

Member State within which the secondary proceedings are opened (Article 3(2) and Article 27);

- (iv) Despite of the fact that secondary insolvency proceedings relate as of the moment of opening to assets located within the territory of the Member State within which the secondary proceedings are opened (Article 2(g)), debts of the main estate already existing prior to the opening of the secondary proceedings are to be recovered too from the assets of the secondary proceedings;
- (v) Despite 'local' creditors being able to lodge claims in secondary proceedings, they are also allowed to lodge claims in the main proceedings or in other secondary proceedings opened in other Member States and both the main and the secondary liquidator shall lodge in the other proceedings claims which have already been lodged (Article 32(1)) in the proceedings for which they have been appointed (Article 32(2));

Secondary proceedings have an auxiliary function and therefore should be considered in the context of the main proceedings. The mutual connection between both proceedings is founded on the maxim that, ultimately, the administration concerns one debtor with one estate and one group of creditors.

[10855d] It is therefore logical that Article 31(1) InsReg states that, subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. The mutual duty to communicate (and to cooperate, see Article 31(2)) is a fundamental element of the Regulation and therefore liquidators in both main and secondary proceedings must be seen as principle agents for realizing the goals of the Regulation (see recital 2 and 3): 'The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively' and where insolvency of businesses 'also affects the proper functioning of the internal market', the need for coordination of the measures to be taken regarding an insolvent debtor's assets is in the hands of the liquidators. As explained in par. 10845, it should be emphasised that the duties of communication (and cooperation) are mutual, thus the main liquidator will also be obliged to inform the liquidator in secondary proceedings and to cooperate with him. The absence of guidance in Article 31 InsReg results in ad hoc and case-by-case communication and cooperation without 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. For this to achieve, in 2007 the European Communication and Cooperation Guidelines For Cross-border Insolvency have been created.

[10855e] The Insolvency Regulation's concept of EU-universality of the main proceedings is that, ultimately, the administration concerns one debtor with one estate and one group of creditors. This maxim dominates the mutual relationship between the main insolvency proceedings opened in one Member State and one or more secondary proceedings opened in another Member State in order to protect the local interests. In line with this maxim the Insolvency Regulation assigns the liquidator in the main insolvency proceedings with several intervening and coordinating powers. Once secondary proceedings opened in another Member State, the liquidator in the secondary proceedings is attributed exclusive (domestic) power over the assets situated in that Member State depriving the main liquidator of his domestic powers in this respect. This does not involve that the secondary proceedings are completely separated from the main proceedings and that the main liquidator has become broken-winged. On the contrary: as the main insolvency proceedings and the secondary proceedings are interdependent proceedings, the liquidator in the secondary proceedings has to fulfill his task under the dominance of the main liquidator. Coordination of the secondary proceedings and the main proceedings is essential for the effective realisation of the total assets. So Article 31(1) and (2) provides for the mutual duty to communicate any information which may be relevant to the other proceedings – within limits as to the extent of the details or national legislation – and to cooperate. In the words of German Professor Paulus, the model laid down (with additional details) in the Regulation is to be regarded as a road map (*Landkarte*), that needs an interpretation given in a cooperative (and not a contentious) way. The model of coordination between liquidators, on which the Regulation rests, aims to ensure the greatest possible efficiency in the administration of winding-up of this one debtor's estate. For an account of the terms communication, cooperation and coordination, and their mutual relation, see Geroldinger (2010), 239ff.

The provision relating to communication and cooperation itself leaves many open questions. Which information has to be shared? Should they contain copies of documents? Translations? Who will bear the costs? What is 'immediately' communicate? What is an 'early' opportunity for submitting proposals? What happens when the secondary liquidator does not take notice of such proposals of the main liquidator. Furthermore, the provision lacks a rule concerning how conflicts between the main and the secondary liquidator are to be decided. Close cooperation with trust between liquidators in main and secondary insolvency proceedings is indispensable in order to achieve an efficient and optimal administration of the insolvent debtor's assets.

[10855f] *European Communication and Cooperation Guidelines For Cross-border Insolvency*. Where Article 31 InsReg is vague, in practice the need was felt for a more clear 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. A group of practitioners, supported by several judges from the Netherlands, Belgium, Germany and Canada, have 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/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 EC Insolvency Regulation. These proposals were supported by INSOL Europe, the European insolvency practitioners organisation. The intensive and lively discussions have led to 'European Communication and Cooperation Guidelines For Cross-border Insolvency', drafted by Professor Miguel Virgós (Madrid, Spain) and myself. The Guidelines reflects the central principle of cooperation and coordination between insolvency proceedings pending in two or more Member States, where the text of the Regulation is left open. They too should serve as a realistic set of rules that should ensure as best as possible to make the Regulation work in practice, so that either liquidation or reorganisation of the debtor's estate is dealt with efficiently. In their final form (see Appendix XV and www.bobwessels.nl, blog: 2007-09-doc1.) the European Communication and Cooperation Guidelines For Cross-border Insolvency should function as a first step in a framework to realize 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. In individual cases, the Guidelines are to be seen as minimum requirements and may need to be supplemented by other measures designed to address particular conditions. The Guidelines are not a cookbook of recipes certain to succeed in all cases. They should inspire all actors to tailor solutions in specific cases. 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. It was envisaged that the Guidelines serve as a sound and well-tailored framework for cross-border cooperation and as a basic reference for individual liquidators, professional insolvency practitioners' associations, judges and other public authorities in all EU Member States and internationally. It will most likely be for national professional associations of insolvency practitioners to introduce or to strengthen ethical or professional rules concerning a relative new subject: cross-border communication and cooperation. These associations may consider the use of the Guidelines as a template in order to review their existing rules and to initiate a plan designed to address any deficiencies as quickly as may be practical within their authority. The Guidelines presuppose that liquidators act with the appropriate knowledge of the EC Insolvency Regulation and its applicability in practice, which would include the operation of these Guidelines. Only a good understanding of the model on which the Insolvency Regulation is build and an awareness of the interwoven relationship between main and secondary insolvency proceedings will bring businesses, which are in financial trouble, the benefits of the Insolvency Regulation. The CoCo Guidelines' proposals were sup-

ported 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. See Wessels and Virgós (2007).

[10855g] *Appreciation.* In general in legal literature the CoCo Guidelines have been welcomed by scholars (e.g. Hortig (2008), 258: ‘... it is to be expected that the Guidelines will develop to the European standard of cooperation’) and insolvency practitioners (such as Taylor, in: Pannen (ed.), 681: ‘highly laudable initiative’ and Louise Verrill (2009), 45: ‘[it is] important for the professions to be aware of and understand the need to adopt the CoCo Guidelines’). See also Geroldinger (2010), qualifying the CoCo Guidelines as a first and by all means very promising attempt (*‘Ein erster durchaus vielversprechender Versuch’*) and Zumbro (2010), 167 (*‘The CoCo Guidelines reflect best practices both inside and outside Europe’*). 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 (i) should form a binding Annex to the Insolvency Regulation, or (ii) should form a national non-binding ‘Kodex’ to add to an existing set of national ethical and professional rules for insolvency practitioners, (iii) should function as a standard yardstick to measure an insolvency office holder’s national duties and obligations and therefore his or her liability As suggested in the Explanation, para. 36, to the CoCo Guidelines, or (iv) may form a first step to a uniform ‘European’ standard for insolvency practitioners. See for the second suggestion: Ehrlicke (2007); Ehrlicke (2008). The non-binding Kodex-idea is supported by Schmüser (2009), 171ff. In a subsequent publication Ehrlicke however supports the idea of including the CoCo Guidelines into a (binding) Annex to the Insolvency Regulation, see Ehrlicke (2010). For the fourth suggestion, see Hortig (2008), 246; Geroldinger (2010), 30. 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 Article 288 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 Article 288 TFEU (*‘Recommendations and opinions shall have no binding force’*).

Bi-lateral agreement. I have seen one bi-lateral example of Guidelines, which carry the spirit of the CoCo Guidelines (although not referring to these), but contain more detail, especially regarding the matters of Articles 20, 32 and 40 In-

sReg. On 7 May 2010, the National Council of Court-Appointed Administrators and Liquidators (*Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires*), which represents French practitioners in Paris, concluded an 'Accord' in the context of a '*Guide de Bonnes Pratiques*' (a treaty of cooperation in the context of a Best Practice Guide) in Rome with Italian practitioners. These were represented by the National Bar Association Council (*Consiglio Nazionale Forense*) and the National Chartered Accountants Council (*Consiglio Nazionale Dei Dottori Commercialisti E Degli Esperti Contabili*). The Accord is intended to optimise the handling of debts and assets in cross-border proceedings involving France and Italy. It contains certain details and solutions for informing creditors involved in the various proceedings, handling the lodging of claims and optimising the handling of assets. It also provides for effective mutual consultation between the liquidators in the main proceedings and territorial proceedings regarding the solutions envisaged, whether these proceedings are a restructuring or a liquidation. See Cherubini, *eurofenix* Summer 2011, 32ff.

[10855h] 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 be addressed in the following paragraphs.

[10855i] See on the basic concept of 'judicial comity' para. 10115b. Although in the text of Article 31 InsReg courts are not made subject to duties of cross-border communication or cooperation, the CoCo Guidelines – may I disclose: with strong support of the participating judges – also provide for recommendations to courts. For a debate, see H. Vallender, *Judicial Cooperation with in the EC Insolvency Regulation*, available via http://www.justiz.nrw.de/WebPortal_en/projects/ieei/documents/public_papers/judicial_cooperation.pdf (visited 14 April 2011); Czaja (2009), 270ff; Hrycaj (2011), 7ff. See CoCo Guideline 16. In German literature it has been expressed that the CoCo Guidelines could be helpful to include cross-border cooperation by courts in Article 31, to provide a proper legal basis for such cooperation. See e.g. Vallender and – though expressing principle objections to cross-border cooperation of courts – Ehrlicke (2007), 2395; Ehrlicke (2008), 167.

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 Amster-

dam (The Netherlands) and Munich (Germany). 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 Jongeneel (2009), 97ff. Other international insolvency cases provide examples of cross-border communication in Europe, e.g. 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). In February 2009, the CoCo 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'). See www.bobwessels.nl, blog 2009-04-doc1. See too Zumbro (2010). 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. For a recent overview of Cross-Border Insolvency Orders and Protocols, see www.amercl.org/resources.cfm (go to: Appendix H) (visited 27 April 2011).

[10855j] *Letters of request*. The judgment of the High Court of Justice (Ch. Div) 11 February 2009 (*Nortel Network*) is discussed in para. 10846a. The Court held: '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.' On the question whether this decision should be transformed into a Guideline, and if so, in which form, see Wessels (2010m).