Global Insolvency Practice Course 2023 – Short Paper
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Short Paper Topic 3: A critical analysis of the CoCo, JudgeCo or JIN Guidelines

Title: The JIN Guidelines and Court to Court cooperation and communication: A bridge to modified universalism

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Introduction

As recognised in the Preamble to the Model Law[1], one of the central objectives and functions of the Model Law is to promote "*[c]ooperation between the courts and other competent authorities….in cases of cross-border insolvency*"[2]. This paper focuses on that objective and considers whether its achievement, and by extension the advancement of modified universalism, has been accelerated by the release of the Judicial Insolvency Network's guidelines (**JIN Guidelines**) in 2016.

As will be demonstrated, the JIN Guidelines support the deepening of judicial acceptance of the benefits of cooperation with other courts and provide a facilitative model by which cooperation and direct communications may be achieved. The JIN Guidelines create a bridge for the judiciary to allow it to directly support the achievement of each of the objectives of the Model Law and greater harmonisation in the management of cross-border insolvency. As Prof. Jay Westbrook remarks, it is modified universalism that is at the heart of the Model Law[3] and so by supporting the achievement of the objectives of the Model Law, modified universalism is further advanced.

[1] UNCITRAL Model Law on Cross Border Insolvency (**Model Law**)
[2] Ibid Preamble (a)
[3] Westbrook, J, Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of Central Court Texas Law Review Vol. 96 p1473 at p1478

Court-to-Court Communication and Cooperation – The Principles

Article 25 of the Model Law requires courts to cooperate to "*the maximum extent possible*" with foreign courts. Article 27 provide a non-exhaustive list of the potential forms that cooperation may take, while permitting other forms of cooperation that might be deemed appropriate. As the Guide to enactment of the Model Law[4] (**Guide**) makes clear, the grant of authority to courts in jurisdictions that have adopted the Model Law to cooperate with foreign courts is not dependent upon either the recognition of foreign proceedings having occurred or even being available in the circumstances. The ability to cooperate is available wherever to do so would assist with achieving the objective of the Model Law in equipping states with "*a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency*"[5].

What cooperation, in the context of article 25, is has been a matter for judicial consideration, for example in the Australian decision in *Re Chow Cho Poon (Private) Ltd*[6] in which Barrett J concluded that "[w*]hat art 25 envisages is some form of collaboration, joint enterprise or agreed parallel or complementary action*"[7]. This highlights that these provisions do not envisage there being a single decision on legal issues or one court deferring to another. To have expected this would have created impediments from a national sovereignty perspective and likely have prejudiced the wide-adoption of the Model Law.

The provisions in the Model Law concerning court-to-court cooperation have been described as '*equally significant*"[8] as the recognition and relief provisions in the Model Law. However, the concept of courts cooperating together to achieve an outcome is not a new one or indeed a creation of the Model Law. Many jurisdictions had, and still have, legislation permitting cooperation with foreign courts, for example, section 581 of the Australian *Corporations Act 2001* (Cth) or section 426 of the *Insolvency Act 1986* in England and Wales.

[4] UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency
[5] Ibid at section I.A.1 p19
[6] (2011) 80 NSWLR 507, (2011) 249 FLR 315, (2011) 29 ACLC 11-022
[7] Ibid. at [59]
[8] Atkins, S, Enhancing efficiency and rescue outcomes in Cross-border Insolvency matters: The role of multilateral cooperation protocols and judicial diplomacy International Corporate Rescue, Volume 20, Issue 3, 2023

Long before the Model Law was developed, the complexities and risk of fragmentation of value arising from the insolvency of multinational companies caused insolvency professionals and courts to explore ways to work together to create a harmonious, or at least more harmonious outcomes with a view to reducing costs and improving outcomes for all stakeholders. As Lord Hoffman stated in the case of McGrath v Riddell[9]:

"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution".

Where insolvency proceedings across two or more jurisdictions occurred and the need for foreign court to cooperate was identified, it would be for the stakeholders to develop an effective protocol and seek acceptance of it by the relevant courts. The most notable early example of this was in the collapse of Maxwell Communication Corporation which involved parallel proceedings in the UK and US.

However, an effective legislative framework outside of the Model Law (as implemented in a jurisdiction) allowing for judicial cooperation is not always available and even where there is, there can be hesitance or reluctance on the part of judges to communicate with other judges[10] or understand how the need to cooperate can be balanced with the role of the judge to determine disputes before it and matters of procedural fairness. As the Honourable Justice James Spigelman described it in 2010, there was a "*complete disconnect*" between the manner in which global corporations conduct their business and the restrictions imposed on relevantly, the courts and the judiciary to act in a similar manner[11].

The provisions of the Model Law marked a significant watershed moment in respect of when and for what purpose judges might cooperate to achieve efficiencies and consistency when dealing with global corporations. It brought the power of cooperation

[9] [2008] UKHL 21 at [30]
[10] See for example comments made in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)
[11] Spigelman J, "Cross Border Issues for Commercial Courts: An Overview" paper for the Second Judicial Seminar on Commercial Litigation, Hong Kong, 13 January 2010 at p17

between courts, and by extension between individual judges, into sharp focus as a key tool in the management of cross-border insolvency.

The Model Law is not prescriptive about how this powerful tool can or should be used, and how in practical terms courts of different jurisdictions may go about cooperating or communicating. It is for the parties to prepare a draft framework for cooperation and seek relevant orders from the court to adopt it in a specific circumstance. To assist with this exercise, organisations began to formulate and publish multilateral guidelines supplementing the Model Law and to which parties could have regard to in preparing a framework. These included the guidelines published jointly by the American Law Institute and the International Insolvency Association[12] and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation[13] published in 2009. However, the adoption of protocols remained subject to judicial discretion and there was a paramount need for a judiciary that was comfortable with using these powers.

It was with this in mind that in 2016 judges from ten jurisdictions[14] came together to form the Judicial Insolvency Network and devised their own set of guidelines being the Guidelines for Communication and Cooperation between courts in Cross-Border Insolvency Matters (**JIN Guidelines**).

The JIN Guidelines

The JIN Guidelines set out six specific objectives, which include the efficient and timely coordination and administration of parallel proceedings[15], the maximisation of the value of the debtor's assets, the sharing of information to reduce costs and the avoidance or minimisation of litigation, cost and inconvenience to the parties in parallel proceedings. What is immediately apparent are the similarities between the objectives of the JIN Guidelines and the objectives of the Model Law itself, highlighting the interconnection between these initiatives. However, it is noteworthy that the JIN Guidelines do not expressly refer to the Model Law. This was presumably to avoid limiting their potential application to only countries who had adopted the Model Law into their domestic legislation.

[12] *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*
[13] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) | United Nations Commission On International Trade Law accessed on 9 July 2023
[14] Including North America, South America, Europe, Asia, Australia and the Caribbean
[15] Which for the purposes of the JIN Guidelines means "*cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction*"

The JIN Guidelines comprise 14 guidelines together with an Annexure A which relates to joint hearings. The JIN Guidelines are framed as a best practice model, and as the introduction to the JIN Guidelines makes clear, they "*should be implemented in each jurisdiction in such manner as the jurisdiction deems fit*"; and "*are not intended to be exhaustive*". The JIN Guidelines are now supplemented by the Modalities of Court–to-Court Communication published by the Judicial Insolvency Network in 2019 to govern the specific mechanics of communications between courts and provide for the making of arrangements regarding the manner, time and language of any communication.

The JIN Guidelines (together with the Modalities) are procedural guidelines[16] for the court, directing that a court should consider whether and how to implement the JIN Guidelines in specific cases and where they have the power to do so, direct the parties to make the necessary applications to the court to facilitate the adoption of the guidelines or an equivalent protocol. According to guidelines 1 and 2, the role of the court is to encourage the parties to adopt a specific coordination protocol to be approved by court order. Guideline 3 assists with the achievement of the objectives and provides that any protocol or order "*should promote the efficient and timely administration of Parallel Proceedings*" and "*[t]o the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings*".

Guideline 4 provides important protections clarifying that where the JIN Guidelines are implemented, they are not intended to interfere with or derogate from the exercise of jurisdiction by a court or the rules or ethical principles by which an administrator[17] is bound in that jurisdiction. Further, the JIN Guidelines do not, among other matters, confer or change jurisdiction and alter substantive rights. The JIN Guidelines expressly allow a court to refuse to take an action that would be "*manifestly contrary to the public policy of the jurisdiction*". These provisions allow courts to retain complete discretion to determine matters and communicate and cooperate with courts of other countries only in a manner that is consistent with the laws, principles and accepted standards of that jurisdiction.

Guidelines 7, 8 and 9 deal with communications between courts, allowing courts to receive communications from a foreign court and respond directly to them, including in

[16] as clarified specifically by Guideline 5
[17] Which for the purposes of the JIN Guidelines includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in possession in a reorganisation or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

accordance with Guideline 7(iii) by "*participating in two-way communications with the other court, by telephone or video conference call or other electronic means".* Provided that the communications satisfy the broad objectives specified in guideline 7, there is no limitation on what the communication may concern. Courts may also cooperate by sharing orders, judgments, opinions, and reasons for decision (among other documents) to improve efficiencies in the management of all aspects of the parallel proceedings. Guideline 8 supplements this by establishing a number of procedural safeguards for the parties involved, including the right to be present when judges are participating in two-way communications and for such communications to be recorded and transcribed.

Guidelines 10 and 11 are important to establish standing for a person to appear and be heard by a foreign court, and provided that it is permitted by the local law and otherwise appropriate, allows them to do so without submitting to the jurisdiction. This is an important point clarified by the JIN Guidelines, particularly where representatives in parallel proceedings, or potential parallel proceedings are being otherwise encouraged to engage with foreign courts at the "*earliest practicable opportunity*"[18]. This may well be before all in the issues in the insolvent estate are fully understood and the risk of inadvertently submitting to a foreign jurisdiction may discourage a party from engaging with a foreign court or establishing a protocol for court-to-court cooperation. This approach is consistent with the approach taken in the Model Law.

Guidelines 12 and 13 allow for the recognition and acceptance as authentic of laws, rules and orders from the other jurisdiction.

Annexure A of the JIN Guidelines specifically allows for joint hearings between two courts and the protocol that may be adopted to facilitate such hearings while allowing each court to retain sole and exclusive jurisdiction over its own proceeding and decision.

The JIN Guidelines in practice

The JIN Guidelines have now been formally endorsed by 16 courts in 12 jurisdictions. Courts have generally adopted the JIN Guidelines by way of a practice note or a similar procedural document. For example, in the Supreme Court of New South Wales in Australia, the JIN Guidelines have been adopted by way of Practice Note SC EQ 6[19]

[18] JIN Guidelines Guideline 1
[19] Supreme Court of New South Wales Practice Note SC EQ 6 Supreme Court Equity Division – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives

which annexes the text of the guidelines. The Supreme Court of NSW Practice Note states: "*The Court adopts the JIN Guidelines…and...will be guided by them in cases involving cross-border insolvency and restructuring of one of more companies situated in different jurisdictions".*

As Gabriel Moss QC commented in his 2017 article[20] the practice notes in many instances are strictly '*facultative*' in that they endorse the use of the JIN Guidelines (and in some cases, other examples of multilateral protocols) rather than mandate their use. It remains within the power of the parties to draft and agree the protocol for a particular case. However, the benefits of formal endorsement in this manner include that the court is directed to consider the implementation of the Guidelines[21], noting in particular the use of the word *'should'* in this regard. The endorsement in a court practice direction also prompts representatives in insolvency cases with a cross-border aspect to consider a protocol early and provides a guide for the parties as to what the courts may consider appropriate or acceptable. In countries where the JIN Guidelines have been adopted, it provides a consistent starting point for cooperation.

The manner by which courts have been able to endorse the JIN Guidelines is in itself significant. The endorsement of the JIN Guidelines has not needed to be by way of legislative consideration and assent (for example, as is required to implement the Model Law). The guidelines are rather adopted as a form of so called 'soft-law'. In order to further embed the principles in common law jurisdictions, certain judges have gone to substantial effort to deliver considered reasons for the adoption of protocols where they are based on the endorsed principles, for example the judgment of Justice Kawaley *In The matter of LATAM Finance Limited and Ors*[22] in the Grand Court of the Cayman Islands, Financial Services Division in which the court outlined the jurisdictional basis for entering into a court-to-court communication protocol based on the JIN Guidelines.

Unlike the provisions in the Model Law relating to recognition and relief, the JIN Guidelines makes it clear that they are not intended to limit the ability to cooperate and communicate where parallel proceedings involve a single entity. This is further apparent from the reference to one or more companies in the New South Wales Supreme Court practice note[23].

[20] Moss QC, G, Are the JIN Guidelines a tonic for cross-border insolvencies Insolvency Intelligence 2017, 30(7),101-103
[21] JIN Guidelines Introduction F
[22] In the matter of LATAM Finance Limited and Ors 24 August 2020 FSD 105, 06 and 154 of 2020 (unreported)
[23] Supra. note 19

The case of *Re Kelly (as joint and several liquidators of Halifax Investment Services Pty Ltd (ACN 096 980 522)(in liq)) and Others (No 5)*[24] in the Federal Court of Australia, illustrates how this might work. The case involved the liquidations of two entities – one in Australia and one in New Zealand as such, relief available under the Model Law, as enacted in Australia by the *Cross-Border Insolvency Act 2008* (Cth) was not necessarily relevant[25]. Nevertheless as a consequence of the cross-border nature of the assets and operations, the companies, which had common liquidators applied for the issuance of a letter of request under section 581 of the *Corporations Act 2001* (Cth) to the High Court of New Zealand requesting that it act in aid of the court in relation to certain matters regarding the liquidations. The judge concluded at [76][26] "…*this case presents as a classic candidate for cross-border cooperation between courts to facilitate the fair and efficient administration*…". Justice Gleeson further observed that " *the manner in which such co-operation is achieved may, for example, be informed at least in part by*" the JIN Guidelines[27]. This decision is notable in that it was the first time a court in Australia had referred to the JIN Guidelines and it was in the context of two entities rather than a single entity. It was also the first time the court had considered and approved, in principle, a joint hearing with a foreign court in respect of an insolvency matter. In January 2020, and subsequent to this decision, the Federal Court of Australia formally adopted the JIN Guidelines recommending that parties should have regard to them in devising a protocol or co-ordination agreement. One can presuppose that the findings in this case may well have supported the formal endorsement of the JIN Guidelines by the Federal Court of Australia.

The JIN Guidelines are intentionally non-prescriptive in approach and allow the court, in conjunction with the parties, real flexibility in determining a protocol that best serves the issues arising in the circumstances and how the parallel proceedings may benefit from communication and coordination between the respective courts. The non-prescriptive approach adopted by the JIN Guidelines was presumably intentional to ensure the guidelines could be widely applicable and allow for all the unique challenges often faced and creative solutions required in cross-border insolvency matters. Gabriel Moss commented that *"[t]he JIN Guidelines are in principle helpful but rather vague*"[28], although

[24] [2019] 139 ACSR 56
[25] Albeit, this conclusion is subject to some debate. See Apathy P and Li H, Classic cross-border cooperation: Joint court hearings in the Halifax insolvency, Insolvency Law Bulletin October 2019
[26] Supra. note 24 at p71
[27] Ibid at p63 [32]
[28] Supra. note 20, at 101

it is not entirely clear that this was meant as an actual criticism of the JIN Guidelines. The requirement for the courts and the parties to at least consider the JIN Guidelines in each relevant instance at the earliest practicable opportunity, coupled with the in-built flexibility appears to serve as one of the real strengths of the JIN Guidelines.

The available flexibility is appropriately tempered by certain safeguards. First the JIN Guidelines are not intended to modify substantive matters of law or to adopt his Honour Justice Black's commentary, they will not assist "*in bridging a gap in a jurisdiction's substantive law, where that law does not permit a step which would or might assist in advancing cross-border insolvency*"[29]. The purpose of the guidelines is not to create a forum in which courts from two jurisdictions can negotiate an outcome, for example concerning competing priority claims (absent of course the parties agreeing that the decision of one court is to prevail). This was a crucial limitation that the judiciary rightly incorporated into the JIN Guidelines. The conservative approach to these, and other matters, adopted in the JIN Guidelines has been important to encourage the wide adoption of the guidelines and confidence in the application of them. Had the JIN Guidelines take too liberal approach, one can expect that judges may have found the adoption and endorsement of the JIN Guidelines too difficult to reconcile with their other core obligations, including the sovereignty of their jurisdiction and the parties' legitimate rights.

In addition, there are also specific procedural safeguards, such as those contained in Guidelines 8. A point highlighted by Gabriel Moss QC is that "*from an English law point of view, the idea of the judges in the different courts chatting together without the presence of parties (at least by telephone or video-conference) would seem very strange*"[30]. In many jurisdictions, this would not just be strange, but potentially unlawful for example, section 17 of the *Federal Court of Australia Act 1976* (Cth) requires the jurisdiction of the Federal Court of Australia to be exercised in open court (which can include by way of video or audio link).

Limitations of the JIN Guidelines

Despite the identified strengths of the approach taken in the JIN Guidelines, criticism can arise as to whether or not the JIN Guidelines, as a discretionary statement of best practice

[29] Black, A, Court to Court Communication Protocols Comments at 7th Judicial Seminar on Commercial Litigation 25 February 2022
[30] Supra. note 20, at 102

go far enough. Despite almost 7 years having elapsed since their formation, there are very few examples of reported cases where courts and parties have adopted the JIN Guidelines in full or in part to assist with cross-border insolvency matters.

This may be as a consequence of many countries having experienced a period of sustained low formal insolvency appointments, which has in turn has reduced the number of cross-border insolvency issues arising. Arguably the tangible impact of the JIN Guidelines is perhaps yet to be demonstrated by way of real-life application. However, a cautious commentator would at least accept that there is a risk that the JIN Guidelines maybe being dismissed as being of aspirational rather than practical assistance[31]. Mere endorsement or facultative support by way of a practice note may not be enough to encourage judges, perhaps not all of whom have deep insolvency expertise or who may feel constrained by domestic law, to engage with foreign courts in the manner contemplated by the Guidelines.

Notable examples of the use of the JIN Guidelines, and in particular the provisions relating to Joint Hearings, have often arisen between jurisdictions that bear a number of similarities, for example, Australia and New Zealand. These countries share a common language and are geographically co-located in a similar time zone, which makes the practicalities of cooperation more straightforward. However and perhaps more importantly, they also share similar legal and political systems making cooperation more ideologically acceptable. This is a limitation in that the Judicial Insolvency Network appears to have recognised with the second conference in September 2018 identifying the value of establishing how courts from diverse backgrounds could communicate effectively[32].

There is also a debate about whether or not the approach recommended by the JIN Guidelines, namely the requirement for a protocol to be made by court order would in fact reduce costs, in circumstances where stakeholders need to engage early with at least two courts to secure the benefits of the cooperation[33]. Such costs may be well justified in the insolvency of a large multinational company but whether practitioners in the insolvency of a small or medium sized enterprise might be so persuaded is questionable.

[31] For example the comments of Gabriel Moss QC, supra note 20 at 103 to the effect that more 'concrete acts of adoption' may be required
[32] www.jin-global.org accessed on 9 July 2023
[33] See supra. note 20 at 103

Pervasive effect of the JIN Guidelines

However, whatever the criticisms or perceived limitations of the JIN Guidelines may be, there is one important feature of the JIN Guidelines that cannot be ignored. This is a feature that may pervade judicial consideration of court-to-court communication and cooperation, a so called *'special virtue'*[34].

The JIN Guidelines represented the first judge led formulation of a protocol or framework for cooperation. In devising the guidelines experienced commercial and insolvency judges had the opportunity to come together though the Judicial Insolvency Network to collaborate, indeed to cooperate in practice, to explore how the court could assist with the challenges of cross-border insolvency. The power of this judge led diplomacy cannot be underestimated. For the judges involved, via the Judicial Insolvency Network and its work there is not only an opportunity to build personal relationships but also an opportunity to share insights, perspectives and experience. For judges in courts where the Guidelines have been adopted, whether or not they were involved in their drafting, they have created a trusted and acceptable starting point for court-to-court communications. As the website for the Judicial Insolvency Network states:

"It is hoped that this deeper understanding will eventually foster more effective communication and cooperation and a convergence in judicial thinking and philosophies in cross-border insolvency and restructuring matters. The JIN believes that this is important in today's globalised economy"[35].

This pervasive effect of the JIN Guidelines is not limited only the jurisdiction that have formally adopted or endorsed them. In the 2017 decision of the High Court of the Hong Kong Special Administrative Region Court of First Instance *In The Matter of China Fishery Group Limited*[36], Justice Harris noted in the context of the provision of documents to the United States' trustee "*the parties can consider a protocol for expediting this process. They might have regard to the JIN Guidelines*"[37]. This demonstrates the broad judicial acceptance that the JIN Guidelines have and their application as a practical means of achieving court-to-court cooperation and communication.

[34] Westbrook, J, Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of Central Court Texas Law Review Vol. 96 p1473 at 1492
[35] www.jin-global.org/about-us
[36] [2015] HCCW 367/2015
[37] Ibid at [9]

Conclusion

As Justice Steven Chong remarked in his paper presented at the World Enforcement Conference in January 2019 "*what modified universalism seeks to do is to reach, by means of sensible judicial co-operation, as unified a system of distribution as possible within the constrained of multiple concurrent proceedings and while maintaining respect of domestic public policy concerns*"[38].

Justice Chong further stated that "*the logical solution must lie in building a sense of coherence and cohesion among the different courts to replicate, if not the fact of, then at least the effect of what a single unified set of proceedings might achieve*"[39].

There is wide support both among academics and the judiciary of the important role that the judiciary has to play in the effective management of cross-border insolvency. As this paper demonstrates the JIN Guidelines provide a framework within which courts, and the parties to parallel proceedings can establish a protocol for cooperation and coordination in their specific case; a framework for sensible judicial cooperation. The first and critical step to effective cooperation has already been taken by the endorsement of the guidelines and there is flexibility to devise a protocol to improve efficiency and consistency of outcomes.

However, the JIN Guidelines achieve more than this. As a consequence of the judge-led approach to devising the JIN Guidelines, they also assist with building the sense of coherence and cohesion among the judiciary that is of recognised significance. It is by this that courts can work to bridge the disconnection between the operation of multinational businesses and the judicial management of cross-border insolvency. This advancement supports the objectives of the Model Law and by extension the promotion of modified universalism as an acceptable approach to cross-border insolvency.

Word Count[40] 4144

[38] The Honourable Justice Steven Chong, Supreme Court of Singapore, Paper presented to the World Enforcement Conference, Shanghai, 22 January 2019 "*The Judicial Insolvency Network: A ready response in an imperfect world*" at [16]
[39] Ibid at [17]
[40] Excluding Table of Context, Bibliography and footnotes

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