



# Joint Insolvency Conference

## Crossing (Dutch) Borders in Insolvency



## ONE YEAR ON

# The European Communication & Cooperative (CoCo) Guidelines for Cross-Border Insolvency

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## CoCo

- Aims
- Application
- Attitude



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## The Challenges

- Legislation
- Judicial attitude
- Insolvency practitioners
- Academics



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## Legislation

- EU Regulation
- UNCITRAL [Cross Border Insolvency Regulations (“CBIR”)]
- Role of Soft Law
  - ALI –III Global Principles Project
    - Feasibility of worldwide acceptance of ALI Principles and Court-to-Court Guidelines
    - Principles re: Conflicts of Law
    - Principles on Ethics for Office Holders
    - Principles on Courts and Protocols
- Time for Hard Law? – Cultural and Market Conditions



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- **Judiciary**

- ECJ in Eurofood:

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

- MG Rover
- Cambridge Gas – 1906 – Common law cooperation. Privy Council Appeal No 46 of 2005 [African Farms 1906 TS373, 377]
- HIH [2008] UKHL 21 – Statutory Cooperation s426 IA 1986
- Bear Stearns – US attitude – Chapter 15 Case No. 07-12383. Civil Case No. 07-8730



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### Application of Guidelines & Protocol

- Full and fair opportunity to present facts and law
- Comment on evidence and legal arguments of opponent
- Procedural rights of parties
- (Urgency:) maximum reasonable notices to relevant parties



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- Court-to-Court communication – Mr Justice Lightman & Judge Drain Cenargo [Art 25 UNCITRAL]
- Protocol
- Certainty/Clarity
- Reporting
- Ben Q case
- PIN-AG case



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## Insolvency Practitioners

- Regulation/Licensing
- EBRD Insolvency Office Holder Principles (July 07)
- Regulators
- Trade Associations





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### Academics

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable case in the case of particularly significant rights an legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

- Awareness
- Publications/Commentary
- International Debate



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## What of the future?

- International projects
- Steps to (partial) harmonisation?
- Draft EU business reorg proceedings?
- European High Yield Association
- International Insolvency Practitioners?
- CoCo Roadshow?



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