When there are parallel insolvency proceedings and assets are to be disposed of (whether by sale, transfer or some other process), courts, insolvency administrators, the debtor and other parties should cooperate in order to obtain the maximum aggregate value for the assets of the debtor as a whole, across national borders.
21.2. Where required to act, each of the courts involved should make orders approving disposals of the debtor's assets that will produce the highest overall value for creditors.

Principle 22 (GP30) Assistance to Reorganisation

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

Principle 23 (GP31) Post-Insolvency Financing

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

Principle 24 (GP36) Plan Binding on Participant

24.1. If a Plan of Reorganisation is adopted in a main insolvency proceeding and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon the debtor and the creditors who participate in the main proceeding.
24.2. For this purpose, participation includes:
(i) Filing a claim;
(ii) Voting on the Plan; or
(iii) Accepting a distribution of money or property under the Plan. Principle 25 (GP37) Plan Binding: Personal Jurisdiction

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

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

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

1. Introduction and Overview

1.1. Introduction

These *EU Cross-Border Insolvency Court-to-Court Principles* present a non-binding statement. They aim to cover all jurisdictions of the European Union, especially those Member States to which the European Insolvency Regulation ('EIR') applies.[1] To some extent these EU Cross-Border Insolvency Court-to-Court Principles build further on the structure and contents of the *Global Principles for Cooperation in International Insolvency Cases* ('*Global Principles'*), laid down in a report from June 2012, presented to the American Law Institute (ALI) and International Insolvency Institute (III). These Global Principles were drafted by Professors Ian F. Fletcher (University College London, UK) and Bob Wessels (University of Leiden, the Netherlands). These Global Principles include as an integral part a set of *Global Guidelines for Court-to-Court Communications in International Insolvency Cases.*[2] The other important source for the text of these EU Cross-Border Insolvency Court-to-Court Principles are the *European Communication and Cooperation Guidelines for Cross-Border Insolvency* (also known as '*CoCo Guidelin*es'). The CoCo Guidelines were developed under the aegis of INSOL Europe (generally representing the European insolvency community) and were published in 2007. This initiative was jointly chaired by Professors Bob Wessels and Miguel Virgós (University Autónoma, Madrid, Spain) and aimed to provide non-binding guidelines to supplement the framework of Article 31 of the EIR. This provision lays down the duty of a liquidator appointed in main insolvency proceedings and those liquidators appointed in secondary proceedings concerning the same debtor to cross-border communicate and cooperate with each other.[3] Finally, the *EU Cross-Border Insolvency Court-to-Court Principles* build on other regional and international initiatives to extend to the global level awareness of the fundamental need for cooperation and communication, adding to the consensus being seen in the area of cross-border insolvency. These Principles also include a set of *EU Guidelines for Court-to-Court Communications in International Insolvency Cases*.

During the course of the work, which started early 2013, of developing these Principles and Guidelines, as further set out below, the name "JudgeCo project" was adopted. It therefore seems appropriate to refer to the Principles with the abbreviation *EU JudgeCo Principles*, and to the Guidelines as *EU JudgeCo Guidelines.*

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[1] Council (EC) Regulation no. 1346/2000, 29 May 2000, entered into force 31 May 2002. The Insolvency Regulation does not apply to Denmark.

[2] 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 (NAFTA) (the 'ALI/NAFTA Principles'). These Principles were evolved within the American Law Institute's Transnational Insolvency Project, conducted between 1995 and 2000, for which the Reporter was Professor Jay L. Westbrook, with the objective to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states, consisting of the United States, Canada and Mexico.

[3] See for the text www.insol-europe.org or www.bobwessels.nl, weblog, Archive 2006-2013, document 2007-09-doc1. These CoCo Guidelines have received attention both in legal literature as well as from practitioners and judges and were for instance taken into account in the June 2009 Global Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies.

Efficient and effective judicial cooperation in cross-border insolvency cases is vital for the rescue of businesses with employees, assets and operations in more than one EU Member State. The existing state of such cooperation is non-existent or weak. Obstacles include formalistic and detailed national procedural law, concerns about a judge's impartiality, unfamiliarity with already existing tools and methods for cross-border cooperation, uneasiness with the use of certain legal concepts and terms, and, evidently language. The results of the JudgeCo project ('principles', 'guidelines' and training) further build on existing experience and tested resources, especially in cross border cases in North America.

1.2. Principles: Systematic Evaluation of the Global Principles in a European Context

The *EU Cross-Border Insolvency Court-to-Court Principles* cover as their core 26 recommendations for cross-border cooperation between courts in different Member States, involved in insolvency proceedings concerning the same debtor. After an introduction in this section, Section 2 constitutes the heart of the statement, the *EU Cross-Border Insolvency Court-to-Court Principles*. These principles are based on the result of a research survey to establish the extent to which its respondents feel it is feasible to achieve a European acceptance of the Global Principles for Cooperation in International Insolvency Cases, either in their existing form or, if necessary, with modifications or variations. An important factor furthermore has been that the Principles to be developed should fit into the existing treaties of the EU, more specifically the EU's so called 'Stockholm programme' to create guidelines for a common policy on a group of topics within the area of 'Freedom, Security and Justice'.[4]

One of the core ground rules is that the judgments deriving from one Member State will be recognised in other Member States (except for Denmark) on the basis of 'mutual trust'.[5] To a large extent in the field of insolvency such recognition is 'automatic' (Articles 16 and 17 EIR). The interpretation of the accompanying legal rules should be exercised in a non-national, 'European' way, with the purpose to create a better functioning internal market. See recital 4 to the EIR.[6] Section 3 specifically deals with court-to-court Communications. The method followed in establishing the *EU Cross-Border Insolvency Court-to-Court Guidelines* is explained in that section.

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[4] For the Stockholm Programme, see OJ C 115, 4.5.2010, p. 1. 'The ambitious goals set by the Treaties and by the Stockholm Programme should be attained inter alia by establishing, for the period 2014 to 2020, a flexible and effective Justice Programme (the "Programme") which should facilitate planning and implementation. The general and specific objectives of the Programme should be interpreted in line with the relevant strategic guidelines defined by the European Council', see recital 2 of the Regulation (EU) No 1382/2013 of the European Parliament and the Council of 17 December 2013, establishing a Justice Programme for the period 2014 to 2020.

[5] Mutual recognition of each other's judgments is based on the fundamental assumption that Member States share common values, including fundamental rights, '… which they are trusted to respect', see O. de Schutter, The Two Europes of Human Rights: The Emerging Division of Tasks between the Council and the European Union in Promoting Human Rights in Europe, in: 14 Columbia Journal of European Law 2008, 542ff. On the principle of mutual trust in the area of freedom, security and justice, see T. Van den Sanden, *Het principe van wederzijds vertrouwen in de ruimte van vrijheid, veiligheid en recht*, in: Sociaal-Economische Wetgeving (SEW) 5/2104, 232 et seq.

[6] Text: 'The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters ...' within the meaning of Article 81 of the Treaty on the Functioning of the European Union (TFEU).

The chosen method to develop the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles* has been a systematic evaluation of the possibility of adapting the June 2012 Global Principles.[7] The project's ultimate aim is to provide a standard (legally non-binding) statement of Principles and Guidelines suitable for application within the specific EU context in cross-border insolvency cases. This specific EU context is generally reflected in six areas: (1) consistency with international norms, (2) goals of the EU, (3) the existence of national procedural law, (4) the existing Insolvency Regulation, (5) ongoing case law, and (6) developments within the EU legislature and the European Judicial community.

1.2.1. Consistency with International Norms

During the development of the Global Principles many of the publications related to 'insolvency', by such organisations as UNCITRAL, EBRD, the World Bank and INSOL Europe have been taken into account.[8] It has been an integral part of the evaluation to identify core values and principles that respondents to the two questionnaires (sent out in May 2013 and July 2013) are aware of and which they feel should be considered in the evaluation of the present texts or in a proposal for a revised or a new 'Principle' or 'Guideline'. Such consistency should enhance certainty in European insolvency practice and stability in the furthering of the EU JudgeCo Principles and Guidelines.[9]

1.2.2. Goals of the EU: Judicial Cooperation

As outlined above, within the EU cross-border judicial communication and cooperation is developed for the area 'Freedom, Security and Justice'. This requires a proper functioning of the internal market on the basis that cross-border insolvency proceedings should operate efficiently and effectively resulting in the goal that the Principles and the Guidelines should be efficient and effective, whilst actively aiming at the strengthening of confidence in the European judicial area. This is a challenge as it is acknowledged by several respondents that in some Member States the quality of judges is in need for improvement, the court's infrastructure and available means are poor, the knowledge of the Insolvency Regulation is insufficiently developed, the experience to deal with international insolvency cases or the mastering of a second language (for instance English, German or French) is lacking[10], whilst the awareness of the impact of international business or the interests involved in a business rescue plan is not often fully understood.[11]

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[7] See for the method adopted in that report, the June 2012 Global Principles Report, par. 1.4.2.

[8] See for some ten sources the Global Principles Report, p. 22.

[9] In the June 2012 Global Principles Report (at p. 55) it is furthermore explained that it has benefited from the experiences gained in (non-insolvency related) cross-border activities in the area of law and the recommendations made by judges and experts in some 50 jurisdictions, as well as the materials that have led to the 'Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards, included in Direct Judicial Communications', an emerging guidance from the Hague Conference on Private International Law, 2013.

[10] In general on this subject: Astrid Sadler, Practice Obstacles in Cross-border Litigation and Communication between (EU) Courts, in: www.erasmuslawreview.nl (volume 5, Issue 3 (2012).

[11] It should be added that several respondents have also criticized the quality of persons acting in a role as insolvency office holder, their understanding of the Insolvency Regulation, their lack of expertise and their

1.2.3. Existence of National Procedural Law

Article 81 paragraph 2 TFEU provides that in developing judicial cooperation in civil matters having cross-border implications, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: … '(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States'. Several of the Global Principles aim to set non-binding rules related to matters regarding businesses which rules in many EU Member States form an integral part of national procedural law, many times in domestic legislation regarding civil procedure or insolvency procedural rules. In legal literature it is questioned whether Article 81(2)(f) TFEU may form the basis for an alignment of the civil procedural rules of the Member States irrespective of the national or international character of the litigation at hand.[12] Where many of these rules not only apply to businesses, but also to natural persons (consumers) the respondents to the survey have been asked to take this observation into account.

1.2.4. The existing European Insolvency Regulation

The Insolvency Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Union (Article 47 EIR). It is therefore nonsensical to test the possible application of Global Principles that would contradict the rules contained in the Regulation or those matters that clearly belong to the national domain of local procedural or insolvency law of the Member States. For this reason out of the 37 Global Guidelines 10 have been analysed and selected that would most certainly be against the text of the Regulation or domestic law. These are Global Principles 7 (Recognition), 12 (Adjustment of Distributions), 13 (International Jurisdiction), 14 (Alternative Jurisdiction), 24 (Control of Assets), 26 (Cooperation), 32 (Avoidance Actions), 33 (Information Exchange), 34 (Claims) and 35 (Limits on Priorities). These Global Principles were left out of further study and research.

1.2.5. Ongoing Case Law

New case law applying the EU Insolvency Regulation or judgments from national (higher) courts have also been taken into account. An example is provided by the judgment of 22 November 2012 of the Court of Justice of the European Union in the matter of *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak, V Christianapol sp. z o.o.*

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awareness of the importance in cross-border insolvency cases to deal with foreign insolvency office holders and/or courts.

[12] For this view, see C.H. van Ree, Harmonisation of Civil Procedure: An Historical and Comparative Perspective, in: Xandra E. Kramer and C.H. van Ree (eds.), Civil Litigation in a Globalised World, The Hague: T.M.C. Asser Press 2012, 39ff., submitting that business will regard these as obstacles in their decisions where to produce, market or sell their products and services. Strong support for the view that differences in national procedural rules function as trade obstacles can be found by Hon. J.J. Spigelman (retired in 2010 as Chief Justice of New South Wales, Australia), see J.J. Spigelman, Transaction costs and international litigation, (2006) 80 Australian Law Journal, 438ff; J.J. Spigelman, Cross-Border Insolvency: Co-operation or conflict? (2009) 83 Australian Law Journal, 44ff.

(Case C-116/11). In short, this is the case. Following the approval of a rescue plan (*procédure de sauvegarde*) by the French court in Meaux, the Polish court '… asked the Tribunal de commerce de Meaux whether the insolvency proceedings in France, which were main proceedings for the purposes of the Regulation, were still pending. The answer given by the French court did not provide the necessary clarification. The referring court then consulted an expert'. The Polish court (*Sąd Rejonowy Poznań-Stare Miasto w Poznaniu*) then decided to stay the proceedings pending before it and to refer questions to the Court of Justice of the EU for a preliminary ruling, which led to the judgment that Article 27 of the EIR must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose: '… It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation'.[13]

Therefore, the principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings to address the challenge (i) to have regard to the objectives of the main insolvency proceedings, and (ii) to take account of the scheme of the Regulation, which aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings. This introduction to the EU JudgeCo Guidelines only signals the challenge for such a court to communicate with the liquidator in the main proceedings and to ensure that he will cooperate. The challenge resulting from the judgment for cross-border court-to-court cooperation is addressed in these Principles.[14]

1.2.6. Developments within the EU Legislature and the European Judicial Community

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[13] From the Court's arguments:

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

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

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

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

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

On 12 December 2012 the European Commission published a Proposal for a Regulation amending the EU Insolvency Regulation [COM(2012) 744], which includes a Report on the application of the EIR [Com(2012) 743].[15] This latter Application Report summarises experiences reported by all Member States in the course of 2012, and provides (at page 14): '… The duties to cooperate and communicate information under Article 31 of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings'.
In the Proposal itself, in Recital 20 to the EIR, it is expressed that main insolvency proceedings and secondary proceedings can only contribute to the effective realisation of the total assets if all the concurrent proceedings pending are coordinated. Then follows (the words underlined are new in comparison to the existing text):
'(20) … The main condition here is that the various liquidators and the courts involved must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time …'

The Proposal is infused by the strengthening of the paradigm of communication and cooperation in cross-border cases. Examples are an extended draft Article 31 (Cooperation and communication between liquidators) [16] , a new Article 31a (Cooperation and communication between courts)[17], and a new article 31b (Cooperation and communication

[15] http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.

[16] Extended Article 31 - Cooperation and communication between liquidators:

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

2. In particular, the liquidators shall:

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

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

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

[17] New Article 31a - Cooperation and communication between courts

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

between liquidators and courts).[18] Finally, in a new recital 20a it is stressed that the amended Insolvency Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated and the various liquidators and courts concerned are under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor (Article 42b of the Proposal). In the Proposal the final sentence of Recital 20 reads as follows:
'In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law'.[19]

In the light of these developments, it has been submitted that, within the EU, there is an open attitude towards 'best practices' such as those under review in the JudgeCo project. Indeed, an endorsement to take into account the Global Principles follows from Commission Staff Working Document (Impact Assessment, SWD(2012) 416 final), p. 24), where it is stated: 'In order to ensure the coordination of proceedings opened in several Member States, the Regulation obliges insolvency practitioners to communicate information and cooperate with each other. Several guidelines for practitioners on cooperation and communication in cross-border insolvencies have been developed by associations of practitioners [51]'. Footnote [51] reads: 'The most recent example are the Global Principles for Cooperation in international

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2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.
3. Cooperation may be implemented by any appropriate means, including
(a) communication of information by any means considered appropriate by the court;
(b) coordination of the administration and supervision of the debtor's assets and affairs;
(c) coordination of the conduct of hearings,
(d) coordination in the approval of protocols."

[18] New Article 31b - Cooperation and communication between liquidators and courts
"1. In order to facilitate the coordination of main and secondary insolvency proceedings opened with respect to the same debtor,
(a) a liquidator in main proceedings shall cooperate and communicate with any court before which a request to open secondary proceedings is pending or which has opened such proceedings and
(b) a liquidator in secondary or territorial insolvency proceedings shall cooperate and communicate with the court before which a request to open main proceedings is pending or which has opened such proceedings,
2. The cooperation referred to in paragraph 1 shall be implemented by any appropriate means including the means set out in Article 31a(3) to the extent these are not incompatible with the rules applicable to each of the proceedings."

[19] On 5 February 2014 the European Parliament (ordinary legislative procedure: first reading) adopted the 'European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7 0413/2012 – 2012/0360(COD))'. Compared to the European Commission's December 2012 proposal, there are quite some differences. Over 60 amendments to the Commission's proposal have been made; the European Parliament supports the suggested extension to the system of cross-border communication and cooperation.

insolvency cases from the American Law Institute and the International Insolvency Institute, elaborated by Ian Fletcher and Bob Wessels (2012)'.
These developments have led to the question to the respondents to allow themselves a forward-looking vision anticipating the challenges the judiciary in general will face.

By applying these elements as set out in paragraphs 1.2.1–1.2.6 the EU JudgeCo Principles and Guidelines – although being a non-binding statement – are in line with the European context as set out and with international developments and other attempts at developing modes of international cooperation in the area of international insolvency.

1.3. The EU JudgeCo Principles' Objectives

The primary aim of the project is to develop 'guidelines' or 'standards' for cross-border communication and cooperation in insolvency cases between courts in the European Union as a result of a systematic evaluation of the possibility of adapting the June 2012 Global Principles. The result should reflect the central notions of cross-border cooperation and coordination between concurrent insolvency proceedings and should lead to a set of Principles ('*EU Cross-Border Insolvency Court-to-Court Cooperation Principles'*) and Guidelines ('*EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines*'):
(i) Ensuring as far as possible that the EU Insolvency Regulation works in practice, to efficiently and effectively deal with the debtor's estate;
(ii) Fitting the current environment where solutions have been developed based on models reflecting cooperation and communication;
(iii) Guaranteeing the organisation and conduct of a fair legal process and ensuring the fair representation of stakeholders concerned in insolvency processes.

A strong signal of the fact that the June 2012 Global Principles are capable of realising these goals and provide practical use and guidance comes from two courts in the UK and in the USA. The Supreme Court of the United Kingdom (*Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others*) [2012] UKSC 46 (24), has referred '… the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings … and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties). It is ultimately derived from the civil law concept of a trader's domicile, and was adopted in substance in the draft EEC Convention of 1980 as a definition of the debtor's centre of administration: see Report by M Lemontey on the draft EEC Bankruptcy Convention, Bulletin of the European Communities, Supp 2/82, p 58; American Law Institute, *Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012), Principle 13, pp 83 et seq.' Another reference to the June 2012 Global Principles has been made by the United States Court of Appeals for the Third Circuit (in *Re ABC Learning Centres*) on 27 August 2013. The Court made references to Global Principle 1, citing that it sets out '… the overriding objective [which is to] enable … courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding'.[20]

[20] Another part of the June 2012 Global Principles Report is cited too by this Court of Appeal: '[T]he emphasis must be on ensuring that the insolvency administrator, appointed in that proceeding, is accorded every possible

The secondary aim of the JudgeCo project is to develop comprehensive training and tools to build capacity amongst judges/practitioners, chiefly in recent EU accession countries, to give full effect to the Insolvency Regulation, to develop uniform interpretation of insolvency terms and concepts, to enable familiarity with the developed EU JudgeCo Principles and Guidelines, and by doing so enhancing the efficiency and effectiveness of insolvency proceedings having cross-border effects which will provide greater certainty and predictability in the market.

1.4. Organisation of the project

1.4.1. Project Team

The Project Team is coordinated by Prof. Bob Wessels.[21] In coordinating the Project Team he was assisted by Prof. Jan Adriaanse[22] and Prof. Paul Omar.[23] In operational coordination, financial management and communication they were assisted by Dr. Jean-Pierre van der Rest, Dr. Bernard Santen, their staff (Gert-Jan Boon, Frédérique Vos and Rumana Abdur) and Leiden Law School master students.[24] The names of all members of the Project Team appear elsewhere.
To avoid any tension between professional and ethical duties a person may have, all persons involved (the Project Team and the Review & Advisory group, see under 1.4.2) have been asked to make appropriate disclosure of ways in which the position they take may be influenced by their professional obligations and relations.

1.4.2. Review & Advisory Group

A Review & Advisory group has been established. The members of the Review & Advisory Group are judges, academics and some senior insolvency practitioners from a majority of the EU Member States and some five non-EU jurisdictions. In all, the R&A groups amounts to around forty persons. The tasks of the group are:
(i) To provide input via questionnaires and act generally as a sounding board,
(ii) To provide certain contacts to European/national representatives of the judiciary,
(iii) To review recommendations or draft texts of principles and guidelines,

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assistance to take control of all assets of the debtor that are located in other jurisdictions." Id. at cmt. to Global Principle 24'.

[21] Prof. Wessels, Professor of International Insolvency Law, University of Leiden, oversees the overall execution of the project, performs the drafting work, maintains contacts with consultative groups of experts and actively participates in the training programme. His responsibility is governed by the Institute of Private Law, Department of Company Law of Leiden Law School.

[22] Prof. Adriaanse, Professor of Turnaround Management, University of Leiden, supervises the day-to-day organisation and is responsible for execution of the projects' application.

[23] Prof. Omar, Professor of International and Comparative Insolvency Law, Nottingham Law School, assists in editing and refining the successive drafts of the EU JudgeCo Principles and Guidelines, is responsible for developing the training programme and participates in it. His responsibility is governed by the Nottingham Law School.

[24] Their responsibilities are governed by the Department of Financial & Economic Affairs of Leiden Law School.

(iv) To assist in providing input and recommendations to the development and delivery of training to judges, and in identifying judges to participate in trainings, and
(v) To be available for any post-training matters that arise.
The names of the members of the Review & Advisory Group, which was chaired by Prof. Ian F. Fletcher Q.C. (hon), Professor Emeritus, University College London, United Kingdom, appear elsewhere.

1.4.3. Other Consultants

As the JudgeCo project is a combined effort with the International Insolvency Institute (III) a Members' Consultative Group was formed by eight III Members with an interest in the project, chaired by Justice Eberhard Nietzer (Heilbronn, Germany) and Hon. Samuel L. Bufford, former United States Bankruptcy Judge in the Central District of California, and Distinguished Scholar in Residence, The Dickinson School of Law, Penn State. The names of the members of this Group appear elsewhere.

1.4.4. The Methodology Followed

As outlined above, the aim of the EU JudgeCo project is to systematically evaluate the possibility of adapting the core of the June 2012 Global Principles for application by EU Member States. The project's ultimate aim is to provide a standard (legally non-binding) statement of Principles and Guidelines suitable for application within the specific EU context in cross-border insolvency cases. The chosen method is similar to the method applied in developing the June 2012 Global Principles and its accompanying Court-to-Court Guidelines. For the JudgeCo project this means a reappraisal of these Principles and Guidelines from the perspective of a wide and diverse array of national insolvency systems and legal traditions, in order to test the feasibility of their being endorsed as the embodiment of "European best practice" or "European best standard" in the matters addressed therein.

The approach chosen has been an open-minded one, undertaken in the spirit of transparent and open debate, to ensure that any aspects of the Global Principles which may give rise to difficulties of transposition into the legal culture of any particular EU Member State can be properly and sensitively considered. This approach resulted in an invitation to the members of the Review & Advisory Group to participate in a consultative process, based on two questionnaires, sent out in May 2013 and July 2013. These questionnaires ensured that each individual Global Principle and each individual Court-to-Court Guideline was evaluated.[25] In

[25] Per Global Principle or Guideline the question has been:
a. Is this Principle already accepted and applied by courts and administrators under the law of your country?
b. If your answer to Question (a) was 'yes', please supply brief references to the sources and authorities which provide the basis for this response (Examples of the application of this Principle in actual cases, drawn from recent practice, would be especially welcome; together with any sources available on the internet).
c. If your answer to Question (a) was 'no', please indicate whether, in your opinion, there is any strong objection to the acceptance of this Principle under the law of your country in its current state. If there is such an objection to acceptance, please explain the nature of it, e.g. an article in your Constitution or procedural rules governing the position of a judge. Please indicate also to what extent, if at all, it might be possible to gain acceptance for a modified version of the Principle (indicating what modification(s) would be necessary).
d. If your answer to Question (a) was 'no', please indicate whether, in your opinion, there is any objection to this Principle based on cultural, economic or practical grounds.

their replies the respondents were asked to provide a true and accurate representation of the law of the country for which they acted as an expert.

The consultative process has also led to the formation of consultative groups and in the convening of discussions and debates in several international gatherings, seminars and lectures. The JudgeCo project ran over 24 months, January 2013 – December 2014. Until July 2014 several seminars, gatherings, email exchanges and conference calls were held where members of the Review & Advisory Group, members of organisations and institutions addressed and other invited guests have been introduced in the objectives of the JudgeCo project and have debated and discussed several topics of the JudgeCo project. These meetings were held at Leiden (Leiden Law School), Trier (European Law Academy), New York (Columbia University, Annual Conference International Insolvency Institute 2013), The Hague (Insol International Academics Colloquium), Nottingham (Nottingham Law School), Paris (INSOL Europe Academic Forum; INSOL Europe Judicial Wing; INSOL Europe Annual Congress 2013), Berlin (*Verband Insolvenzverwalter Deutschlands e.V (VID)* Insolvency Administrators Congress 2013), Leiden (joint conference of the Netherlands Association of Comparative and International Insolvency Law and INSOL Europe Academic Forum 2014, including a discussion with judges Melissen (Netherlands), Richards (England), Vallender (Germany) and Verougstraete (Belgium)), Barcelona (Annual Conference International Bar Association, Insolvency Section, 2014, including a discussion with judges Melissen (Netherlands), Nietzer (Germany), Peck (USA, New York) and Sanches Cargallo (Madrid), Mexico (Annual Conference International Insolvency Institute, 2014) and Leiden (Leiden Law School, Turnaround, Rescue and Insolvency Master Class).

After having discussed drafts of the EU JudgeCo Principles and Guidelines within the Project Team itself, a first non-public draft was discussed with the Review & Advisory Group in December 2013/January 2014. The comments and observations received led to a Second non-public draft (February 2014). In March 2014, a first public draft of the EU JudgeCo Principles and the EU JudgeCo Guidelines was published. The launch of a website allowed the leaders of the Project to invite comments from the general public. Based on discussion within the Project Team and comments received from the III Members Consultative Group, a Final Public Draft was prepared in the first half of June 2014. This Final Public Draft has been reviewed by the Review & Advisory group, which led to the July 2014 Draft, which will form the basis for the training of judges, foreseen in the second half of 2014.

Also during other occasions members of the Project Team were able to discuss items with groups of academics, practitioners, law students and judges. The feedback from all these sessions has been particularly instructive. The project has benefitted from the privilege of collaborating with a wide circle of international and European experts and practitioners who volunteered to participate, notably by supplying expert advice about the suitability (or otherwise) of the Principles for application in systems of which they had first-hand knowledge. They were also able to comment on the evolving drafts of the Principles and Guidelines at the various stages of its gestation. The support thus provided by all involved, including judges, practitioners, academics and law students allowed the Project Team to develop the texts of the Guidelines based on surveys and input of more than 20 separate jurisdictions representing a variety of different legal traditions. The present text[26] is based on

[26] The present text of the EU JudgeCo Principles and Guidelines has been finalized early July 2014.

the cumulative results of discussions in these meetings and suggestions communicated by individuals to the reporters. We are very grateful for all the assistance received.[27]

Unrelated to insolvency, the JudgeCo project may be regarded as an instrument in solving international commercial disputes in which a new concept of 'judicial comity' is evolving, providing a framework of ground-rules for establishing and developing judicial dialogue both in a general context and in relation to a specific case.[28]

1.4.5. The Final Text of the EU JudgeCo Principles

It has been concluded that the June 2012 Global Principles for Cooperation in International Insolvency Cases, a prominent sources for the development of the EU JudgeCo Principles, represent a truly inter-national, global consensus among the consultants. In the June 2012 Global Principles Report, it is explained that the terms 'cooperation', 'coordination' and 'communication' play a major role in cross-border insolvency cases. Given the foundation of the Global Principles the term 'cooperation' encompasses 'a variety of approaches to make legal systems work together better in addressing multinational problems, without necessarily making the systems more similar'. The term 'coordination' is sometimes used to mean a limited harmonisation aimed at making two different systems work better together, without being fully harmonised'. [29] 'Communication' relates to certain forms of exchange of information between different jurisdictions via various role players (courts, insolvency office holders, court clerks, certain other authorities) as a means to cooperate or to coordinate pending insolvency proceedings or developments within an international insolvency case.[30]

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

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

[29] American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003, p. 3.

[30] Where the Reporters of the June 2012 Global Principles Report aimed at further building on the accepted concepts and terms of the ALI/NAFTA Principles, the Global Principles Report does not follow the distinctions made by the Austrian author Geroldinger, to use the term 'coordination' as the result of 'collaboration', which term itself covers all topics of information exchange ('communication'), all other matters in which different

As with the Global Principles, the JudgeCo project is directed primarily at cooperation, but in its recommendations seeks a measure of coordination as well.[31]

The final text is based on the shared aspiration that the EU JudgeCo Principles and Guidelines accurately represent a consensus shared among a large group of leading experts and consultants from a large group of jurisdictions. On the whole, the Project Team is of the opinion that the texts of the EU JudgeCo Principles and Guidelines reflect such a consensus. If any particular issue was not capable of being resolved on the basis of a text of universal application acceptable to all members of the Review & Advisory Group, accommodations have been sought by means of a proviso to allow the main principle to operate subject to certain necessary local modifications. In the course of this process, the many available internationally generated texts mentioned earlier have been studied with a view to ascertaining additional, complementary principles of law and practice which are considered to command general support. As with the Global Principles the approach has been taken that no term, principle, guideline or legislative recommendation would be adopted that was substantially opposed by three or more of the members of the Review & Advisory Group. Again, the final text does not always reflect unanimous agreement in every particular principle or guideline, but indeed expresses agreement on fundamental values and general standards, preventing disagreement on certain matters.[32]

The June 2012 Global Principles for Cooperation in International Insolvency Cases contain 37 Global Principles for Cooperation in Global Insolvency Cases and 18 Global Guidelines for Court-to-Court Communications in International Insolvency Cases, in each case accompanied by commentary. The commentary contains – comparative – elucidations and provides informed background on how a certain rule, including its specific terms, is applied in a certain legal context. Often the considerations at stake are outlined and balanced, whilst many times a specific chosen rule is illustrated by examples or illustrations. In this way, users of the Global

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proceedings pending in different states can influence each other ('intervention' possibilities), 'cooperation' (actually aligning approaches to pending proceedings) and 'harmonisation' or 'uniformation' (as found in certain provisions of the EU Insolvency Regulation, such as Articles 7(2) (reservation of title), 20 (return and imputation), 29 (right to request the opening of secondary proceedings), 30 (advance payments of costs and expenses), 31 (duty to cooperate and to communicate), 32 (exercising creditors' rights), 33 (stay of the process of liquidation in secondary proceedings), 34 (measures ending secondary proceedings), 35 (assets remaining in the secondary proceedings), 39 (right to lodge claims) and 40 (duty to inform creditors). See Andreas Geroldinger, *Verfahrenskoordination im Europäischen Insolvenzrecht. Die Abstimmung von Haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2010, p. 25ff. See also I.F. Fletcher and B. Wessels, Harmonization of Insolvency Law in Europe, Preadvies 2012 uitgebracht voor de Vereniging voor Burgerlijk Recht/ Report 2012 for the Netherlands Association for Civil Law, Deventer: Kluwer 2012.

[31] Cooperation in cross-border cases between courts is based on the premise that these courts in principle act on the same footing and are not subordinated to one another, see in general Michael Nunner, *Kooperation internationaler Gerichte*, Jus Internationale et Europaeum 36, Mohr Siebeck, 2009, p. 112ff.

[32] Professors Fletcher and Wessels, as the Reporters of the June 2012 Global Principles Report, were of the opinion that the Global Principles have as their foundation, in the words of Paul L. Friedman, Chair of the American Law Institute (ALI) Program Committee: '… the Institute's traditional and primary goals: achieving coherence, reflecting current best practices, and better adapting the law to social needs', see The President's Letter, 32 The ALI Reporter, nr. 2, Winter 2010, p. 3.

Principles are able to understand more fully the background and meaning of a certain rule or its application in a certain situation. The commentary forms an integral part of these June 2012 Global Principles.[33]
The availability of the original broad commentary has resulted in a final text of the EU JudgeCo Principles and Guidelines, in which, for every Principle or Guideline, an indication will be given as to what the original Global Principle of Guideline is, with references to the June 2012 Global Principles Report, for those users who wish to learn more about background and meaning of the original provision. In some cases the short explanation provided to the Global Principles has been inserted in the commentaries to the EU JudgeCo Guidelines, for ease of reference or to illustrate their working with practical examples.

As explained in paragraph 1.2.4, the EU JudgeCo Principles reflect a selection of the June 2012 Global Principles, reconsidered and/or amended to fit for the purpose to be applied in a European context. The EU JudgeCo Principles follow their own numbering (with between brackets the number of the Global Principle ('GP') were the original text can be found). It is acknowledged that several Global Principles address themselves to insolvency administrators and not (directly) to courts. As the role of the court in many EU Member States interrelates or evolves based on action taken or to be taken by insolvency administrators, the view has been held that courts should not (and should not be seen as) work(ing) in isolation. These Principles therefore also have been the subject of review and research.

1.4.6. Innovative Value

Using non-binding principles, guidelines or recommendations is not new in European insolvency practice, but there is only limited experience. It is rather 'new' for judges dealing with cross-border matters. The assumption is that closer approximation of national laws, especially insolvency laws, has always been seen as unattainable. Where political unanimity, as necessary under Article 81 TFEU, seems to be hard to achieve, 'best practices' are seen as a better alternative. The JudgeCo project combines existing expertise with a framework in which judges and other experts are able to be directly involved in the drafting process. The project is innovative as it aims to include the actors concerned in the development of certain rules, encouraging them to achieve greater convergence to the main EU goals. The strong European basis of the project is unique and well spread, but flows rather logically from the way existing networks especially of academics and practitioners have functioned for over ten years. A fundamental basis of EU legislation is warranted. However, insolvency is 'global' and in other parts of the world principles and guidelines have been developed and used in cross-border cases for over twenty years. In developing the European (soft law) instruments 'EU Cross-Border Insolvency Court-to-Court Cooperation Principles' and 'EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines' the project further builds on recent (non-European) results and warrants its consistency with international norms by organising input from judges located outside Europe. Also, the project's results may be a well prepared step for certain measures to be taken by the European Commission (e.g. a 'recommendation' or an 'opinion') or they may be used for the 'approximation' of civil, procedural or insolvency laws

[33] In the June 2012 Global Principles Report Notes (or Reporters' Notes) have been used to set forth or discuss legal and other sources, the legal position in certain matters in instruments of soft law. When provided, they appear at the end of a segment of black-letter commentary. The Reporters' Notes should enable readers to better evaluate the background of certain principles and sometimes suggest avenues for further investigation or additional research.

of the Member States. In this way the efficiency and effectiveness of insolvency proceedings having cross-border effects will be enhanced and will provide greater certainty in the market. But again, the EU JudgeCo Principles and Guidelines are non-binding; all suggested action, cooperation or communication in the text of the Principles and Guidelines themselves should be interpreted as containing an implicit requirement that these be applied 'to the maximum extent possible', which several times is reinforced by its use at specific points in the texts.[34]

1.5. Project Funding

Funding for the project:
- European Commission Directorate General Justice (Action Grant for the Specific Programme "Civil Justice" (JCIV Programme) in order to contribute to the strengthening of the area of Freedom, Security and Justice.
The project is registered under: JUST/2012/JCIV/3422.

Co-sponsors:
- International Insolvency Institute (III), whose goal is the promotion of international cooperation in the insolvency area, achieving greater co-ordination among nations in multinational business reorganisations and restructurings[35], and
- Leiden Law School, in order to gain experience to further judicial cross-border cooperation in insolvency areas, further develop professional rules for insolvency office holders, to further improve cross-border insolvency training of non-judges, such as insolvency professionals, including turnaround professionals, or bailiffs, and – more generally – to further the development of the law regarding business failure, rescue and insolvency.[36]
- Nottingham Law School, for similar reasons as the Leiden Law School.[37]

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[34] During the development of the project it has been expressed rather often that the majority of the judges which will be the addressees of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (courts in first instance in the EU Member States) cannot be expected to readily embrace the EU JudgeCo Principles and Guidelines as a valuable box of tools for their work. During trainings it will be necessary to explain these tools, demonstrate their function and show judges how beneficial they can be for their work and the work of the Judge-colleague in the other Member State. There is general agreement that such a training should include an introduction to the EU Insolvency Regulation and the concept of cross-border judicial cooperation and the involvement in these training sessions of judges with experience in judicial cooperation in insolvency matters. It was felt that in many EU Member States translations of the Principles and Guidelines should be made available, to create better circumstances for building a tradition of cross-border cooperation between courts across borders. The latter observation is not within the remit of the JudgeCo project. It was felt too that cross-border cooperation between courts (and between courts and insolvency administrators) would work more effectively if the judges (and/or insolvency administrators) who are cooperating have at least some basic understanding of each other's legal systems, especially how insolvency proceedings work in the other judge's jurisdiction. Samples of such materials prepared by INSOL Europe's Judicial Wing can be found in the technical series published by INSOL Europe, see http://www.insol-europe.org/publications/technical-series-publications/.

[35] See www.iiiglobal.org.

[36] See www.law.leidenuniv.nl and www.tri-leiden.eu.

[37] See www.ntu.ac.uk/nls.

2. EU Cross-Border Insolvency Court-to-Court Cooperation Principles
[Full Text and Commentary]

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

Nothing in these EU JudgeCo Principles is intended to:
(i) Interfere with the independent exercise of jurisdiction by a national court involved, including in its authority or supervision over an insolvency administrator;
(ii) Interfere with the national rules or ethical principles by which an insolvency administrator is bound according to applicable national law and professional rules; or
(iii) Confer substantive rights, to interfere with any function or duty arising out of any applicable law and professional rules or to encroach upon any local law.

Commentary

Reference is made to June 2012 Global Principles Report, p. 59. The *EU Cross-Border Insolvency Court-to-Court Cooperation Principles* (or 'EU JudgeCo Principles') are standards to apply in insolvency cases regarding the same debtor pending in two or more EU Member States, or alternatively in cases where the debtor may potentially be made the subject of parallel proceedings, even if that does not ultimately occur. These EU JudgeCo Guidelines reflect the central principle of cooperation and coordination between parallel insolvency proceedings and aim to offer a realistic set of rules that should ensure that either a reorganisation or a liquidation of the debtor's estate is dealt with efficiently and effectively.[38]

Generally, the EU JudgeCo Principles address courts and insolvency administrators in parallel proceedings. These terms need clarification.[39]
According to Article 2(d) of the Insolvency Regulation 'Court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings. Recital (10) explains that 'insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression "court" in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. Within the context of Article 234 EC Treaty, the European Court of Justice has decided that a functional criterion, and not the national definition, should be used in order to decide whether an authority is to be regarded as a court.[40] It therefore follows that the term 'court' can include what in certain Member States is called a supervisory judge or a delegate judge (overseeing the proceedings and/or supervising the insolvency administrator) or the person in charge of the proceedings, such as a judicial officer (in Germany: *Rechtspfleger*).[41]

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[38] These EU JudgeCo Guidelines further the existing rules and standards available to solve transnational commercial disputes and to align international insolvency cases, such as the American Law Institute / UNIDROIT Principles of Transnational Civil Procedure 2004 (ALI/UNIDROIT Principles), the European Communication & Cooperation Guidelines for Cross-border Insolvency 2007 (the 'CoCo Guidelines') and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation of July 2009 (the 'Practice Guide').

[39] The June 2012 Global Principles Report contains a Glossary with over 150 Terms and Expressions. See [website].

[40] *HSB Wohnbau*, Case C-86/00, ECJ 10 July 2001.

[41] A *Rechtspfleger* is a junior judicial officer authorised to perform specific judicial functions, see www.insolvencycourts.org/ICE/ICEGermanBasics.html.

The term ‘insolvency administrator’ refers to the person or entity that the insolvency law in a Member State places in charge of an insolvent debtor’s property, including trustees, liquidators, sindicos, administrators, curators, monitors, interim trustees, court-appointed trustees and debtors in possession. An ‘insolvency administrator’ is a person or body, including one appointed on an interim basis, authorised in an insolvency proceeding to administer the reorganisation or liquidation of the insolvent person’s assets or affairs.[42] In the EU Insolvency Regulation as a general term of reference to denote any of the recognised species and designations of insolvency office holders the word ‘liquidator’ is used throughout. The term ‘insolvency administrator’ also includes a ‘debtor in possession’ in those insolvency proceedings where its appointment (or staying in control) is available.

The EU Insolvency Regulation provides the possibility to open secondary insolvency proceedings parallel to the main insolvency proceedings. In principle ‘parallel’ proceedings concern main proceedings and one or more secondary proceedings against the same debtor.[43] The fundamental principle is that, where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State (Article 3(2) EIR). Furthermore, the Regulation provides that the opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings, listed under Annex A) shall permit the opening of secondary proceedings in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State (Article 27 EIR).[44]

Whilst offering a basic framework for coordination of cross-border cases, it must be stated however at the outset that the non-binding nature of the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles* is an integral feature of these Principles. The text of Principle 1 explicitly expresses this character. It is nearly identical to Guideline 3 of the CoCo

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[42] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 335. The definition is not included in the DCFR Outline Edition 2009, see footnote 136.

[43] For a description of ‘parallel insolvency proceedings’, see the June 2012 Global Principles Glossary ‘To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run parallel with the main proceedings’, see recital 12 to the EU Insolvency Regulation.

[44] It should be stressed, however, that main proceedings and secondary proceedings under the application of the EU Insolvency Regulation do not operate on the same footing: ‘Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended’, see recital 20 to the EIR.

Guidelines. Principle 1 seeks to ensure that the EU JudgeCo Principles do not cause friction with existing applicable laws or professional rules or with duties flowing from applicable international law, such as the EU Insolvency Regulation or bi- or multilateral conventions or treaties. The Principles therefore also should not hinder a court in the application or the interpretation of rules of domestic law in accordance with EU law or in accordance with judgments of the European Court of Justice. Furthermore the EU Cross-Border Insolvency Court-to-Court Cooperation Principles themselves are not intended to create any substantive rights. The nature of these Principles is non-binding for anyone concerned, such as a court, an insolvency administrator, a debtor or a creditor.

The EU JudgeCo Principles do not contain rules regarding the basic requirements for courts or judges[45] or for insolvency office holders.[46] Where the Principles may serve as a source of guidance or as an aid to interpretation in certain situations, it is evident that the autonomous position of a national court and the independence of a judge should be respected unconditionally at all times.[47] The same goes for national rules concerning the court's supervision regarding insolvency proceedings or the performance of an insolvency office holder's tasks.[48] See EU JudgeCo Principle 1(i).[49]

EU JudgeCo Principle 1(ii) likewise leaves untouched the position of the insolvency office holder and the way in which she or he exercises her or his function. Any rules regarding professional sanctions or the insolvency office holder's civil liability are, where appropriate, determined by applicable national law, including rules on private international law. In assessing relevant criteria with regard to professional sanctions or civil liability, a court may take notice of certain of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles. Again, this does not mean that these Principles have any binding force by themselves, but that they are regarded by the court in the given circumstances of a case as reflecting a general consensus with regard to professional trustworthiness and due care.

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[45] Reference is made to Principle 1 ('Independence, Impartiality, and Qualifications of the Court and Its Judges') of the ALI / UNIDROIT Principles.

[46] Reference is made to the European Bank of Reconstruction and Development Office Holders Principles 2007. See Neil Cooper, The EBRD Office-Holder Principles, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 15-19; Adrian Walters, Regulating the Insolvency Office-Holder Profession across Borders, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 49-56.

[47] For a review of international standards on judicial conduct and the possibility of achieving uniformity, see the memo 'Judicial Independence: a principle for every judge?' (July 2013), written by Tom Reker, research assistant at Leiden Law School. See www.tri-leiden.eu.

[48] Principle 1.1 of the ALI / UNIDROIT Principles: 'The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence'.

[49] Reference is made to the similarity with the 'Overarching principles' under the Hague Draft Principles for Direct Judicial Communication (2013) in specific cases including commonly accepted safeguards: '6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction. 6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue. 6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue'. (footnotes omitted)

EU JudgeCo Principle 1(iii) expresses the intention that the EU JudgeCo Principles do not create additional, substantive rights, as they are not intended to breach binding rules of any applicable law or applicable professional rules or encroach upon any applicable local law.

It is envisaged that the EU JudgeCo Guidelines apply analogously to instances which fall (partly) outside the context of parallel proceedings which are subject to the Insolvency Regulation, e.g. to administrators acting outside their home country, trying to locate a debtor or its assets abroad or courts dealing with issues of evidence. See EU JudgeCo Principle 26. However, as follows from the intention of Principle 1, nothing in these EU JudgeCo Principles can alter or infringe the rights or duties of these participants.

Principle 2 (GP 3(iii)) Public Policy

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

Commentary

Reference is made to the June 2012 Global Principles Report, p. 59. Some of the matters falling within the scope of paragraphs (i) and (ii) of EU JudgeCo Principle 1 could in some states be classified as belonging to the realm of public policy and, as such, would be considered as subject to the ultimate control of the applicable national rules even in a case possessing international characteristics. The concept of public policy can, however, extend to a wider range of matters than those which are expressed by EU JudgeCo Principle 1, paragraphs (i) and (ii). Accordingly, for the removal of doubt, EU JudgeCo Principle 2 expressly confirms that these EU JudgeCo Principles are not intended to detract from the accepted freedom of a national court to refuse to take an action which would be manifestly contrary to the public policy of the state to which that court belongs. This concession to national sovereignty is not intended to be employed as a means whereby courts can readily avoid playing their expected part in the resolution of issues in accordance with internationally agreed principles, merely because the concrete outcome happens to vary in some way from that which would occur in a purely domestic case. The expression ‘manifestly contrary to public policy’ has become a widely accepted drafting convention to indicate that the refusal to act on the ground of public policy must be based on some serious, and fundamental, reason going to the core of the system of values of the state in question.

Within Europe, in accordance with recital 22 in the preamble to the Insolvency Regulation, which states that grounds for refusal are to be reduced to the minimum necessary, Article 25(3) EIR provides that Member States are not obliged to recognise or enforce a judgment concerning the course and closure of insolvency proceedings which might result in a limitation of personal freedom or postal secrecy. Article 26 EIR states that any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the

individual.[50] It follows from the case-law of the Court of justice of the EU that this scheme of recognition constitutes an autonomous and complete system independent of the legal systems of the Member States and that the principle of legal certainty in the Union requires a uniform application in all Member States.[51]

Principle 3 (GP 1) Overriding Objective

3.1. These EU JudgeCo Principles embody the overriding objective of enabling courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtor's business, and furthering the just administration of the proceeding.
3.2. In achieving the objective of Principle 3.1, due regard should be given to the interests of creditors, including the need to ensure that similarly ranked creditors are treated equally. Insolvency administrators should act fairly and proportionately in charging fees or costs. Due regard should also be given to the interests of the debtor and other parties in the case, so far as national law permits, and to the international character of the case.
3.3. All parties in an international insolvency case should further the overriding objective of Principle 3.1 and should conduct themselves in good faith in dealing with courts, insolvency administrators and other parties in the case.
3.4. Courts and insolvency administrators should cooperate in an international insolvency case with the aim of achieving the objective of Principle 3.1.
3.5. In the interpretation of these EU JudgeCo Principles due regard should be given to their international origin and to the need to promote good faith and uniformity in their application.

Commentary

Reference is made to the June 2012 Global Principles Report, p. 37ff.[52]

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[50] With regard to 'public policy' in Article 26 EIR, the Court of Justice of the EU stated initially in the context of the Brussels Convention (predecessor of the Brussels I Regulation) that, since recourse to the public policy clause contained in Article 27(1) of that Convention constitutes an obstacle to the achievement of one of the fundamental aims of the Convention, namely to facilitate the free movement of judgments, such recourse is reserved for exceptional cases (Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-1935, paragraphs 19 and 21, and Case C-1/04, *Eurofood IFSC* [2006] ECR I-701, at paragraph 62). The case-law relating to Article 27(1) of the Convention is transposable to the interpretation of Article 26 of the Regulation (*Eurofood IFSC*, paragraph 64), see CJEU 21 January 2010, Case C-444/07 (*MG Probud Gdynia sp. z o.o*. [2010] ECR I-417), paragraph 34.
[51] Member States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept area matter for interpretation of the Convention (Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-1935), paragraph 22.
[52] The Hague Principles for Direct Judicial Communications (2013, Introduction, p. 12) have a comparable aim, providing a non-exhaustive list: 'Matters that may be the subject of direct judicial communications include, for example:
a scheduling the case in the foreign jurisdiction:
i to make interim orders, e.g., support, measure of protection;
ii to ensure the availability of expedited hearings;

EU JudgeCo Principle 3 draws heavily on Global Principle 1. The United States Court of Appeals for the Third Circuit (in *Re ABC Learning Centres*) on 27 August 2013 made references to Global Principle 1, citing that it sets out '… the overriding objective [which is to] enable courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding'.

In giving effect to EU JudgeCo Principle 3 account should be given to the fact that in several Member States courts only have a supervisory role but are not involved in the preparation of solutions for the parties involved.[53] These courts will probably not be able to apply Principe 3 to its fullest extent, as they will be more involved in the early stages of the proceedings, however, before an insolvency administrator is appointed. In the very early stages of the proceedings, many times on the day of an application for opening insolvency proceedings itself, these courts will acknowledge that effective and speedy judicial action is crucial, whilst in many cases appropriate court orders are required[54] to get the case on the right track and because they are the legal basis for the action taken by the parties involved, above all, the insolvency administrators.

The terms in which EU JudgeCo Principle 3 is expressed are neutral in relation to the underlying philosophy concerning the ultimate mode of administration of the debtor's worldwide assets. Although EU Member States may use different approaches to the treatment of assets in insolvency cases in relation to non-EU Member States (universality; territoriality) and the Insolvency Regulation itself is silent on the subject, the declared objective is that of 'maximising the value of the debtor's global assets', together with the additional goal of 'furthering the just administration of the proceeding'. Therefore, Principle 1 is compatible with the pursuit of a variety of ultimate outcomes in terms of the method of administering and distributing the debtor's global assets. The concept of 'just administration of the proceeding' is also capable of receiving more than one interpretation, according to the system of values prevailing in different types of legal tradition. Hence, it could be possible for Member States with differing systems of insolvency law to find common cause in ensuring that the debtor's assets are administered in the most efficient way achievable, while reserving the ultimate right

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b establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;

c ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;

d ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions);

e confirming whether orders were made by the foreign court;

f verifying whether findings about domestic violence were made by the foreign court;

g verifying whether a transfer of jurisdiction is appropriate'.

[53] See the descriptions of the courts' role in 12 Member States, provided by the Judicial Wing of INSOL Europe, in: H. Vallender (ed.), The Role of the Judge in the Restructuring of Companies Within Insolvency, Nottingham: INSOL Europe 2013.

[54] See for measures to be taken very near to the commencement of insolvency proceedings in 14 Member States: H. Vallender (ed.), Regulations and Measures of Protection in National Legislations Within the European Union, Nottingham: INSOL Europe 2010.

to determine the mode of distribution of such assets as are properly subject to their local jurisdiction and control.
Although the EU JudgeCo Principles do not specifically address insolvency administrators, their involvement in insolvency cases and their contact with courts cannot be left untouched. For this reason EU JudgeCo Principle 3 wishes to express a benchmark for professional actions and behaviour of administrators involved. The application of the EU JudgeCo Principles in their entirety should be conditioned by the interests of creditors and for this reason EU JudgeCo Principle 3.2 also requires that insolvency administrators, especially in countries where professional or ethical rules for administrators may not be available, act fairly and proportionately in charging fees or costs. The text of EU JudgeCo Principle 3.2 reflects the nearly similar text of Guideline 1.2 of the CoCo Guidelines.

In general in Europe, it should be understood that judicial cross-border cooperation is regarded as a difficult and complex issue as it may be difficult to reconcile with the traditional role of the judiciary. This is not only related to cultural issues and the influence national procedural rules may have on a judge's authority to act (or not act) in certain matters, but also to legal grounds. In several Member States a judge is considered only to be qualified to decide on legal issues, whilst the applicable insolvency law only allows a passive and merely supervisory role. In these States, the initiative for action lies with the debtor, his insolvency administrator and sometimes with the debtors creditors.[55] Nevertheless, in November 2012 the Court of Justice of the EU[56] ruled that Article 27 of the EIR must be interpreted as meaning: that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose: '… It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation'. The precise meaning and impact of the 'principle of sincere cooperation' remains rather vague. The CJEU observes: '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 [of the EIR; Wess.], 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'.

Although the role of a court may vary, its role is paramount in insolvency matters relating to reorganisations, consolidations or rescues. These EU JudgeCo Principles also refer to courts (see EU JudgeCo Principles 3.1, 3.3 and 3.4), but it must be remembered – as for any other party addressed – that these Principles are non-binding (see EU JudgeCo Principle 1).[57] The

[55] One of the hindrances to the wider application of the ALI Guidelines applicable to Court-to-Court Communications Guidelines in the way that has already been demonstrated in USA and Canada is the existing law in a State and the role of the courts. For an overview, see June 2012 Global Principles Reports, p. 50ff, also identifying several (legislative) tendencies pointing in the direction that the role of a court '… is changing into a judicial body that acts, also internationally, in a cooperative mode' (at p. 53).

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

[57] For other areas of law where duties to cooperate exist between courts, either based on a treaty or on customary law, see Anne Peters, Cooperation in International Dispute Settlement, in: Jost Delbrück (ed.), International Law

text as a whole is to be understood as being predicated upon respect for the individuality of courts and legal cultures and therefore the EU JudgeCo Principles are written so as to be facilitative. They should not, for that reason, offend judges' or courts' views of their roles, nor should they serve to undermine notions of judicial independence or respect for national sovereignty. The mutual inter-relationship of insolvency proceedings, originating from specific procedural rights of an insolvency administrator – e.g. requesting the opening or recognition of certain insolvency proceedings, or requesting the stay of an execution against a debtor's assets or the stay of a process of liquidation – and the interwovenness of the claims of creditors, who often have the right to lodge claims in any of the pending insolvency proceedings, supplies the practical necessity for the effective and efficient operation of cross-border insolvency proceedings. The text of EU JudgeCo Principle 3.1 is largely based on the text of Guideline 1.1 of the CoCo Guidelines.

EU JudgeCo Principle 3.1 expresses the overriding objective of these EU JudgeCo Principles as they relate to courts and insolvency administrators in the context of cross-border (or 'international') insolvency cases.[58] The words 'preserving where appropriate the debtor's business' are intended to give further emphasis to the overriding aim by explicitly stating that any form of the available variations of administration which contributes to the primary goal of maximising the value of the debtor's assets, including providing an opportunity for reorganisation of a debtor's business, is likewise addressed in these EU JudgeCo Principles.

EU JudgeCo Principle 3.2 uses the term 'should', whilst in other principles sometimes 'shall' or 'may consider' is used. It is stressed that throughout the texts and the explanations it is intended to use neutral language as well as "well considered options". Principle 3.2 underlines the importance of acting in the interest of the debtor's creditors. In many countries creditors have the right to receive information, the right to lodge a claim in all insolvency proceedings regarding the debtor, the right to be heard concerning any proposal for a rescue and, overall, a right to equal treatment. Treated 'equally' in Principle 3.2 means a treatment of the same class of creditors in a similar way and without discrimination as worded in EU JudgeCo Principle 9.
In Principle 3.2, second sentence, the words 'the interests of the debtor' are to be understood in a national legal context, as in several Member States a debtor's interest is limited to the possibility of receiving a discharge. As achieving the best outcome in relation to the interests of the creditors is the main goal of insolvency proceedings, the words 'so far as national law permits' stress that the interests of creditors are not to be limited by the interest of a debtor. The words 'the interests of … other parties', cover other interests involved in an international case, such as the interests of maintaining employment or – in specific cases – the interest of shareholders.

EU JudgeCo Principle 3.3 should encourage all players in cross-border insolvency proceedings, including the debtor, creditors, employees and public authorities, to respond to

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of Cooperation and State Sovereignty, Berlin 2002, pp. 108-162; Michael Nunner, *Kooperation internationaler Gerichte*, Jus Internationale et Europaeum 36, Mohr Siebeck, 2009, p. 141ff.

[58] The expressions "international insolvency" and "cross-border insolvency" are used interchangeably throughout the EU JudgeCo Guidelines and its accompanying explanations, as this usage is in conformity with practice and scholarly literature. Both terms are regarded as identical.

the necessity for the effective and efficient operation of these proceedings.[59] The words 'All parties …' signifies that the duty to observe the requirement of good faith applies equally to the debtor, and those who represent the debtor, as it applies to creditors and other interested parties.[60] Conduct in 'good faith' includes that parties act with integrity in their dealings with courts.

EU JudgeCo Principle 3.5 is nearly identical to Article 8 of the UNCITRAL Model Law on Cross-Border Insolvency. It should function as a reminder for courts and parties that application of all the Principles (and Court-to-court Guidelines) will always carry the potential to engage foreign legal cultures where certain legal effects may create confusion or even aggravation, without interfering with a foreign court's exercise of jurisdiction, a foreign administrators' powers or a foreign state's public policy. For this reason, EU JudgeCo Principle 3.5 aims to ensure that the Principles are applied with sensitivity and in a uniform way, whilst in certain circumstances where the Principles allow, a court should apply analogous legal rules to produce effects which are akin to those achievable under the legal system to which they are addressed.

Principle 4 (GP 2) Aim

4.1. The aim of these EU JudgeCo Principles is to facilitate the coordination of the administration of international insolvency cases involving the same debtor, including where appropriate through the use of a protocol.
4.2. These Principles aim to promote in particular:
(i) The orderly, effective, efficient and timely administration of proceedings;
(ii) The identification, preservation and maximisation of the value of the debtor's assets, including the debtor's business, on a global basis;
(iii) The sharing of information in order to reduce costs; and
(iv) The avoidance or minimisation of litigation, costs and inconvenience to the parties in the proceedings.
4.3. These Principles aim to promote in each separate international insolvency case its administration with a view to:
(i) Ensuring that creditors' interests are respected and that creditors are treated equally;
(ii) Saving expense and reducing costs;
(iii) Managing the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors and to the number of jurisdictions involved; and
(iv) Ensuring that the case is dealt with effectively, efficiently and timely.

Commentary

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[59] The text of EU JudgeCo Principle 3.3 is a further development of the text of Guideline 1.3 of the CoCo Guidelines and Principle 11.1 of the ALI / UNIDROIT Principles.

[60] For example, a debtor's conduct in failing to disclose material information, which might have led the court to conclude that it did not have jurisdiction to open the insolvency proceedings requested by the debtor himself, was the subject of adverse judicial comment by the High Court in Northern Ireland on the occasion of the subsequent annulment of the bankruptcy order. See *Irish Bank Resolution Corporation Ltd v. Quinn* [2012] NICh 1 (10 January 2012) (High Court of Justice in Northern Ireland, Deeny J), at paragraph [56] et seq. (esp. at [62]-[65]).

Reference is made to the June 2012 Global Principles Report, p. 54ff. The EU JudgeCo Principles' aim is the alignment and attuning of two or more insolvency proceedings pending in several Member States and therefore to facilitate coordination within the context of a common purpose regarding the debtor, his assets and the treatment of his creditors. This has led to two principal rules. The first one concerns the aim of the EU JudgeCo Principles themselves, see EU JudgeCo Principle 4.1 and 4.2. These always cover two or more insolvency proceedings in two or more countries. The other Principle, EU JudgeCo Principle 4.3 covers each separate insolvency proceeding which takes place, whether it is the sole proceeding, or one that is taking place at the same time as other, parallel proceedings. The text of EU JudgeCo Principle 4 follows in many respects Guideline 2 of the CoCo Guidelines.[61]

The text of EU JudgeCo Principle 4.1 underlines the function of the principles. They aim to facilitate the coordination between insolvency cases pending in several Member States. Coordination is possible through all types of modern international modes of professional communication (telephone, email, fax or video link, including conferencing arrangements enabling discussions to take place simultaneously with creditors and/or other stakeholders in several jurisdictions) and through the use of a protocol, i.e. a means of agreeing the alignment between different insolvency proceedings or pre-reorganisation measures, which is designed to overcome certain legal or factual obstacles.

The term protocol should be clarified. In international insolvency practice, insolvency office holders often enter into such protocols, which have been used in (mostly non-European) cross-border insolvency cases. In EU JudgeCo Principle 4.1, the word 'protocol' has been used as it builds on a term used in many international cases during the last two decades, although in practice several other terms have also been used to – broadly – refer to the same species of instrument, such as '(governance) protocol'[62], 'cooperation agreement or protocol'[63], 'cross-border agreement'[64], and indeed 'protocol'[65] in international insolvency cases. For further references see June 2012 Global Principles Report, p. 116ff,

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[61] The Hague Principles for Direct Judicial Communications (2013) contain similar 'commonly accepted procedural safeguards', see:

'6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:

• except in special circumstances, parties are to be notified of the nature of the proposed communication;

• a record is to be kept of communications and it is to be made available to the parties;

• any conclusions reached should be in writing;

• parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities'.

(Footnote omitted)

[62] See CoCo Guideline 2.1.

[63] See CoCo Guideline 16.2.

[64] The UNCITRAL Practice Guide (2009), under B 'Glossary', in '1, Notes on terminology' states: 'Cross-border agreements are most commonly referred to in some States as "protocols", although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. These Notes attempt to compile practice with respect to as many forms of cross-border agreement as possible and, since the use of the term 'protocol' does not necessarily reflect the diverse nature of the agreements being used in practice, these Notes use the more general term "cross-border agreement"'.

In Europe, under the application of the CoCo Guidelines, a 'protocol' plays a central role, see e.g. CoCo Guideline 2.1, which states: 'The aim of these Guidelines is to facilitate the coordination of the administration of insolvency proceedings involving the same debtor, including through the use of a governance protocol'. A protocol is described[66] as a means of agreeing the alignment between different insolvency proceedings or pre-reorganisation measures, which has been used in (mostly non-European) cross-border insolvency cases. Such an agreement is concluded in the course of multiple proceedings and is designed to overcome certain legal or factual obstacles. The use of a protocol is inserted in the CoCo Guidelines, and also in these EU JudgeCo Guidelines, as reflecting an established and successful practice, especially outside Europe, mainly in the USA and Canada, but also in the UK, although it has been reported that courts in other jurisdictions have been involved in such protocols as well, e.g. Australia, Bahamas, Bermuda, British Virgin Islands, France, Hong Kong, Israel and Switzerland'.[67]

Appendix I to the CoCo Guidelines contains a 'Checklist Protocol' addressing the considerations for inserting in a Protocol clauses or statements regarding the basic requirements concerning a Protocol itself, the relevant insolvency administrators ('liquidators'), the debtor, the proceedings or specific issues for cooperation. Co-Co Guideline 16.2 [68] and CoCo Guideline 16.5 [69] stress the importance for courts not only to allow the use of a protocol, but also that it should be used as a mechanism to gain experience from every case. However, it is acknowledged that the information to be used has its limits, which may be determined by the national laws of the parties or the proceedings involved. In 2010 German authors have provided a sample protocol which is aligned to German procedural law ('*Mustervereinbarung*').[70] Although decided outside the EU, it is interesting to note that Canadian courts give effect to a protocol, see the Ontario Court of Appeal, which denied leave to parties objecting to the holding of a joint (in the sense of both judges hearing the evidence at the same time in their own in parallel cases and being able to confer with each other before rendering their decisions) trial between the Canadian and US insolvency courts: 'Cooperation and communication between the two courts in accordance with the relevant protocols is not

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[65] This term appears in Article 31(1), Article 31a(3)(d) and Article 42b(3)(d) of the December 2012 proposal to amend the EU Insolvency Regulation.

[66] Explanation to the CoCo Guidelines, para. 31.

[67] Further details on protocols, see the June 2012 Global Principles Report, p. 116ff.

[68] CoCo Guideline 16.2 states: 'Courts are advised to operate in a cooperative manner to resolve any dispute relating to the intent or application of these Guidelines or the terms of any cooperation agreement or protocol'.

[69] CoCo Guideline 16.5 states: 'Courts should encourage liquidators to report periodically, as part of national reporting duties, on the way these Guidelines and/or agreed Protocols are applied, including any practical problems which have been encountered'.

[70] See Peter Busch, Andreas Remmert, Stefanie Rüntz and Heinz Vallender, *Kommunikation zwischen Gerichten in Grenzüberschreitenden Insolvenzen. Was geht und was geht nicht?*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2010, 417, 428ff. 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.). These documents can also be accessed via www.insolvenzrecht.jura.uni-koeln.de/6169.html. For a Prospective Model International Cross-border Insolvency Protocol, see: Joseph J. Bellissimo and S. Power Johnston, Cross Border Insolvency Protocols: Developing an International Standard, in: Norton Annual Review of International Insolvency 2010, 37ff. See also Bob Wessels, Cross-border insolvency agreements: what are they and are they here to stay?, in: N.E.D. Faber, J.J. van Hees, N.S.G.J. Vermunt (eds.), Overeenkomsten en insolventie, Serie Onderneming en Recht, deel 72, Deventer: Kluwer 2012, p. 359-384.

inconsistent with judicial independence, but rather is a sensible and effective response to a significant interjurisdictional commercial case'.[71]

The text of EU JudgeCo Principle 4.2 specifies the central objectives of the EU JudgeCo Principles as a general tool for cross-border judicial coordination. It sets out the context for professional action and behaviour and may assist in providing guidance in those matters or controversies of the Principles which need interpretation or which are not covered at all. The first two objectives have a broader meaning[72] or a stronger historic base in other statements of best practice.[73] The term 'timely' should allow a court to set strict, although reasonable deadlines. EU JudgeCo Principle 4.2(ii) stresses the importance of business preservation as a means of maximising value, see also the commentary to EU JudgeCo Principle 3.1. As an example of the potential use of EU JudgeCo Principle 2.3(ii), the example may be given of a situation in which a Luxemburg supervising judge (*juge commissaire*) encourages cooperation with the representatives of foreign liquidations. In the BCCI case (a pooling agreement between the Luxembourg liquidation of BCCI International S.A. (main liquidation), BCCI Holdings S.A., the BCCI UK branch (ancillary liquidation) and BCCI Overseas Ltd) judicial assistance has resulted in the determination and distribution of a common dividend and the case showed good levels of cooperation between the various liquidators.

As indicated, EU JudgeCo Principle 4.3 concerns itself with each of the respective proceedings where there are separate, parallel insolvency proceedings to be coordinated. The formulation of Principle 4.3 is inspired by the Overriding Objective in Part 1 of the Civil Procedure Rules (England and Wales) 1998 (S.I. 1998/3132, as amended). The specific objectives align with those mentioned in EU JudgeCo Principle 4.2. The duty to ensure the

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[71] *Re Nortel Networks Corporation*, 2013 ONCA 427: at para 5. In the midst of May 2014 cross-border joint hearings have started in the Nortel Networks Corp. bankruptcy case, presently mainly involving the Delaware court in the USA and the Toronto court in Canada. The joint hearings will be simultaneously conducted by the U.S. Judge Kevin Gross and the Canadian Judge Frank Newbold of the Ontario Superior Court and have been scheduled till the end of June 2014. It is said that both courtrooms are linked by $1.3-million worth of video equipment to live stream the complex event between the two locations. At steak is not an issue of looking for a joint approach to resolve a certain matter, but a cross-border battle over how to divide $7.3 billion from Nortel Networks Corp.'s liquidation process, being patents sale proceeds of the various companies from the now defunct Canadian telecom group. As indicated, such a cross-border joint hearing is not new, but the sheer size of it (over 50 expert witnesses may be cross-examined remotely using the video technology; there are hundreds of documents, many of them have been kept sealed under applicable confidentiality agreements; how to ensure reliable cross-border techno-connections) makes it a prime case to follow and to test whether Global Guideline 10 of the Global Principles, which has formed the basis for EU JudgeCo Guideline 10 (see Section 3) has been followed and/or needs some amendment to mirror as best as possible what may prove to work fine.

[72] Compare Principle 11.2 ALI / UNIDROIT Principles: 'The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence'. Cross-border insolvency proceedings involve an amalgam of interests of many types of creditors (secured; unsecured; subordinated), including non-private interests, such as continuation of employment, which are to varied to support the idea of 'shared responsibility' in the sense it is intended to bear in the cited principle.

[73] ALI/NAFTA General Principle I ('Cooperation'): 'Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the Debtor's worldwide assets and furthering the just administration of the proceeding'.

creditors' interests flows logically from the similar aim mentioned in EU JudgeCo Principle 3.1.

Principle 5 (GP 4) Case Management

5.1. Actively managing an international insolvency case involves coordination and harmonisation of proceedings with those in other states, except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be necessary in the circumstances.
5.2. If a court is managing the international insolvency case, it:
(i) Should seek to achieve disposition of the international insolvency case effectively, efficiently and timely, with due regard to the international character of the case;
(ii) Should manage the case to the maximum extent possible in consultation with the parties and the insolvency administrators involved and with other courts involved;
(iii) Should determine the sequence in which issues are to be resolved, preferably laid down in an overall schedule for all stages of the proceeding;
(iv) May hold status conferences regarding the international insolvency case;
(v) Should arrange for the proper information to the insolvency administrator and/or the creditors about the coordination and harmonisation of the international insolvency case. 5.3. If an insolvency administrator is managing the international insolvency case, s/he:
(i) Should seek to achieve disposition of the international insolvency case effectively, efficiently and timely, with due regard to the international character of the case;
(ii) Should manage the case in consultation with the parties and the insolvency administrators involved and with courts involved;
(iii) Shall hold status conferences regarding the international insolvency case;
(iv) Should arrange for the determination of the sequence in which issues are to be resolved, preferably laid down in an overall schedule for all stages of the proceeding;
(v) Will inform the court and/or the creditors about the coordination and harmonisation of the international insolvency case.

Commentary

As set out in the commentary to EU JudgeCo Principle 3 (Overriding Objective) account should be given to the fact that in several Member States courts only have a supervisory role but are not involved in the preparation of solutions for the parties involved. In these states insolvency proceedings are led by the insolvency administrator and Principle 5 may only be relevant for a court in the very first stages of the proceeding opened until the insolvency administrator is appointed. The term 'case' is used as an equivalent for insolvency proceeding (in English: insolvency proceedings) or insolvency proceedings pending in two or more Member States, in which there is a need for coordination or where cross-border coordination already is taken place.[74] EU JudgeCo Principle 5 underlines the importance of furthering the

[74] For determining what an 'international' insolvency case under the Insolvency Regulation is, regard is to be had to the judgment of the Court of Justice of the EU 14 January 2014 (Case C-328/12) (Schmid v Hertel). The Court rejects the idea that for the Regulation to apply, there must in any event be cross-border elements in the sense that only situations involving connecting factors with two or several Member States fall within the Regulation's scope. Several of the recitals, thus the Court, do not support a narrow interpretation of the Regulation's scope. The Court refers to recitals 2 to 4 and continues '… Recital 8 refers to the objective of 'improving the efficiency

efficient and timely administration of an (international) insolvency case.[75] In formulating this Principle, regard has been taken to EU JudgeCo Principle 4 (Aim) and Principles 9.3 and 14 of the ALI/UNIDROIT Principles.[76] The latter Principles address courts. However, in many EU 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 these States, the role of the courts is limited, often only to giving decisions in legal disputes and/or supervision of the way in which insolvency administrators fulfil their tasks. For this reason, EU JudgeCo Principles 5.2 and 5.3 address these different role players. As explained earlier, the term 'insolvency administrator' in Principle 5.3 includes others, such as the debtor and/or his creditors, who may be in charge of the case. EU JudgeCo Principle 5.3(iv) should ensure that the court receives sufficient information from the insolvency administrator to be able to exercise its supervisory tasks and to be adequately informed in cases of communication with other courts.

Case management by a court generally includes (i) identifying issues at an early stage; (ii) encouraging administrators to co-operate with each other or with other courts in the conduct of the proceedings; (iii) deciding promptly which issues need full investigation; (iv) fixing timetables or otherwise controlling the progress of the proceedings; (v) considering whether the likely benefits of taking a particular step justify the cost of taking it; (vi) giving directions to ensure that the treatment of the case proceeds quickly and efficiently; (vii) setting dates by which a party in interest or an administrator provides (written) information; (viii) verifying that all matters communicated have been fully understood; (ix) paying attention to all interests concerned, including those of other courts, (x) addressing the matters appropriate for early attention, such as questions of international jurisdiction, the law applicable, and provisional measures; (xi) addressing availability, admission, disclosure and exchange of evidence; and

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and effectiveness of insolvency proceedings having cross-border effects' and recital 12 states that insolvency proceedings falling within the Regulation's field of application '… have universal scope and aim at encompassing all the debtor's assets'. The latter objectives may encompass not solely relations between Member States but, by their nature and in accordance with their wording any cross-border situation' [paragraph 25]. Explaining the 2006 Case C-1/04 (*Staubitz-Schreiber*) the Court comes to the conclusion that application of Article 3(1) EIR cannot ('as a general rule'), depend on the existence of a cross-border link involving another Member State.

[75] Since June 2014 Article 1(1) of the English Civil Procedure Rules provide their overriding objective of enabling the court to deal with cases justly and at proportionate cost. Article 1(2) then details this objective: 'Dealing with a case justly and at proportionate cost includes, so far as is practicable, (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate ((i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party); (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders'. On case management in comparative perspective see C.H. van Rhee (ed.), Judicial Case Management and Efficiency in Civil Litigation, Antwerpen: Intersentia 2008.

[76] See also Hague Principles for Direct Judicial Communications (2013) 6.4 (cited under EU JudgeCo Principle 4) and Hague Principle 6.5 ('Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude').

(xii) identifying potentially disputed issues for early determination of all or part of a dispute.[77] The topics mentioned are illustrative, not exhaustive.

An exclusion to the central principle of open and constructive case management of an international case has been added to EU JudgeCo Principle 5.1, with the terms: '… except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be appropriate in the circumstances'. This exclusion should only be applied in extraordinary circumstances, such as where there are genuine doubts whether the court in a given country is able to function properly in the light of prevailing circumstances such as widespread riots or war, or other factors bringing about the disruption of the administration of justice.

EU JudgeCo Principle 5.2(i), 5.2(ii) and 5.2(iii) are closely similar to Articles 14.1, 14.2 and 14.3 of the ALI/UNIDROIT Principles.[78] In addition to furthering the overarching objective of the EU JudgeCo Principles, Principle 5.2(i) adds that consideration should be given to the transnational character of the case. This relates to the speed of the case and the methods of communication used, sometimes with translators in different time zones (three hours in Europe), but also to the awareness that, in such a case, the interests of parties that are not fully involved in the proceedings are also at stake. The consultation as required in EU JudgeCo Principle 5.2(ii) allows a court to assess or anticipate any issues that need to be addressed. The words "to the maximum extent possible" should leave discretion to the court in the exercise of the formulated consultation requirement. Principle 5.2(iii) is important in cases which relate to assets, administrators or creditors in several Member States which may involve different time zones, which need an orderly schedule to facilitate expeditious proceedings, including hearings. The determination of the order or the sequence in which issues are to be resolved could include fixing a timetable for all stages of the proceeding, including dates and deadlines, preferably as much as possible in alignment with the wishes of the foreign courts involved. It will also include the court's determination to revise the given order, taking into account a foreign court's wishes and the procedural interests of the parties involved. In its active role, a court may hold a status conference, see EU JudgeCo Principle 5.2(iv). The justification for such a status conference lies in the complexity of the case, with the involvement of insolvency administrators from several jurisdictions, the use of different languages which could give rise to the need to verify that what has been said or decided is indeed correctly understood by all those involved, and the dimensions of the chosen method of communication.

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[77] The last three elements are inspired by Principles 9.3.3 – 9.3.5 of the ALI/ UNIDROIT Principles. Certain other elements of describing case management have been taken from the Rules & Practice Directions, Part 1 (October 2005), of the Civil Procedure Rules of the Ministry of Justice of England (www.justice.gov.uk).

[78] See Principle 14 ('Court Responsibility for Direction of the Proceeding') ALI/UNIDROIT Principles:

'14.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.

14.2 To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties.

14.3 The court should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines. The court may revise such directions'.

The insolvency administrator should perform similar activities when it is managing the case. In addition to EU JudgeCo Principle 4 (Aim), in such a situation the emphasis will lie on taking those steps that are reasonable and necessary in the light of the value of the assets, including the preservation of an insolvent debtor's business. The duty to inform the court and/or the creditors about the coordination and harmonisation of the international insolvency case is connected to the court's own task of appropriately supervising the insolvency administrator and/or the debtors' assets and affairs as well as, where relevant, to the role of creditors in approving steps taken or results achieved. Adequate information presupposes complete information, for which reason EU JudgeCo Principle 5.3(iii) requires the insolvency administrator to arrange for a method of obtaining and recording the status of all matters in the international insolvency case.

Principle 6 (GP 5) Equality of Arms

6.1. All judicial orders, decisions and judgments issued in an international insolvency case are subject to the principle of equality of arms, without any conditions, so that there should be no substantial disadvantage to a party concerned. Accordingly:
(i) Each party should have a full and fair opportunity to present evidence and legal arguments and each party shall receive reasonable time to do so;
(ii) Each party should have a full and fair opportunity to comment on the evidence and legal arguments presented by other parties.
6.2. For the purpose of deciding a dispute, the court should inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure.
6.3. Where the urgency of a situation calls for a court to issue an order, decision or judgment on an expedited basis, the court should so far as national law permits ensure:
(i) That reasonable notice, consistent with the urgency of the situation, is provided by the court or the parties to all parties who may be affected by the order, decision or judgment, including the major unsecured creditors, any affected secured creditors, and any relevant supervisory governmental authorities;
(ii) That each party may seek to review or challenge the order, decision or judgment issued on an expedited basis as soon as reasonably practicable, based on local law;
(iii) That any order, decision or judgment issued on an expedited basis is temporary and is limited to what the debtor or the insolvency administrator reasonably requires in order to continue the operation of the business or to preserve the estate for a limited period, appropriate to the situation. Such order, decision or judgment will contain a 'come back' clause to allow objections to be heard on a timely basis. The court should then hold further proceedings to consider any appropriate additional relief for the debtor or the affected creditors, in accordance with Principle 6.1.

Commentary

EU JudgeCo Principle 6.1 is or, at least, should be fully consistent with the substantive law and civil procedure of the EU Member States. The fundamental principle of equality of arms ensures the actual, as well as the merely theoretical, attainment of fairness in an international legal proceeding. For specific insolvency proceedings, the principle was emphasised by the Court of Justice of the EU in the case of *Re Eurofood IFSC Ltd*, (Case C341/04) [2006] ECR I-3813, at paragraph 66 of the judgment:
'66. Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard…, these rights occupy an eminent position in the organisation

and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency'.

The right to equal treatment in the context of international legal proceedings entails more than the mere avoidance of overt discrimination based on such factors as nationality or residence.[79] Attention must be given to such modifications of the standard rules and procedures that would govern the conduct of a purely domestic case as may be practicable and proportionate for the purpose of ensuring that all parties in interest are afforded a genuine opportunity to participate fully and effectively in the proceeding. This includes the right to be notified of procedural documents and, more generally, the right to be heard, with adequate time and opportunity to arrange for representation at any hearing at which a decision having a material bearing upon the outcome of the matter may be taken. While it must be recognised that certain urgent matters may sometimes require a rapid response, whereby not all parties are enabled to participate in the first instance, any such action should be accompanied by procedural guarantees to ensure that each party in interest shall have an adequate opportunity to challenge subsequently any measures adopted under such circumstances. Further aspects of the application of the principle of 'equality of arms' are included among the other EU JudgeCo Principles, notably numbers 14 (Language) and 18 (Notice).

In the June 2012 Global Principles Report, p. 64, the reporters conclude that, as a matter of international judicial practice, the principle of equality of arms should be applied to all judgments, decisions or orders which are within the scope of an insolvency proceeding, suggesting that, in each individual international case, a court could be guided by checking the following steps:
1. Each party in interest in an international insolvency case shall be given a full and fair opportunity to present both the facts and the law on its side:
2. Each party shall be given a full and fair opportunity to comment on the evidence and legal arguments of an opponent;
3. Steps 1 and 2 may only be restricted where the urgency of a given ruling calls for it;
4. Such a ruling will only have the character of a 'first day order' or other individual measures that 'absolutely' cannot wait;
5. If such a ruling is considered before the court issues first day orders, either the parties or the court must provide maximum reasonable notice consistent with the urgencies of the case to the major unsecured creditors, any affected secured creditors, and any supervisory governmental authorities;
6. The Court should take such procedural guarantees to ensure that each party in interest in fact will have the opportunity to challenge any measure adopted in urgency;
7. In such a case the Court should consider that any such measure is temporary and limited to what the insolvent debtor requires to continue its business or to what the administrator needs to preserve the estate and that the duration of such a measure should be limited to only that period of time which is strictly necessary, an example being a duration of three days; and

[79] As is indicated by Article 3.2 of the ALI/UNIDROIT Principles of Transnational Civil Procedure.

8. The court should then schedule further proceedings to consider additional relief for each party, including the debtor and the affected creditors, at which time all parties in interest enjoy the full and unconditional application of the principle of equality of arms.

As an example of step 1, see, for instance, the English High Court of Justice: 'I think in the circumstances, it would be more prudent to give a short period of time, in which the Official Receiver, if he wishes to do so, can come into this jurisdiction and seek whatever orders are appropriate or he may decide not to do so. Indeed that may well be the course the Receiver takes. I propose to grant a short adjournment so as to afford that courtesy to a court officer of an adjoining jurisdiction, where there is mutual respect between the courts of this State and the courts of Northern Ireland. I would not wish it to be said that the Official Receiver was taken short by any order that I might make today. So I do it in that context, with a view to ensuring that the mutual respect between our respective courts is observed and that the Official Receiver gets at least an opportunity to consider the position' (order with respect to a hearing of Monday 14th November, 2011, abstaining from entering a summary judgment), cited by High Court of Justice 23rd November 2011 [2011] IEHC 428 (*Irish Bank Resolution Corporation Ltd. v. Seán Quinn et al.*).

EU JudgeCo Principle 6.2 aims to provide that the court ensures that (foreign) parties are aware of their responsibilities for producing evidence for the purposes of litigation. In certain Member States, the legal consequences relating to the omission to lodge a request for the performance of taking of evidence, or if such a request is presented following a delay, may result in having this evidence excluded. Principle 6.2 aims to avoid such a situation.

Whilst EU JudgeCo Principle 6.3(i) and 6.3(ii) set out the basic procedural requirement for a situation which calls for an urgent judicial determination, Principle 6.3(iii) limits the contents and the consequences of any order, decision or judgment issued to the specifics of what has been requested. The recommendation that such an order will contain a 'come back' clause follows Canadian judicial practice, thus allowing objections to be heard on a timely basis.[80] Where national laws of Member States may limit the options available to the court, the words 'so far as national law permits' have been included in the text of EU JudgeCo Principle 6.3, first two lines.

Principle 7 (GP 6) Decision and Reasoned Explanation

[80] Under the Companies' Creditors Arrangement Act in Canada, applications for a stay and the commencement of proceedings may be made ex parte (although the judiciary has required the applicant to give notice to major affected parties, sometimes given within a few hours. The initial order (as per the model order 'endorsed' by the court) contains a 'come back clause' in case the initial order is made before parties have had a sufficient opportunity to review and comment on the application materials. The 'come back clause' may be used by any party affected by the order to return on notice to the court for an amendment to adjust the terms of the initial order that it might have obtained at the first hearing if it had been given notice. The affected parties may include those parties who did in fact attend on short notice and indicate that they did not have adequate time to digest the applicant's material and prepare. The onus on is the applicant to justify the continuation of the provisions of the initial order complained about. The Canadian courts have been vigilant in most circumstances to require that the initial order only deal with matters which need immediate attention so as to reduce the necessity of resort to the come back clause. Under certain circumstances in a post initial order where there has been short service or where an affected party had no notice because it was not appreciated that it was being affected by an order, the come back clause doctrine will be employed.

7.1. Upon completion of the parties' presentations relating to the opening of an insolvency case or the granting of recognition or assistance in an international insolvency case, the court should promptly issue its order, decision or judgment.
7.2. In cases where the court decides ex officio regarding the scheduling of proceedings, it should take into consideration parties' submissions on scheduling; all parties should cooperate and consult with one another concerning the scheduling of proceedings.
7.3. The court may issue an order, decision or judgment orally, which should be set forth in written or transcribed form as soon as possible.
7.4. The order, decision or judgment should identify:
(i) The name of the court and the number of the case;
(ii) The name and address (including email address) of the parties and of their counsels;
(iii) Any order previously made on any related subject;
(iv) The period, if any, for which it will be in force;
(v) Any appointment of an insolvency administrator and supervisory judge;
(vi) Any determination regarding costs;
(vii) The issues to be resolved;
(viii) The timetable for the relevant stages of the proceedings, including dates and deadlines;
(ix) The date showing the place and time of rendering the order, decision or judgment;
(x) The name of the judge(s) involved, and
(xi) The possibility of opposition or appeal to the order, decision or judgment and the period in which an opposition or an appeal must be made.
7.5. If the order, decision or judgment is opposed or appealed, the court should set forth the legal and evidentiary grounds for the decision.
7.6. To the maximum extent possible, courts should encourage their orders, decisions or judgments to be published as soon as possible.

Commentary

Insolvency proceedings, especially in their initial phase, may take place where circumstances are hectic and the need for an order, decision or judgment can not be postponed. EU JudgeCo Principle 7.1 therefore requires a court to give any decision promptly, which in appropriate circumstances means: 'within a reasonable time'.[81] Promptness[82] requires parties to cooperate (Principle 7.2)[83] and should allow, where circumstances require, an oral decision, which should also be available in a written form (verbatim or transcribed) as soon as possible (Principle 7.3).[84] Such a decision should contain the necessary information for all parties

[81] Principle 7.1 of the ALI/UNIDROIT Principles: 'The court should resolve the dispute within a reasonable time'.

[82] Comment P-7B to Principle 7 of the ALI/UNIDROIT Principles determines: 'Prompt rendition of justice is a matter of access to justice and may also be considered an essential human right, but it should also be balanced against a party's right of a reasonable opportunity to organize and present its case'.

[83] Principle 7.2, first sentence, of the ALI/UNIDROIT Principles: 'All parties concerned have a duty to cooperate and a right of reasonable consultation concerning scheduling'. Principle 7.2, second sentence, adds: 'Procedural rules and court orders may prescribe reasonable time schedules and deadlines and impose sanctions on the parties or their lawyers for noncompliance with such rules and orders that is not excused by good reason'.

[84] Principle 23.1 of the ALI/UNIDROIT Principles: 'Upon completion of the parties' presentations, the court should promptly give judgment set forth or recorded in writing'.

concerned (Principle 7.4).[85] EU JudgeCo Principle 7.4 lists a number of details with the aim of enabling transparency for parties in interest (which number may include many hundreds of creditors in a variety of jurisdictions).[86] The decision provides a record of the judgment, including its reasoning on all contentions made (Principle 7.5)[87], which often is a requirement for the recognition of such an order, decision or judgment in another country. EU JudgeCo Principle 7.5 relates to an order, decision or judgment which is 'opposed or appealed', thus allowing, in "unopposed" cases, for a reasoned explanation not to be necessary. Where an order, decision or judgment determines less than all the issues to be resolved, it should specify the matters that remain open for further proceedings and/or the period for which the order, decision or judgment will have force of law. Where such a decision will have legal effect as of a certain moment to be determined by local law, affected parties should be able to learn about the decision. Therefore, EU JudgeCo Principle 7.6 encourages the court to publish or to have published the decision at hand as soon as possible.

Principle 8 (GP 8) Stay or Moratorium

8.1. Insolvency cooperation may require a stay or moratorium at the earliest possible time in each State where the debtor has assets or where litigation is pending relating to the debtor or the debtor's assets.
8.2. The stay or moratorium should impose reasonable restraints on the debtor, creditors, and other parties.
8.3. If the local law does not provide an effective procedure for obtaining relief from the stay or moratorium, then a court should exercise its discretion to provide such relief where appropriate and to the extent possible under national law. Exceptions to the stay or moratorium should be limited and clearly defined.

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[85] Principle 23.1, second sentence of the ALI/UNIDROIT Principles: 'The judgment should specify the remedy awarded and, in a monetary award, its amount'.

[86] Compare Hague Principles for Direct Judicial Communications (2013), Principle 7.5, providing that when making contact with a judge in another jurisdiction, the initial communication should normally be in writing (refer to Hague Principle 8) and should in particular identify:
'a the name and contact details of the initiating judge;
b the nature of the case (with due regard to confidentiality concerns);
c the issue on which communication is sought;
d whether the parties before the judge initiating the communication have consented to this communication taking place;
e when the communication may occur (with due regard to time differences);
f any specific questions which the judge initiating the communication would like answered;
g any other pertinent matters.
7.6 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 of counsel unless otherwise ordered by either of the courts'.
(Footnote omitted)

[87] Principle 23.2 of the ALI/UNIDROIT Principles: 'The judgment should be accompanied by a reasoned explanation of the essential factual, legal, and evidentiary basis of the decision'. Principle 5.6 of the ALI/UNIDROIT Principles: 'The court should consider all contentions of the parties and address those concerning substantial issues'.

8.4. A court should encourage publication of its decision to render a stay or a moratorium as soon as possible.
8.5. The decision to render a stay or a moratorium should be open to appeal.

Commentary

The UNCITRAL Legislative Guide defines: 'Stay of proceedings' as: a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate."[88] In several member States, and also recommended for instance in the UNCITRAL Legislative Guide[89], a "stay" is *ex officio, ex lege*, mandatory or automatic at the moment of opening an insolvency case. A stay (sometimes: moratorium) is very often of vital importance since it is essential that courts and administrators should cooperate with foreign courts and administrators on an expedited basis in the interest of ensuring the preservation of value and the prevention of fraud. A moratorium in many cases is essential to prevent seizure and other actions by individual creditors and the dissipation of assets by debtors. However, the mechanism of an *ex lege* moratorium generally raises two concerns: (i) not all jurisdictions in the EU provide for the concept of a "stay", nor need they necessary have knowledge about its effects: does it stay pending insolvency proceedings? Does a stay postpone these proceedings or does it only postpone certain actions of the administrator within these proceedings? Does it stay litigation against the estate? Where a stay is intended to have cross-border effect: what are its legal consequences in other countries? The second concern is (ii) that the automatic force of a stay can be used as a tactical weapon in those jurisdictions where the court or creditors cannot oversee the whole case. In such a case, a stay may be used to fend off creditors for a certain period. EU JudgeCo Principle 8.1 therefore uses the word "may" to leave the decision concerning the imposition of a stay to the court's discretion, to avoid these uncertainties or this type of tactical behaviour.

The phrase 'at the earliest possible time' in EU JudgeCo Principle 8.1 leaves open the possibility that, as a matter of law, the entry into effect of the moratorium may occur at different points in time, having regard to national standards and procedures. Ideally, the moratorium should enter into effect, at least on a provisional basis, as soon as a decision has been made on any request for cooperation. In practice, a more durable moratorium is likely to enter into effect following a judgment, considering all the relevant circumstances, delivered in response to an application for recognition, possibly combined with a specific request for a moratorium.
A stay may impose on the debtor a general prohibition on making dispositions or order that the debtor's dispositions shall require the consent of the insolvency administrator or the supervisory judge in order to become effective. It may also be limited to a restriction or measures of execution against the debtor concerning specific assets. EU JudgeCo Principle 8.2 provides that a stay or moratorium should only impose reasonable restraints on the debtor,

[88] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". Ditto: UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".
[89] UNCITRAL Legislative Guide on Insolvency Law, adopted in 2004, Recommendations 39-51.

creditors, and other parties. The decisions must be proportionate and adequately deal with all interests involved and be sufficiently reasoned.
Where a decision to render a stay will only have legal effect as at a certain moment to be determined by local law, affected parties should be able to learn about the decision. EU JudgeCo Principle 8.4 encourages the court to publish or to have published the decision at hand as soon as possible.
The open formulation of the imposition of 'reasonable restraints' in EU JudgeCo Principle 8.2 and the specific needs to respond to the specific interests of certain parties affected by these constraints lead to EU JudgeCo Principle 8.5, providing that the decision to stay is appealable.

Principle 9 (GP 11) Non-Discriminatory Treatment

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

Commentary

The formal position under the domestic laws of almost every one of the Member States is that the principle of equality of creditors is accepted. Indeed, every effort should be made to ensure that, so far as is practicable, all creditors and parties in interest in an international case are afforded the opportunity to participate fully and effectively in the proceeding in accordance with the principle of 'equality of arms' as expressed in EU JudgeCo Principle 6. EU JudgeCo Principle 9 expresses a fundamental tenet of the modern era in terms of the application of remedies and standards of treatment on a basis of equality before the law. As an essential aspect of the principle of equality of treatment, all reasonable care should be taken to minimise as far as possible the relative disadvantages that will be experienced by non-local creditors when exercising their rights of participation in an insolvency proceeding pending in another State. These disadvantages result from such factors as distance, publicity, lack of information and the use of another language, thus affecting the ability of creditors to participate effectively because of their being based beyond the frontiers of the State in which the proceeding is taking place.

From EU JudgeCo Principle 9 flows the rights of foreign creditors in domestic insolvency proceedings concerning their entitlement to present a petition in such proceedings and execute procedural acts in such proceedings on an equal basis compared to those rights enjoyed by domestic creditors. In the particular field of international insolvency, this Principle bears a special significance in relation to the concept of the *pari passu* distribution of assets among creditors, and likewise in relation to their eligibility to participate fully and effectively in the relevant proceeding, whether its purpose is the reorganisation or liquidation of the debtor's estate. In terms of the substantive rights of participation, the provisions of a State's insolvency law should be applicable on a non-discriminatory basis to all persons occupying the status of creditor by virtue of their having some kind of claim against the debtor. In former times, this principle was expressed in the doctrinal literature of insolvency law using the Latin maxim: *par est condicio omnium creditorum* (literally: 'the condition of all creditors is equal').[90]

[90] See Stefan Weiland, *Par condition creditorum. Der insolvenzrechtliche Gleichbehandlungsgrundsatz und seine Durchbrechungen zugunsten öffentlich-rechtlicher Gläubiger*, Saarbrücker Studien zum Privat- und

Acceptance of the principle of non-discrimination between domestic and foreign creditors need not preclude the continued application of rules whereby certain categories of claims are allocated differing priorities of ranking according to the system of distribution maintained under the insolvency laws of a given state. Usually these laws contain six main categories or ranks: (i) super-priority creditors, (ii) priority creditors, (iii) pari passu or unsecured creditors, (iv) subordinated creditors, (v) equity shareholders, and (vi) expropriated creditors[91] What is required under EU JudgeCo Principle 9 is that the claims of foreign creditors should not be ranked lower than those of domestic creditors whose claims are of a similar character.[92]

Principle 10 (GP 16) Modification of Recognition

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

Commentary

The system of recognition as laid down in Articles 16, 17 and 25 of the EIR provides that main insolvency proceedings are automatically recognised in the other Member States. The courts in other Member States can open secondary proceedings, based on the availability of an establishment within the meaning of Article 3(3) and Article 2(h) of the EIR. During the assessment of the request to open a secondary proceeding, the court may become aware of information which would make this court cautious. Although there is a familiar legal maxim to the effect that 'fraud undoes all things', the present system of recognition is that '… the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose', see CJEU 22 November 2012 (*Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o.* (Case C-116/11; at paragraph 74).

Wirtschaftsrecht, Band 67, Frankfurt am Main: Peter Lang, 2010. This author refers for the maxim *par condicio creditorum* to Corpus Iuris Civilis, Ulp. D. 42, 8.6, § 7.

[91] See Philip R. Wood, The Bankruptcy Ladder of Priorities, in: Business Law International, Vol. 14, No 3, September 2013, p. 209ff. As an example of domestic law, the United Kingdom Supreme Court (in: *Nortel Companies & Ors*, Re [2013] UKSC 52, [2013] 4 All ER 887 (24 July 2013) sets out that the order of priority for payment out of the company's assets is, in summary terms, as follows: (1) Fixed charge creditors; (2) Expenses of the insolvency proceedings; (3) Preferential creditors; (4) Floating charge creditors; (5) Unsecured provable debts; (6) Statutory interest; (7) Non-provable liabilities; and (8) Shareholders (at 39).

[92] It should be mentioned that, in principle, there is no discrimination against a foreign "tax" or "social security" claim, see Article 39 EIR. See Bob Wessels, Tax Claims: Lodging and Enforcing in Cross-Border Insolvencies in Europe, in: International Insolvency Law Review 2/2011, p. 131ff.

In international insolvency practice, however, the subsequent discovery of material fraud is widely acknowledged to constitute a ground for the revocation of transactions or agreements previously concluded. In the context of fraud perpetrated for the purpose of obtaining a legal order or judgment, there is a high level of public interest in ensuring that such actions should not be seen to succeed. Whenever the true facts are brought to the attention of the court, even after its order has begun to be acted upon, the revocation or modification of the order is the appropriate response, subject to any considerations regarding the practicability of fully reinstating the status quo ante. Article 18 of the UNCITRAL Model Law on Cross-Border Insolvency makes it a matter of obligation for the foreign representative to inform the recognising court promptly of any change in the status of the recognised foreign proceeding or the status of the foreign representative's own appointment. Fidelity to the ethical principles attaching to the foreign representative's own professional organisation should also dictate that he or she takes prompt action to notify any court whose jurisdiction has been engaged, as well as other affected parties, of a material discovery affecting the very legitimacy of the proceeding. This is a fortiori the required course to be followed where that discovery indicates the existence of fraud.[93]

It is also necessary to maintain a balance between the sanctions to be applied against the perpetrators of fraud, as and when such conduct is discovered, and the need to maintain a proper level of deterrence against the possibility that unfounded or vexatious allegations of fraud may be made by persons seeking to delay proceedings, or to derail them entirely. If there is compelling and uncontested evidence to support the allegation of fraud, the appropriate form of modification could be revocation. Where the recognition of the judgment opening insolvency proceedings under the EU Insolvency Regulation is 'automatic', it does not seem possible that courts in another Member State may refuse recognition other than on the grounds of 'public policy', see Article 26 EIR and EU JudgeCo Principle 2. Beyond 'public policy', it is doubtful that the court in the other Member State has a discretion to modify recognition, for instance pending further hearing of the evidence.
However, where such a court has been required to open secondary insolvency proceedings and, during the formulation of its decision, becomes aware of a pending appeal against the judgment opening main insolvency proceedings based on issues including 'fraud', it is suggested that the court postpones its decision to prevent irremediable harm being done to the interests of those who are alleging fraud, pending determination of the substance of the allegations at an expedited hearing for the court in the other State.

The causes for such action by the court, set out in EU JudgeCo Principle 10, are illustrative, not exclusive. Fraud in the opening of the foreign main insolvency case includes where it is proven that a court has been bribed. The foreign main insolvency could have been opened based on the presentation of sheer artificial facts seeking to establish a 'centre of main interests' or an erroneous understanding of the facts, including in a situation where the decision regarding opening is based on insufficient information or a failure to disclose relevant information. At this juncture, mention is made of an English Registrar in the decision

[93] Cf. *Re Hans Brochier Holdings Ltd v. Exner* [2006] EWHC 2594 (Ch); [2007] BCC 127 (U.K., Chancery Division), in which administrators who discovered that their appointment had been based on the false averment that the COMI of the company was in England made a prompt application to the High Court to have the appointment declared invalid.

in *Re Eichler (No 2); Steinhardt v Eichler* [2011] BPIR 1293. The decision contains at the end the following *Postscript:*[…]

'[190] This is one of a number of cases in which the courts have annulled bankruptcy orders made on petitions presented by German debtors where it has been established that the court had no jurisdiction to open the proceedings. The scope of the inquiries the court can make when faced with a debtor's bankruptcy petition and doubts about the truth of what a debtor says about where his centre of main interests is situated is limited, not least of all because there is an understandable reluctance to depart from the long established principle that evidence given on oath (or nowadays in a witness statement verified by a statement of truth) should not be disbelieved unless it is properly challenged or is inherently incredible.
[191] In the light of persistent abuse of its jurisdiction, however, this court has now developed two practices when dealing with petitions where it has doubts about its jurisdiction. Before a bankruptcy order is made, a debtor may be required to file more detailed evidence than is required by rr 6.38 and 6.41 of the Insolvency Rules in order to establish that his centre of main interests really is in this country, exhibiting documentary evidence in support of his claim that it is situated here; and/or the court may adjourn the petition and require that notice of the hearing be given to the debtor's creditors so that they can appear and make representations at that stage in opposition to the making of the order instead of having to apply after the order has been made. It is hoped that in future those steps (and perhaps others which may develop in the future) will ensure that bankruptcy orders founded on sham claims as to jurisdiction or supported by a false statement of affairs are not made in the future.'

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

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

Commentary

Where concurrent insolvency proceedings take place in respect of the same debtor, every effort should be made to minimise the possibility of value-destructive conflicts between the respective proceedings. The provisions of domestic law may purport to have effect in relation to the debtor's property anywhere in the world ('wherever situated'). The logical corollary of that assertion is that any stay or moratorium imposed under the insolvency law in question is also regarded as having global effect. Although secondary proceedings may only have territorial effect, the effects of the national rule can readily give rise to confusion or irreconcilable conflicts between the respective insolvency administrators of the parallel proceedings, as each of them seeks to perform his responsibilities in relation to property situated in the Member State of his appointment, and additionally in any other Member States in which property of the debtor is to be found. EU JudgeCo Guideline 11 therefore advocates the adoption of a policy of moderation in the assertion or exercise of rights which may happen to be expressed in unqualified terms, possibly on account of the omission of the national legislator in former times to envisage the practical consequences of expressing the law in terms of unmodified universalism, regardless of the quality or intensity of the debtor's forensic connections with the jurisdiction in question. Although a court may sometimes go so far as to acknowledge that the enacted law is making unrealistic claims to possessing extraterritorial effect, it may also have to concede that it is not empowered to disapply the clear provisions of the legislation, while at the same time conceding that the ambitious claims

expressed therein cannot dictate the final terms of the response that will be accorded by foreign courts in whose jurisdiction property may happen to be situated.[94] EU JudgeCo Principle 11 therefore recognises that the courts having jurisdiction over any of the proceedings may encounter some difficulties on account of the provisions within their domestic legislation, but it exhorts each of the courts concerned to use its best efforts to minimise the negative consequences of any conflict between the rival stays.

Principle 12 (GP 19) Abusive or Superfluous Filings

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

Commentary

Where main insolvency proceedings have been opened, there may be doubts as to whether the court in any other Member State must open secondary proceedings, where the requirement for international jurisdiction (availability of an 'establishment' in the meaning of Article 3(3) jo. Article 2(h) EIR) has been met or whether the court has room for discretion to open such proceedings. The EU JudgeCo Principles are based on this latter view. The purpose of EU JudgeCo Principle 12 is to minimise the potential harm that may be caused to the legitimate administration of an international case through tactical misuse by some interested parties of the right to initiate secondary proceedings in a certain jurisdiction. Typically, this is a jurisdiction with which the debtor has the minimum contact sufficient for that purpose, but where there is otherwise no genuine purpose to be served save that the superfluous procedure may impede the efficient conduct of the main proceeding, notably by generating issues of conflict regarding the competing effects of the stays imposed under the parallel proceedings. EU JudgeCo Principle 12 recommends that the court where the request to open secondary proceedings is filed should give consideration to the possibility of declining jurisdiction where its law so permits, provided that no legitimate interests would be damaged thereby, or alternatively that the court should apply territorial limitations to the scope of its own stay so that this does not pose any threat of interference with the main proceeding.

Principle 13 (GP 20) Court Access

13.1. An insolvency administrator representing a foreign main insolvency proceeding should have direct access to any court in any other Member State necessary for the exercise of its legal rights.
13.2. An insolvency administrator representing a foreign main insolvency proceeding should have the same access to any court in any other Member State as a domestic administrator has or would have had were domestic proceedings opened.

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[94] See the candid admission of Millett J, in the English High Court, that the universalist claims of an English winding up order in respect of a foreign company to have effect in relation to the company's property 'wherever situated' could not be attained in reality, because the overseas courts of the *situs* would necessarily have the final word: *Re International Tin Council* [1987] Ch. 419 at 446.

Commentary

Although the EU JudgeCo Principles concern court-to-court cooperation, the adequate functioning of courts in this respect will also be dependent on information provided by insolvency administrators. In a European context, the insolvency administrator's powers are determined by the law of the Member State within which the main proceedings have been opened. In principle, the insolvency administrator appointed in main insolvency proceedings may exercise all powers conferred on him by the law of the State where main proceedings are opened in any other Member State. It may be the case, however, that local (procedural) laws of the other States are insufficiently geared to the internationality of the case or contain obstacles in exercising these powers. Access to justice in that State is a fundamental prerequisite to the exercise of legal rights and remedies in a genuine and concrete sense, instead of as a merely abstract or theoretical possibility. In an international insolvency case, it has been recognised that measures should be taken to avoid the delays and obstacles traditionally encountered by foreign insolvency administrator seeking to establish their standing to invoke the assistance of courts in the 'race against time' that is invariably present in an international insolvency case. Recognition without the provision of standing to the foreign insolvency administrator to claim direct access to any court in another Member State for the purpose of initiating or participating in proceedings under local law in furtherance of the interests of the insolvency administration inevitably leads to obstacles, costs and delay in international cases. An example of such recognition are the articles contained in the UNCITRAL Model Law on Cross-Border Insolvency, based on the need to 'provide expedited and direct access for foreign representatives to the courts of the enacting state'.[95]

EU JudgeCo Principle 13 expresses this core objective by affirming that the right of direct access is to be accorded on the basis that the foreign insolvency administrator may act procedurally in a manner coextensive with that in which an equivalent domestic insolvency administrator would be empowered to do. He may act without e.g. a prior authorisation from the court that has appointed him or her. This can result in the foreign representative of a recognised foreign proceeding being accorded standing to take action under domestic law which would only be legally permissible if a domestic insolvency proceeding had been opened, yet without such a proceeding having been opened in fact. Such action could include the right to intervene in already pending civil proceedings against the debtor as a party to such proceedings. The standing provided to the foreign insolvency administrator could also concern the possibility of having certain notices or decisions published or relevant facts registered in public registers in the other State in cases that local legislation does not provide these possibilities. The system of recognition under the EIR therefore serves to generate a hypothetical equivalence to the state of affairs that would exist as if domestic proceedings in fact had been opened. Article 29(a) EIR in addition provides the right for the insolvency administrator in the main insolvency proceedings to request the opening of a secondary proceeding.[96]

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[95] Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (United Nations General Assembly, document A/CN.9/442, 19 December 1997, § 28.

[96] On access under the UNCITRAL Model Law itself, see Articles 9 to 14 inclusive. The text of Procedural Principle 7, laid down in Global Principle 20.1 and 20.2, has been considered when drafting CoCo Guideline 5 ('Direct Access'): 'Any foreign liquidator should be granted direct access to any court necessary for the exercise of legal rights to the same extent that a national liquidator is so permitted'.

Principle 14 (GP 21) Language

14.1. Where there is more than one insolvency case pending with respect to a debtor, the insolvency administrators and courts involved should determine the language in which communications should take place with due regard to convenience and the reduction of costs. Notices should indicate their nature and significance in the languages that are likely to be understood by the recipients.
14.2. With due regard to local law and available resources, courts:
(i) Should permit the use of languages other than those regularly used in local proceedings in all or part of the proceedings, if no undue prejudice to a party will result.
(ii) Should accept documents in the language designated by the insolvency administrators without translation into the local language, except to the extent necessary to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties.
(iii) should promote the availability of orders, decisions and judgments in languages other than those regularly used in local proceedings, if no undue prejudice to a party will result.

Commentary

When one comes to the use of languages in cross-border insolvency cases in Europe, there is a large contrast between the languages national courts use and the languages in which communication takes places between insolvency administrators in an international case. Article 31 of the EIR is based on the assumption that insolvency administrators, appointed in different insolvency proceedings, communicate. Hence these provisions oblige the administrators to identify a common language, which can be the language used in the court where main proceedings are pending, the language of one of the courts where one of the secondary proceedings is pending, or any language convenient to the insolvency administrators involved, such as English, German or French.

Many courts do understand that it is for the administrators to smoothly and effectively run their proceedings, but, in nearly all Member States surveyed, the rule is that the use of the local language in proceedings is mandatory.[97] In certain States, several different languages have official status and therefore can be used in insolvency proceedings: French, German and Luxembourgish in Luxemburg, French, German and Dutch in Belgium and e.g. Danish in certain cases in Sweden. Domestic law often prescribes that the court may and generally will request translations in the domestic language of any document submitted to the court. This request is not based on practical or cultural grounds, but may relate to a domestic rule providing that participants in the proceedings have a right to inspect the court files (in Germany e.g. § 4 *Insolvenzordnung* (InsO) and § 299 *Zivilprozessordnung* (ZPO)). These participants may not be fluent in the foreign language, which is why their right to be heard and to present legal arguments may be prejudiced. Furthermore, local legislation often provides that for persons participating in a hearing who do not have a command of the local language used, an interpreter shall be called in. In general, the possibility of accepting another language than the local language in insolvency proceedings is very limited or even

[97] In the Republic of Slovenia a proposal from December 2013 to introduce English as foreign language for cases involving cross-border cooperation, see Article 473a of the Slovenian Insolvency Act, Amendment F (besides the Slovenian language) has been refused by the National Council to come into legal effect.

excluded.[98] The court may communicate with a foreign administrator or a foreign court in another language, but, in many cases, this communication has to be translated into the local language for the benefit of other parties in the proceedings.
Even in a case where a non-local language is used, specific legal language itself could be difficult to understand, especially where it relates to terms which sometimes do not find an equivalent in another country or jurisdiction. It also could be the case that certain terms have a (slightly) different meaning or may result in (slightly) different legal consequences. In many instances, it may be very dangerous where a party does not know or appreciate the full meaning of a judicial expression. For a first step towards overcoming such problems in international insolvency practice, the June 2012 Global Principles Report contains a Glossary of over 150 terms and expressions.[99]
With regard to language, the cost of translation may become an issue. If the local law e.g. provides that the court has to make a translator or interpreter available to a party not reading and speaking the language used in the proceedings, the local law will also contain a rule on costs, e.g. the translator fees are to be paid either by the party determined by local law or by the Treasury of the respective Member State. The court has to find a translator or interpreter. In the absence of such a provision, the general rule will be that the party needing the help of a translator or interpreter has to pay the translator fees and has to find a translator or interpreter on its own.

EU JudgeCo Principle 14 has its origin in the CoCo Guidelines.[100] It is noted that the text of the Insolvency Regulation is equally authentic in over 20 languages. The potential complexity, and consequent costs, of administering a proceeding under the Insolvency

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[98] See in case of general civil proceedings District Court Utrecht 19 December 2012, *ECLI*:NL:RBUTR:2012:BY7457, deciding that in case of the presentation of parts of the procedural documents and productions in a foreign language (in the case at hand German), there is a duty to supply translations, and in case such a translation (into Dutch) lacks the passages in the foreign language are not taken into account by the court.

[99] Separately published at http://bobwessels.nl/2013/12/2013-12-13-glossary-on-terms-and-expressions-in-insolvency-law/. As set out in the introduction, the June 2012 Global Principles Report contains *Global Principles for Cooperation in International Cases* and a set of *Global Guidelines for Court-to-Court Communications in International Insolvency Cases.* A German translation of both these Principles as well as these Guidelines can be found in: Christoph Paulus, *Globale Grundsätze für die Zusammenarbeit in grenzüberschreitenden Insolvenzen und globale Richtlinien für die gerichtliche Kommunication*, Recht der Internationalen Wirtschaft 4/2014, 194ff.

[100] The Hague Principles for Direct Judicial Communications (2013) provide a certain parallelism in approach:
'8 The form of communications and language difficulties
8.1 Judges should use the most appropriate technological facilities in order to communicate as efficiently and as swiftly as possible.
8.2 The initial method and language of communication should, as far as possible, respect the preferences, if any, indicated by the intended recipient in the list of members of the Hague Network. Further communications should be carried out using the initial method and language of communication unless otherwise agreed by the judges concerned.
8.3 Where two judges do not understand a common language, and translation or interpretation services are required, such services could be provided either by the court or the Central Authority in the country from which the communication is initiated.
8.4 Hague Network Judges are encouraged to improve their foreign language skills'.
(Footnote omitted)

Regulation involving one or more secondary proceedings in Member States having different official languages can readily be appreciated. For this reason in 2007 CoCo Guideline 10 has been designed to accommodate the choice of an agreed language for purposes of communication, which is based on international practice, convenience and agreement. The text itself found its inspiration in Article 6 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 2004.[101]
Where courts are involved, as explained, the ordinary language will be the language regularly used by the courts. In this EU JudgeCo Principle, the court is advised, in cases where domestic law would allow so, to allow the use of other languages in all or part of the proceedings, except to the extent necessary to ensure that misinterpretations should be avoided, that the local proceedings are conducted effectively and that no prejudice to a party will result.[102]

Principle 15 (GP 22) Authentication

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

Commentary

Nearly all Member States are a party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, adopted in The Hague on 5 October 1961.[103] The Convention exempts certain public documents, such as those produced by courts, from legalisation: 'Legalisation describes the procedures whereby the signature / seal / stamp on a public document is certified as authentic by a series of public officials along a "chain" to a point where the ultimate authentication is readily recognised by an official of the State of destination and can be given legal effect there'.[104] The Member States surveyed mention a variety of forms, based on local law, ensuring that a court can rely on the documents presented, such as a certified copy of the judgment for the opening of the foreign insolvency proceedings and for the appointment of the foreign insolvency administrator, a certificate issued by the foreign court itself, certifying the existence of foreign proceedings and the

[101] Article 6 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 2004:
'6. Languages
6.1 The proceedings, including documents and oral communication, ordinarily should be conducted in a language of the court.
6.2 The court may allow use of other languages in all or part of the proceeding if no prejudice to a party will result'.

[102] Where a choice of a language is made, a native speaker of that language should be sensitive to the fact that the person(s) he or she is speaking to may be communicating in what is for them a second or third language. Acting fairly (CoCo Guideline 4.2) in general will mean the use of simple and clear words spoken with careful articulation, and the avoidance of dialect words, over-sophisticated language, linguistic puns, euphemisms, topical references or nationally-derived cultural allusions that may be incomprehensible to those from outside the state in question. Further on the topic of language, see the June 2012 Global Principles Report, p. 106ff.

[103] For its text, see http://www.hcch.net/upload/conventions/txt12en.pdf.

[104] See Apostille Handbook, para. 9, at http://www.hcch.net/ upload/apostille_hbe.pdf.

appointment of the foreign insolvency administrator or – with regard to creditor's claims – an authentic instrument or private document with full probative force that the claim exists, and that it originates from before the time of receipt of the creditor's payment notice, including the data as required by Article 41 of the EIR.[105]

Several Member States are at different stages in developing electronic registration and communication systems for general civil proceedings or insolvency proceedings. Article 16(2) of the UNCITRAL Model Law on Cross-Border Insolvency provides: 'The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised'. US courts also rely on electronic filing of cases and use public on-line dockets so that electronic transmission is often required, with the courts also relying on the use of conforming signatures, e.g. signatory name is typed and preceded with a "/s/" to note that the party submitting the document has the signed signature page if needed.

In the light of these developments and given the nature of an international insolvency case, EU JudgeCo Principle 15 aims to respond to the need for efficient and effective operation of cross-border insolvency proceedings, which is enhanced greatly by authentication procedures with respect to judicial cooperation. Indeed, national rules and practices may include such procedures; in individual cases they may be agreed on an ad hoc basis. Where certain judgments and orders follow a similar structure, courts may anticipate the use of a foreign language to facilitate coordination and to promote the speedy administration of proceedings. EU JudgeCo Principle 15 is formulated along the lines of CoCo Guideline 9, which in turn was inspired by ALI/NAFTA Principles, Recommendation 7.[106]

Principle 16 (GP 23.1 – 23.3) Communications between Courts

16.1 Courts before which insolvency cases are pending should, if necessary, communicate with each other directly or through the insolvency administrators to promote the orderly, effective, efficient and timely administration of the cases.
16.2. Such communications should utilise modern methods of communication, including electronic communications as well as written documents delivered in traditional ways.
16.3. The EU JudgeCo Guidelines for Court-to-Court Communication, presented as an Annex to these EU JudgeCo Principles, should be employed.
16.4. Electronic communications should utilise technology which is commonly used and be reliable and secure.
16.5. If courts are to manage an international insolvency case, they should consider the use of one or more protocols to manage the proceedings with the agreement of the parties, and approval by the courts concerned.

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[105] Article 41 EIR provides: 'A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking'.

[106] ALI/NAFTA Principles, Recommendation 7: 'Where authentication of documents is required, the NAFTA countries should establish methods to permit very rapid authentication and secure transmission of faxes and other electronic communications relating to cross-border insolvencies within the NAFTA on a basis that permits their acceptance as official and genuine by ministries and courts'.

Commentary

EU JudgeCo Principle 16.1 takes as its starting point that communications through courts in different Member States are to be decided at the court's discretion and may take place directly or through the respective insolvency administrators.[107] The words 'if necessary' should reflect a Member States' insolvency system, within which either insolvency office holders are actively managing a case or whether a court has a more active role.[108] As to the modes of communication, it is obvious that establishing communications through electronic means between courts requires the availability of such means, including teleconferencing, electronic mail, internet video conferencing and web based conferencing. The effective conduct of such communication requires the use of technology which is commonly used and which should

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[107] Compare Hague Principles for Direct Judicial Communications (2013) ('Initiating the communication'), observing with regard to necessity of direct communications: '7.1 In considering whether the use of direct judicial communications is appropriate, the judge should have regard to speed, efficiency and cost-effectiveness.' Making contact with a judge in the other jurisdiction is left to the court's discretion. Concerning its timing the Hague Principles provide:
'7.2 Judges should consider the benefit of direct judicial communications and when in the procedure it should occur.
7.3 The timing of the communication is a matter for the judge initiating the communication'

[108] From a judgment of 1 May 2013 by the High Court of Justice (Ch) [2013] EWHC 1664 (Ch) (*In the Matter of Lehman Brothers International Europe (in Administration v In the Matter of the Insolvency Act 1986*) it can be taken that cross-border court-to-court communications many times may naturally follow cross-border coordination and negotiating between insolvency office holders (or do not have to take place at all). Mr Justice David Richards has to decide about the application of the Joint Administrators of Lehman Brothers International Europe (LBIE) for a direction under paragraph 63 of schedule B1 to the Insolvency Act 1986, that they shall 'exercise their power so as to cause LBIE to perform its obligations under the settlement agreement in accordance with its terms'. The settlement, thus Richards J, '…brings to an end litigation in New York and the likelihood of litigation in London, which would have taken years to complete as well as being a major drain on the resources of the estates and the courts involved'. One condition is that the courts in New York and London will approve the agreement, another is that it requires the direction which the Joint Administrators have applied for from the London court. The judge gives the direction sought. In assessing the agreement Richards J endorses New York judge Peck's assessment when approving the settlement agreement that it represents a truly remarkable achievement. Then all professionals involved were praised: '*It is right to acknowledge, as did Judge Peck, that this achievement is the result of the determination and good sense of the office holders together with the skill and sheer hard work of their professional advisors. Above all, it very significantly accelerates and improves the prospect of distributions to clients and creditors which is, after all, the purpose of these insolvency proceedings*'. The case also demonstrates that cross-border court-to-court communications does not have to be the chosen way to go forward. Richards J cite a remark from Judge Peck: '*One of the other notable aspects of this is that this is a cross-border problem, one in which no courts communicated with each other. We had no court to court communication. We had no need for coordination at that level. Rather, this is an example of pure negotiation with the avoidance of litigation risk, cost, and uncertainty driving a very creative outcome*'. Nevertheless there has been such communication. Richards J: '*I would like to say that since he made those remarks and with the strong encouragement of the Joint Administrators and the trustee, Judge Peck and I have conducted a telephone discussion. We did so yesterday and were able to take stock of progress to date and to inform each other of what appear to be the principal outstanding matters in our respective jurisdictions. We agreed that, if appropriate and always with the knowledge of interested parties, we would be willing to have further communications. Whether they would be with or without the presence of other parties would depend upon the circumstances and on the views of those involved*'.

ensure expeditious sharing of information and the accessibility of electronic data in a traceable, current and understandable form. Information to be exchanged should be reliable, in that data received or sent has not been manipulated, does not originate from a non-party and is not accessible to persons for whom it is not intended.[109]

EU JudgeCo Principle 16.5 is based on the notion that a court must be ever mindful of its responsibility to uphold the principles of justice that are inherent within its own system of law, and to retain the necessary degree of control over the legal process over which it is presiding. When engaging in court-to-court communication in the context of an international insolvency proceeding, it may be advisable to draw up a written framework that expresses the objectives of the cooperative process in which the respective courts, together with all parties in interest, are engaged, and to recall the terms of that agreement in the form of a protocol to be approved by the courts concerned. In this way, reference can be made to a formal text in the event of any subsequent disagreement about the course or conduct of the communications which ensue.

Principle 17 (GP 23.4 – 23.5) Independent Intermediary

17.1. Courts should consider the appointment of one or more independent intermediaries within the meaning of Principle 17.2, to ensure that an international insolvency case proceeds in accordance with these EU JudgeCo Principles. The court should give due regard to the views of the insolvency administrators in the pending insolvency cases before appointing an intermediary. The role of the intermediary may be set out in a protocol or an order of the court.
17.2. An intermediary:
(i) Should have the appropriate skills, qualifications, experience and professional knowledge, and should be fit and proper to act in an international insolvency proceeding;
(ii) Should be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest;
(iii) Should be accountable to the court which appoints him or her;
(iv) Should be compensated from the estate of the insolvency case in which the court has jurisdiction.

Commentary

In certain circumstances, the court may wish to refrain from conducting direct communications with another foreign court, or even from doing so through the insolvency administrators who are conducting the respective proceedings in the Member States concerned. Reasons for considering such a course of action could include the need to attend to other immediate priorities or the general pressure of business upon the court, which require it to limit the time and resources devoted to the demands of the international case. A more

[109] See by way of analogy the Hague Principles for Direct Judicial Communications (2013) on written communications, Principle 8.1 ('Judges should use the most appropriate technological facilities in order to communicate as efficiently and as swiftly as possible', and Hague Principle 8.5 ('Written communications, particularly in initiating the contact, are valuable as they provide for a record of the communication and help alleviate language and time zone barriers') and Principle 8.6 ('Where the written communication is provided through translation, it is good practice also to provide the message in its original language').

obvious consideration may be the anticipated complexity of multi-lingual communications in different time-zones, with more than two insolvency cases pending simultaneously (e.g. in such cases as *Madoff* or *Lehman Brothers*, involving some eight and fifteen jurisdictions respectively), the unavailability or insufficiency of e-technological means, and possibly the court's genuine desire to maintain full impartiality, particularly if there are perceived to be conflicts between the administrators. In any such case, the court could consider appointing an independent intermediary. The court could be encouraged to do so too in cases where one or more creditors so request.

There are two reasons that a court should make use of EU JudgeCo Principle 17 with caution. First, many EU Member States are administrator-driven. For that reason there should be no need for an intermediary if the administrators do their job properly in performing their duties to coordinate parallel proceedings (Article 31 EU Insolvency Regulation). Second, the appointment of an independent intermediary is adding one more layer to the proceedings, resulting in extra costs, delay and a possible source for confusion or even conflict, which must be coordinated with the already existing layers. With too many parties involved, there is a risk that too much time is spent on preparing the coordination of measures and not enough time on preparing and performing the actual measures themselves. However, there may be cases warranting the appointment of an independent intermediary, e.g. if a judge does not have the skills mentioned under 17.2(i) or is unable to communicate in any other language than her/his native language.

An intermediary's general task is to help ensure that an international insolvency case is operated in accordance with these EU JudgeCo Principles and with any specific provisions which are either set out in a protocol or specified in an order made by the court. In addition, an independent intermediary will be able to alert the court to potential conflicts or problems. It will be part of the intermediary's mission to devise a practical means for conducting communication between the courts concerned, in such a way as to ensure that all parties are properly informed and, where appropriate, involved. The intermediary should also be required to address the practical issues generated by such factors as the different working languages in which the various courts are able to operate, and the logistical problems caused by the fact (if such is the case) of the courts being situated in different time zones thereby impeding the conduct of live communications during normal working hours, and the differences in these working hours themselves. EU JudgeCo Principles 17.1 and 17.2 foresee the appointment of an independent intermediary, which fully fits within the structure of Articles 25-27 UNCITRAL Model Law.[110] Furthermore, the UNCITRAL Legislative Guide has adopted the figure of a 'court representative' having a similar function to that of an intermediary.[111]

As the term 'intermediary' is intended to indicate, the person selected for the task must be, and must be seen to be, suitably qualified for the mission upon which he or she is engaged, and must likewise be manifestly free from any suggestion of bias or conflict of interests. In order to function properly as an 'honest broker', the independent intermediary must command the trust and confidence of all parties interested in the matter, and should therefore be capable

[110] Article 27(a) UNCITRAL Model Law allows a court to implement cooperation by any appropriate means, including the appointment of a person or body to act at the direction of the court.

[111] A court representative is a person who may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions, see UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups (adopted in 2010), para. 37.

of engaging in discussions aimed at resolving practical issues within the case on a 'without prejudice' basis. Parties may thereby participate in a process whose outcome may serve the best interests of all concerned without fearing that they may be at risk of compromising their rights in a way which could result from a direct judicial hearing. Although the act of appointment is performed by the court, it is self-evidently essential that this should be preceded by a process of consultation with interested parties, so far as is reasonably practicable. Such consultations should be conducted by the respective administrators who should report their findings to the court together with such recommendations as they consider appropriate.[112]

Principle 18 (GP 25) Notice

18.1. If an insolvency case appears to include claims of known foreign creditors from a State where an insolvency case is not pending, the court should assure that sufficient notice is given to permit those creditors to have a full and fair opportunity to file claims and participate in the case.
18.2. The court should encourage the publication of such notices in the Official Gazette (or equivalent publication, including any internet-registry) of each State concerned.
18.3. For the purposes of notification within the meaning of Principle 18.1, a person or legal entity is a known foreign creditor if:
(i) The debtor's business records establish that the debtor owes or may owe a debt to that person or legal entity; and
(ii) The debtor's business records or bookkeeping establish the address of that person or legal entity.

Commentary

It is inherently true of any international case that the debtor is likely to have foreign creditors. In the interests of maintaining both the appearance and also the substance of due process as well as the fair and equal treatment of all creditors, it is necessary to ensure that such interested parties are enabled to take an effective part in the proceeding, and that they do not experience unintended prejudice or discrimination due to the factors of distance or language, or through some procedural element such as the operation of time limits for filing claims or for responding to communications. Provisions which have been designed for application in the context of purely domestic proceedings may fail to take account of these matters, and may also lack the necessary element of flexibility to allow for appropriate adjustments to be made with respect to foreign creditors.

In order to achieve the propositions expressed in EU JudgeCo Principles 6 (Equality of Arms) and 9 (Non-discriminatory treatment), courts should be ready to exercise such inherent discretionary powers as they may have, so as to compensate for any potential disadvantage that might otherwise be experienced by foreign creditors due to the likelihood of delay in their reception of notice. Where existing domestic legislation fails to confer such discretion upon the court or to inject an element of flexibility in the operation of the rules where a case has an

[112] It is beyond the scope of the JudgeCo project to present a set of professional and ethical standards for an independent intermediary, as suggestion for national legislators or courts or for the creation of a European standard.

international dimension, consideration should be given to effecting a suitable amendment to the rules themselves.

Principle 19 (GP27) Coordination

19.1. Where there are parallel proceedings, each insolvency administrator should obtain court approval for any action affecting assets or operations in that forum if required by local law, except as otherwise provided in a protocol approved by that court.
19.2. An insolvency administrator should seek prior agreement from any other insolvency administrator in relation to matters concerning proceedings or assets in that administrator's jurisdiction, except where emergency circumstances make this unreasonable.
19.3. A court should consider whether the insolvency administrator in a main proceeding, or his or her agent, should serve as the insolvency administrator or co-administrator in secondary proceedings to promote the coordination of the proceedings.
19.4. Courts should encourage insolvency administrators to report periodically, as part of national reporting duties, on the way these Principles and/or agreed Protocols are applied, including any practical problems which have been encountered.

Commentary

In principle, 'parallel' proceedings concern main proceedings and one or more secondary proceedings against the same debtor. The objectives of EU JudgeCo Principle 19 may best be achieved if each court, as early in the proceeding as is practicable, enters an order imposing the stated requirements on the relevant insolvency administrator, thereby producing a matrix of complementary orders applicable in each of the States concerned. Full and constant disclosure should be the rule. On the other hand, one benefit of a protocol is an agreement that a particular sort of action can be taken without court approval.[113] The words 'approval … if required by local law, except as otherwise provided in a protocol approved by that court' should express that provisions in a protocol, approved by a court, override local law.
This Principle sets the basic pre-condition for cooperation among proceedings because it ensures that the key official in each case, the insolvency administrator, has knowledge of important matters as to which interested parties in each proceeding may be entitled to an opportunity to be heard.
Whether the insolvency administrator has the obligation in turn to transmit particular information to the court and creditors in the proceeding in which the administrator was appointed will be determined by the national law applicable to that administrator or by the protocol concluded.

When deciding on the opening of secondary proceedings, or even during its progress, a court could consider, where domestic law allows so, to appoint or to co-appoint the 'foreign' insolvency administrator as the insolvency administrator or co-insolvency administrator in these secondary proceedings. Consequently, such an appointment shall subject the foreign insolvency administrator to the regime of supervision or general oversight of the court which is in charge of the secondary proceedings. EU JudgeCo Principle 19.3 has its origin in CoCo Guideline 16.3. By applying EU JudgeCo Principle 19.3 'double' management of an

[113] For the meaning of a 'protocol', see the commentary to EU JudgeCo Principle 4.

international case can be avoided, whilst the risk of conflicts of interest is absent, as both proceedings concern the same insolvent debtor.

EU JudgeCo Principle 19.4 aims to encourage efficient sharing of information by providing the court with feedback. It underlines the importance of accountability of insolvency professionals for the benefit of the quality of a court's orders. The feedback may be useful for courts to better understand certain practical problems, the way in which these are solved and in what way to address or apply certain EU JudgeCo Principles or specific provisions in a protocol. Principle 19.4 has its origin in CoCo Guideline 16.5.

Principle 20 (GP28) Notice to Administrators

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

Commentary

This EU JudgeCo Principle flows from CoCo Guidelines 17.1 and 17.2.[114] It reflects an essential feature of the required approach to cooperation between insolvency administrators in parallel proceedings, i.e. the honouring of both the letter and the spirit of the principle of mutual trust that must apply in such situations. Candour and transparency are fundamental aspects of such mutual trust. Whenever any of the insolvency administrators proposes to apply to their national court, or to a court in any other Member State, in respect of any matter relating to the insolvency proceeding, a duty of candour should be observed whereby advance and timely notice of the proposed application should be provided to all other administrators. In national procedural laws in the EU, it may differ whether the insolvency administrator or the court is under the duty to send prompt notice prior to a court hearing.[115] In both cases, sending of notices should be done at a sufficiently early time to enable the receiver to consider the implications of the application in question both from the standpoint of their own proceeding and with regard to the general interests of all affected parties.

Wherever possible, there should be communication among the administrators to ascertain the extent to which the proposed application can command the assent and support of all of them, and also whether it is appropriate for some or all of them to be represented at the hearing. It is

114 CoCo Guideline 17 ('Notices'):
'17.1. Notice of any court hearing or the making of any order by a court should be given to each of the liquidators at the earliest possible point in time where the hearing or order is relevant to that liquidator.
17.2. Where a liquidator cannot be present in person before the court, the court is advised to invite the liquidator to communicate any observations to the court prior to any order being made.
17.3. The liquidators should provide for the keeping of an accessible record of notices in the meaning of Guideline 17.1, which shall be regularly updated, to note the dates and relevant descriptions of any legal documents communicated, including those filed or transferred electronically'.

115 Reference is made to Article 40(1) EIR, in which the duty to inform creditors is laid either to the court or to the insolvency administrator: '1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States'.

to be understood that there may be occasions when the urgency of the matter necessitates the making of an instant application, without there being time for orderly notice to be given in advance to the other insolvency administrators. In such cases, every effort should be made to notify them as soon as possible, to provide an explanation for the lack of advance notice or consultation, as well as to make any appropriate representations to the court as may safeguard the interests of the other insolvency administrators.

Principle 21 (GP29) Cross-Border Sales

21.1. When there are parallel insolvency proceedings and assets are to be disposed of (whether by sale, transfer or some other process), courts, insolvency administrators, the debtor and other parties should cooperate in order to obtain the maximum aggregate value for the assets of the debtor as a whole, across national borders.
21.2. Where required to act, each of the courts involved should make orders approving disposals of the debtor's assets that will produce the highest overall value for creditors.
Commentary

The purpose of EU JudgeCo Principle 21.1 is to enhance the benefits of international cooperation for the benefit of the body of creditors. It seeks to maximise the value realised through the disposal of any part of the debtor's property which happens to be administered in one of the parallel proceedings. The present text reflects CoCo Guideline 13.[116] Furthermore, among the jurisdictions surveyed leading to the June 2012 Global Principles Report, there were indications that a positive response might be expected if such an approach were to be proposed, either in a specific proceeding or at the level of legislative enactment. In addition, in certain jurisdictions specific rules apply to guarantee the transparency of the process of disposing of the assets (often through an auction process). In certain cases, spontaneous collaboration between insolvency administrators, acting in a manner corresponding to the terms of EU JudgeCo Principle 21.1, already takes place on some occasions, where the benefits of such cooperation are apparent to the administrators involved.[117] The involved administrators may also consider the use of a protocol for governing the process and means of disposing of assets. In the spirit of mutual trust, insolvency administrators should cooperate in resolving matters of remuneration of insolvency administrators in jurisdictions where these are calculated on the basis of a percentage of the money which has been received and included in the insolvency estate as a result of the disposal.[118]

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116 CoCo Guideline 13 ('Cross-Border Sales'):
'13.1. Where during any period of cooperation between liquidators in main and any secondary proceedings assets are to be sold or otherwise disposed of, every liquidator should seek to sell these assets in cooperation with the other liquidators so as to realise the maximum value for the assets of the debtor as a whole.
13.2. Any national court, where required to act, should approve those sales or disposals that will produce such maximum value'.

117 In Brazil, for example, such an approach has been followed in relation to the sale of assets in the Parmalat case, see www.latincounsel.com/eng/notitiaampliada.php?nod=5447.

118 It should be acknowledged that courts and insolvency administrators in Member States whose laws do not treat the proceedings as opened immediately after the petition has been filed, may not always be in a position of complying with EU JudgeCo Principle 21.1. These laws will provide that during the period between the receipt of the petition by the court and the judgment by which the proceedings are opened, the court has to assess whether the petition meets all formal and substantive requirements for insolvency proceedings to be opened. In

EU JudgeCo Guideline 21.2 will not apply in all EU Member States, as, in certain jurisdictions, involvement or approval for a disposal (whether through a sale or other process) is in the hands of a creditors' assembly or a selected group of creditors. Alternatively, creditors may consent to provide leave for the insolvency administrator to act according to the domestic rules for such processes. The role of a court in such cases may be limited to staying the process of liquidation within the meaning of Article 33 EIR. Where a court is required to act, it is recommended that it should approve orders authorising sales, transfers or other forms of disposal that will produce the highest overall value for creditors, which not automatically mean 'the highest price'.

Principle 22 (GP30) Assistance to Reorganisation

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

Commentary

EU JudgeCo Principle 22 has its direct roots in CoCo Guideline 14.[119] Reorganisation proceedings are invariably complex and delicate matters, with a considerable degree of inherent uncertainty as to their eventual success. These factors are greatly magnified where the assets and interests of the reorganising debtor are dispersed among several different Member States, whose respective laws may also give rise to difficulties, especially where an integrated solution is being sought that will embrace all aspects of the debtor's business. If vital elements of the debtor's operations are located outside the state in which the centre of main interest (COMI) is situated, non-cooperation on the part of the courts and authorities of the other state or states concerned could stultify all prospects of a meaningful reorganisation taking place. The outcome of a fragmented process is likely to be, at best, a weaker enterprise than might otherwise have been constituted and, at worst, a complete failure of the reorganisation attempt, resulting in a liquidation. Loss of value is virtually inevitable, with the negative effects being experienced by creditors as well as equity holders in all the states involved. Ideally, parallel reorganisation proceedings should take place in each of the states concerned, and they should be conducted as far as possible in a manner that aspires to be in sympathy with the aims and purpose of the main proceeding. Where possible, simultaneous filings under the laws of the states in question are likely to prove efficacious in attaining the benefits of a protective moratorium across the entire enterprise, even if this is built up on a piece-meal basis and is not of a uniform nature across all jurisdictions.

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such a case, disposing of assets before knowing if the proceedings are opened at all cannot be in the best interest of the creditors.

119 Guideline 14 ('Assistance in Reorganisation'):

'14.1. Where main insolvency proceedings are aimed at ensuring the rehabilitation and reorganisation of the debtor's business, all other liquidators shall cooperate in any manner consistent with the objective of reorganisation or the sale of the business as a going concern wherever possible, mindful of the interests protected by local insolvency proceedings.

14.2. Liquidators should cooperate so as to obtain any necessary post-commencement financing, including through the granting of priority or secured status to lenders providing finance to the debtor and related entities as may be appropriate and insofar as permitted under any applicable law'.

Two practical constraints which may be encountered when parallel filings are contemplated to occur. The first is that the present framework of the EU Insolvency Regulation provides that a main insolvency proceeding in one Member State may be combined with secondary insolvency proceedings in other Member States, which must be liquidation proceedings. Reorganising a debtor would mean that, in such secondary proceedings, the process of liquidation needs to be aligned with the reorganisation objectives in the main proceedings, if indeed this is possible. The CJEU judgment of 22 November 2012 in *Bank Handlowy* (or: *Christianapol*) (mentioned in the next paragraph below) provides a general bases for such an alignment.[120]
The second constraint is that the different domestic laws may impose diverse criteria for establishing eligibility for commencing a reorganisation proceeding. For example, the law of the Member State of the COMI may allow a filing for reorganisation to be resorted to as a proactive measure, whereas in some of the other concerned legal systems it may be necessary to establish that the debtor's local operations are currently in a state of insolvency according to the criteria employed by the local law. If those criteria are not met with regard to the local branch of the debtor's international operations, the domestic law may deny the right to file or disallow an application. Even if the debtor's circumstances are such as to amount to a state of insolvency for the purposes of the law of the COMI (and a fortiori where they do not), there is a possibility that it may prove impossible to open a parallel proceeding in other, strategically significant, jurisdictions. EU JudgeCo Principle 22 aims to address this issue by asserting the rational basis for the courts and authorities of other states to adopt a supportive approach towards a proceeding opened in the state of the debtor's COMI for the purpose of attempting a value-preserving reorganisation. Such a reorganisation could include partial liquidation in such a way that shares in a subsidiary of an insolvent debtor or assets of this subsidiary are divested and the proceeds will become a part of main insolvency proceedings in the context of the insolvency of a group of companies. This is very much within the spirit of international cooperation which these Principles seek to nurture. For example, a court may face a particularly sensitive issue of judgment, particularly where local parties seek to initiate a liquidation proceeding with respect to the debtor's operations and assets in that jurisdiction. If – as may well be the case – such a proceeding would increase the likelihood that the main reorganisation proceeding will be unsuccessful, the court should give careful consideration to the wider implications of what it is being asked to do, and should endeavour to achieve a solution that will avoid inflicting a potentially fatal blow to the prospects of reorganisation.

The rationale of EU JudgeCo Principle 22 finds support in the judgment of 22 November 2012 of the Court of Justice of the European Union in the matter of *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak, V Christianapol sp. z o.o.* (Case C-116/11), where the court observes that winding-up proceedings, to be opened in a 'secondary' state, risks running counter to the purpose served by main proceedings, which are of a protective nature. Decisive is, thus the Court of Justice, the following: '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

[120] The sharp contrast between main insolvency proceedings and secondary (mandatory winding-up) proceedings may disappear when the December 2012 proposal of the European Commission for a Regulation amending the EU Insolvency Regulation [COM(2012) 744] is adopted.

coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings'.[121]

It is acknowledged that the court must ultimately balance the interests of local parties against the broader interests of the international body of creditors, and may have to take account of any substantiated indications that the prospective effects of the reorganisation upon the local creditors are likely to be disproportionately unfavourable when compared to the position of creditors in other states.[122] The possibilities of court-to-court communication should be explored before any decision is taken to open a liquidation proceeding under domestic law.

Principle 23 (GP31) Post-Insolvency Financing

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

Commentary

The availability of post-insolvency (or post-commencement) financing is among the vital factors bearing upon the prospects of a positive outcome of a reorganisation, both in national as in cross-border cases. Unless the providers of such finance can be assured that they will enjoy adequate protection in the event that the reorganisation does not succeed, financing is unlikely to be available on affordable terms, or even at all. In a cross-border case, an additional level of complexity arises because lenders need to be reassured that their rights will be accorded equal protection – including the enjoyment of priority or secured status – according to the laws of all the states in which the funds may be deployed during the course of the attempted reorganisation. To the extent that such priority or security may not be recognisable under the domestic law of any of the states concerned, there needs to be full transparency between all the administrators concerned both in their communications amongst themselves and in their negotiations with the funding providers. It may be necessary to agree that restrictions shall be placed on the application of at least a portion of the funding to prevent its being deployed in a jurisdiction whose laws would deny the full measure of protection to the lender in the event of a subsequent liquidation following a failed reorganisation. In agreeing to such a plan, insolvency administrators should be prepared to engage in a certain amount of 'give and take' in the interests of securing the optimum amount of funding, and on the most favourable terms, that will offer the best prospects of success for the coordinated reorganisation.[123]

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[121] Article 4(3) EU refers to the consolidated version of the Treaty Establishing the European Union.

[122] See, for instance, the analysis of Hirst J in *Felixstowe Dock and Railway Co v. U.S. Lines Inc* [1989] Q.B. 360, at 376 and 389, whereby the judge concluded that the prospective benefits of a proposed plan of reorganisation of a U.S.-based company under Chapter 11 of the U.S. Bankruptcy Code would be almost exclusively enjoyed by the U.S. creditors, whereas European creditors, including those in the U.K., would have little to expect in the future by way of net return.

[123] This Principle is closely based on Procedural Principle 19 ('Post-Bankruptcy Financing') of the ALI/NAFTA Principles: 'Where there are parallel proceedings, especially in reorganization cases, administrators and courts should cooperate to obtain necessary post-bankruptcy financing, including the granting of priority or secured status to reorganization lenders insofar as permitted under applicable law'.

Although in many cases it will be up to the insolvency administrator and the participants in the insolvency proceedings to take care of the necessary post insolvency financing, in certain jurisdictions there may be a role for the court, e.g. in approving the conclusion of a refinancing agreement. For this reason the word court is included within the text of EU JudgeCo Principle 23.

Principle 24 (GP36) Plan Binding on Participant

24.1. If a Plan of Reorganisation is adopted in a main insolvency proceeding and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon the debtor and the creditors who participate in the main proceeding.
24.2. For this purpose, participation includes:
(i) Filing a claim;
(ii) Voting on the Plan; or
(iii) Accepting a distribution of money or property under the Plan.

Commentary

A Plan of Reorganisation (or: reorganisation plan) generally can be described as a plan by which the financial well-being and viability of the debtor's business can be restored.[124] EU JudgeCo Principle 24 has its basis in Procedural Principle 26 of the ALI/NAFTA Principles. The foundation is the principle that a party who voluntarily submits to the jurisdiction of a given state by the act of participating in a legal proceeding that is being conducted this party is bound by the outcome or result of the proceeding in question. In reorganisation proceedings, the basis on which a plan is capable of acquiring binding force upon assenting and non-assenting creditors alike is the subject of domestic provisions which can vary from state to state. Not through the mere fact of receiving a notice as a creditor, but by the act of participation in a reorganisation conducted under the regime of a given Member State, creditors are to be treated as bound in accordance with the terms imposed by the system of law in question.

Where only one such (main) proceeding takes place, the fact that all creditors have had a fair opportunity to participate on a basis of equality (if such is shown to be the case) should give rise to European-wide recognition of the binding nature of the adopted plan. It should therefore not be open to any creditor who participated in these main proceedings (whether they were in fact consenting in terms of the final terms of the adopted plan or not) to resile from that act of participation and to seek to initiate an action or proceeding in some other state with a view to re-asserting their original claim. The fact that the reorganisation proceeding has taken place under the law of a state whose courts had international jurisdiction should give rise to an estoppel precluding such a creditor from resorting to any such action, and this consequence should be recognised by courts in other states in which the creditor attempts to invoke any legal process that contravenes this EU JudgeCo Principle. It therefore may assist in those circumstances in which the applicable national law (as the *lex concursus*) does not contain a rule to the effect that such a creditor is bound by that plan on the basis of Article

[124] UNCITRAL Legislative Guide (2004), para. 12, under B, 'Glossary, Terms and definitions'. UNCITRAL Practice Guide (2009), under B 'Glossary', in '2. Terms and explanations'.

4(2) under j EIR (the *lex concursus* determines the conditions for and the effects of closure of insolvency proceedings, in particular by composition).

Principle 25 (GP37) Plan Binding: Personal Jurisdiction

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

EU JudgeCo Principle 25 has its basis in Procedural Principle 27 of the ALI/NAFTA Principles, which extends the binding effects of an adopted reorganisation plan to creditors who, for some reason, have chosen not to participate in the proceeding despite having received adequate notice and opportunity to do so. In some jurisdictions, if duly notified creditors are bound by the outcome of the method of voting applied, even if they happened to form part of a dissenting minority. However, non-participating creditors may escape being bound under the law applicable. In the interests of avoiding the creation of a perverse incentive for certain creditors to abstain from participating in a duly constituted reorganisation proceeding that is taking place in a Member State where a main insolvency proceeding is pending, EU JudgeCo Principle 25 has the effect of treating any individually notified creditor who would be considered to be subject to the jurisdiction of the courts of the country in question in an ordinary commercial proceeding, according to the provisions of the law of the main insolvency proceeding, to be bound by the outcome with respect to the type of claims asserted by that creditor. The effect of this extension will thus depend upon the rules of the Member State in question with regard to the exercise of jurisdiction in ordinary commercial matters, and on the particular criteria that are applicable under that system of law to determine the sufficiency of the connection between the defendant and that state.[125] In some instances, a 'doing of business' test may suffice; in other systems, a test based on residence or establishment, or on the maintenance of a place of business, or on the fulfilment of some other connecting factor, may be required.

The requirement that the creditor must have received adequate, individual notice of the reorganisation proceeding and of its right to participate must be appraised according to the prescribed standards of the Member State in which the proceeding is taking place, but it will also be open to the court in any state where the issue of recognition falls to be determined to

[125] Jay Lawrence Westbrook, Chapter 15 and Discharge, 13 American Bankruptcy Institute Law Review 2005, p. 515, explains that ALI/NAFTA Principle 27 was primarily addressed to application within NAFTA, and poses the question: '…to what extent will the United States courts examine the fairness of a foreign proceeding before deciding whether to enforce a plan of reorganisation?' Westbrook seems to come to the conclusion that Chapter 15's section 1506 (public policy exception) and section 1522(a) (creditors are to be 'sufficiently protected') may generate substantive fairness. In *re Metcalfe & Mansfield Alternative Investments*, the U.S. Bankruptcy Court for the Southern District of New York held that broad non-debtor, third-party releases, previously approved as part of a restructuring proceeding under the Canadian Companies' Creditors Arrangement Act, in which a restructuring plan was adopted by 96 percent of its creditors, would be enforced in the U.S., although such releases might not be approved under chapter 11 U.S. Bankruptcy Code proceedings. *Res judicata* effect to the foreign judgment was given by the bankruptcy court on the basis of comity (421 B.R. 685, 699 (Bankr. S.D.N.Y. 2010).

apply its own judgment concerning the conformity of the original proceeding with the standards of due process which are deemed to be appropriate by the latter state. At a minimum, the conformity of the original proceedings practices in this matter, as well as the actual nature of the reorganisation process itself, should be amenable to review, with reference to such matters as are identified in these EU JudgeCo Principles as set out above, and notably Principles 6 (Equality of arms) and 14 (Language), as well as with Principles 9 (Non-discriminatory treatment) and 18 (Notice). Finally, the court which is called upon to recognise the binding effect of the reorganisation may refer to the provisions of EU JudgeCo Principles 1 (International Status) and 2 (Public Policy) before deciding whether to acknowledge the jurisdictional legitimacy of the foreign proceeding and the binding effects of its outcome in relation to non-participating creditors.

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

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

Commentary

The overall objective of these EU JudgeCo Principles is to enabling courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtor's business, and furthering the just administration of the proceeding. See EU Judge Principle 3.1. It is felt that the value of this principle should not stop at the formal boundaries of the Insolvency Regulation.[126] There are three groups of cases which indeed fall outside the scope on the Insolvency Regulation:
(i) International cases within the Member States (to which the Insolvency Regulation applies), but which cases are not covered because of the type of debtor (e.g. a consumer, non-merchant) or the type of insolvency proceeding (not listed in Annex A);
(ii) International cases in which the debtor's centre of main interests is not located in the Union[127], but for instance in Norway, Switzerland, Turkey, CIS, USA or any other non-EU Member State (apart from Denmark). Application by analogy may serve in an international case where the opening of insolvency proceedings in a Member State has taken place towards debtor, who's COMI is outside the EU, but where national legislation offers sufficient ground for the jurisdiction of that Member State's court or in cases opened outside the EU regarding a debtor with its COMI outside the EU, who possesses an 'establishment' in a Member State. Support of the merits of EU JudgeCo Principle 26 to these type of international cases can be found the judgment of Court of Justice of the EU 14 January 2014 (Case C-328/12) ((*Ralph Schmid (acting as liquidator of the assets of Aletta Zimmermann) v Lilly Hertel*), deciding that that application of Article 3(1) EIR cannot as a general rule depend on the existence of a cross-border link involving another Member State. The Court follows the opinion of Advocate

[126] In general on the topic, see Nikitas Hatzimihail and Arnaud Nuyts, Judicial Cooperation between the United States and Europe in Civil and Commercial Matters: An Overview of Issues, in: Arnaud Nuyts, Nadine Watte (eds.), Transnational Civil Litigation in The European Judicial Area And in Relations With Third States, Brussels: Bruylant, 2005, p. 1ff.

[127] Recital 14 to the Regulation provides: 'This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community'. Since 2009 'Community' is replaced by Union.

General Sharpston, delivered on 10 September 2013, in Case C-328/12: '… Holding that the competent court under Article 3(1) of the Regulation has jurisdiction to hear a claim brought by a liquidator to set aside a prior transaction between the debtor and a defendant domiciled in a third country [i.e. Switzerland] respects the principles of unity and universality and furthers the aims of the single market. The liquidator will be able to deal with the debtor's estate more effectively and at lower cost, which will inure to the benefit of the creditors (many of whom are likely to be domiciled in the European Union). These advantages outweigh any disadvantage to the third country defendant of having to defend the claim in what is for him the 'wrong' jurisdiction; and – precisely because any judgment will not be granted automatic recognition and enforcement under the Regulation – he will in any event continue to enjoy a degree of protection from his local court';

(iii) International cases with several insolvency proceedings relating to different companies forming part of a group of companies. It follows from existing European practice that in case insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated: 'The various liquidators and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor'.[128] In such cases, therefore, the analogous application of the EU JudgeCo Principles is recommended.

[128] Citation of recital 21a of the December 2012 proposal of the European Commission for a Regulation amending the EU Insolvency Regulation [COM(2012) 744].

Abbreviations

ALI	American Law Institute
CJEU	Court of Justice of the European Union
CoCo	Communication and Cooperation Guidelines
COD	Ordinary legislative procedure (EU)
COM	European Commission
COMI	Centre of main interests
DCFR	Draft Common Frame of Reference
EBRD	European Bank for Reconstruction and Development
EC	European Council
ECJ	European Court of Justice
EEC	European Economic Community
EIR	European Insolvency Regulation
EU	European Union
GP	Global Principle
Hon.	The Honorable
IEHC	High Court of Ireland
III	International Insolvency Institute
InsO	Insolvenzordnung
JudgeCo	EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines
NAFTA	North American Free Trade Agreement
NZI	Neue Zeitschrift für das Recht der Insolvenz und Sanierung
ONCA	Court of Appeal for Ontario
R&A	Review & Advisory
SEW	Sociaal Economische Wetgeving
Supp.	Supplement
SWD	Staff Working Document
TFEU	Treaty on the Functioning of the European Union
UKSC	UK Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
ZPO	Zivilprozessordnung

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