European Communication and Cooperation Guidelines for Cross-border Insolvency

Developed under the aegis of the
Academic Wing of INSOL Europe

by

Professor Bob Wessels
and Professor Miguel Virgós

July 2007

Contents

Section 1:	The Guidelines	Page 5
Section 2:	Introduction to the Guidelines	Page 15
Section 3:	Explanation of the Guidelines	Page 29
Appendix I:	Checklist Protocol	Page 75
Appendix II:	Task Force / Review Group	Page 81

Section 1:
European Communication and Cooperation Guidelines for Cross-border Insolvency

Guideline 1: Overriding objective

1.1. These Guidelines embody the overriding objective of enabling courts and liquidators to operate efficiently and effectively in cross-border insolvency proceedings within the context of the EC Insolvency Regulation.

1.2. In achieving the objective of Guideline 1.1., the interests of creditors are paramount and are treated equally.

1.3. All interested parties in cross-border insolvency proceedings are required to further the overriding objective as set out above in Guideline 1.1.

Guideline 2: Aim

2.1. 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.

2.2. In particular, these Guidelines aim to promote:

(i) The orderly, effective, efficient and timely administration of proceedings;

(ii) The identification, preservation and maximisation of the value of the debtor's assets (which includes the debtor's undertaking or business) on a world-wide basis;

(iii) The sharing of information in order to reduce the costs involved; and

(iv) The avoidance or minimisation of litigation, costs and inconvenience to all parties affected by proceedings.

2.3. In individual insolvency proceedings, the Guidelines require cases to be administered with a view:

(i) To ensure that the creditors' interests are paramount and that they are on an equal footing;

(ii) To save expense;

(iii) To deal with the debtor's estate in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues, and to the number of jurisdictions involved; and

(iv) To ensure that the case is dealt with timely and fairly.

Guideline 3: Status

3. Nothing in these Guidelines is intended:

   (i) To interfere with the independent exercise of jurisdiction by each of the national courts involved, including their respective authority or supervision over a liquidator;

   (ii) To interfere with national rules or ethical principles by which a liquidator is bound according to applicable national law and professional rules; or

   (iii) To confer substantive rights or to interfere with any function or duty arising out of the EC Insolvency Regulation or to impinge on applicable national law.

Guideline 4: Liquidator

4.1. A liquidator is any appointed person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of its affairs, either in reorganisation or in liquidation proceedings.

4.2. A liquidator is required to act with the appropriate knowledge of the EC Insolvency Regulation and its application in practice.

4.3. A liquidator is required to act honestly, objectively, fairly and expeditiously in dealing with all parties concerned, including the courts.

Guideline 5: Direct Access

5. 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.

Guideline 6: Communications

6.1. Liquidators are required to communicate with each other directly and as soon as they are appointed.

6.2. The liquidator appointed in the main proceedings should always take the initiative to start or to continue communications with other liquidators.

6.3. Substantive replies by a liquidator to queries from other liquidators should always be responded to as soon as reasonably practicable.

Guideline 7: Information

7.1. Liquidators are required to provide prompt and full disclosure to all other liquidators involved of all relevant information about the existence and status of the insolvency proceedings in which they have been appointed.

7.2. Liquidators are required to provide information periodically which may be relevant to the other proceedings detailing the conduct of the proceedings.

7.3. Liquidators in possession of such information are required to inform the courts insofar as they are subject to any reporting duties under national law, of any material development in any such other proceedings.

7.4. A foreign liquidator should be permitted to use all legal methods to obtain information that would be available to a creditor or to a liquidator in any national insolvency proceedings.

7.5. To the fullest extent permissible under any applicable law, relevant non-public information should be shared by a liquidator with other liquidators subject to appropriate confidentiality arrangements to the extent that this is commercially and practically sensible.

7.6. The duty to provide information in the meaning of this Guideline includes the duty to provide copies of documents at reasonable costs on request.

Guideline 8: Information by a Liquidator in Secondary Proceedings

8.1. The liquidator in any secondary proceedings should provide all relevant information to the liquidator in main proceedings without any delay so as to facilitate the submission of proposals on the liquidation or use of assets in secondary proceedings.

8.2. The liquidator in any secondary proceedings is encouraged to provide advice to the liquidator in the main proceedings concerning any views on how to best to proceed.

8.3. The liquidator in main proceedings is encouraged to involve liquidators in any secondary proceedings in devising those proposals referred to above in Guideline 8.1.

8.4. Where a reorganisation or rescue plan can be adopted in secondary proceedings which, in attaining the aims pursued under Guideline 2.2(ii), would give better value to creditors in main proceedings or reduce the overall size of debts, the liquidator in main proceedings and the courts shall take advantage of the opportunity to promote the adoption of this plan.

Guideline 9: Authentication

9.1. Except to the extent provided for under any applicable law, where existing authentication of documents is required, methods should be established so as to permit rapid authentication and secure transmission of faxes and other electronic communications relating to cross-border insolvencies on any basis that permits their acceptance as official and genuine communications by liquidators and courts in other jurisdictions.

9.2. To the extent permissible under national law, courts are encouraged to provide or publish judgments, orders or rulings also in languages other than those regularly used in proceedings or encourage translations to be made as much as possible.

Guideline 10: Language

10.1. Liquidators shall determine the language in which communications take place on the basis of convenience and the avoidance of costs. The court is advised to allow use of other languages in all or part of the proceedings if no prejudice to a party will result.

10.2. Courts are encouraged, to the maximum extent permissible under national law, to accept any documents related to those communications in language decided upon under Guideline 10.1, without the need for a translation into the language of proceedings before them.

Guideline 11: Obligations Incurred by and Fees of Liquidators

11.1. Obligations incurred by the liquidator during proceedings and the liquidator's fees are funded from the assets within those proceedings in which the liquidator is appointed.

11.2. Obligations and fees incurred by the liquidator in the main proceedings prior to the opening of any secondary proceedings but concerning assets to be included in the estate in principle will be funded by the estate corresponding to the secondary proceedings.

Guideline 12: Cooperation

12.1. Liquidators are required to cooperate in all aspects of the case.

12.2. Liquidators ensure that cooperation takes place with other liquidators with a view to minimising conflicts between parallel proceedings and maximising the prospects for the rehabilitation and reorganisation of the debtor's business or the value of the debtor's assets subject to realisation, as may be the case.

12.3. Cooperation is intended to address all issues that are important to the actual case.

12.4. Cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures, although decisions may

continue to be made informally as long as they are compatible with the substance of any such agreement or "protocol".

12.5. In case where any matter is not specifically provided for within the protocol, the liquidators shall act in a manner designed to promote the overriding objective set out above in Guideline 1.1.

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.

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.

Guideline 15: Coordination between Secondary Proceedings

15. Liquidators in all secondary proceedings are required to comply with these Guidelines.

Guideline 16: Courts

16.1. Courts are advised to seek to give effect to the overriding objective of enabling courts and liquidators to operate efficiently and effectively in cross-border insolvency proceedings within the context of the EC Insolvency Regulation, in the meaning of Guideline 1.

16.2. 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.

16.3. Courts are advised to consider whether an appointment of the liquidator in main proceedings or a nominated agent of such liquidator as a liquidator or a co-liquidator in secondary proceedings would better ensure coordination between different proceedings under the courts' supervision.

16.4. To the maximum extent permissible under national law, courts conducting insolvency proceedings or dealing with requests for assistance or deciding on any matters relating to communications from other courts should cooperate with each other directly, through liquidators or through any person or body appointed to act at the direction of the courts.

16.5. 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.

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.

Guideline 18: Scope

18. Whilst 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 protocol), liquidators or administrators and courts outside the scope of the EC Insolvency Regulation are encouraged, wherever possible, to use these Guidelines so as to facilitate or increase the prospects of cooperation in other proceedings taking place.

Section 2:
Introduction to the Guidelines

1. The EU Insolvency Regulation is founded on the rationale that the proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. The Insolvency Regulation aims to achieve this objective, which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the EC Treaty. The Regulation requires the coordination of the measures to be taken regarding an insolvent debtor. The form chosen is that when the centre of main interest (COMI) of the debtor is in Member State A, main insolvency proceedings can be opened. In Member State B, C and/or D secondary proceedings over the same debtor can be opened when, in this other State, the debtor possesses an establishment (being any place of operations where the debtor carries out a non-transitory economic activity with human means and goods) within the territory of these latter States.

2. 'Main insolvency proceedings and secondary proceedings can ... 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', as stated in Recital (20) preceding the text of the EU Insolvency Regulation (all italics by the authors). Main insolvency proceedings, opened in one Member State, do not deprive the courts in other Member States of the authority to open secondary proceedings, for which see Article 16(2) of the Insolvency Regulation. The universal effect of the main proceedings throughout the European Community (except for Denmark) does not apply to secondary proceedings opened in another Member State, although the effects of the secondary proceedings may not be challenged in other Member States (Article 17). Because the procedural and substantive effects of the secondary proceedings are determined by the *lex concursus* (Article 4 and Article 28), the focus of the secondary proceedings is the protection of local interests.

3. There are, however, other aspects of this primary function of secondary proceedings, which view secondary proceedings as national proceedings, albeit functioning in an European context:

(i) despite secondary proceedings being opened in another Member State (in which the debtor has an establishment, for which see Article 3(2) and Article 2(h)), the secondary proceedings are concerned with (a part of the assets and liabilities of) the same (insolvent) debtor as the main insolvency proceedings;

(ii) despite the secondary proceedings only being permitted to comprise proceedings listed in Annex B, and therefore winding-up proceedings with territorial effect (Article 3(2) and Article 27), Chapter III of the Insolvency Regulation provides the liquidator appointed in the main insolvency proceedings with several powers to influence or change the character of the secondary proceedings and to align these latter proceedings in accordance with developments in the main proceedings;

(iii) despite 'local' creditors being able to lodge claims in secondary proceedings, these proceedings are fully open for other creditors to also lodge their claims (Article 32).

It is generally acknowledged that secondary proceedings have an auxiliary function and therefore should be considered in the context of the main proceedings. The Insolvency Regulation does not aim to ring-fence these secondary proceedings. These proceedings have the formal characteristic (listed in Annex B) of proceedings in the Member State where they have been opened and cover assets, located in the territory of that Member State. Nevertheless, although the concept of the universality of the main proceedings is subject to fragmentation, it is not to be renounced. The mutual connection between both proceedings is founded on the maxim that, ultimately, the administration concerns one debtor with one estate and one group of creditors. See Recital 3, indicating that the Regulation stems from the need for 'coordination of the measures to be taken regarding an insolvent debtor's assets.' This may be referred to as the principle of unity of estate.

4. The concept of one debtor with one estate to satisfy all creditors is reflected – though less systematically – by the rights and powers assigned to the liquidator in the main insolvency proceedings by the Insolvency Regulation. The following illustrates these rights and powers:

(i) he has the power to apply for secondary proceedings in other Member States (Article 29);

(ii) he can ask liquidators in the secondary proceedings for information

(Article 31(1)); and

(iii) he can demand that they cooperate with him (Article 31(2));

(iv) he can exercise the power to put forward certain proposals in the context of the secondary proceedings (pursuant to Article 31(3));

(v) he may request a stay of the process of liquidation in these secondary proceedings (Article 33(1));

(vi) he may request the termination of a stay (Article 33(2));

(vii) he may propose a rescue plan in the secondary proceedings (see Article 34(1)), also during the stay of the process of liquidation (Article 34(3));

(viii) he shall lodge in other proceedings claims which have already been lodged in the main proceedings (Article 32(2));

(ix) he has the power to participate in the other proceedings on the same basis as the creditors (Article 32(3));

(x) he has the right to request the return to the main proceedings of anything already obtained by creditors as they have satisfied their claims by any means on the assets of the debtor situated in the other Member State (Article 20); and

(xi) he has the power to collect any remaining assets from the secondary proceedings if all claims in these proceedings have been met (Article 35).

5. These powers have their origin in the Insolvency Regulation. In addition, the liquidator appointed in the main proceedings will use the powers conferred on a liquidator according to its domestic insolvency legislation, for which see Article 18. The recitals to the Regulation devote only a few words to the guiding notion of unity of the estate. Recital (3) states: 'The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring *coordination of the measures to be taken regarding an insolvent debtor's assets*.' See also Recital (12), explaining the characteristics of main proceedings and secondary proceedings, adding: '*Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community*.' Furthermore, Recital (20) states: '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', and Recital (21): 'Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. (all italics by the authors).

6. To summarise, cross-border insolvency proceedings in a large part of Europe are managed and realised within a model of main insolvency proceedings (opened in a Member State where the debtor has its centre of main interests) and secondary insolvency proceedings (in other Member States, where the debtor possesses an establishment). The main liquidator has a list of powers to influence secondary proceedings. This raises questions with regard to the coordination of these proceedings. Close cooperation with trust between liquidators in main and secondary insolvency proceedings is indispensable in order to achieve an efficient and optimal administration of the insolvent debtor's assets.

7. The footing for cooperation is expressed in Recital (20) of the EC Insolvency Regulation ("...the main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information ..."), which is reflected in Article 31 of the EC Insolvency Regulation. The text is as follows:

> Article 31
>
> Duty to cooperate and communicate information
>
> 1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.
>
> 2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.

3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

8. The absence of guidance in Article 31 of the EC Insolvency Regulation in general results in ad hoc and case-by-case communication and cooperation without a solid and practical framework which might guarantee the realisation of the overriding objective of enabling liquidators and courts to efficiently and effectively operate in cross-border insolvency proceedings in the context of the EC Insolvency Regulation.

9. The Core Group of the Academic Wing of Insol Europe, at its second meeting in October 2004 (Prague), discussed a proposal to address the principal issue of the liquidators' duties of communication and cooperation in cross-border insolvency instances. The Core Group mooted the idea of the possibility/necessity of the establishment of a (non-binding) set of standards for communication and cooperation in cross-border insolvency cases, which are subject to the application of the EC Insolvency Regulation. The Core Group generally agreed that the proposal should be supported and it established a Task Force with the mandate to draft a plan, which was approved in early-2005. The Task Force is co-chaired by Professor Bob Wessels (Amsterdam, the Netherlands) and Professor Miguel Virgós (Madrid, Spain).

10. The following European Communication and Cooperation Guidelines For Cross-Border Insolvency are based on several papers of the individual members of the Task Force providing an overview and critical assessment of literature and court cases with regard to Article 31 of the EC Insolvency Regulation, of literature and court cases concerning non-EU examples of cross-border communication and cooperation in cross-border insolvency cases and of literature and the EC Treaty-related regulation and court cases concerning cross-border communication and cooperation in general civil and commercial law matters within the framework of the EC Treaty. The members of the Task Force are listed in Appendix II.

11. The Task Force has been guided by three primary reasons for focusing on the development of 'standards' for cross-border communication and cooperation between liquidators in the EU:

a. A set of Guidelines reflects (i) the central principle of cooperation and coordination between insolvency proceedings pending in two or more

Member States, where the text of the Regulation is left open, and (ii) a realistic set of Guidelines should ensure as best as possible to make the Regulation work in practice, so that either liquidation or reorganisation of the debtor's estate is dealt with efficiently.

b. A set of Guidelines fits in the current environment within which in the field of cross-border insolvency efficient and effective solutions have been developed based on models reflecting cooperation among courts and liquidators (e.g. Protocols; UNCITRAL Model Law). Several Member States have enacted provisions relating to communication and cooperation in its respective national legislation, inspired on these examples.

c. The insolvency profession in Europe has reached a stage in its development that demands heightened attention to strong, international standards of professionalism. A consistent set of Guidelines regarding the organisation, the contents and the quality of communication and cooperation processes (i) aims to be beneficial to the goals of the insolvency proceedings within which they will function, (ii) increases the strength and the reputation of the profession, and (iii) may support courts in providing tailor-made orders or insolvency (related) judgments in general.

12. The Task Force assigned with the project organised its work according to a plan, which would ensure that during its operation different stakeholders and interest groups were involved in the outcome. In addition to a number of discussions of several drafts between the members of the Task Force, the Task Force has been guided in its work by a Review Group, committed to review drafts of the Guidelines and comment on their consistency and practical use. The members of the Review Group are listed in Appendix II.

13. The outcome of the Task Force's work, including a first round of comments and discussion with the Review Group, was a non-public draft of the Guidelines (May 2006). This draft was explained and discussed at the INSOL International Academics meeting in Scottsdale AZ., USA, 20-21May, 2006. We then prepared a public draft of the Guidelines, to be discussed during the Annual Conference of INSOL Europe end-September 2006 in Bucharest, Romania. Furthermore, this public draft was the result of consultation both within the Task Force and with the Review Group. Compared to the text distributed during the Scottsdale conference, the subsequent discussions and evaluation resulted in a final number of 18 Guidelines as compared to

the Scottsdale draft, which contained 22 Guidelines. The main reasons for the changes were (i) the rearrangement of certain sections, and (ii) the view that in a stage of a first step framework some of the proposed guidelines seemed superfluous (Guideline 13 – Notices Among liquidators; Guideline 17 – Informal processes; Guideline 19 – Interim measures; Guideline 22 – Definitions), combined with (iii) the idea that some of the proposed guidelines might prove to be too complex in this stage (Guideline 16 – Corporate Groups; Guideline 21 – Actions to be taken outside the territory of the Member States where proceedings are pending).

14. The public draft of the Guidelines dated September 2006, including a brief Explanation, was discussed extensively during the general meeting at the Annual Conference of INSOL Europe in Bucharest, assembling over around 300 insolvency practitioners. Additionally in a workshop during this Conference specific Guidelines were discussed, and during the treatment of a hypothetical case twenty questions were raised and answered by the audience by way of electronic voting. This draft again has been subject for discussion during the Annual Conference of the Insolvency Lawyers Association, Oxford, 2-3March, 2007, and the INSOL International Academics meeting in Cape Town, South Africa, 17-18March, 2007. We thank all the participants of these meetings for their remarks and suggestions made.

In the light of the outcome of these discussions, the authors have reconsidered the content of the draft Guidelines. This has led to the introduction of Guideline 1.2 and 2.3, and to a full re-consideration of Guideline 11. Texts of several draft Guidelines have been moved to the Explanation, in an aim to come to a ready readable text. We also expanded the Explanation and finalised Guidelines and Explanation after a round of consultation in April and May 2007 with the Task Force and the Review Group.

15. We consider the European Communication and Cooperation Guidelines For Cross-border Insolvency, in their final form, to function as a first step in a framework to realise the objective of enabling liquidators and courts to efficiently and effectively operate in cross-border insolvency proceedings in the context of the EC Insolvency Regulation. In individual cases, the Guidelines are to be seen as minimum requirements and may need to be supplemented by other measures designed to address particular conditions. The Guidelines are not a cookbook of recipes certain to succeed in all cases;

but should inspire all actors to tailor solutions in specific cases. The Guidelines strongly endorse the use of agreements concerning cooperation or 'protocols' as a means to codify coordination in decision making procedures related to two or more insolvency proceedings in two or more Member States' jurisdictions. We are pleased with INSOL Europe's decision to install a 'Protocol Committee' to further develop certain forms or templates for such protocols.

16. We intend the Guidelines to serve as a sound and well-tailored framework for cross-border cooperation and as a basic reference for individual liquidators, professional insolvency practitioners' associations, judges and other public authorities in all EU Member States and internationally. It will most likely be for national professional associations of insolvency practitioners to introduce or to strengthen ethical or professional rules concerning a relative new subject: cross-border communication and cooperation. These associations may consider the use of the Guidelines as a template in order to review their existing rules and to initiate a plan designed to address any deficiencies as quickly as may be practical within their authority. We are confident that the Guidelines reflect present consensus within larger groups of insolvency practitioners and specialised scholars. INSOL Europe is in the process of establishing a permanent Communication/Cooperation Standards Committee, supervising the roll out of the Guidelines, to review them on an ongoing basis and police and monitor their application in practice or their implementation by associations. It is the purpose that judges will participate in this Committee. These associations are encouraged to submit any comments or suggestions for improvement or for additional Guidelines to the said Committee.

17. We believe that achieving consistency with the Guidelines in Member States will be a significant step in the process of improving communication and cooperation between insolvency proceedings pending in two or more Member States. We recognise, however, that the speed with which this objective will be achieved will vary. In some Member States changes in the legislative framework may prove to be necessary. In such cases, it is essential that national legislators give urgent consideration to the changes necessary to ensure that the Guidelines can be applied in all material respects.

18. The Guidelines presuppose that liquidators act with the appropriate knowledge of the EC Insolvency Regulation and its applicability in practice, which would include the operation of these Guidelines. We encourage

INSOL Europe and other professional organisations of lawyers, accountants or judges to engage in structured training, preferable on a European level in order to get acquainted to the multi-jurisdictional and multi-cultural setting within which the Regulation and these Guidelines operate.

19. In conclusion, we express our sincere appreciation to our colleagues on the Task Force and our consultants from the Review Group. Collectively, they have put in time, energy, their intellect and a sense of purpose for the development of the Guidelines.

July 2007

Amsterdam/Dordrecht
The Netherlands

Bob Wessels

Madrid
Spain

Miguel Virgós

Sources

The drafters of the European Communication and Cooperation Guidelines For Cross-border Insolvency have drawn on several public sources. These are:

UNCITRAL Model Law

United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, with Guide to Enactment, 1997.

ALI Principles

The American Law Institute's Transnational Insolvency Project regarding Cooperation Among NAFTA Countries (USA; Canada, Mexico), which resulted in General Principles, Procedural Principles and Recommendations. (source: Westbrook, Jay (reporter), International Statement of United States Bankruptcy Law (2nd volume in: American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries, 4 Volumes), JP Juris Publishing, Inc., 2003).

ALI/UNIDROIT Principles on Transnational Proceedings 2004

Principles and the accompanying commentary, adopted by the American Law Institute (ALI) in May 2004 and by the International Institute for the Unification of Private Law (source: Uniform Law Review 2004-4, 760)

EBRD Insolvency Office Holders Principles Draft January 2007

Principles setting standards for the qualifications, appointment, conduct, supervision and regulation of office holders in insolvency cases (Draft January 2007) (source: www.ebrd.com/country/sector/law/insolve/Princip/principles.pdf)

Principles of European Insolvency Law 2003

Principles designed by an Ad hoc International Working Group on European Insolvency Law (source: Principles of European Insolvency Law, McBryde, W.W., Flessner, A, Kortmann, S.C.J.J. (eds.), in: Law of Business and Finance, Vol. 4, Deventer: Kluwer Legal Publishers, 2003)

Protocols

Examples from several protocols of cross border insolvency cases can be found via www.iiiglobal.org

Virgós / Schmit Report (1996)

Miguel Virgós and Etienne Schmit, Report on the Convention on Insolvency Proceedings (July 1996)

Section 3:
Explanation of the Guidelines

European Communication and Cooperation Guidelines For Cross-border Insolvency

Contents

Guideline 1	Overriding objective	Page 33
Guideline 2	Aim	Page 35
Guideline 3	Status	Page 38
Guideline 4	Liquidator	Page 40
Guideline 5	Direct Access	Page 43
Guideline 6	Communications	Page 44
Guideline 7	Information	Page 48
Guideline 8	Information by a Liquidator in Secondary Proceedings	Page 51
Guideline 9	Authentication	Page 54
Guideline 10	Language	Page 55
Guideline 11	Obligations Incurred by and Fees of Liquidators	Page 57
Guideline 12	Cooperation	Page 60
Guideline 13	Cross-Border Sales	Page 66
Guideline 14	Assistance to reorganisation	Page 67
Guideline 15	Coordination between Secondary Proceedings	Page 68
Guideline 16	Courts	Page 69
Guideline 17	Notices	Page 72
Guideline 18	Scope	Page 73

Guideline 1: Overriding objective

1.1. These Guidelines embody the overriding objective of enabling courts and liquidators to operate efficiently and effectively operate in cross-border insolvency proceedings within the context of the EC Insolvency Regulation.

1.2. In achieving the objective of Guideline 1.1. the interests of creditors are paramount and are treated equally.

1.3. All interested parties in cross-border insolvency proceedings are required to further the overriding objective as set out above in Guideline 1.1.

Explanation

General

20. Member States in the European Union have a strong mutuality of interests in the management and execution of effective operations of cross-border insolvency proceedings. It is therefore important that Member States, courts, any other competent legal authority and associations of insolvency practitioners develop arrangements for the efficient and effective cooperation in enforcing these proceedings and minimise conflict in the application of these Guidelines.

21. Article 31 of the Insolvency Regulation falls short in giving appropriate detail of the duties to communicate and to cooperate for liquidators, who therefore may be not sufficiently aware of their mutual duties at the European level, which is that both are working towards a common goal, the ultimate unity of the process of administering the debtor's estate as an economic unit. The mutual inter-relationship of the proceedings (originating from procedural rights of the main liquidator, e.g. requesting the opening of secondary proceedings, requesting the stay of the process of liquidation or the proposal of a rescue plan within the secondary proceedings) and of the claims of creditors (who have the right to lodge claims in any of the insolvency proceedings) assume the adequate and unconditional realisation of mutual duties with regard to communicating information and to cooperation.

22. The role of the courts is paramount in insolvency matters and, particularly with view to rescues, consolidations or reorganisations, experience often is that the attitude taken by courts may be determinative of the eventual outcome. The Guidelines also refer to courts, but it must be remembered – like for any other party addressed – the Guidelines are non-binding (Guideline 3). The text should be understood as to reflect the drafters respect of the individuality of courts and legal cultures and therefore the texts are facilitative and 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.

Guideline 1.1.

23. The text has its basis in Recital 2 of the Insolvency Regulation ('*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 65 of the Treaty*'). The Guidelines therefore fully function within the system and scope of the Insolvency Regulation.

Guideline 1.2.

24. This Guideline serves two purposes. The importance of acting in the interest of the debtor's creditors results from the principle rationale of the creditor's position in the Regulation: a right to receive information (Article 40), the right to lodge claims in all insolvency proceedings regarding the debtor (Article 32) and the right of equal treatment (Article 20(2)). A basis for the text is provided in Recital 21 of the Insolvency Regulation ('*Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.*')

25. The other purpose of this Guideline is to set a benchmark for professional actions and behaviour of liquidators involved. The application of the Guidelines as a whole should be conditioned by the paramount interests of creditors. Guideline 1.2 therefore also requires that liquidators, especially in jurisdictions where professional or ethical rules for liquidators may not be available, act fairly and proportionately in charging fees or costs. See also Guideline 11.

Guideline 1.3.

26. In establishing this Guideline, all interested parties in cross-border insolvency proceedings are required to act in accordance with the Guidelines and therefore the Regulation's general requirements. It should encourage all players in cross-border insolvency proceedings, including creditors, employees and public authorities, to respond to the necessity for the efficient and effective operations of these proceedings. It is envisaged that the Guidelines apply analogously to instances which fall (partly) outside the scope of the Insolvency Regulation, so for instance to liquidators and courts of two ore more secondary proceedings, for which see Guideline 18. Nothing in these Guidelines, though, can alter or infringe the right or duties of these participants.

Guideline 2: Aim

2.1. 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.

2.2. In particular, these Guidelines aim to promote:

(i) The orderly, effective, efficient and timely administration of proceedings;

(ii) The identification, preservation and maximisation of the value of the debtor's assets (which includes the debtor's undertaking or business) on a world-wide basis;

(iii) The sharing of information in order to reduce the costs involved; and

(iv) The avoidance or minimisation of litigation, costs and inconvenience to all parties affected by proceedings.

2.3. In individual insolvency proceedings, the Guidelines require cases to be administered with a view:

(i) To ensure that the creditors' interests are paramount and that they are on an equal footing;

(ii) To save expense;

(iii) To deal with the debtor's estate in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues, and to the number of jurisdictions involved; and

(iv) To ensure that the case is dealt with timely and fairly.

Explanation

General

27. The general principle is that, in the system of the Insolvency Regulation, there is only one debtor who is submitted to main insolvency proceedings and – for reasons that need no explanation here – possibly one or more secondary proceedings in other Member States . The Insolvency Regulation requires these proceedings to be coordinated.

28. Coordination means that the duties of communication and cooperation as set out in Article 31 of the Insolvency Regulation are fulfiled within the context of a common purpose regarding the debtor, his assets and the treatment of his creditors. This results in two principal rules, one concerning the aim of the Guidelines themselves, and one governing the specific insolvency proceeding concerning the said debtor. Guidelines 2.1 and 2.2 are related to the general aim of the Guidelines, always covering two or more insolvency proceedings in two or more jurisdictions. Guideline 2.3 should cover each of the individual insolvency proceedings.

29. Guideline 2 has its basis in Recital 3 ('*The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets'*) and a part of Recital 20 ('*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').

Guideline 2.1.

30. The text underlines the function of the Guidelines as facilitating the coordination between main proceedings and one or more secondary proceedings. Coordination is possible through all types of means of modern international methods for professional communication (telephone, email, fax or video conferencing for instance enabling discussions with creditors in several jurisdictions) and through the use of a "protocol".

31. A protocol is 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. Office holders often enter into a protocol with the consent of courts and the active participation of the judges involved. A Protocol could cover different types of cross-border insolvency cases, for example (i) main proceedings, covering all assets in Europe (also those which do not result in an establishment in another Member State) and all claims of creditors, irrespective of where they are located or (ii) main proceedings with two or more secondary proceedings. See the explanation to Guideline 12. The use of a governance protocol is mentioned as this is an established practice outside Europe, mainly in the USA and Canada, but also in the UK. However, courts in other jurisdictions have been involved in protocols as well, e.g. Bahamas, Israel, Switzerland, Bermuda and Hong Kong. An example of a protocol filed in conformity with the European Insolvency Regulation is that concluded in respect of the French branch of Sendo International Limited, signed by (the representatives of) a French liquidator and English liquidators and endorsed by the Commercial Court of Nanterre (dated 1 June, 2006). It is noted that in a number of jurisdictions, the nature of a protocol (containing procedural and substantial provisions) may be of such a kind that a court or an insolvency practitioner can not be (fully) bound by it. See also Guideline 3 expressing the non-binding nature of the Guidelines.

Guideline 2.2.

32. The text of Guideline 2.2 would fit in a preamble, but given the non-binding nature of the Guidelines, have now been formulated in Guideline 2.2. The text specifies the central objectives of the Guidelines. It sets out the context for professional action and behaviour and may assist in providing guidance in those matters of the Guidelines which need interpretation or which are not covered at all.

Guideline 2.3.

33. Guidelines 2.1 and 2.2 relate to connected jurisdictions or related insolvency proceedings, while Guideline 2.3 concerns itself with each of the individual insolvency proceedings to be coordinated. The formulation of Guideline 2.3 is inspired by the Overriding Objective in Part 1 of the Civil Procedural Rules (England and Wales). The specific objectives align with those mentioned in Guideline 2.2. The duty to ensure the creditors' interests follows the similar aim mentioned in Guideline 1.2.

Guideline 3: Status

3. Nothing in these Guidelines is intended:

   (i) To interfere with the independent exercise of jurisdiction by each of the national courts involved, including their respective authority or supervision over a liquidator;

   (ii) To interfere with national rules or ethical principles by which a liquidator is bound according to applicable national law and professional rules; or

   (iii) To confer substantive rights or to interfere with any function or duty arising out of the EC Insolvency Regulation or to impinge on applicable national law.

Explanation

General

34. Guideline 3 seeks to ensure that the Guidelines do not cause friction with existing applicable laws or professional rules or with duties flowing from the EC Regulation, nor that the Guidelines create any rights. The nature of these Guidelines is non-binding for anyone concerned (court, liquidator, creditor, debtor).

Guideline 3(i)

35. Although the Guidelines may serve as a guide for 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. The same goes for national rules concerning the court's supervision regarding insolvency proceedings or the performance of the liquidator's tasks.

Guideline 3(ii)

36. The EC Insolvency Regulation does not contain any sanctions in cases where the duties within the meaning of Article 31 of the EC Insolvency Regulation are not fulfiled, or are not fulfiled in due time. Therefore, the insolvency court which supervises the regularity of the proceedings from the perspective of both national and international insolvency law should be seen as being in the position to enforce the duty to cooperate and communicate information. The Regulation, after all, is legally binding as a whole and thus directly applicable in all EU Member States (except for Denmark) according to Article 249 (2), second sentence EC Treaty and Article 47, second sentence, of the Insolvency Regulation. The Virgós / Schmit Report (1996), paragraph 234, submits that, where appropriate, the applicable national law will determine the liquidator's liability where the latter has not complied with duties arising from Article 31 of the EC Insolvency Regulation. In assessing relevant criteria with regard to liability, a court may take notice of certain of the Guidelines. This does not mean that these Guidelines have any binding force by themselves, but that they are seen by the court in the given circumstances of a case as reflecting a general consensus with regard to professional trustworthiness.

37. In instances where a national association of insolvency practitioners would apply the Guidelines as part of the Member State's applicable professional rules, a professional regulatory remedy will be available to sanction a liquidator's failure to abide by the Guidelines.

Guideline 3(iii)

38. In addition to respect for national courts (Guideline 3(i)) and national professional rules (Guideline 3(ii)), the Guidelines do not create substantial rights, as they are not intended to breach any binding rules of the Insolvency Regulation or applicable national law. Guideline 3.3 aims to encapsulate this intention.

Guideline 4: Liquidator

4.1. A liquidator is any appointed person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of its affairs, either in reorganisation or in liquidation proceedings.

4.2. A liquidator is required to act with the appropriate knowledge of the EC Insolvency Regulation and its application in practice.

4.3. A liquidator is required to act honestly, objectively, fairly and expeditiously in dealing with all parties concerned, including the courts.

Explanation

General

39. The text aims to ensure that, in cross-border insolvency cases, liquidators act with appropriate knowledge and experience of the EU Insolvency Regulation and with honesty, as well as appropriate understanding of the interconnection between parallel proceedings.

Guideline 4.1.

40. For the purposes of the Guidelines, a liquidator is the person or body meant by the definition in Article 2(b) of the Insolvency Regulation and therefore

listed in Annex C. It covers also any such person or body which, based on applicable law, fulfils a provisional function based on a judgment which is not yet final. In addition, Guideline 4.1 intends to cover a temporary administrator in the meaning of Article 38.

Guideline 4.2.

41. This Guideline aims to encourage liquidators to undertake training, both technical and skills training. The lack of detail in Article 31 of the Insolvency Regulation and the absence of appropriate knowledge may lead to domestic liquidators fulfiling their national tasks, without being fully familiar with the purpose and the effect of the Insolvency Regulation and the supportive function of secondary proceedings. Guideline 4.2 will promote the efficient and effective operation of cross-border insolvency proceedings (Guideline 1.1) and will prevent undue instances of conflicts between liquidators.

Guideline 4.3.

42. Guideline 4.3 is to be regarded in the light of Guideline 1.2, which furthers the overriding objective of the Guidelines. The collaborative spirit which underpins Article 31 of the Insolvency Regulation requires a relationship between liquidators and courts of trust and cooperation for the benefit of efficient and effective operations in cross-border insolvency proceedings.

43. Acting honestly means that a liquidator conducts himself in dealing with courts, creditors, the debtor and other parties in good faith.

Acting objectively means that a liquidator, within the specific role allocated by the Insolvency Regulation, acts with professional trust. Liquidators are to respect each other's professional integrity and treat each other with respect.

Acting fairly includes the assurance that liquidators involved are on an equal footing. Acting fairly also includes the obligation to prevent any concern arising over professional behaviour, specific knowledge and over costs and fees.

Acting expeditiously includes acting in a way to save costs and expenses.

44. Inspiration has been taken from three sets of Principles:

- The CCBE (Council of Bars and Law Societies of Europe) Charter of core principles of the European legal profession (2006). These core principles are in particular: (a) 'the independence of the lawyer', (c) 'avoidance of conflicts', (d) 'the integrity and good repute of the individual lawyer', (f) 'fair treatment of clients in relation to fees', (g) 'the lawyer's professional competence', (h) 'respect towards professional colleagues', and (i) 'respect for the rule of law and the fair administration of justice';
- The EBRD (European Bank for Reconstruction and Development) Insolvency Office Holders Principles Draft January 2007, related to setting standards for the qualifications, appointment, conduct, supervision and regulation of office holders in insolvency cases, especially Principles 1 (Qualifications & Licensing Generally) and 6 (Standards of Professional and Commercial Conduct); and
- Article 11, section 1 and 2 of the American Law Institute (ALI)/UNIDROIT Principles on Transnational Proceedings 2004:

11. Obligations of the Parties and Lawyers

11.1 The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties.

11.2 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.

Guideline 5: Direct Access

5. 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.

Explanation

General

45. The text underlines the importance of direct access to the courts of each Member State for intervention or for substitution, as appropriate, in lawsuits involving the debtor. It also allows for the bringing of lawsuits to obtain or defend assets or for other purposes. Granting access does not alter the need to engage local counsel in each State.

    Guideline 5 reflects Article 9 (Right of direct access) of the UNCITRAL Model Law on Cross-Border Insolvency (*A foreign representative is entitled to apply directly to a court in this State*) and the meaning of the American Law Institute's (or: ALI) Procedural Principle 7 (Court Access), the first two sentences:

    A recognised foreign representative should be granted direct access to any NAFTA court necessary for the exercise of its legal rights. A recognised foreign representative of a main proceeding should be granted such access to the same extent as a domestic administrator.

46. The Guideline does not intend to cover those substantive rights of a liquidator which find their source in national insolvency (procedural) law. If the liquidator has been appointed in main insolvency proceedings, these rights will follow from the applicable law (*lex concursus*). The Guideline aims to address the need to allow access to a foreign court on the same basis as a national liquidator has according to the host jurisdiction.

Guideline 6: Communications

6.1. Liquidators are required to communicate with each other directly and as soon as they are appointed.

6.2. The liquidator appointed in the main proceedings should always take the initiative to start or to continue communications with other liquidators.

6.3. Substantive replies by a liquidator to queries from other liquidators should always be responded to as soon as reasonably practicable.

Explanation

General

47. Insolvency in cross-border insolvency proceedings where the insolvent debtor's estate is managed and realised in two or more separate proceedings raises questions with regard to the coordination of the proceedings. Close cooperation with trust between liquidators in main and secondary insolvency proceedings is indispensable in order to achieve the efficient and optimal administration of the insolvent debtor's assets.

48. The text of Guideline 6 finds its basis in Recital 20 (referring to: '*the main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information*'). Guideline 6 should also be regarded in the light of the liquidators' duty to communicate information to each other, for which see Article 31(1). According to the Virgós / Schmit Report (1996), paragraph 230, the exchange of information between the liquidators concerns in particular:

(i) the assets;

(ii) the actions planned or under way in order to recover assets;

(iii) actions to obtain payment or actions for set aside;

(iv) possibilities for liquidating assets;

(v) claims lodged;

(vi) verification of claims and disputes concerning them;

(vii) the ranking of creditors;

(viii) planned reorganisation measures;

(ix) proposed compositions;

(x) plans for the allocation of dividends; and

(xi) the progress of operations in the proceedings.

49. On the topic of communications, the Guidelines are inspired by Chapter IV of the UNCITRAL Model Law on Cross-Border Insolvency, titled 'Co-operation and direct communication between a court of this State and foreign courts or foreign representatives', Articles 25-27.

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. *In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a* ***[insert the title of a person or body administering a reorganisation or liquidation under the law of the enacting State]****.*
2. *The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.*

Article 26. Cooperation and direct communication between the ***[insert the title of a person or body administering a reorganisation or liquidation under the law of the enacting State]*** *and foreign courts or foreign representatives*

1. *In matters referred to in article 1, a* ***[insert the title of a person or body administering a reorganisation or liquidation under the law of the enacting State]*** *shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.*
2. *The* ***[insert the title of a person or body administering a reorganisation or liquidation under the law of the enacting State]*** *is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.*

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) Appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

(c) Coordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) Coordination of concurrent proceedings regarding the same debtor;

(f) ***[The enacting State may wish to list additional forms or examples of cooperation]***.

50. Another source for consideration has been ALI Procedural Principle 10 (Communications):

To the maximum extent permitted by domestic law, courts considering bankruptcy proceedings or requests for assistance from foreign bankruptcy courts should communicate with each other directly or through administrators. To the maximum extent, such communications should take advantage of modern methods of communication including telephone, telefacsimile, teleconferencing, and electronic mail, as well as written documents delivered in traditional ways. Any such communications should at all times follow procedures consistent with domestic law as to such matters.

51. It should be noted here that Guideline 3 determines that any method of communication may not interfere with applicable law, e.g. rules regarding form and language of certain communications as provided in the Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ L 160, 30 June 2000, 37) or domestic constitutional rules involving the rights and liberties of an individual or rules restricting the communication of information. The provisions of Guideline 6 cover all liquidators, being those – as per Guideline 2.1 – who act in different proceedings involving the same debtor.

Guideline 6.1.

52. According to Article 31 (1) sentence 2 of the Insolvency Regulation, information is to be passed on 'immediately'. However, delays that are, for instance, due to translations may be taken into account. Circumstances will differ as to much may be allowed in each case to include these delays and communications may be required to occur within a certain period (e.g. within 8 days). Communications should take place at the earliest possible time without undue delay.

Guideline 6.2.

53. Given the dominance of the position of the main liquidator, he acts as a conductor overseeing different proceedings. Therefore, he should always take the initiative to start or to continue communications with other liquidators and, for this reason, be mindful of any secondary proceeding started in another jurisdiction. Evidently, the Guideline does not allow any secondary liquidator to be passive in cases where he reasonably understands that any intended action will influence the course of the main proceedings. Before taking any such action, he should communicate with the main liquidator.

Guideline 6.3.

54. The notion of communication and cooperation, resulting in the coordination of proceedings and actions to be taken, will raise questions by a liquidator appointed in insolvency proceedings concerning the same debtor or questions concerning other interested parties, such as creditors. Queries may relate to issues concerning the practical developments in and administration of the proceedings. Liquidators should treat other liquidators with the appropriate professional standard and provide substantive replies to their queries within a reasonable time. The Guideline does not intend to create a duty to report or to account for certain actions taken or intended to be taken.

Guideline 7: Information

7.1. Liquidators are required to provide prompt and full disclosure to all other liquidators involved of all relevant information about the existence and status of the insolvency proceedings in which they have been appointed.

7.2. Liquidators are required to provide information periodically which may be relevant to the other proceedings detailing the conduct of the proceedings.

7.3. Liquidators in possession of such information are required to inform the courts insofar as they are subject to any reporting duties under national law, of any material development in any such other proceedings.

7.4. A foreign liquidator should be permitted to use all legal methods to obtain information that would be available to a creditor or to a liquidator in any national insolvency proceedings.

7.5. To the fullest extent permissible under any applicable law, relevant non-public information should be shared by a liquidator with other liquidators subject to appropriate confidentiality arrangements to the extent that this is commercially and practically sensible.

7.6. The duty to provide information in the meaning of this Guideline includes the duty to provide copies of documents at reasonable costs on request.

Explanation

General

55. Communications relate to information. The exchange of information and cooperation cannot take place without the knowledge of other proceedings. Whether in main or secondary proceedings, local rules cannot be correctly applied in ignorance of activities taking place elsewhere. Acting as a representative of creditors, a liquidator should be able to use all legal procedures to obtain information to the same extent as a creditor seeking to enforce a claim or a judgment. This information should include, as far as possible, non-public information.

56. The text of Guideline 7 is inspired by ALI General Principle IV ('Information').

A. Cooperation should include, as a minimum, free exchange of information obtained in each proceeding concerning assets and claims.

B. A recognised foreign representative should be entitled to use all available legal means to obtain information about the debtor's assets in each jurisdiction.

Guideline 7.1.

57. Coordination between proceedings is only possible where all relevant information is shared. All information should be understood widely, including information about and the background of pending litigation as well as facts which could generate liabilities for the debtor or its directors. For the text, guidance has been taken from ALI Procedural Principle 8 ('Information and Communication'):

An administrator, debtor, or creditor filing a bankruptcy or seeking recognition of a foreign bankruptcy should be required to provide full disclosure of all relevant information about the existence and status of each bankruptcy or similar proceeding pending in other jurisdictions as to the same or a related debtor at the time of filing.

Guideline 7.2.

58. Guideline 7.2. intends to maintain the ongoing process for the mutual sharing of information. This should be done periodically, the time for which may be based on an agreement (protocol) between liquidators or which should follow certain events which are relevant for other proceedings. Information which may be relevant to other proceedings, detailing the conduct of the proceedings, may in particular relate to (but are not limited to):

(i) the progress made in lodging and verifying claims;

(ii) the ranking of the admitted claims;

(iii) the calling of creditors meetings;

(iv) planned actions regarding realisation of relevant assets;

(v) planned actions to initiate proceedings concerning wrongful trading or actions based on rules regarding detrimental acts;

(vi) distribution of (interim) dividends to creditors, including the application of the rules regarding imputation as meant in Article 20(2) of the Regulation; and

(vii) all measures aimed at terminating proceedings, including a composition or rescue plan.

59. Information may include details of the debtor's assets and past transactions, especially those taking place during the applicable suspect period as well as such other particulars as the other liquidators may reasonably require.

Guideline 7.3.

60. In most jurisdictions, the court or a supervisory judge plays an important role in the general progress of the administration of proceedings, sometimes being afforded powers of approval laid down in national law. In general, such courts and judges should be aware of developments in proceedings against the same debtor taking place elsewhere. For this reason, Guideline 7.3 aims to establish a reporting duty. The text is based on ALI Procedural Principle 8 ('Information and Communication') (second line):

Administrators or debtors in possession should be required to inform the court of any material development in any such foreign proceeding.

Guideline 7.4.

61. This Guideline recognises the need for the liquidator to perform his task based on adequate and relevant information. In case of necessity, the main or secondary insolvency liquidator may even file a claim for the disclosure of information which may enable them to exercise their powers as set out in Article 18(1) and 18(2) of the Insolvency Regulation. Guidelines 7.3 and 7.4 aim to prevent the need to have recourse to such powers. The text is based on ALI Procedural Principle 9 ('Obtaining Information'):

A recognised foreign representative should be permitted to use all legal methods of obtaining information that would be available to a creditor or to an administrator in a domestic bankruptcy proceeding.

Guideline 7.5.

62. Most information exchanged by liquidators is of a public nature. In this case, there is no doubt that information which is relevant to other proceedings should be transferred to the other liquidators. It is possible, though, that some information is of a non-public character; in this case, the basic

principle of communication between liquidators should be maintained subject to legitimate restrictions. In these cases, therefore, the sharing of information should be made possible subject to the use of confidentiality agreements. The text is based on the Everfresh protocol:

5. *Information publicly available in any forum state shall be publicly available in both fora. To the extent permitted, non-public information shall be made available to official representatives of the Debtors, including any official committee appointed in these cases and shall be shared with other official representatives, subject to appropriate confidentiality arrangements and all privileges under the applicable rules of evidence.*

Guideline 7.6.

63. The sharing of information should not be limited to the exchange of statements describing relevant and specific developments in an insolvency proceeding. In certain cases, liquidators may wish to verify certain information or their national law may require that certain information be filed in a duly authenticated form. For such cases, Guideline 7.6 formulates a duty to provide information that may also include the duty to provide copies of documents on request at a reasonable cost.

Guideline 8: Information by a Liquidator in Secondary Proceedings

8.1. The liquidator in any secondary proceedings should provide all relevant information to the liquidator in main proceedings without any delay so as to facilitate the submission of proposals on the liquidation or use of assets in secondary proceedings.

8.2. The liquidator in any secondary proceedings is encouraged to provide advice to the liquidator in the main proceedings concerning any views on how to best to proceed.

8.3. The liquidator in main proceedings is encouraged to involve liquidators in any secondary proceedings in devising those proposals referred to above in Guideline 8.1.

8.4. Where a reorganisation or rescue plan can be adopted in secondary proceedings which, in attaining the aims pursued under Guideline 2.2(ii), would give better value to creditors in main proceedings or reduce the overall size of debts, the liquidator in main proceedings and the courts shall take advantage of the opportunity to promote the adoption of this plan.

Explanation

General

64. Without prejudice to the application of Guideline 7, Guideline 8 reflects in particular the dominant role of main proceedings, within the context of establishing a fair relationship between insolvency professionals. See Recital 20 ('*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*').

65. The liquidator in secondary proceedings must give the liquidator in main proceedings the opportunity to submit proposals on the realisation or use of the assets in secondary proceedings (Article 31(3) of the Insolvency Regulation). In making these proposals, the main liquidator should involve liquidators in any secondary proceedings.

66. The duty to communicate information forms at the same time the basis for the liquidator's supplementary duty to ensure mutual cooperation as provided in Article 31(2) of the Insolvency Regulation and enables the main liquidator to intervene in any individual secondary insolvency proceeding according to Articles 32 to 38 of the Insolvency Regulation.

Guideline 8.1.

67. The Virgós / Schmit Report (1996), paragraph 233, provides: 'Article 31(3) expressly mentions a specific obligation of information and cooperation that affects the liquidator in the secondary proceedings, on the grounds of primacy of the main proceedings over the secondary proceedings. The liquidator in the secondary proceedings must give the liquidator in the main proceedings the opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings. The secondary liquidator must therefore inform the main liquidator of any use or realisation of these assets. ..... This duty to communicate information forms at the same time the basis for the liquidator's supplementary duty to ensure mutual cooperation as provided in Article 31(2) and enables main liquidators to intervene in any individual secondary insolvency proceeding according to Articles 32 to 38.' Guideline 8.1 requires the secondary liquidator to provide all such information in such a way that the main liquidator can perform his tasks timely and with full information.

Guideline 8.2.

68. The overriding objective of Guideline 1.1 and the liquidators' general obligation to act fairly and respecting each others know-how and professional integrity within the meaning of Guideline 4 will encourage the main liquidator to invite the liquidator in any secondary proceedings to provide advice, which will be in accordance with applicable domestic law, to the liquidator in main proceedings concerning his view on how best to proceed.

69. These same objectives and obligations justifies the need for any secondary liquidator to be encouraged to give his opinion on any related issue, although he should be mindful of the need to avoid unnecessary delay and of the fact that the main liquidator represents the dominant proceedings.

Guideline 8.3.

70. Proposals on the liquidation or use of the assets in secondary proceedings will have to take into account domestic law and practice. Guidelines 1.1 and 4 should set the tone for the main liquidator's to encourage the involvement of liquidators in any secondary proceedings in the design of proposals as meant by Guideline 8.1.

Guideline 8.4.

71. One of the aims in Guideline 2.2 is the identification, preservation and maximisation of the value of the debtor's assets (which includes the debtor's undertaking or business) on a world-wide basis. Where a reorganisation plan or a rescue plan can be adopted in secondary proceedings, which would give better value to creditors in main proceedings or reduce the overall debt, Guideline 8.4. encourages all participants, especially the liquidator in main proceedings as well as the courts, to promote the adoption of this plan.

Guideline 9: Authentication

9.1. Unless otherwise provided under any applicable law, where existing authentication of documents is required, methods should be established so as to permit rapid authentication and secure transmission of faxes and other electronic communications relating to cross-border insolvencies on any basis that permits their acceptance as official and genuine communications by liquidators and courts in other jurisdictions.

9.2. To the extent permissible under applicable law, courts are encouraged to provide or publish judgments, orders or rulings also in languages other than those regularly used in proceedings or encourage translations to be made as much as possible.

Explanation

General

72. The efficient operation of cross-border proceeding is enhanced greatly by authentication procedures with respect to judicial cooperation. National rules and practices may include such procedures; in individual cases they may be agreed. Where certain judgments and orders follow a similar structure, courts may anticipate the use of a foreign language to facilitate coordination and promote the speedy administration of proceedings.

Guideline 9.1 and 9.2.

73. These guidelines are inspired by ALI Recommendation 7 ('Authentication'):

> *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.*

Guideline 10: Language

10.1. Liquidators shall determine the language in which communications take place on the basis of convenience and the avoidance of costs. The court is advised to allow use of other languages in all or part of the proceedings if no prejudice to a party will result.

10.2. Courts are encouraged, to the maximum extent permissible under national law, to accept any documents related to those communications in language decided upon under Guideline 10.1, without the need for a translation into the language of proceedings before them.

Explanation

General

74. It is noted that the text of the Insolvency Regulation is equally authentic in over 20 languages. Guideline 10 tries to accommodate the choice of a language, which is based on international practice, convenience and agreement.

Guideline 10.1.

75. Although in appropriate cases of cross-border insolvency, German or French may be the language used in parallel proceedings and cross-border communication between liquidators, the general experience is that English is the language of the global business community and in cross-border communications between advisors, lawyers and liquidators involved in a cross-border insolvency case. Where courts are involved, the ordinary

language will be the language regularly used by the courts, although the court is advised to allow the use of other languages in all or part of the proceedings if no prejudice to a party will result.

76. Where a choice of a language is made, native speakers of that language should be cautious of the fact that the person(s) he is speaking to may be communicating in a second or third language. Acting fairly (Guideline 4.2) in general will mean the use of simple and clear words, spoken with slow pronunciation, and the avoidance of dialects, sophisticated language, puns or references.

Guideline 10.2.

77. It is recognised (and respected) that national law will provide for rules relating to the translation of documents. Guideline 2.2 determines that the Guidelines in general promote the orderly, effective, efficient and timely administration of proceedings, the sharing of information in order to reduce the costs involved, and the avoidance or minimisation of litigation, costs and inconvenience to all parties affected by proceedings. Although the ordinary language will be the language regularly used by the courts, these cost considerations may require the court to decide that translation of lengthy or voluminous documents may be limited to portions, as agreed by the parties or as ordered by the court. On the other hand in fair proceedings, translations should be allowed or provided where a party (e.g. a foreign liquidator, debtor, creditor or expert) is not competent in the language in which the proceedings are being conducted.

78. The text of Guideline 6 finds its inspiration in 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.*

Guideline 11: Obligations incurred by and fees of liquidators

11.1. Obligations incurred by the liquidator during proceedings and the liquidator's fees are funded from the assets within those proceedings in which the liquidator is appointed.

11.2. Obligations and fees incurred by the liquidator in the main proceedings prior to the opening of any secondary proceedings but concerning assets to be included in the estate in principle will be funded by the estate corresponding to the secondary proceedings.

Explanation

General

79. Due to the specific international character of the case, liquidators may face additional costs, e.g. engaging foreign local counsel, costs for tracing or valuing assets, court filing fees and the costs of document-translations to present to the foreign court or to share with other liquidators. Costs will also relate to obligations incurred (including trading costs), to fees, to the costs of the court, costs for service of documents, costs for an expert, costs for representation in a court or costs of enforcement. The determination of the remuneration of a liquidator will be based on the domestic (insolvency) law applicable. The method for calculating that remuneration may differ according to national law: In some systems, it may be fixed by reference to the time properly spent on the administration of the estate, in others it may be calculated upon a certain percentage of the quantum of the estate or a combination of both methods.

80. The possible inter-relationship of main insolvency proceedings and one or more secondary proceedings opened subsequently concerning the same debtor may result in uncertainty. Certain obligations incurred or certain costs or fees in the main proceedings may relate to the assets or the interests of the secondary proceeding and its creditors. Guideline 11 intends to provide a general rule concerning to the allocation or the sharing of these costs. It is based on three premises as set out below.

81. The first premise is the general principle that obligations incurred and therefore costs that result from these obligations and the liquidators' fees are to be funded from the debtor's assets and satisfied as they fall due.

The second premise is that the main liquidator, appointed in the main insolvency proceedings, is recognised and can exercise all its powers all over the Community (Article 18), as long as no secondary proceedings have been opened.

The third premise is that secondary proceedings do not operate from scratch. The opening of subsequent secondary proceedings entails a "conversion" from the main insolvency proceedings governed by the law of the state of debtor's COMI, and deploying all their effects in the forum, into insolvency proceedings governed by the law of the state of the establishment. Recognition of the main proceedings and of the main liquidator's powers in all Member States involves a principle of continuation: payments made and liabilities incurred in the course of the administration of the main proceedings in accordance with the law governing those proceedings are recognised as valid in all Member States.

Guideline 11.1.

82. The first premise results in Guideline 11.1. Obligations incurred by the liquidator during main proceedings or any secondary proceedings and the main liquidator's or any secondary liquidator's fees are funded from the assets within those proceedings in which a liquidator is appointed. Where the Insolvency Regulation systematically is build on interdependency of different national insolvency proceedings, domestic law, including procedural rules of a court, and legal tradition will be decisive. The text reflects § 5.1 of the Principles of European Insolvency Law ('Obligations incurred by, and fees of the administrator')

Obligations incurred by the administrator during the proceeding and the administrator's fees are to be funded from the debtor's assets and satisfied as they fall due, in priority to insolvency claims

Guideline 11.2.

83. Where, in a simple example, main insolvency proceedings are opened on Day 1, and secondary proceedings in the jurisdiction of another Member

State are opened on Day 33, it is evident that the main liquidator will have incurred obligations in the interest of the assets which, as of Day 33, are encompassed within secondary proceedings. Examples include costs regarding the assets or the establishment in the latter jurisdiction, e.g. engage foreign counsel, payment of ongoing trading costs, payment of salaries for employees or the fees of the main liquidator.

84. Guideline 11.2 determines that outstanding pre-secondary insolvency costs will be funded in principle by the estate of the secondary proceedings. Here the second and third premises are decisive. Where the liquidator, appointed in the main insolvency proceedings, can exercise all its powers all over the Community (Article 18), his 'pre-secondary' actions are valid by virtue of the Regulation. From the principle of recognition, two consequences follow: (i) obligations incurred by the main liquidator in accordance with the law governing the main proceedings relating to the assets which are now comprised in secondary proceedings remain as obligations to be respected by the liquidator of the secondary proceedings; and (ii) the status of any action taken prior to the opening of secondary proceedings by the main liquidator, including any liability and the calculation of remuneration, will be referred to the law governing the main proceedings.

85. It is acknowledged that Guideline 11.2 may create some tension in cases in which the honorarium of the main liquidator is at a (much) higher level than the general basis of the honorarium for liquidators in a jurisdiction where secondary proceedings have been opened. Given the internationality of a case, a main liquidator, who acts objectively and fairly, will maintain detailed record-keeping, including the allocation of time spent on certain proceedings, assets or specific interests. On the other hand, courts are advised to honour fees, where it is recognised that the liquidator has acted in due exercise of his powers with the aim of achieving the efficient and effective operation of a cross-border insolvency case.

At this point, it may be desirable to recall that the position of the creditors is not influenced by the outcome of the question as to which portion of the costs will fall to which estate. The right of a creditor to lodge its claim in any of the insolvency proceedings (Article 32(1) of the Insolvency Regulation), the rule regarding imputation (Article 20(2)) and the rules concerning multi-cross filing of claims (Article 32(2)) establish a system in which the position of a creditor is not influenced by the outcome of that question.

86. From a practical point of view, the possibility may not be discounted that a main liquidator, where he expects that secondary proceedings in other jurisdictions will be opened, will retain other professionals in the State where secondary proceedings presumably will be opened to assist him in carrying out his duties. If allowed by the applicable law and assuming the appropriate knowledge, experience and professionalism, such a division of work seems practical and efficient.

87. Guideline 11.2 is expressed as a principle. Acting in accordance with applicable domestic law and taking into account the international circumstances of the case, liquidators may agree another division based on the availability of assets in a certain estate and the interests of creditors concerned. Acting fairly and expeditiously includes the duty to provide any court, at its request, with full disclosure of any such agreement, which should include a justification of any departure from the principle laid down in Guideline 11.2.

Guideline 12: Cooperation

12.1. Liquidators are required to cooperate in all aspects of the case.

12.2. Liquidators ensure that cooperation takes place with other liquidators with a view to minimising conflicts between parallel proceedings and maximising the prospects for the rehabilitation and reorganisation of the debtor's business or the value of the debtor's assets subject to realisation, as may be the case.

12.3. Cooperation is intended to address all issues that are important to the actual case.

12.4. Cooperation may be best attained by way of an agreement or "protocol" that in the context of and in conformity with applicable laws establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such agreement or "protocol".

12.5. In case where any matter is not specifically provided for within the protocol, the liquidators shall act in a manner designed to promote the overriding objective set out above in Guideline 1.1.

Explanation

General

88. Article 31(2) of the Insolvency Regulation is the central provision concerning the coordination between main and secondary insolvency proceedings ('*Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other*'). Main liquidators are obliged to actively cooperate with secondary liquidators. The Virgós/Schmit Report (1996), paragraph 232, refers to the duty of the liquidators to exchange information and the complementary function of the obligation to cooperate with each other. Guideline 12 seeks to ensure that cooperation is related to all aspects of certain insolvency proceedings, to the maximum extent possible and encourages globally accepted practices of recording the methods and content of cooperation in writing. It cannot be stressed enough that the concept of cooperation forms a central element in the system of the Regulation. It is designed to bridge the gap between two or more insolvency proceedings pending in two or more Member States. By connecting these proceedings and aligning their purposes, by cooperation, by sharing of information and by establishing mutual procedural adjustments and assisting each other in consistency with the objective of managing the insolvency of the debtor (and insofar as permitted under any applicable law), the participants involved can minimise the loss of efficiency and higher transaction costs resulting from the multiplicity of proceedings.

Guideline 12.1.

89. The liquidators' duty to act in concert with a view to the development of proceedings and their coordination, and to facilitate their respective work, is reflected in Guideline 12.1: to cooperate in all aspects of the case. Their cooperation is based on mutual respect and fairness (Guideline 4.2) in the spirit of the overriding objective to efficiently and effectively operate in cross-border insolvency proceedings in the context of the EC Insolvency Regulation (Guideline 1.1). The text is similar to the first sentence of ALI Procedural Principle 14 ('Cooperation'):

    A. The administrators in parallel proceedings should cooperate in all aspects of the case.

Guideline 12.2.

90. Cooperation takes place within the spirit of Guideline 1, the overriding objective of enabling courts and liquidators to efficiently and effectively operate in cross-border insolvency proceedings within which the interests of creditors are paramount and are treated equally.

The general aim of the Guidelines, as expressed in Guidelines 2.1 and 2.2 is decisive for the course taken during cooperation. In specific cases, the goals of individual proceedings, as formulated in Guideline 2.3, should become a shared goal.

91. For this reason, Guideline 12.2 intends to direct the course of cooperation towards this shared goal, especially to minimise conflicts between parallel proceedings (main insolvency proceedings and any secondary proceedings) and to maximise the prospects for the rehabilitation and reorganisation of the debtor's business or the value of the debtor's assets subject to realisation, as may be the case.

92. In alignment with Guideline 3, it is intended that cooperation will not come into conflict with applicable domestic law; on the other hand, the benefit of domestic law in promoting and facilitating cooperation should be taken to the maximum extent permissible under national law, to make cooperation effective and successful.

Guideline 12.3.

93. Liquidators are required to cooperate in all aspects of the case and therefore cooperation is intended to address all issues that are important to the actual case, including (but not limited to):

(i) Publication of the proceedings and notices to creditors;

(ii) Organising creditors meetings;

(iii) Continuing operation and management of the business;

(iv) Disposal of relevant assets;

(v) Raising of new finance;

(vi) Preparing and implementing composition or reorganisation plans;

(vii) realisation of the estate in liquidation and distribution to creditors.

Guideline 12.4.

94. Guideline 12.4 is founded on globally accepted practices of recording the methods and content of cooperation in writing. Cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such agreement or protocol. See paragraph 31 above. The text is inspired by ALI Procedural Principle 14 ('Cooperation'):

    A. The administrators in parallel proceedings should cooperate in all aspects of the case. Such cooperation is best obtained by way of an agreement or "protocol" that establishes decision making procedures, but many decisions may be made informally as long as the essentials are agreed.

Guideline 12.5.

95. This Guideline states that a protocol establishes decision-making procedures. It is not meant to limit the content of any arrangement between the liquidators. A protocol for cooperation between proceedings should include, at the very least, provisions for the coordination of court approval for decisions and actions whenever required and for communications with creditors as required under any applicable law. It should also include a statement of the various cross-border issues to be addressed (e.g. reorganisation, treatment of claims, realisation of assets) and any questions in respect of which the liquidators are required to seek agreement in advance from other liquidators.

96. In practice, cooperation – and therefore a protocol – can take different forms and its contents should adapt to the circumstances of the case. In some cases, a protocol may achieve its purpose in a simple way by aligning the practical means for treating notifications to creditors, the treatment of claims lodged, the verification of claims and the distribution of dividends. In other cases, a protocol could also cover other topics and could, in particular, refer to:

    – the goal of co-operation;
    – the phases of the insolvency proceedings to be taken by or followed by all liquidators;
    – the performance of acts concerning realisation;

- the drawing up or the submission of a liquidation or reorganisation plan;
- the right to demand performance or to terminate an executory contract;
- communications with creditors;
- the exercise of any voting rights;
- the location of assets;
- the use of actions to set aside detrimental acts;
- borrowing or the provision of security;
- the filing of additional insolvency petitions concerning other establishments;
- the filing of actions against third parties in relation to the insolvent company;
- the submission of an insolvency plan (of reorganisation or liquidation) or a composition;
- the disposal of relevant assets;
- the distribution of any dividends;
- the application of the hotch-pot rule;
- the applicable law on certain issues;
- the closure of secondary proceedings and the change in applicable law.

In cases where a particular problem is not dealt within the protocol, Guideline 12.2 constitutes a reminder of the main objective which is to be pursued by cooperation among liquidators.

97. Each liquidator is required to obtain court approval or creditors' approval of any action affecting assets or operations in the jurisdiction where proceedings have been opened, if approval is required under the laws of that jurisdiction.

98. To the maximum extent possible, a protocol should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings. See also Guideline 2.

The explanation for the foregoing is that it is inspired by ALI Procedural Principle 14 (' Cooperation'):

B. A protocol for cooperation among proceedings should include, at a

minimum, provisions for coordinated court approvals of decisions and actions when required and for communication with creditors as required under each applicable law. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

99. The protocols are called upon to apply within the framework of the Insolvency Regulation and in conformity with applicable laws. Therefore, all liquidators should be acquainted with the terms referred to in the Regulation and the protocols. See Guideline 4.1. For the sake of clarity and in order to avoid misunderstandings that may hinder the achievement of the aims pursued in the protocol, it is recommended highly that a final annex is included with the definitions of the terms used in the protocol. A sample of issues which could be covered by a protocol appears as Appendix I to these Guidelines.

100. Agreements of cooperation (or protocols) are not static; they may evolve as the needs of the proceeding demand. This dynamic character does not entail, however, any entitlement to unilateral or informal amendments.

For the source of the text, see for example the Protocol in *Re Everfresh*:

17. *This Stipulation may not be waived, amended or modified orally or in any other way or manner (including, without limitation, pursuant to a plan of reorganisation of the Debtors) except by a writing signed to a party to be bound, and such approval and authorisation of the Bankruptcy Court or the Canadian Court as may be necessary and appropriate under the circumstances. Notice of any proposed amendment or modification of the Stipulation shall be provided by the party providing such to the Specified Parties in accordance with the Notice Procedures. This Stipulation may be supplemented from time to time by the parties hereto as circumstances require with any supplementing stipulations as approved by the Bankruptcy Court and the Canadian Court.*

101. National attitudes towards the use of a protocol will differ. There will be countries in which the law allows cross-border protocols to be concluded and executed, especially in those jurisdictions where there is a tradition of judicial assistance. In these cases, a liquidator should be mindful of the fact that the laws of other jurisdictions may not allow a protocol or will at least be very sceptical in applying it. In such cases, a court may consider the issue of one or more orders explaining the purpose and content of a protocol

and include certain elements of it in a separate judicial decision deriving directly from the insolvency proceedings.

102. In cases where the law does not allow cross-border protocols to be concluded or executed, a liquidator should explain that the laws of other jurisdictions indeed allow for a protocol and should point to any other available legal bases to enable the exchange of letters or memoranda of understanding between cooperating office holders or courts.

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.

Explanation

General

103. A central goal of cooperation is maximising value (Guideline 2.2(ii)). In reorganisation cases, that objective may be sought primarily in a financial or operational restructuring or in a sale of the business. Sale of (large parts of) the assets is the most common method used in liquidation. A coordinated and aligned approach across national borders is likely to produce greater value. Guideline 13 addresses the latter goal.

104. Approval by anyone concerned, but at the very least by any national court, will be encouraged where proposals are based on the advice of or to be marketed by a professional third party employed jointly by all liquidators concerned. This party may also provide an expert opinion as to the allocation of the sales price between the assets sold, which may form the basis for distributions to creditors, unless the protocol contains a different methodology.

105. Though divided into two sections, the text of Guideline 13 finds its basis in

ALI Procedural Principle 17 ('Cross-Border Sales'):

When there are parallel proceedings and assets are to be sold, each domestic administrator should seek to sell assets in cooperation with the other administrators to produce the maximum value for the assets of the debtor as a whole, across national borders. Each domestic court should approve sales that will produce such value.

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.

Explanation

General

106. Any cooperation should take place within the spirit of these Guidelines and in any manner consistent with the objective of reorganisation or the sale of the business as a going concern. In obtaining post commencement financing, Guideline 14 also inspires liquidators to cooperate.

Guideline 14.1.

107. The text is based on ALI Procedural Principle 18 ('Assistance to reorganisation'):

The existence of a main proceeding that is a reorganisation proceeding in a NAFTA country is a compelling reason for courts in the other two NAFTA countries to cooperate by conducting parallel domestic proceedings in a

manner as consistent with the reorganisation objective in the main proceeding as is possible under the circumstances.

The final words of Guideline 14.1 are intended to ensure that the interests protected by local insolvency proceedings are not prejudiced.

Guideline 14.2.

108. Quite often the prospect of reorganisation is based on the availability of post-commencement financing. Liquidators should cooperate to the maximum extent possible to put into place a financing proposal, which may count on the approval of a large group of creditors.

Guideline 15: Coordination between Secondary Proceedings

15. Liquidators in all secondary proceedings are required to comply with these Guidelines.

Explanation

General

109. Estate assets and business values are more likely to be preserved and enhanced if administration is coordinated by a single forum. Article 31 of the Insolvency Regulation does not address the situation where there may be multiple insolvency proceedings, without, however, any main forum. If assets are located in several secondary jurisdictions or outside of these jurisdictions, in such cases, the same objectives may be met if the relevant liquidators agree upon a protocol. The protocol should take into account Guideline 12 and consider a balanced way of cooperation, given the fact that all secondary proceedings are on the same footing.

Guideline 16: Courts

16.1. Courts are advised to seek to give effect to the overriding objective of enabling courts and liquidators to operate efficiently and effectively operate in cross-border insolvency proceedings within the context of the EC Insolvency Regulation, in the meaning of Guideline 1.

16.2. Courts are advised to operate in a cooperative manner to resolve any dispute relating to the intent or application of the terms of any cooperation agreement or protocol.

16.3. Courts are advised to consider whether an appointment of the liquidator in main proceedings or a nominated agent of such liquidator as a liquidator or a co-liquidator in secondary proceedings would better ensure coordination between different proceedings under the courts' supervision.

16.4. To the maximum extent permissible under national law, courts conducting insolvency proceedings or dealing with requests for assistance or deciding on any matters relating to communications from other courts should cooperate with each other directly, through liquidators or through any person or body appointed to act at the direction of the courts.

16.5. 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.

Explanation

General

110. Article 31 of the Insolvency Regulation only provides a duty on the liquidator to communicate information and to cooperate as far as the relationship between main and secondary liquidators is concerned. Article 31 does not express a duty for any court involved in related proceedings. Nevertheless, in certain countries, judgments have accepted that a court is subject to the principles stated in Article 31, see, e.g. Higher Regional Court Vienna 9 November 2004 (*Stojevic*), NZI 2005, 56, deciding that, although according to the text, Article 31 of the Insolvency Regulation only obliges liquidators to cooperate, according to the prevailing opinion and under the

UNCITRAL Model Law, this obligation also applies to a court. There is some experience that, in other cross border insolvency cases, communication between courts (in England, Germany, the Netherlands and France) has proven efficient in the alignment of judicial developments in these cases.

111. Several jurisdictions in Europe will provide for some methods of cross-border cooperation between judges. It is noted, however, that mutual cross-border communication and cooperation between courts is implicit in the Insolvency Regulation. It flows generally from the reasoning behind the duty of mutual assistance and cooperation between Member States, as provided in Article 10 of the EC Treaty, and the place of the Insolvency Regulation as a method operating within the scope of overall judicial cooperation in civil matters within the meaning of Article 65 of the EC Treaty. As this flows from the principle of mutual trust within the meaning of Recital 22 ('*This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision'*), courts are advised to act in aid of, and be auxiliary to each other and to all courts, as well as judges and officers of those courts, that have jurisdiction under corresponding laws in all administration matters.

Guideline 16.1

112. Courts will interpret the Insolvency Regulation and its application to a given case in light of circumstances to hand. In doing so, it is advisable that a court gives effect to the overriding objective as set out above in Guideline 1. Courts may take notice of these Guidelines when deciding on matters related to communication and cooperation under the aegis of the Insolvency Regulation.

Guideline 16.2.

113. The cooperative spirit in which cross-border coordination between liquidators takes place should inspire courts to operate in a cooperative manner to resolve any dispute relating to the intention or the application of these Guidelines or the terms of any cooperation agreement or protocol.

Guideline 16.3.

114. Cooperation between two courts takes place with a view to establishing methods of communication, coordinating orders and rulings and conducting joint hearings, e.g. by conference call, with or without translators. Guideline 16.5 underlines the importance of the accountability of insolvency professionals.

115. When deciding on the opening of secondary proceedings, a court could consider, where domestic law allows so, to appoint or to co-appoint the 'foreign' main insolvency practitioner as a liquidator or as a co-liquidator in secondary proceedings. Consequently, such an appointment shall subject the foreign main liquidator to the regime of supervision or general oversight of the court opening the secondary proceedings. A main liquidator, appointed or co-appointed as secondary liquidator, is advised to seek the assistance of local counsel. This advised approach could also apply to a nominated agent of the main liquidator.

Guideline 16.4.

116. Cooperation between two or more courts should take place in a context of mutual trust, in a collaborative manner and by the most rapid means possible. Several methods could be used, direct communication between the courts, through liquidators or through any person or body, appointed to act as an independent intermediary at the direction of the courts. In cases where no formal request for assistance is involved, direct means of communications could include phone, email or facsimile. The starting words ('To the maximum extent permissible under national law') express the idea that methods and ways for communication and cooperation must comply with applicable national laws and Community legislation.

Guideline 16.5.

117. Guideline 16.5 underlines the importance of accountability of insolvency professionals. In applying Guideline 16, it may be useful for courts to better understand certain practical problems, the way in which these are solved and in what way to address certain Guidelines or specific provisions in a protocol. This guideline aims to provide the court with some feedback.

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.

Explanation

General

118. When a court is involved in giving a specific order or approval, this fact is presumed to be important enough to require notice to other liquidators. Guideline 17.1 and 17.2 intend to underline and guarantee that notices are made and that liquidators are heard timely. Where the exigencies of the circumstances render it impractical to provide prior written notice as required herein, the necessary notice shall be provided as soon as possible thereafter and enable a liquidator to give a view. Where allowed by domestic law, hearings could be assisted by technological aids (conference call; video conference) or by making certain court orders subject to action by the other interested court.

119. The text of Guideline 17.1 and 17.2 is inspired by ALI Procedural Principle 16 ('Notice Among Administrators'):

Notice of any court hearing or the making of any order by a court should be given to each of the administrators at the earliest possible time, if the hearing or order is relevant to that administrator. Notice and approval should always be in advance of such an action if possible or if required by applicable law.

Guideline 17.3.

120. Liquidators should keep a record of such notices and other relevant documents. These records should be accessible for the courts and the liquidators involved.

Guideline 18: Scope

18. Whilst 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 protocol), liquidators or administrators and courts outside the scope of the EC Insolvency Regulation are encouraged, wherever possible, to use these Guidelines so as to facilitate or increase the prospects of cooperation in other proceedings taking place.

Explanation

General

121. The view is to be encouraged that the Guidelines are to be applied by analogy in instances which fall outside the scope of the EC Insolvency Regulation. These Guidelines are standards for transnational disputes on insolvency matters. Although the Guidelines are drafted in order to be applicable in issues concerning communication and cooperation between liquidators in cross-border insolvency proceedings under the EC Insolvency Regulation, same Guidelines can be used in the context of domestically enacted versions of the UNCITRAL Model Law on Cross-border Insolvency or in other cross-border insolvency cases.

Appendix I

Checklist Protocol

A Protocol is designed to apply within the framework of the EC Insolvency Regulation and all liquidators should be acquainted with the terms referred to in the Regulation, the Guidelines and in a Protocol. See Guideline 4.1. In practice, cooperation – and therefore a Protocol – will particularly refer to certain basic requirements and to specific issues to be addressed in the cross-border insolvency case at hand.

Basic requirements for a Protocol

1. A clause should be inserted, stating that nothing contained in the protocol shall be construed to increase, decrease or otherwise affect in any way the independence, sovereignty or jurisdiction of the relevant national courts.

2. An additional clause should be inserted, stating that the courts involved shall be entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to the courts and the conduct of the parties appearing in such matters, including the court's ability to provide appropriate relief on an *ex parte* basis or a limited notice basis.

3. A clause could be inserted, stating that where there is any discrepancy between the Protocol and the Guidelines either one of them (the Protocol or the Guidelines) will prevail.

Basic requirements with regard to liquidators

1. Statement of the status of the liquidators.

2. Statement that each of the liquidators is subject only to the jurisdiction of its own court.

3. Statement of the right of each of the liquidators to be heard as a foreign representative in the other insolvency proceedings.

4. Statement of each of the liquidators that they will communicate and cooperate with each other as best as possible under the application of the European Communication and Cooperation Guidelines For Cross-border Insolvency.

Basic requirements with regard to the debtor

1. Statement of identity of the debtor and its management.

2. Statement of the involvement of the debtor prior to certain steps taken.

Basic requirement with regard to the proceedings

1. Statement of type (main, secondary) and nature (domestic name) of the insolvency proceedings.

2. Statement of specific topics, like mandatory involvement of certain third parties or bodies and to certain mandatory forms to use.

3. Statement of the use of language.

4. Statement of division of costs.

5. Statement relating to methods of exchanging and sharing information.

Specific issues for cooperation

1. The goal of co-operation.

2. The performance of certain acts and timescales to realise this goal.

3. The coordination of issuing information to be communicated to creditors.

4. The coordination of lodging of claims.

5. The sharing of information on claims lodged, the verification and disputes concerning claims.

6. The ranking of creditors.

7. The description and disposal of relevant assets.

8. The actions planned or underway in order to recover assets, including action to obtain payment from debtors.

9. The location of assets.

10. The actions to obtain payment from debtors.

11. The initiation of actions to set aside detrimental acts.

12. The filing of actions against third parties in relation to the insolvent company.

13. The right to demand performance or to terminate an executory contract.

14. The exercise of any voting rights.

15. The decisions relating to (post-commencement) financing, including the provision of security.

16. The filing of additional insolvency petitions concerning establishments in other Member States.

17. The process of drawing up or the submission of a liquidation or reorganisation plan.

18. The distribution of any kind of dividends.

19. The application of the hotch-potch rule.

20. The applicable law on certain issues.

21. The closure of any insolvency proceedings and its effect on the continuation of other insolvency proceedings.

Appendix II

European Communication and Cooperation Guidelines for Cross-border Insolvency

Task Force

- Paul Omar, Associate Professor University of Sussex, United Kingdom;
- Klaus Pannen, insolvency practitioner, partner White & Case, Hamburg, Germany;
- Susanne Riedemann, associate White & Case, Hamburg, Germany;
- Anker Sörensen, Medus Devaux Sorensen, Paris, France;
- Professor Miguel Virgós, Universidad Autónoma de Madrid; Uría Menéndez, Madrid, Spain;
- Professor Bob Wessels, Vrije University, Amsterdam, the Netherlands, Chair;
- Willem van Nielen, attorney-at-law, Udink & De Jong, The Hague, the Netherlands, secretary of the Task Force.

Review Group

- Jan van Apeldoorn, Attorney-at-law, Amsterdam, The Netherlands; former member of several Technical Committees of INSOL Europe;
- Neil Cooper, Partner Corporate Advisory & Restructuring Group, Kroll, London, United Kingdom; Past President of Insol Europe and INSOL International;
- Isabelle Didier, Insolvency Practitioner, Paris, France; Former President Insol Europe; Chair "Best Practices" Committee of Insol Europe;
- Professor Eric Dirix, University of Leuven (Belgium) and Justice Supreme Court Belgium;
- Honourable James Farley, Senior Counsel to McCarthy Tetrault LLP, Toronto, formerly Justice in the Ontario Superior Court of Justice, Toronto, Canada; Member of the Committee on Cross Border Communications in Insolvency Cases, International Insolvency Institute (III);
- Richard Gitlin, Gitlin & Company, Hartford (CT), USA. Past president of the American Bankruptcy Institute;

- R. Han C. Jongeneel, Justice District Court (Bankruptcy Chambers), Amsterdam, The Netherlands;
- Professor Sebastian Kortmann, University of Nijmegen, The Netherlands; Chair Core Group Academic Wing INSOL Europe;
- Maggie Mills, Partner Corporate Finance & Advisory Services, Ernst & Young, London, United Kingdom;
- Steven Taylor, partner AlixPartners, London, United Kingdom;
- Professor Heinz Vallender, Justice District Court Cologne, Germany; Professor University of Cologne;
- Professor Jay Westbrook, Benno C. Smidt Chair of Business Law, University of Texas Law School, Austin (Texas), USA. U.S. Reporter of American Law Institute's Principles of Cooperation in Transnational Insolvency Cases Among the Members of NAFTA.