# A judicial "cookbook" and recipes for international insolvency cooperation

Nicoleta Mirela Năstasie recounts how the idea first began and how the story is developing

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**In 2014, I attended a training programme related to guidelines and best practices for judicial cooperation in cross-border insolvency.[1]**

Explaining that in my daily judicial activity I had insufficient time to determine the most appropriate method to transform general guidelines and rules into concrete measures in pending litigations, someone asked me: "*What do you want, Judge, a cookbook for insolvency?*"

My direct and immediate answer was: "*Yes, if a cookbook helps me to find practical solutions and be efficient*".

I have been trying since then to verify if my answer was or was not correct. Nowadays, I am also involved in an EU project in connection to judicial cooperation[2] and I would like to address the same question to practitioners, academics and members of the judiciary. This is the subject I propose as an epic literary work.

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## The exposure: A short theory of the concept of soft-law

The interest for soft-law mechanisms from a theoretical point of view became more pronounced after 1980, with different theories being developed. Soft-law is generally described as non-binding legal instruments, general standards and instructions produced by international organisations, used in many domains of law with practical effects. International soft-law is seen as a "*legal metaphor*"[3] or "*grey zone*"[4]. The term "*soft law*" brings about terminological issues, ambiguous and even conflicting interpretations.[5]

It is beyond the scope of this article to provide a comprehensive analysis of academic writing related to the concept of soft-law, global disputes regarding its normative position and effects, its enthusiastic proponents or radical critics, or even to find the correct answer to the question of whether soft law is a "*law*" at all, and what the conditions might be for its legitimacy and effectiveness. This article focuses less on general aspects as rules for creating soft law, instead it concentrates more on their practicality and how the judiciary as well as academics should cooperate for this purpose.

Soft-law may provide the ground for changes in international law, a step "*towards traditional law-making*".[6] The use of soft-law tools is an expression of the positive obligations of private actors in the context of internationalisation and globalisation, not just in the field of cross-border insolvency. For the judiciary it is essential to see the link between legal professions in correlation to the new role of private actors for the development of international insolvency law and soft-law instruments.

## The intrigue: Recital 48 of the Recast EIR

The Recast EIR, through its 226 referrals, especially Recitals 48, 49 and 50, Articles 41, 42 and 43 as well as Chapter V, brings to our attention that cooperation and communication are fundamental mechanisms for cross-border insolvency. Courts and practitioners have the duty to cooperate "*in any form, including the conclusion of agreements or protocols*".

Recital 48 describes best practices and guidelines for cooperation and communication developed by international institutions and organisations as veritable solutions for transforming general goals of cooperation into practice. This text brings to scholars, practitioners and judges multiple questions related to what are the "*best practices*", what they should look like and how should they be put in practice as adequate instruments for international insolvency.

## The conduct of the action: From theory to EU practice, with possible difficulties related to soft-law mechanisms

EU soft-law experience reveals the need to adapt the international guidelines to the specificity of different civil and common law multilingual EU jurisdictions. The present is a time of speed and informatisation, leading to the requirement of quick solutions for the international community. The informational circuit is so intense that we have objectively to recognise that there is no time to think in depth about each step or stage in every concrete international insolvency case. We should also keep in mind that not only in the Southeast European jurisdictions, but everywhere, the vast majority of cases are simple, involving only a few companies or creditors.

At the European level there are differences in the legal culture

of the judiciary and the academia. Because of some inflexible, contentious and inconsistent national legal dispositions and procedures, the need for harmonisation of the civil continental and common law systems is real. Judges or academics are not the final beneficiaries of soft-law instruments, but their creators or simple intermediaries. The final goal is the development of a performing environment for those professionals struggling to connect to the pulse of intracommunity and extra-European commerce.

Brexit and its effects may induce for the main actors of international businesses the concern of being marginalised. It may also bring changes and polarisation toward new jurisdictions that are more flexible and favourable to fast restructuring procedures.

Using guidelines in practice is not always an easy activity, taking into consideration their increasing number and the large quantity of information and related commentaries provided by each soft-law instrument. Another issue is that international guidelines are not very well known by the EU practitioners and judges active in different EU jurisdictions, because they are not translated into national languages. Thus, there are fewer references in the domestic literature about them, without available explanations and examples of their value for practical activity. Even the UNCITRAL guidelines are not promoted in some national EU jurisdictions in a manner easy to understand or apply.

## The climax: A pragmatic approach

The academics have an important influence not only on the effectiveness of the judiciary specialised in cross-border insolvency, but on the judiciary overall. On the other hand, the soft-law has significant capabilities to encourage the development of cooperation between academics and the judiciary, if they all focus more on practical obstacles and questions facing the international insolvency, than on debating abstract ideological interprofessional differences.

As a former lawyer and actual member of the judiciary I am sympathetic to those scholars promoting a more pragmatic perspective. But what is pragmatism for the judiciary? There may be judges who consider each case on its individuality, judges exercising their job as a natural activity, without overestimated theoretical sophistication, judges who know how to be accurate, but also imaginative, in their decisions. What is pragmatism for academics? It may be the ability to bring their guidance from a theoretical sphere closer to day-to-day activities. For both professions, it may be a flexible interpretation of legal provisions, soft-law mechanisms and legal doctrines, in order to ascertain explanations, clarifications and solutions to difficult situations appearing in cross-border insolvencies and the situation of multinational businesses in financial distress.

The role of academics and the judiciary is essential for the promotion of international soft-law instruments and their implementation in correspondence with the specificity of different Member States' legal systems. Some alternatives may be to create examples connected to the national reality and practice, describe concrete situations in international cases, where one or several guidelines are used to facilitate solving relevant issues. Simple template-type standards connected to relatively similar or complementary procedures in different jurisdictions, translations of legal terms, accessible online, and not only for judges or practitioners, but also for other interested parties, simple formulations and explanations, in a language accessible regardless of the mother tongue of the person accessing the information, may be convenient.

## The outcome which may solve the problem

### *Is a cookbook the answer?*

Searching for practical solutions for international cooperation in the insolvency domain, we should try and forget for a moment that we are judges, practitioners, academics, and to become members of a chef's team, working together to create the most appropriate recipes for European peculiarities. We are all aware that recipes for this special "cookbook" of international insolvency are the result of hard work, and plenty of less successful experiences or failed endeavours. The recipes should be precise and simple, desired, easy to read and follow, both for sophisticated practitioners, multinational business owners, and for individuals and small actors in the market.

### *Do we need a European team for soft-law development?*

Since I have started to write this material, one expression has been in my mind: "*the European Team*". Developing efficient soft-law mechanisms for international insolvency requires team work, it is not a game for individuals. To be part of such a team needs more than mutual respect, and requires confidence and empathy, as components of a whole where each part has an essential role.

Because I have not found the answers to these questions yet, my hope is that we will all write together this part of the story. ■

**Footnotes:**

1 *EU JudgeCo Project*, Website available at: www.universiteitleiden.nl/en/research/research-projects/law/eu-judgeco-project.
2 The project "*Judicial Co-Operation supporting Economic Recovery in Europe*" (JCOERE), led by Professor Irene Lynch Fannon, University College Cork, involves the Titu Maiorescu University Bucharest and University of Florence. The author is acting as the PhD researcher from Titu Maiorescu University.
3 Laslo Blutman, *In the Trap of a Legal Metaphor: International Soft Law* (2010) 59 ICLQ.
4 JHH Weiler and AL Paulus, "*The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*" (Symposium, Part 2) (1997) 8 EJIL p.554.
5 A. Aust, *Handbook of International Law* (2nd edn) (CUP, 2010), 11; Blutman, 610; MA. Fitzmaurice, "*International Protection of the Environment*" (2001) 293 RdC 9, 125; AT. Guzman, "*The Design of International Agreement*" (2005) 16 EJIL 579, 583–584; LF. Damrosch and others, *International Law. Cases and Materials* (4th edn) (West Group, 2001), 34.
6 Blutman,617.

> **RECIPES FOR THIS SPECIAL "COOKBOOK" OF INTERNATIONAL INSOLVENCY ARE THE RESULT OF HARD WORK, AND PLENTY OF LESS SUCCESSFUL EXPERIENCES OR FAILED ENDEAVOURS**