**A Critical Analysis of the CoCo, JudgeCo or JIN Guidelines (collectively the “Guidelines”)**

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12. **Introduction**
13. Various factors have prevented the kind of seamless regime that exists for international commercial arbitration from being replicated in the context of cross border restructuring and insolvency (CBRI) proceedings. These include divergences in how different jurisdictions treat the allocation of creditors and stakeholders’ claims in such collective proceedings. Sensitive policy and political considerations also sometimes come into play, as a major corporate insolvency could have a wide-reaching impact on the economy, social stability and labour relations.[[1]](#footnote-1)
14. There is, however, broad acceptance that co-operation and co-ordination between courts and practitioners across jurisdictions will help to minimise additional transaction costs that arise when a restructuring or insolvency proceeding has cross-border elements.[[2]](#footnote-2) There should also be little debate that effective co-operation and co-ordination between the relevant courts involved in a CBRI will help to preserve enterprise value and maximise recovery, increase transparency, and minimise costs.
15. The European Communication and Cooperation Guidelines for Cross Border Insolvency (the “**CoCo Guidelines**”), the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines (“**JudgeCo Principles**”), and the Judicial Insolvency Network Guidelines (the “**JIN Guidelines**”) (collectively referred to as “**Guidelines**”), all seek to encourage and facilitate such co-operation and co-ordination via the implementation of protocols. This short paper seeks to critically examine the effectiveness of the Guidelines in achieving this purpose.
16. International insolvency protocols are not a recent innovation- they were introduced close to three decades ago with great success in the *Maxwell[[3]](#footnote-3)*case on an *ad hoc* basis, out of the pragmatic need to coordinate two *primary* insolvency proceedings in the UK and the US.[[4]](#footnote-4) Since then, courts have approved protocols in cases involving concurrent plenary proceedings in multiple jurisdictions, or when there is a plenary main proceeding in one or more jurisdictions accompanied by ancillary proceedings in one or more additional jurisdictions.[[5]](#footnote-5)
17. Building on the positive experiences from the use of international insolvency protocols in individual cases, the Insolvency Committee of the International Bar Association first introduced the Cross-Border Insolvency Concordat in 1995 (the “**Concordat**”), which was then followed in 2000 by the American Law Institute’s ‘Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases’ (the “**ALI Guidelines**”). It has been observed that the ALI Guidelines have been very influential in the US and are routinely incorporated by reference in subsequent cases, in whole or in part, into protocols approved by the US Courts.[[6]](#footnote-6)
18. The Guidelines are more recent innovations:
19. The CoCo Guidelines were drafted by Professor Bob Wessels of Leiden University and Professor Miguel Virgos of Universidad Autonoma de Madrid, and codify best practices and suggest non-binding provisions for protocols, particularly in respect of insolvency proceedings where the EU Insolvency Regulations are the applicable law. The 18 CoCo Guidelines provide a model framework for communication and cooperation in cross-border CBRI proceedings, and Appendix I contains a ‘Checklist Protocol’, which enumerates and describes certain basic requirements and specific provisions to be addressed in cross border insolvency protocols. The Coco Guidelines have been incorporated into successful protocols in the US, Canada and the UK.[[7]](#footnote-7)
20. The JudgeCo Principles were jointly developed by the Leiden Law School and the Nottingham Law School. They contain 26 principles and aim to strengthen efficient and effective communication between courts in EU Member States in cross-border insolvency cases. They relate to, among other things, case management of courts and the equal treatment of creditors, as well as the notifications and authentication of documents.[[8]](#footnote-8)
21. The JIN Guidelines are the most recent innovation. Thy are the result of the concerted and collective effort at judicial diplomacy among the participating judiciaries of the inaugural JIN conference in October 2016. The JIN Guidelines have been described as possibly a historic watershed in the development of Asia-Pacific judicial diplomacy.[[9]](#footnote-9) The JIN Guidelines set out the key requirements to be embodied in a protocol or order of court relating to communication and cooperation between courts, insolvency representatives (such as liquidators, administrators and trustees), and other parties to a cross border insolvency proceedings.[[10]](#footnote-10) There are 14 guidelines for the establishment for such a protocol or court order.
22. The Guidelines build on the UNCITRAL Model Law on Cross Border Insolvency (the “**Model Law**”), which is itself based on a number of key but broad principles encouraging cooperation and coordination among both courts and insolvency representatives in different jurisdictions to maximise creditor recovery through the fair and efficient administration of the insolvency estate.[[11]](#footnote-11)
23. This short paper is organised in the following manner: (i) Section II below discusses some of the key features and benefits of the Guidelines with reference to specific principles contained in the relevant Guideline; (ii) Section III then critically evaluates the likely impact of the Guidelines on cross-border insolvency proceedings; (iii) Section VI concludes with some observations.
24. **Key Features and Benefits of the Guidelines**
25. **Costs and Efficiency**
26. Creditors involved in CBRI proceedings demand a realistic reduction of costs in insolvency administration and increase asset recovery. Given that the Guidelines have the stated aim of optimising costs efficiency in cross-border restructuring and insolvency cases, it is important to assess the Guidelines on the likelihood that they will achieve this purpose.
27. Given the number of parties involved in a CBRI proceedings, the process of drafting an international insolvency protocol can be complex and involve extensive multi-party negotiations. The Guidelines serve as a useful springboard to these negotiations by providing certain default and commonly accepted principles which can form the basis for the implementation of a protocol.
28. This is especially useful in lower value cases involving smaller companies, who may have less available resources to support the cost of negotiating the protocol. It has been observed by Judge Christopher Sontchi of the United States Bankruptcy Court for the District of Delaware that the JIN Guidelines will ‘*lead to more efficient and prompt coordination and cooperation in many cases, but especially in those smaller cases that in the past have not had the resources to pursue expensive and lengthy negotiations and hearings over a cross-border protocol*’.[[12]](#footnote-12) Judge Sontchi’s observations are especially pertinent, given that cases involving smaller companies may not necessarily mean that the issues are any less complex or cross-border in nature. The Guidelines therefore perform an extremely useful role in bridging the gap between the need for a protocol and the desire to keep costs manageable.
29. However, one cannot escape from the fact that some upfront costs will have to be incurred in order to implement the protocol, in order that the relevant parties involved in the CBRI proceedings can then reap the benefits in the longer term (including reduced overall costs).[[13]](#footnote-13) Indeed, the Guidelines themselves contemplate court-driven proceedings, notwithstanding that this may drive up costs, at least in the beginning. Guideline 2 of the JIN Guidelines provides that a court intending to apply the JIN Guidelines *must* issue a protocol or order, upon application by the parties or pursuant to a judicial direction. This entails upfront costs being incurred by the relevant parties, who will need to take out the necessary application(s) to Court for the implementation of the protocol.
30. As insolvency practitioners, counsel and the Courts themselves gain more familiarity with the Guidelines and the use of such protocols, this should help to drive down the upfront costs. As more protocols are implemented in CBRI proceedings these will serve as useful precedents for future cases, which can either be adopted in full or with the necessary modifications. Judges engaged in court-to-court communications with one another will also build trust and gain increased familiarity with one another, which is likely to make subsequent interactions smoother and more efficient. All of these will help to reduce costs and increase the efficiency of proceedings for the approval of protocols.
31. **Transparency and Due Notice**
32. Another of the key feature of the Guidelines is the emphasis on transparency and the need of timely disclosure of information about legal proceedings.
33. For instance, Guideline 7 of the CoCo Guidelines sets out the information that liquidators are obliged to disclose to other liquidators, including about the existence and status of the proceedings in which they have been appointed. They are also required to provide periodic updates to the other liquidators. Principle 18 of the JudgeCo Principles obliges the relevant court to ensure that all foreign creditors are given sufficient notice of any proceedings commenced, while Principle 19.1 provides that where there are parallel proceedings, each insolvency practitioner should obtain court approval for any action affecting assets or operations in that forum if required by local law. Likewise, Guideline 9 of the JIN Guidelines provides that a court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. These guidelines build on existing provisions in the Model Law, including Article 14 (Notification to foreign creditors of a proceeding under the laws of the enacting state).
34. The assurance that another party will not be allowed to “*steal a march*” by surreptitiously commencing foreign proceedings helps to increase trust among the parties involved in a CBRI proceeding. Timely disclosure enables all stakeholders, including foreign creditors, to be adequately represented before the Court. It also allows the relevant Court to have a holistic appreciation of the full corporate and creditor profile of the restructuring/insolvent company, which leads to better case management and judicial decision-making. Indeed, it may also act as a catalyst for Court to consider the implementation of a protocol, given the involvement of foreign creditors and proceedings.
35. The principles relating to transparency and notification are complemented by equal emphasis in the Guidelines on equality of arms, which stipulate there should be no substantial disadvantage to any party (including any foreign creditor) in terms of the ability to present its case: see for *e.g.*, Principle 6 of the JudgeCo Principles.
36. **Right of Audience for Foreign Representatives**
37. CBRI proceedings often involve transnational and inter-connected issues of foreign and local law, and the ability of foreign legal counsel and insolvency practitioners to appear and be heard before a court without necessarily submitting to the court’s jurisdiction is critical.
38. Guidelines 10 and 11 of the JIN Guidelines allow a court to authorise foreign counsel to appear before it, including to submit on foreign parallel proceedings and any specific matter without becoming subject to the court’s jurisdiction.
39. The liberalisation of the right of audience of foreign counsel improves the quality of information available to the relevant Court, who will benefit from hearing first-hand submissions by foreign counsel, particularly on matters pertaining to the foreign proceedings and foreign law. It also deepens the level of collaboration of the different teams of legal counsel representing a party across different jurisdictions. The ability of local and foreign lawyers to appear jointly before the court is likely to facilitate the efficient and effective delivery of legal submissions, assist the court in resolving any cross-jurisdiction issues, and reduce the costs associated with filing expert reports and affidavits to formally adduce evidence on foreign law.
40. Allowing foreign counsel audience rights may raise questions about whether foreign counsel is subject to the professional regulations of the jurisdiction of the Court.[[14]](#footnote-14) Such concerns have long existed in the field of international arbitration[[15]](#footnote-15), where it is commonplace for counsels from different jurisdictions to appear and submit before the arbitral tribunal. The concern should, however, not be overstated given that the involvement of foreign counsel in CBRI proceedings is likely to be limited to submitting on issues relating to foreign proceedings and foreign law, and not participating in matters such as witness preparation and document disclosure (where the issue of counsel ethics is most keenly felt in the context of international arbitration). If necessary, the Court can also extract an undertaking from the relevant foreign counsel seeking a right of appearance that he/she owes an over-riding duty to the Court. A breach of the undertaking can lead to the Court disregarding foreign counsel’s submissions (or placing less weight), and also undermine his/her credibility with the Court (including for future proceedings).
41. **Critical Assessment and Likely Impact**
42. While the utility of the Guidelines is obvious, it is important not to overstate their importance. This section discusses some of the limitations, in the context of an overall assessment of their likely impact on CBRI proceedings.
43. **The Question of Adoption**
44. One of those limitations is the question of adoption. While the CoCo Guidelines and JudgeCo Principles are applicable to CBRI proceedings in European Union member states, outside of Europe there has not been widespread adoption of similar principles of coordination and cooperation in CBRI proceedings (save for a few notable exceptions, such as the United States).
45. In 2016, the JIN Guidelines were created with the specific intention that they be adopted into legal systems and court processes. The preamble of the JIN Guidelines also stipulate that they should ‘*be considered at the earliest practicable opportunity*’. As of the date of this paper, sixteen (16) jurisdictions have formally adopted the JIN Guidelines.[[16]](#footnote-16) Of these, all but three (the Seoul Bankruptcy Court, the Netherlands and Brazil) are common law jurisdictions. The question is whether the hitherto limited adoption of the JIN Guidelines, might limit the widespread adoption of protocols in CBRI proceedings.
46. In this regard, it is equally important to focus attention on the fact that the jurisdictions who have adopted the JIN Guidelines include: the US Bankruptcy Courts for the District of Delaware, Southern District of New York, the Southern District of Florida, the Southern District of Texas, the Supreme Court of Singapore, the Supreme Court of Bermuda, the Chancery Division of England & Wales, the Eastern Caribbean Supreme Court, the Grand Court of the Cayman Islands, the Federal Court of Australia and the District Court Midden-Netherlands.
47. All of these courts may be said to have the potential to be “*nodal jurisdictions*” or courts of “*control countries*”[[17]](#footnote-17), in the sense that they are located in important financial, legal or economic centres where major cross-border restructurings are likely to take place (and therefore they are likely to host the central proceeding for a given case or at least ancillary proceedings). Many of these courts are also located in jurisdictions with laws that are conducive for centring a CBRI proceeding, thus making it yet more likely that most major cross-border restructurings will take place in one or more of these jurisdictions.
48. This is an important development for a few reasons:
49. Given that many cross-border restructurings will take place in one or more of these jurisdictions, and given the JIN Guidelines encourages the early adoption of cross insolvency protocols, this will enhance the amount and quality of direct communication between the docketed insolvency judges in these jurisdictions. This is likely to lead to the deepening of working relationships among these judges. The increase degree of trust and coordination among the *judiciary* is likely to, in turn, lead to increased communication and negotiations among the professionals and advisors involved as well. Over time, this virtuous cycle is likely to lead to cross-border insolvency protocols being implemented more frequently, and also make the interactions between the different courts and professionals involved smoother and more efficient.
50. Where a particular CBRI proceeding involves a jurisdiction or court that has not adopted the Guidelines, the likely involvement of the courts of the jurisdictions which have adopted the Guidelines may nevertheless lead to the establishment of *ad hoc* protocols (possibly at the encouragement or behest of the JIN-empowered courts).[[18]](#footnote-18) As these non-JIN-empowered courts gain increased confidence and familiarity with the use of protocols in CBRI proceedings, it is hoped that they too will formally adopt the JIN Guidelines. In that regard, it is worth noting that there also does not appear to be any reciprocity requirement in the JIN Guidelines – this will facilitate quicker and more widespread adoption given that such a requirement would entrench a perceived first-mover disadvantage by creating potential pitfalls associated with timing and impasse (‘After you.’ ‘No, no, after you’’).[[19]](#footnote-19)
51. With economic prospects across the Asia-Pacific increasing, the JIN Guidelines are poised to play an important role in cross-border restructurings, particularly in countries with compatible legal traditions, such as the United States, Singapore, Canada, Bermuda and Australia. The adoption by the Seoul Bankruptcy Court of the on 28 June 2018 is also a positive sign, as it hints that the divide between civil and common law jurisdictions is likely to be bridged in view of the geo-economic significance of the JIN Guidelines.[[20]](#footnote-20) Japan was another civil law jurisdiction who had nominated four observers to the JIN, and it will be significant if Japan too adopts the JIN Guidelines.
52. The proverbial tipping point may have been crossed, given that the Guidelines cover jurisdictions ranging from the EU member states, many of the key offshore jurisdictions, and important nodal jurisdictions such as the various US bankruptcy courts, the English courts, Singapore, the Netherlands, Canada and Australia. It is likely that protocols will be more commonly adopted in future CBRI proceedings, and this will be due in no small part to the impact of the Guidelines.
53. **The Disincentives of Professionals**
54. Another potential obstacle to the widespread adoption of protocols in CBRI proceedings is thought to be the natural desire of professionals – lawyers, accountants, investment bankers and others to seek substantial opportunities for professional employment in the jurisdictions where they practise.[[21]](#footnote-21) At the very least, this may bar the early adoption of protocols before tactical considerations make it difficult for parties to agree.[[22]](#footnote-22)
55. This concern is overstated. For one, professionals are ethically and commercially circumscribed by the need to put their clients’ interest first, and it will be difficult to justify a refusal to apply the principles under the Guidelines particularly if it becomes commonly accepted practice. At the same time, judicial encouragement to focus on international cooperation will also help to overcome difficulties of coordination among professionals who are inclined to consider tactical and strategic advantages for their clients and who lack a broad vision of the needs of the case as a whole.[[23]](#footnote-23) Such judicial encouragement is all the more likely to be present in light of the positive impact and adoption of the Guidelines. Once consideration of the principles in the Guidelines is legitimised as part of the routine early case management of a CBRI proceeding, it will be difficult for professionals to stand in the way.
56. **No Impact on Substantive Law**
57. It must be accepted that the Guidelines are supplemental to the law in each jurisdiction and are designed to address only the practical and procedural aspects of cooperation and communication across jurisdictions; they do not impact substantive law. As such, the Guidelines cannot resolve issues such as the priority in the distribution of assets or the avoidance of transactions, nor are they intended to. This follows the lead of the Model Law in not seeking to attempt the harmonisation of substantive domestic law.
58. It should be emphasised that the fact that two jurisdictions may have different substantive laws is usually no bar to the relevant courts communicating and cooperating as contemplated under the Guidelines. In fact, one might argue that in such cases it is even more critical that there be close cooperation between the courts and the practitioners across jurisdictions. In the much-discussed *Nortel[[24]](#footnote-24)* case, after the Nortel group had sold its assets for USD 7.3 billion, there was disagreement between the parties on the method of allocating the proceeds between the various Nortel entities, given that the group had subsidiaries in more than 100 countries. Despite both the Ontario Superior Court of Justice (Commercial List) and the US Bankruptcy Court for the District of Delaware coming from common law traditions, they nevertheless existed differences in their substantive laws governing this issue. A protocol for communication and cooperation between was entered into and approved by both courts, which provided for a joint trial between the two courts. Of particular note is that the protocol allowed for the US and Canadian to communicate after trial to determine whether consistent decisions can be delivered by both courts, and whether the decisions can be released at the same time. Ultimately, consistent decisions were released at the same time by both courts.
59. The ambitious task of harmonising substantive domestic law is unlikely to be achieved anytime soon. Even among common law jurisdictions (where judicial decisions can be persuasive across jurisdictions), this can be challenging. However, by encouraging active and early communication and cooperation between courts, what the Guidelines can do is to minimise the risks of inconsistent decisions. Even if the substantive domestic laws dictate that inconsistent decisions will have to be rendered by the relevant courts, coordinated steps can be taken to manage any consequential impact on the stakeholders involved, including by giving them a chance to participate in any relevant hearings and be promptly apprised of the outcome. Active communication and cooperation between the courts and the practitioners involved will not only save time and costs, it can help to ameliorate any sense of injustice or unfairness arising out of unexpected outcomes because of differences in substantive domestic laws.
60. **Conclusion**
61. Protocols are not only likely to remain an important part of international insolvency practice, they will also almost certainly evolve and increase in both importance and complexity as CBRI proceedings themselves become more complex.[[25]](#footnote-25) For a protocol to be successful, cooperation and a high degree of mutual trust among the courts and practitionerss involved is critical. That was true in the *Maxwell* case – where it was evident from the respective judgments of the UK and US Courts that there was a spirit of mutual trust and dignity – even before the Guidelines were enacted, and it remains true today.
62. While the Guidelines and any resulting protocol implemented are ultimately procedural in nature, by providing the framework and opportunities for Courts to work closely together, they lay the groundwork for cooperation and coordination on substantive matters as well, and will ultimately lead to greater harmonisation of substantive law across different jurisdictions.
63. The effect of this is likely to be more pronounced in key nodal jurisdictions such as the US, the UK, Singapore and certain offshore jurisdictions, but it will be a matter of time before the other jurisdictions (including many civil law jurisdictions) follow suit. If that happens, the Guidelines (being soft law instruments) would have achieved their objective.
64. **Bibliography**

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2. *Re Nortel Networks Corporation 2015 ONSC 2987*

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2. The official website of the Judicial Insolvency Network: <http://jin-global.org/jin-guidelines.html>
1. *James Spigelman, "Cross-Border Insolvency: Cooperation or Conflict?" (2009), Australian Law Journal, Vol. 83, No. 1, pg 6* [↑](#footnote-ref-1)
2. *Ibid* [↑](#footnote-ref-2)
3. *Maxwell Communication Corp v. Société General (In re Maxwell Communications Corp.),* 170 BR 800 [↑](#footnote-ref-3)
4. See Evan D Flaschen and Ronald J Silverman, ‘Cross-Border Insolvency Cooperation Protocols’ (1998) 33 Texas International Law Journal 587 at 591

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5. Paul H Zumbro, "Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool" (2010) Business Law International (“**Zumbro**”) at 157-158 [↑](#footnote-ref-5)
6. See Zumbro at 166 [↑](#footnote-ref-6)
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10. Lee & Ip at 394 [↑](#footnote-ref-10)
11. Jackson, Sheryl, and Rosalind Mason, "Developments in court-to-court communications in international insolvency cases." University of New South Wales Law Journal, The 37, no. 2 (2014) at pg 6 [↑](#footnote-ref-11)
12. These observations were made by Judge Christopher Sontchi of the United States Bankruptcy Court for the District of Delaware: see Lee & Ip at 400 [↑](#footnote-ref-12)
13. Jessica Walker and Annabelle Trotter, “What has the Judicial Insolvency Network Done for Cooperation between Courts in Multi-Jurisdictional Insolvencies” (2017) 14 International Corporate Rescue 431 [↑](#footnote-ref-13)
14. See for example Annex A(v) of the JIN Guidelines which stipulates this as a matter for the Court’s consideration when making an order permitting foreign counsel to appear [↑](#footnote-ref-14)
15. See for e.g., Iris Ng, Rethinking Counsel Ethics in International Arbitration, Kluwer Arbitration Blog, December 12 2019 [↑](#footnote-ref-15)
16. See <http://jin-global.org/jin-guidelines.html>

 [↑](#footnote-ref-16)
17. Jay Lawrence Westbrooke, “Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court”, 96 Tex. L. Rev. 1473 (“**Westbrooke**”), 1479 and 1480 [↑](#footnote-ref-17)
18. A recent example of this would be the proceedings brought by the liquidators of Halifax Investment Services Pty Ltd (in liquidation) (Halifax Australia)and Halifax New Zealand Limited (in liquidation) (Halifax NZ), which involved the Federal Court of Australia and the New Zealand High Court sitting together in a hearing and delivering contemporaneous judgments and orders. While the Federal Court of Australia has adopted the JIN Guidelines, the Court of New Zealand have not. [↑](#footnote-ref-18)
19. Lee & Ip at 399 [↑](#footnote-ref-19)
20. Lee & Ip at 406 [↑](#footnote-ref-20)
21. See Westbrooke at 1489 [↑](#footnote-ref-21)
22. *Ibid* [↑](#footnote-ref-22)
23. Wesbrooke at 1491 [↑](#footnote-ref-23)
24. *Re Nortel Networks Corporation 2015 ONSC 2987* [↑](#footnote-ref-24)
25. Zumbro at 169 [↑](#footnote-ref-25)