

Communication and Cooperation: The continuing challenge

Paul Omar and Reinout Vrieseindorp report on the new CoCo2 Project and working with CERIL



REINOUT VRIESEINDORP
Secretary, CERIL Executive;
Professor of Insolvency Law,
Leiden University; and
Partner, DeBrauw Blackstone



PAUL OMAR
Technical Research Officer,
INSOL Europe; and
Co-Chair, CoCo2 Working Group

The European Guidelines on Communication and Cooperation Guidelines 2007 (CoCo Guidelines)¹ were the outcome of a project led by Professors Bob Wessels (Leiden) and Miguel Virgos (Madrid Autonoma) over the course of two years beginning in 2005.

The project was built on the then Article 31 of the European Insolvency Regulation (EIR) and its injunction to practitioners in main and secondary proceedings to cooperate and communicate with each other. The CoCo Guidelines were designed to flesh out a methodology for the way in which that cooperation and communication should take place and which the parent text had left largely silent.

The draft CoCo Guidelines were the subject of a formal presentation at the Bucharest Conference (Autumn 2006), although they were not formally endorsed by INSOL Europe until the Monaco Conference (Autumn 2007). The brief text, of only 18 articles, provides guidelines for, *inter alia*, the resolution of problems such as direct access by a practitioner to a foreign court, the content of communications, the relevant language to use, the duty of practitioners in main and secondary proceedings to communicate, the coordination of sales and cross-border rescues as well as the issue of costs. It also includes, in an Annexe, a Draft Protocol for potential use in relevant cross-border cases. Though the CoCo Guidelines got off to a slow start, within a few years, its terms, particularly those on cross-border coordination of



rescues and sales, were being considered in cases such as *BenQ Holding*, *Automold*, *Pin AG*, *Landsbanki-Icesave*, *Kaupthing* and even *Lehman Brothers Holdings* (where the global protocol made express mention of the CoCo Guidelines). Judicial attention to the scope of the CoCo Guidelines even occurred in 2009 in *Stojevic*, where the Austrian court suggested that the duty to cooperate and communicate should also be extended to the courts.

In 2012, two things happened to further propel the issue of court-to-court communication and cooperation into the limelight. The first was the publication of the ALI-III Global Principles for Cooperation in International Insolvency Cases,² the product of a study led by Professors Ian Fletcher (UCL) and Bob Wessels. The second was the occasion of the initiation of the EIR revision project, which resulted in a report and draft proposals for reform being presented at the end of that year. Of note, within the extensive changes that were incorporated in the final version adopted in May

2015 and which came into force in mid-2017 were the provisions which created both vertical and horizontal cooperation between practitioners in main and secondary cases involving the same debtor, between the same practitioners and the courts involved as well as between the courts themselves (Articles 41-43). In the group context, the same types of cooperation and communication were to be achieved between those involved in the administration of cases involving debtors belonging to a group of companies (Articles 56-58), while the opening of a group coordination procedure, one of the many novelties in the Recast EIR, would attract a duty under Article 74 for practitioners to cooperate with the coordinator of such a procedure.

Responding to the court-to-court element of the Recast EIR, led by Professor Wessels, Leiden University began a project in 2014. Over two years, the study, funded by the European Commission, produced the EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines (JudgeCo Guidelines)³ and also

Share your views!



provided training for judges in their potential application to cross-border instances. At the time of writing, the JudgeCo Guidelines may be said to represent the state of the art in their application to the duties laid on courts to communicate and cooperate with each other and with practitioners. In that light, the CoCo Guidelines and their content, produced nearly a decade earlier, have not kept up with progress in practice with regards to the experience of cooperation and communication, nor do they reflect current thinking about the purpose and extent of achievable cooperation and communication.

The project proposal

A proposal to review the CoCo Guidelines recently emanated from the Conference of European Restructuring and Insolvency Law (CERIL),⁴ an institute set up by a group of European academics, judges and practitioners, including (now Emeritus) Professor Bob Wessels, who chairs the organisation. CERIL comprises some 75 invited representatives of academia, practice and the judiciary. Its intention is to assist in the promotion of insolvency law development and reform at European and domestic levels. In a pioneering cooperation between CERIL and INSOL Europe, a Joint Working Group, to be called the CoCo2 Working Group, will be set up to coordinate work in order to review the Guidelines in light of present practice and understanding of cross-border cooperation and communication in insolvency matters.

The CoCo2 Working Group will be led by Tomáš Richter (Linklaters LLP/Charles University) and Paul Omar (INSOL Europe/De Montfort University), together with a membership composed of representatives of academia, judiciary and practice belonging to both organisations. The working methodology for the CoCo2 Working Group will see the creation of a Core Team,

whose role will be to generate proposals for revision of the CoCo Guidelines and carry out consultation and feedback. The Core Team will be advised by a Review Panel, also consisting of practitioners, academics, judges and policy makers drawn from a wide constituency. This will also include input at the comparative level from parties outside Europe, so as to ensure the review of the CoCo Guidelines reflects best practice not just in Europe, but globally. Furthermore, there will also be engagement with stakeholders not otherwise represented on the CoCo2 Working Group.

Project outcomes and reporting

The intention is that, in pursuing the creation of second-generation CoCo Guidelines, the CoCo2 Working Group will take into account recent work, including the JudgeCo Guidelines, on templates for cross-border communication and cooperation. The scope of the CoCo2 Working Group will concentrate on the duty to cooperate and communicate in Articles 41, 43, 56 and 58 of the Recast EIR, which directly address practitioner cooperation in both the single debtor and group contexts.

The judicial cooperation elements (Articles 42 and 57), addressed by the JudgeCo Guidelines, will also be considered, insofar as provisions addressing court cooperation with practitioners will need to be mirrored, as far as practically possible and expedient. Similarly, it is intended that the CoCo2 Working Group will coordinate on matters of common interest with a separate CERIL working party set up to examine Article 74 as part of consideration of the feasibility of a Code of Conduct for such coordinators. Overall, the intention is to achieve synergy between the initiatives in this area with a view to enhancing take up by the international bodies that have previously expressed an interest in soft-law approaches to

communication and cooperation, including the European Commission.

At the time of publication, the CoCo2 Working Group will have already begun its work, the intention being to present a working draft of the new generation CoCo Guidelines by the time of the Athens Conference (Autumn 2018). Based on the feedback during the currency of the project by the Review Panel as well as by attendees at the Athens Conference, a final version will be produced in late 2018 which will then be disseminated with view to adoption by INSOL Europe, CERIL and other bodies interested in the field. While the project is ongoing, regular updates in the newsletters and via the websites of the organisations will keep the membership informed of progress.

Summary

Overall, the project is exciting for a number of reasons, not least its utility in bringing up to date the CoCo Guidelines and enhancing the use of such soft-law instruments within practice. It is also the first opportunity for collaboration between INSOL Europe and CERIL and a particularly fitting occasion too to mark the immense contribution Professor Bob Wessels has made in the field of international insolvency law, especially in the area of communication and cooperation, as the co-author of the original CoCo Guidelines and the originator of the JudgeCo Guidelines project. The CoCo2 Working Group hopes to live up to the challenge of following in his footsteps in this revision and updating process. ■

Footnotes

- 1 See: www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf
- 2 See: www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf
- 3 See: www.universiteitiden.nl/en/research/research-projects/law/eu-judgeco-platform
- 4 See: www.ceril.eu



THE PROJECT IS THE FIRST OPPORTUNITY FOR COLLABORATION BETWEEN INSOL EUROPE AND CERIL

