Court-to-court Communications: Hard and Soft Laws

Introduction

Cooperation and communication between courts in cross-border insolvency cases (the subject) has been the subject of discussion during many international conferences I have attended since 2008.

These discussions showed that the judges from common law jurisdictions, especially the US, Canada, and the UK, were more familiar with the subject than judges from civil law jurisdictions.
I have tried to very briefly explain this lack of familiarity in civil law jurisdictions on my little website (http://www.insolvencycourts.org/ICE/ICECommunications.html).
A more extensive discussion of a civil law (German) perspective on the subject can be found in a German article which I translated into English in 2010 (http://www.insolvencycourts.org/DL/Singapore2019/Germany_Article_on_Communications.pdf).

Hard and Soft Laws

A first milestone was the publication of the UNCITRAL Model Law on Cross-border Insolvency in 1997.
Its chapter IV includes provisions on the subject which direct the courts to cooperate and explain possible forms of cooperation.
The Model Law's popularity significantly increased when the US adopted its provisions under Chapter 15 of the US Bankruptcy Code.
Its section 1521 provides that "the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee".

In 2000, the American Law Institute published the "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases" which are more specific than the provisions in the Model Law.
These guidelines were initially designed for cross-border cases within the three Nafta countries (US, Canada, Mexico). When they were published, however, the American Law Institute mentioned in the introduction that "the Guidelines at this time contemplate application only between Canada and the United States because of the very different rules governing communications with and among courts in Mexico". This shows again that common law and civil law jurisdictions do not always have the same perspective on the subject.

The first version of the European Insolvency Regulation of May 29, 2000, only imposed a duty to cooperate and communicate information on the liquidators (Article 31). This gave rise to the discussion (made obsolete by the recast version of the Regulation) if Article 31 could also be construed to include such a duty for the courts.

The recast version of the European Insolvency Regulation of May 20, 2015, now includes a provision on communications between courts, however (Article 42).

A few years later, Professors Bob Wessels and Miguel Virgós developed the European Communication and Cooperation Guidelines for Cross-border Insolvencies

designed to enable courts and liquidators to operate efficiently and effectively in cross-border insolvency proceedings within the context of the EC Insolvency Regulation (2007).
The focus of these guidelines is on the cooperation of the liquidators but courts are advised to "operate in a cooperative manner" (Guideline 16).

In 2010, UNCITRAL published its "Practice Guide on Cross-Border Insolvency Cooperation". Its main objective is to explain possible forms of cooperation under Article 27 of the Model Law. It mentions an aspect which is of particular relevance for judges in civil law jurisdictions:

"A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency derives from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts."

Judges in jurisdictions that have adopted the Model Law do not have that uncertainty. In other jurisdictions such uncertainty may arise if the domestic law is silent on the subject.

In 2012, Germany explicitly authorized its judges to cooperate with foreign courts (section 348 (2) of the German Insolvency Code).

The International Insolvency Institute came up with the idea of finding out whether the Guidelines Applicable to Court to Court Communications could also be useful in multinational bankruptcies on all continents if they were adapted accordingly. This idea resulted in the international project "Global Principles for Cooperation in International Insolvency Cases." The reporters were Prof. Bob Wessels and Prof. Ian F. Fletcher. The report was submitted in 2012.
Two other important projects have drawn on these principles:

- The "EU JudgeCo Principles" and "EU JudgeCo Guidelines (2014, editor: Prof. em. Bob Wessels, University of Leiden, The Netherlands)
- The "JIN Guidelines" by the Judicial International Network

The EU JudgeCo Principles and Guidelines are designed for use within the EU.
In the introduction, Prof. Bob Wessels explains that court-to-court communication between judges in insolvency matters in the EU is limited to only a few cases. For the near future, however, he expects judicial cooperation and communication to become a "cornerstone in the efficient and effective administration of insolvency cases" within the EU.

The JIN Guidelines state their overarching objective as follows:
"…to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted."

The JIN Guidelines include an annex on joint hearings between different courts.

A comparison with the EU JudgeCo Principles' overriding objective stated in Principle 3 (…"of enabling courts and insolvency practitioners to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtor's business, and furthering the just administration of the proceeding.") makes me conclude that both principles and guidelines have the same purpose.

The development described above shows that judges, especially in civil law jurisdictions, are more likely to cooperate and communicate with judges from foreign courts if they find a statute in their domestic law explicitly authorizing them to do so.

Such authorization by "hard laws" is not enough, however, because they provide no guidance (e.g., section 348 (2) of the German Insolvency Code) or only limited guidance (e.g., section 1527 of the US Bankruptcy Code, Article 42 (3) of the European Regulation) on how to practically manage court-to-court cooperation and communication.

Therefore, we need "soft laws" like those mentioned above, to provide "best practices" for judges on how to proceed in cross-border insolvency cases requiring the coordinated administration by courts from different jurisdictions.
This has been acknowledged in recital 48 of the recast version of the European Insolvency Regulation:

"When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral)".

Using the Soft Laws

The non-binding character of the "soft laws" raises the question how they can become a basis for the management of the case by the courts and the parties involved.

A famous example in which the "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases" were incorporated into an agreement (protocol) is the protocol in the Lehman Brothers' Case.
Under the heading "5. Communication Among Tribunals", the protocol provides that the Guidelines "shall…. be incorporated by reference and form part of this Protocol subject to formal adoption of the Guidelines in whatever form by each Tribunal…".
The shortcomings of this protocol were described by retired judge Allan Gropper from the US Bankruptcy Court of the Southern District of New York (SDNY) as follows:

"It took the insolvency administrators of 18 subsidiaries of Lehman Brothers seven months to work out a protocol that contained general principles of coordination and cooperation; however, even that document provides that the protocol is not a legally enforceable agreement and expressly reserves to the respective administrators the right to act independently. Furthermore, even though the protocol was designated as

non-binding, the administrators of the largest non-U.S. affiliate, Lehman UK, held out and refused to sign."

A more recent example is a case (Ezra Restructuring Group) involving the High Court of Singapore (Justice Kannan Ramesh) and the SDNY (Judge Robert Drain).
The parties agreed on a protocol which both courts made applicable to the proceedings by orders approving that protocol.

These cases show that the courts in common law jurisdictions have the power to integrate soft laws into the procedural basis of insolvency proceedings pending before them.

Do courts in civil law jurisdictions have that power as well?

The authors of the German article mentioned above seem to think that German courts have the power to enter into such procedural arrangements. They argue that *"communication arrangements with a foreign insolvency court do neither constitute a waiver of any sovereign powers nor a limitation of the judicial powers of the involved courts nor any restriction of the rights of the parties to any proceedings".*

Many German judges do not share this view, however.
German domestic law does not mention protocols in any provision.

In cases governed by the recast EU Regulation, Article 42 (3) (e) provides a legal basis for courts to approve protocols, however.

Language

Some soft laws (e.g., Principle 21 of the Global Principles for Cooperation in International Insolvency Cases) address the language issue which does not exist when only English-speaking courts from common law jurisdictions are involved in cross-border cases.

When I observed a joint hearing in the Nortel case between Judge Morawetz from Toronto, Ontario, and Judge Gross from Wilmington, Delaware, I realized that the absence of a language barrier was a great advantage.
If the judges and the parties involved do not speak the same language, a joint hearing is not practical.
The use of interpreters would slow the proceedings down too much.
An interpreter may be helpful in a telephone conference between the judges only but not in a hearing with many parties present.

If communications are only made in writing, it is easier to have them translated by professional translators.

What about English as a vehicle for communications between people from different countries with different languages?

English is often used to make communication possible between people not sharing a native language.
But that does not mean that the communicating parties always understand each other because they use different "versions" of English.
If two non-native speakers who rely on the English they learned back in their days at

school try to discuss the management of a cross-border case in English, they run a high risk of mishandling the case because of misunderstandings during their conversation.

Therefore, we need to develop an international English legal terminology in which we define the terms in detachment from any local law concepts. A first step has been made in the appendix of the Global Principles (pp. 153 et seq.) which includes a "Glossary of Terms and Descriptions".