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The role of courts in solving cross-border insolvency cases

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Regulation 1346/2000 on insolvency proceedings

*Insolv. Int. 65 1. Introduction

In recent years, several high profile international insolvency cases have aroused much attention, such as Rover Cars, BenQ, Nortel Network, Yukos Oil and Lehman Brothers. With the general acknowledgment that in many countries, including the Netherlands, the international legal (procedural) framework is weak, if not absent, the obvious question rises: what is the role of a (domestic) court in this international arena, where many parties are trying whatsoever to get their hands on what each party sees as its full exercised rights? This will be the central question to address in this article. I will commence with a general observation. During the last decade in international commercial disputes a new concept of “judicial comity” has been evolving, providing a framework of ground-rules for establishing and developing judicial dialogue both in a general context and in relation to a specific case. According to Anne-Marie Slaughter, judicial comity has four strands:

1. respect for a foreign court in its ability to apply the law honestly and competently;
2. the entitlement, in the global task of judging foreign courts, to adjudicate those matters where local interests are closely involved;
3. the strong judicial role in protecting individual rights; and
4. a greater willingness to clash with other courts when necessary, “as an inherent part of engaging as equals in a common judicial enterprise”.

*Insolv. Int. 66 In relation to cross-border commercial disputes Judge Kawaley (Supreme Court Bermuda), submits that the principle of judicial comity “appears to be essentially a legal expression of the globally recognised moral and religious principle, ‘do unto others as you would have them do unto you’”. Specifically, in the context of international insolvency cases Hon. J.J. Spigelman (Chief Justice of New South Wales, Australia) upholds that direct court-to-court communication in cross-border insolvency cases is a particular manifestation of the new sense of international collegiality that has emerged amongst judges of different nations, who now meet in many different multilateral, regional and bilateral contexts. This phenomenon has variously been called “judicial globalisation”, a “global community of courts”, and “international judicial negotiation”. Finally, a recent observation from a senior English Justice, Lord Neuberger, Master of the Rolls, submitting the possibility of division of issues between courts:

“I suspect that we are moving inexorably towards the development of inter-court, cross-jurisdictional, framework agreements, of joint and simultaneous hearings via video-link, and so on. It may well see, who knows, the development of insolvency jurisdiction sans frontières to match capitalism and bankruptcy sans frontières.”

In this contribution I will discuss several tools available to courts and insolvency practitioners to address legal matters and disputes in insolvency proceedings, which have cross-border effects. These effects may relate to the fact that an insolvent debtor owns assets which are located abroad or may have creditors, which operate in another country than the country in which the insolvency proceedings are pending. In international practice these cases can present themselves as relatively simple or as enormously complex. Examples of the latter are for instance the insolvency, early 2009,
of the European branch of Nortel Network, with some 20 subsidiaries in just as many European
countries or the insolvency case (since end 2003) of Parmalat (32,000 employees; 40,000
shareholders; some 200 subsidiaries, mostly outside Italy (35 jurisdictions) and 10,000 creditors,
more than 50 percent of them from 103 countries). I will then turn to Europe and discuss
developments in cross-border cooperation in insolvency cases between appointed insolvency office
holders and courts. Subsequently, an overview will be given of the difficulties in creating such an
“insolvency jurisdiction sans frontières to match capitalism and bankruptcy sans frontières”. Finally, a
short analysis will be presented of legislation, which includes provisions concerning such cross-border
cooperation, and a short account will be given of what I see as a rather radical change in the attitude
of judges to the subject. I will finalise with a short conclusion.

2. Soft law as strategic tool in developing international insolvency law

In the absence of binding global treaties or rules, the first decade of the 21st century offered many
non-binding principles and recommendations as the method of choice in further building and
developing the system of international insolvency law. Nearly all results of this choice have been
published in the last ten years. See the following list, which for the purposes of this article is limited to:

- American Law Institute Principles of Cooperation among the North American Free Trade Association
  (USA, Canada, Mexico) 2000 (“ALI NAFTA Principles”).
- American Law Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border
- European Bank of Reconstruction and Development Core Principles for an Insolvency Law Regime
  2004.
  with a Part Three: “Treatment of enterprise groups in insolvency”.
- Guidelines for Coordination Multi-National Enterprise Group Insolvencies (July 2010 Draft).
- Prospective Model International Cross-border Insolvency Protocol.

Several of these soft law type of principles and propositions have been elaborated as a result of a
number of initiatives taken in recent years by different organisations at international level, such as the
World Bank or the European Bank for Reconstruction and Development (EBRD), although their work
is not principally concerned with the harmonisation or renovation of legal systems, as they mainly
work within the international financial system and deal with insolvency matters only insofar as they
recognise that effective insolvency regimes play a major role in strengthening economic and financial
systems in any jurisdiction, particularly those in course of transition or in emerging economies. The
value of strong domestic insolvency laws is a feature of the reports and enquiries of nearly all these
organizations in the field. Other organisations, including the American Law Institute, have addressed
the specific issue of insolvency with a view to creating principles of cooperation between courts and
office-holders allowing for better cross-border treatment of insolvency procedures within NAFTA
(North-American Free Trade Association between USA, Canada and Mexico; “ALI NAFTA Principles”) and,
in collaboration with UNIDROIT, the Institute addressed wider principles governing the conduct
of civil litigation. In Europe, common principles governing insolvency law have emerged from a
collaborative academic project or they are the result of a process of being created to assist
European insolvency practitioners in performing according to their mutual duties to communicate and
to cooperate cross-border (CoCo Guidelines, which I will address further below). Finally, a list of
recommendations for countries wishing to update their insolvency regimes exists as a result of work
by UNCITRAL. In all, the number of international initiatives is a clear evidence and a welcome sign
that more thought is being put into the resolution of what was once, some 10-15 years ago,
considered an intractable and unsolvable phenomenon of a regulation for insolvencies with cross-border effects.

*Insolv. Int. 67* 3. Developments in Europe

Nearly four years ago, in October 2007, the European Communication and Cooperation Guidelines For Cross-border Insolvency have been published. Article 31 of the EU Insolvency Regulation establishes duties to communicate information and to cooperate for the liquidator appointed in main insolvency proceedings, opened in one Member State, and the liquidators appointed in any secondary proceeding opened against the same insolvent debtor, in any other Member States. In the early days of the EC Insolvency Regulation, after its entry into force May 2002, it was felt that the absence of guidance in art.31 of the EC Insolvency Regulation in general resulted in ad hoc and case-by-case communication and cooperation, if at all. First attempts of communication and cooperation lacked 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 Insolvency Regulation. In 2005 and 2006 a group of practitioners, supported by several judges from the Netherlands, Belgium, Germany and Canada, discussed proposals to address the principal issue of the liquidators' duties of communication and cooperation in cross-border insolvency instances. The group mooted the idea of the possibility or even the 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 EU Insolvency Regulation. These proposals were supported by INSOL Europe, the European insolvency practitioners organisation, presently with over thousand members. The intensive and lively discussions have led to the European Communication and Cooperation Guidelines For Cross-Border Insolvency (also called: CoCo Guidelines), drafted by Professor Miguel Virgós (Madrid, Spain) and myself.14

In their final form the CoCo Guidelines are 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. 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.15

Although the CoCo Guidelines are relatively new, in general in literature they have been welcomed.16 Also in conferences and workshops in circles of judges and academics the CoCo Guidelines generally have received a positive response, just as other sorts of “soft law” and best practices or guidelines in international insolvency. Next steps have been suggested. The CoCo Guidelines:

1. should form a binding Annex to the Insolvency Regulation, or
2. should form a national non-binding “Kodex” to add to an existing set of national ethical and professional rules for insolvency practitioners,
3. should function as a standard yardstick to measure an insolvency office holder’s national duties and obligations and therefore his or her liability17, or
4. may form a first step to a uniform “European” standard for insolvency practitioners.18

As the aim of the Guidelines in addition to being beneficial to the quality of the system of coordination of insolvency proceedings pending in different Member States, also is to increase the strength and the reputation of the profession, these suggestions are welcomed. It could be considered that the European Commission takes a “decision” to create legal effect to (a selection of) the CoCo Guidelines. See art.288 of the Treaty on the Functioning of the European Union (TFEU), in which it is provided that a “decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.” If the non-binding nature still is to be preferred, the CoCo Guidelines could form the subject of a recommendation or an opinion in the meaning of art.288 TFEU (“Recommendations and opinions shall have no binding force”).

Although in the text of art.31 of the Insolvency Regulation courts are not made subject to duties of cross-border communication or cooperation19, the CoCo Guidelines--may I disclose: with strong support of the participating judges--also provide for recommendations to courts. The key provision is Guideline 16.
“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 1.20

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."

In German literature it has been expressed that the CoCo Guidelines could be helpful to include cross-border cooperation by courts in art.31, to provide a proper legal basis for such cooperation.21

With all respect for the opinions in academic circles, the real test for the usefulness of the CoCo Guidelines lies in their adoption in international practice, either as having guided courts in their decisions or insolvency practitioners in the way they act in cross-border cases. Until recently only unreported sources have indicated the use of the CoCo Guidelines in solving disputes among practitioners or courts. It has, for instance, been mentioned that in the BenQ Holding BV proceedings early 2007 an earlier draft of the Guidelines played a role in cross-border communications between judges of the District Courts of Amsterdam (The Netherlands) and Munich (Germany).22 Other international insolvency cases provide examples of cross-border communication in Europe.23 In February 2009, the CoCo *Insolv. Int. 68 Guidelines demonstrably have been used in what has become known as the largest global bankruptcy to date, in the proposed Cross-Border Insolvency Protocol For the Lehman Brothers Group of Companies, which shall govern the conduct of Lehman Brothers Holdings Inc. (“LBHI”) and its affiliated debtors worldwide. The need for a Protocol is manifest, given the integrated and global nature of Lehman’s businesses, the spread of assets and activities, the efficient coordination of the administrations in many jurisdictions. The draft Protocol of twelve pages, contains thirteen terms. The aims of the Protocol are in short: Coordination, Communication, Information and Data Sharing, Asset Preservation, Claims Reconciliation, Fair Distribution and Comity (“To maintain the independent jurisdiction, sovereignty, and authority of all Tribunals”). The draft refers to several other bits of soft law and to several Protocols of international cases, which are reflected in the Draft. It specifically refers to CoCo Guidelines 3 (Status), 17.1 and 17.2 (Notices) and 12.1 (“Liquidators are required to cooperate in all aspects of the case”). As mentioned earlier, Communication among Tribunals will be regulated to a mechanism well known in USA and Canada, the ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases, which also has inspired the drafters of the CoCo Guidelines.24

Although several practical topics may be ready for adoption into the CoCo Guidelines or for amending the present text, a topic I would like to discuss here is derived from a recent English case, the High Court of Justice (Ch. Div) February 11, 2009 in the matters of Nortel Network, which comprises of Nortel Network SA and 17 other Nortel Network companies in 15 continental Member States, including companies incorporated in the Netherlands and in Germany, further: the Nortel Group.25 The Group operates in Europe, the Middle East and Africa. The Nortel Group is a global supplier of networking solutions: i.e. telecommunications, computer networks and associated software. On January 14, 2009 various Canadian companies in the Nortel Group including Nortel Networks Corporation (NNC), the ultimate parent company of the Nortel Group, sought protection in Canada under the provisions of the Companies Creditors Arrangement Act. At the same time some of NNC's direct and indirect US subsidiaries also filed voluntary petitions pursuant to Ch.11 of the US Bankruptcy Code. At the same date too in England COMI of all companies was regarded to be in England.26 Four weeks later the Joint Administrators of the Nortel Group made an application for the court to send a letter of request to the courts of a number of Member States in the European Union
asking those courts to put in place arrangements under which the Joint Administrators will be given notice of any request or application for the opening of secondary insolvency proceedings in respect of any of the companies in administration ("the Companies"). The letter will also request the courts to which it is sent to permit the Joint Administrators to make submissions on any such applications in respect of the potential damage which secondary proceedings might have on the interests of the estate and the creditors of the relevant Companies. Further to the administration orders of January 14, Blackburne J. also made a number of Day One Orders authorising the Joint Administrators in their discretion to make payments out of their assets to employees and preferential creditors of the relevant Companies corresponding to the amounts they would receive in the event that secondary insolvency proceedings were to be commenced in other Member States. He also authorised the Joint Administrators to apply to the relevant judicial authorities in any other country for such assistance as they consider they may require in connection with the performance of their functions as administrators.

Should the court allow such letters of request to be sent to the courts of the relevant Member States in the EC asking those courts to put in place the requested arrangements? The High court considers that is has “an inherent jurisdiction to issue a letter of request to a foreign court in appropriate circumstances.” According to the court these circumstances are:

- the request for assistance stems from art.31(2) Insolvency Regulation;
- this duty reflects “a wider obligation which extends to the courts which exercise control of insolvency procedures in their respective jurisdictions” (see Re Stojevic, Vienna Higher Regional Court November 9, 2004);
- it is desirable that a court which is dealing with an application to open insolvency proceedings to be provided with the reasons why such proceedings might have an adverse impact on the main proceedings (see Rover France SAS, Court of Appeal Versailles December 15, 2005); and
- Art. 33(1) allows the stay of the process of liquidation, but it does not prevent the continuation of winding-up proceedings (Re Collins & Aikman, Higher Regional Court Graz October 20, 2005).

His Honour Patten J. concludes:

“In these circumstances, it seems to me highly desirable that the assistance of the foreign courts specified in the Schedule to the draft order should be sought with a view to enabling the Joint Administrators to be heard prior to the opening of any secondary insolvency proceedings in these jurisdictions and I will therefore authorise the sending of appropriate letters of request to the judicial authorities in those States.”

The High Court judgment seems a strong argument to advance cross-border cooperation between courts, although it must be said--with all due respect--that art.31 only applies when main proceedings have been opened in one Member State (in the Nortel case: UK) and in another Member State secondary proceedings have been opened. This was clearly not the case at that stage of the proceedings because the very purpose of issuing the letters of request was if possible to avert the opening of secondary proceedings in other Member States. The reference to the Vienna court's decision seems to overlook that Austria is the one of the only Member State that lists the “bankruptcy court” (“Konkursgericht”) in Annex C, which lists “liquidators”. For this reason said art.31 applies to the Austrian court (in its role as “liquidator”).

4. Towards Global Principles for Cooperation in International Insolvency Cases

Earlier I mentioned the ALI NAFTA Principles. These American Law Institute Principles of Cooperation among the NAFTA Countries (2000) consist of substantive principles and procedural recommendations for cooperation in international cases. The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases accompany the ALI NAFTA Principles. They represent procedural suggestions for increasing communications between courts and between insolvency administrators in cross-border cases. These Guidelines have been included in many cross-border insolvency cases, including more recently (January 2009) by the U.S. Bankruptcy Court for the District of Delaware concerning Nortel Networks Inc., et al and (in February 2009) in a “Proposed Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies”, which has the form of a non-binding agreement between sixteen insolvency office holders (administrators, liquidators etc.), which have been appointed by courts in over seventy
Having laid the groundwork for a wider dissemination of the ALI NAFTA Principles and the ALI NAFTA Guidelines, the American Law Institute and the International Insolvency Institute (III) considered that it would be timely and appropriate to undertake a systematic evaluation of the possibility of adapting them so as to provide a standard statement of principles suitable for application on a global basis in international insolvency cases. In 2006 ALI appointed Professor Ian F. Fletcher (University College London) and myself as Co-Reporters for the project titled as “Global Principles for Cooperation in International Insolvency Cases” (or: ALI-III Global Principles). The most important objective within the remit of the project is to establish the extent to which it is feasible to achieve a worldwide acceptance of the ALI NAFTA Principles together with the ALI NAFTA Guidelines. After a consultation process and a discussion period, both within the two organisations and also with other interested groups of practitioners, academics and judges, a Preliminary Draft of Global Principles for Cooperation in International Insolvency Cases, was published in April 2010. These Principles reflect a non-binding statement, drafted in a manner to be used both in civil-law as well as common-law jurisdictions, and aim to cover all jurisdictions in the world. To a large extent these Global Principles for Cooperation in International Insolvency Cases build further on the ALI NAFTA Principles and the ALI NAFTA Guidelines. The draft texts of, respectively, 41 Global Principles for Cooperation in Global Insolvency Cases, 18 Global Guidelines for Court-to-Court Communication in International Insolvency Cases, and 23 Global Rules on Conflict of Laws Matters in International Insolvency Cases are at this stage provisional, pending further drafting and approval and formal adoption by the ALI and III respectively.

Apart from resolving difficulties caused by the need to identify mutually understandable legal terminology and (choice of) language in a large group of countries, the law, including its constitution and its procedural statutes, determines strictly the powers of a court and the practical procedural actions a court is allowed to take. In their interpretations or decisions courts may be guided by the rationale of certain of the Guidelines, but they lack the authority to “adopt” or “apply” the ALI NAFTA Guidelines and/or to suggest to another court to “approve” the suggested course of dealing with the specific cross-border insolvency case, or conversely to “approve” certain approaches suggested by a foreign court. The Guidelines furthermore assume an active role for the courts involved. In certain countries a court may have a different role, i.e. only acting after having been explicitly requested by the insolvent debtor, the insolvency office holder, by a creditor or by any other interested party, which is allowed to do so either based on the law of the courts’ jurisdiction or the rules applicable in a cross-border insolvency case. The mutuality of court-to-court communication as assumed by the ALI NAFTA Guidelines (communications “to the maximum extent” possible) is based on the rationale that courts on an equal footing work together towards a common goal. Both (or all) courts have an equal interest to know all relevant details of the case to be able to arrange for providing solutions to problems which arise between the parallel proceedings. Where the applicable law does not allow a court (fully) to collect facts or evidence, communication or cooperation with another court is likely to fail. Although the ALI-III Global Principles we hope to present in mid-2011 fall within the category of “soft law”, the protection certain countries have claimed by inserting a reciprocity clause may also have an impact on the willingness to use or to be inspired by these Global Principles.

Professor Fletcher and I therefore are looking for ways to overcome several of the difficulties mentioned. One recommendation we will most probably suggest is a guideline concerning the court’s appointment of (what we presently call) an “Independent Intermediary”, which expands the rule laid down in art.27(a) UNCITRAL Model Law (Appointment of a person or body to act at the direction of the court). I refer to its present number in the preliminary draft in principle 25.3 and 25.4.

“Principle 25 Communications between Courts; Intermediaries

25.1. To the maximum extent permitted by domestic law, courts considering or presiding over insolvency proceedings or requests for assistance from foreign insolvency courts should communicate with each other directly or through the respective 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. All such electronic communications should be based on technology which is commonly used and reliable.

25.2. Where communications are established between courts, consideration should be given to the possibility that the future management of the concurrent proceedings may be undertaken in accordance with a protocol to be drawn up with the agreement of all interested parties, and approved by the courts concerned.

25.3. In addition to considering court-to-court communication directly or through administrators, and the possibility of structured cooperation by way of a protocol, the court may consider, of its own motion or at the request of any administrator, the appointment of one or more intermediaries whose function it is to help ensure that a transnational insolvency proceeding is operated in accordance with the goals of these Global Principles. The provisions concerning the functions of such an intermediary may be set out in a protocol, or in an order of the court. The court should solicit the views of the administrators in each of the pending insolvency proceedings prior to such an appointment.

25.4. An intermediary:

(i) Will be a person with appropriate skills and qualifications, experience, professional knowledge, and good character;

(ii) Must be capable of performing the duties with which he or she is entrusted in an impartial manner, avoiding any perception of possible conflict of interest;

(iii) Is accountable to the court which appoints him or her.

(iv) May be awarded fees and costs out of the estate of the insolvency proceeding in which the court has jurisdiction."

Global Principle 25.1 has been developed from Procedural Principle 10 of the ALI NAFTA Principles. It takes as a starting point that communications through courts in different states take place directly or through the respective administrators. As to the modes of communication it is obvious that establishing communications through electronic means between courts requires the availability of such means, including teleconferencing, electronic mail, internet video conferencing and web based conferencing. The effective conduct of such communication requires the use of technology which is commonly used and which should ensure expeditious sharing of information and the accessibility of electronic data in a traceable, current and understandable form. Information to be exchanged should be reliable in that data received or sent has not been manipulated, does not originate from an unmentioned person and is not accessible to persons for whom it is not intended. Global Principle 25.2 is based on the notion that a court must be ever mindful of its responsibility to uphold the principles of justice that are inherent within its own system of law, and to retain the necessary degree of control over the legal process over which it is presiding. When engaging in court-to-court communication in the context of an international insolvency proceeding, it may be advisable to draw up a written framework that expresses the objectives of the cooperative process on which the respective courts, together with all parties in interest, are engaged, and to commemorate the terms of that agreement in the form of a protocol to be approved by the courts concerned. In this way reference can be made to a formal text in the event of any subsequent disagreement about the course or conduct of the communications which ensue.

It is acknowledged that under certain circumstances the court may wish to refrain from conducting direct communications with another foreign court, or even from doing so through the appointed insolvency administrators who are conducting the respective proceedings in the countries concerned. Reasons for considering such a course of action could include the need to attend to other immediate priorities or the general pressure of business upon the court, which require it to limit the time and resources devoted to the demands of the international case. A more obvious consideration may be the anticipated complexity of multi-lingual communications in different time-zones, with more then two insolvency proceedings pending simultaneously, the unavailability of e-technological means, and possibly the court's genuine desire to maintain full impartiality, particularly if there are perceived to be conflicts between the administrators. In any such case the court could consider appointing an independent intermediary. An intermediary’s general task is to help ensure that a transnational insolvency proceeding is operated in accordance with the goals of the Global Principles and with any specific provisions which are either set out in a protocol or specified in the order made by court. In addition an intermediary will be able to alert the court to potential conflicts or problems. It will be part of the intermediary's mission to devise a practical means of conducting communication between the
courts concerned, in such a way as to ensure that all parties are properly informed and, where appropriate, involved. The intermediary should also be required to address the practical issues generated by such factors as the different working languages in which the various courts are able to operate, and the logistical problems caused by the fact (if such is the case) that the courts are situated in different time zones thereby impeding the conduct of live communications during normal working hours. Global Principles 25.3 and 25.4 are new compared to the ALI NAFTA Principles, but the appointment of an intermediary, as indicated, fully fits within the structure of arts 25-27 UNCITRAL Model Law.

5. Changing legislation

In the English speaking parts of the world, cross-border judicial communication in international insolvency cases is an accepted form of reaching effective solutions. In general, cross-border communication between judges and administrators in pending parallel proceedings is seen as the best way of maximisation of the value of the debtor's worldwide assets, either trough forms or liquidation of by preserving the business activities for that purposes. For the rules that govern such communications, in the USA and in Canada many court judgments or orders refer to the ALI NAFTA Guidelines, which originally formed an Appendix to the ALI NAFTA Principles. General Principle I of these Principles state: “Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximising the value of the debtor's worldwide assets and furthering the just administration of the proceeding.” However, as noted earlier, in many legal systems and traditions such a practice would contravene to notions of the proper role of the judge as a detached and impartial figure who must neither seek nor accept advice or guidance from any other source, domestic or foreign, concerning the conduct of the matter over which he or she is presiding, unless domestic or international explicit rules allow to do so. In many international conferences in the last decade the latter argument has been made by European judges. It did not stop the debate, but it turned the subject of judicial cross-border communication into something like an unrealistic dream. However, during the last years there is a growing acceptance for ways of enabling cross-border cooperation, and in recent years legislation is noticeably changing and including topics of cross-border cooperation in insolvency cases. Courts in two of the three NAFTA jurisdictions, i.e. USA and Canada, have applied the ALI NAFTA Guidelines on a fairly routine basis. Since October 2005 in the USA rules for communication and cooperation, inspired by arts 25-27 UNCITRAL Model Law on Cross-border Insolvency apply. In as far as the matters regulated in arts 25-27 Model Law were not already existent in domestic law, they now have been taken into account by those European jurisdictions which have introduced or amended their legal system concerning provisions of international insolvency law, inspired by the Model Law. As a result, as at early 2011, the following European countries have adopted rules concerning communication and cooperation in cross-border cases: United Kingdom, Poland, Romania and Greece, whilst in new legislation proposed in Slovenia and the Netherlands similar provisions are under way. Not (directly) related to the Model Law, but inspired by it and by other examples, rules regarding cross-border communication and cooperation have been adopted in other European countries as well. Examples include Belgium, Croatia, Germany, Spain and Ukraine. It should be noted though that only the British, Polish, Romanian and Greek legal rules and the draft Dutch rules (see below) provide for cross-border judicial cooperation.

*Insolv. Int. 71 A most exciting new development has taken place in Germany, as a part of a recent draft Gesetz zur weiteren Erleichterung der sanierung von Unternehmen /Law for further flexibility of reorganisation of businesses, issued by the Ministry of Justice on February 23, 2011. In a new proposed s.348(2) of the German Insolvency Act, it is provided--in my translation:

“When the requirements for recognition of a foreign insolvency proceeding have been met, the insolvency court can cooperate with the foreign insolvency court, more particularly provide information, which is meaningful for the foreign proceeding”

. From both its text as its place in the German Insolvency Act, it seems to follow that the discretion for a German insolvency court “can” only relates to those courts who are not bound by the EU Insolvency Regulation.

In addition to new legislation, several tendencies in Europe point in the direction that the role of a court is changing into a judicial body which acts, also internationally, in a cooperative mode. In addition to a growing general awareness for an international mindset for “judicial comity”, as indicated in the beginning of this article, these tendencies include:
• the duty to cooperate, which is felt in accordance with the notion of mutual trust and the basis of the system of recognition of insolvency judgments under the application of the EU Insolvency Regulation (see Recital 22: “Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust”); The basis for mutual recognition though is wider, see art.81(1): “The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases…”;

• the existence of some anchor points in other European legislation, where courts are expected to communicate and to cooperate; and

• the (albeit creeping) convergence of civil procedural law and common procedural law. It is submitted that the divide concerning procedural rules between civil law oriented and common law oriented legal systems is narrowing. In literature reference has been made to “a tendency to converge ‘naturally’ as a result of the increasing interaction between the systems”, providing as examples of a convergence of civil law procedures to common law: orality, discovery (disclosure) and pre-action protocols.

I leave aside other areas of law in which cross-border cooperation between courts is included in legislation, such as criminal procedural law or the rules regarding child abduction.

6. Judges on the move

Judicial cross-border communication will meet many obstacles, such as a general reciprocity provision, language, uncertainties about the meaning of certain procedural or substantial legal terms or an inadequate infrastructure that would impede local judges from participating in teleconferences. The ALI NAFTA Guidelines assume an active role for the courts involved. As explained, in certain countries a court may have a different role. However, it is striking to see that since mid-2010 illustrations can be found that judges in Germany, France and the Netherlands will be much more open to engage in such communications. In an article published in May 2010, written by three German judges and a legal advisor to the German Ministry of Justice ("Ministerialrat"), it is argued that the ALI NAFTA Guidelines should be seen as a valuable resource for cross-border judicial communication. The authors conclude that also after a detailed analysis of these Guidelines it now seems that also according the German domestic procedural law much more cross-border communication is possible than had been expected. Their assessment is made within the context of the authors’ reading of three points of departure, laid down in the German Insolvency Act (Insolvenzordnung), art.1 (Objectives of the insolvency proceeding: satisfaction of creditors), art.5(1) (Principles of the Insolvency Proceeding; the insolvency court shall investigate ex officio all circumstances relevant to insolvency proceedings), and art.21(1) (The insolvency court shall take all measures appearing necessary in order to avoid any detriment to the financial status of the debtor for the creditors until the insolvency court decides on the request). In the light of these points of orientation, and tested against German domestic law, the result is that out of 17 ALI NAFTA Guidelines more than half of these can be accepted directly and four of them in a modified form. Four Guidelines can not be accepted under German (insolvency) procedural law and should not be taken into account in a protocol. Indeed, in general the authors do not see any objections against a protocol and they even provide a sample ("Mustervereinbarung"). These four non-compatible principles especially relate to certain procedural requirements in exchanging documents and evidence, conducting a joint hearing, the establishment of a Service List mentioning parties that are entitled to notices and the cancellation of a stay.

In France, the President of the Court of Appeal in Colmar (who is also a law professor in Paris and Strasbourg), has suggested proposals to institute “une veritable coopération judiciaire” (a real judicial collaboration). For the Netherlands I am not aware of research such as the German one mentioned above.

In the Netherlands in September 2010, Judge Ms. Melissen, who also presides an informal commission of insolvency judges ("Recofa") has published an article, in which several of the tombstone documents of international insolvency, including the ALI Guidelines, are described. She does not see any objection in principle against cross-border communication, under the condition that certain rights of creditors and legal positions of the administrator and the judge are safeguarded. In Great Britain a notable example of successful communication is the Cenargo case, in which direct court-to-court communication took place by telephone between judges sitting in London and New York respectively. The live conference was arranged with the agreement of all the parties to the
parallel sets of proceedings, whose counsel were present and actively participated in the discussion between the presiding judges. The entire discussions were recorded and a transcript was produced for the parties and as part of the record of the proceedings. An illustration of the fact that a court retains its own discretion, is the refusal of an application for a direct telephonic conference call to be arranged between the English court and a US court. Richards J. acknowledges that inter-court communications could have a vital role to play in major cross-border insolvencies, but he concluded for the case at hand that such a communication would not be appropriate at the given stage of the proceedings.

7. Short conclusion

International insolvency law is on the rise. In 2002 the EU Insolvency Regulation introduced a system within Europe, which already has been tested in over hundred court cases in the Netherlands. Another remarkable sign is the publication of the Dutch Pre-draft for a new Insolvency Act (“Voorontwerp Insolventiewet”) in 2007. It contains in Title 10 (“Internationaal insolventierecht”) 35 articles concerning international insolvency law, to be applied especially in these international cases that fall beyond the scope of the Insolvency Regulation. Section 5 (“Internationale samenwerking”) of this Title concerns rules on cross-border sharing of information and cooperation between administrators in several parallel insolvency proceedings, or between administrators and courts, or between courts among themselves in such cases. Although forms of cooperation involving Dutch administrators and courts have occurred in practice (e.g. Eurodis, BenQ, Lehman Brothers Treasury), these developments are in their very first stage. In this type of cooperation the court-to-court cooperation seems the most exciting. However, in November 2009, the legislative process for a new Insolvency Act in the Netherlands has been put on hold and the Rutte Verhagen administration, active since autumn 2010, only very recently (January 2011) has given the sign that in its present form the Pre-draft will not be enacted. In the meantime, international commercial practice (Lehman Treasury, KPNQuest, Yukos Oil) makes its many demands. As long as specific rules are lacking in this area some guidance may be found in the results of the soft law examples discussed above.

According to art.46 of the EU Insolvency Regulation the Commission shall present a report on the application of the Regulation no later than June 1, 2012. With the revision of the Insolvency Regulation coming up, in a Top 10 will be the inclusion of courts in art.31 and a more detailed framework for communication. Personally I am of the opinion that where business is global, also its accompanying or facilitating provisions should be global and therefore should be contained in a convention, by which at least courts in all parts of the world would be provided with a sound and well-tailored framework for international cooperation. International practice and present opinion demonstrates the ability and willingness that (insolvency) judges possess to play the vital role in applying an effective and efficient insolvency system. Such a convention should act as an aid for judges to navigate in uncharted waters, should ensure that all stakeholders in a restructuring or insolvency have the information they need to make informed decisions, and should adopt procedural safeguards to ensure the integrity of all judgments given.

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does not exist anymore” (De Nederlandse rechter bestaat niet meer), Advocatenblad 12 November 2010, 579, as European law is an integral part of “Dutch law”.


12. Principles of European Insolvency Law, see W.W. McBryde, A. Flessner and S.C.J.J. Kortmann (eds.), in: Law of Business and Finance, Vol. 4, Deventer: Kluwer Legal Publishers, 2003. It is understood that a research group, led by Professor Dennis Faber (Radboud University Nijmegen) is preparing for a revised and amended set of these Principles. An obvious criticism on the 2003 set of principles was, that they were drawn from comparing only eight European countries, see Bob Wessels, Principles of European Insolvency Law, in: American Bankruptcy Institute (ABI) September 2003, pp. 28/29.


15. The CoCo Guidelines were endorsed by INSOL Europe during its Annual congress in Monaco, October 2007. The text of a non-public draft of the Guidelines has been discussed (including electronic voting) during the Annual meeting of INSOL Europe, Bucharest, September 2006. For the results of these discussions see my blog: 2006-12-doc8.


17. As suggested in the Explanation, para. 36, to the CoCo Guidelines.


20. Guideline 1 (‘Overriding objective’) provides: 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.


22. The sole shareholder of BenQ Holding BV is a company from Taiwan, which acquired in 2004 the telecom branch of the German Siemens group, with operations in several countries, but with its main workforce of over 3000 people) working in the southern part of Germany. See in general Han Jongeneel, Cross-Border Co-Operation for Courts and Administrators, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 97-102.

23. Automold (communication of a German court to the UK liquidator regarding the coordination of scheduling a date for creditors’ meeting in secondary proceedings) and PIN AG case (court to court communication between Germany and Luxembourg regarding the decision to open main insolvency proceedings). I am indebted to Hon. Andreas Remmert, Justizministerium Nordrhein-Westfalen, Düsseldorf.

24. For a recent overview of Cross-Border Insolvency Orders and Protocols, see www.amercl.org/resources.cfm (go to: Appendix H) (visited 14 April 2011).

25. High Court of Justice (Ch. Div) 11 February 2009 (Hon Mr Justice Patten) [2009] EWHC 206 (Ch); [2009] BCC 343.

26. The opening of English insolvency proceedings towards the two Nortel related Dutch incorporated companies was published, see www.rechtspraak.nl.

27. On the question whether this decision should be transformed into a Guideline, and if so, in which form, see my article: Three Outstanding Issues in Co-ordinating Insolvency Cases, in: Bob Wessels and Paul Omar (eds.), The European Insolvency Regulation: An Update, Nottingham, Paris: INSOL Europe 2010, pp. 111-126.


30. These Guidelines (seventeen in all) in general codify experiences and practices resulting from some fifteen cross-border insolvency cases in which courts in different jurisdictions have mutually aligned their approaches, their communication, their supervision and their completion of cross-border insolvency cases (whether based on a protocol or not).


33. Prof. Fletcher and I developed in 2006 and 2007 a systematic consultation exercise, conducted with the help of experts, drawn from a wide range of jurisdictions and legal traditions around the world and able to pronounce authoritatively on the suitability of applying the Principles (or conversely, any obstacles to doing so) from the perspective of each country and legal system with which they have direct personal experience.

34. In our research Fletcher and I are assisted by a group of over fifty academics, practitioners, judges and regulators from around thirty jurisdictions. As the Global Principles Project is a combined effort with III, an International Advisory Group has been formed, which is divided in four sub-groups: (i) International Advisors, appointed by ALI and III, chaired by Professor Jay Westbrook (Texas, USA), (ii) Members’ Consultative Group, formed by other ALI Members with an
interest in the project, (iii) III Working Group, containing other III Members with an interest in the project, chaired by E. Bruce Leonard (Toronto, Canada), Chair of III, and (iv) International Consultants, with an interest in the project, not being member of ALI or III, chaired by us as Reporters.

35. The text, including commentaries and Reporters’ Notes, is available via http://bobwessels.nl/wordpress/?p=996. The Reporters intend to produce a final draft of their Report in May 2011.

36. Many judges in the non-English language countries do not speak another language than the national language and if they do speak another language it would not always be English (but -- I limit myself to continental Europe -- German or French).

37. For arguments against reciprocity, see: K. Yamauchi, Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?, in: 16 International Insolvency Review, Winter 2007, Issue 3, p. 145ff. Although nature and content of these reciprocity provisions vary, in insolvency cases they are used in: Argentina (draft), Belgium, British Virgin Islands, China, Mexico, Romania, South Africa, Spain and Tanzania.

38. Article 27(a) Model Law allows a court to implement cooperation by any appropriate means, including the appointment of a person or body to act at the direction of the court. In its recommendations of the treatment of insolvency of enterprise groups, UNCITRAL in 2010, has suggested the appointment of a “court representative”, to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions, based on rather similar arguments as mentioned for the suggestion for an “independent intermediary”.

39. See e.g Article 8(2) and 19(3) of the Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding-up of credit institutions and Article 8 of the EC Regulation 867/2007 of 11 July 2007 establishing a European small claims procedure (cross-border hearing of parties).


43. The authors refer to ALI Guidelines 6, 9(2)(b), 12 and 14.


46. Already in this way the Amsterdam judge Jongeneel 2009.


50. Aanhangsel van de Handelingen II, vergaderjaar 2010-2011, Aanhangsel nr. 1014.

51. The latter words are taken from my lecture mentioned in footnote 40.

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