**Topic: A critical analysis of the JIN Guidelines**

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*Introduction*

1. The JIN Guidelines (the “Guidelines”) are a reflection of modified universalism. Although procedural in nature, the intended effect of the Guidelines is the uniform treatment of creditors. A key aspect of such uninform treatment is the creditors’ parity of access to information in the jurisdictions involved in the cross border insolvency.
2. The aims of the Guidelines are thus aligned with the UNCITRAL Model Law on Cross-Border Insolvency (the “Model Law”) although its use is not limited to jurisdictions that have adopted the Model Law.[[1]](#footnote-1) The Guidelines share some similar features with the Model Law[[2]](#footnote-2) although the Model Law goes further and provides for judicial relief and assistance such as staying execution of a debtor’s assets and staying individual actions or proceedings from being commenced or continued concerning the debtor’s assets rights, obligations or liabilities[[3]](#footnote-3). For jurisdictions that have adopted both the Model law and Guidelines, the latter can be regarded as serving a supplementary function to the former.[[4]](#footnote-4)
3. In Singapore, the Guidelines were promulgated after an inaugural JIN conference in October 2016 (the “Inaugural Conference”) with the first jurisdictions (Singapore and Delaware) adopting the Guidelines in February 2017. The Southern District of New Year entered a General Order adopting the Guidelines about a month later. Other adoptees include the Chancery Division of England & Wales (May 2017), the Eastern Caribbean Supreme Court (May 2017), the Supreme Court of New South Wales (September 2017) and the Federal Court of Australia (January 2020). Hearteningly, the adoptees are not limited to those from common law jurisdictions. The Seoul Bankruptcy Court adopted the guidelines in July 2018. The Brazil National Council of Justice did so in May 2021.
4. The Guidelines were drafted by Judges who participated in the Inaugural Conference and they purported to do so *de novo*. It is clear from the Guidelines, however, that existing guidelines issued by ALI/III and the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines served as inspiration.[[5]](#footnote-5) Indeed ALI-III states in the Introduction to the ALI-III Global Principles for Cooperation in International Insolvency Cases that: “*we would like to remind everyone about the excellent work that has been done on the ALI-III Global Principles and Guidelines 2012, upon which the JIN Guidelines have drawn*.”
5. Given the international nature of the drafting effort, it would be wrong to suggest that the Guidelines have a Singapore focus even though they were initiated by the Singapore judiciary. It is however not incorrect to seek to understand the Guidelines as a part of a larger initiative by Singapore to build its status as a legal hub be it in dispute resolution or debt restructuring. Singapore well understands that to gain traction in these attempts it needs to grow the sphere over which the hub has influence. The Guidelines have the effect of allowing judicial cooperation and coordination over a wide geographical spread. With Singapore at the heart of the JIN, this favours the use of Singapore as the jurisdiction to undertake global restructuring efforts. The Guidelines are therefore a significant aspect of Singapore’s endeavour to become an international debt restructuring hub.
6. That endeavour is bolstered by the Singapore International Commercial Court having now inducted three eminent insolvency judges into its fold: Justice Christopher Sontchi (formerly the Chief Judge of the Bankruptcy Court for the District of Delaware), Justice Arjan K Sikri (formerly a Judge of the Supreme Court of India) and Justice James M Peck (formerly a Judge in the Bankruptcy Court for the Southern District of New York). In 2021, Singapore’s Second Minister for Law, Mr Edwin Tong SC (who was formerly an insolvency lawyer) announced that the SICC provides a “*conducive, if not perhaps, natural forum for cross border insolvency matters that have a significant foreign element.”* The use of the SICC as an international forum to handle cross-border insolvencies coupled with the ability to coordinate with other jurisdictions through the Guidelines enhances Singapore’s attractiveness as a debt restructuring centre. This is further complemented by recent efforts to employ mediation to deal with some of the disputes arising in an insolvency context.[[6]](#footnote-6) In the case of cross-border insolvencies, such attempts to promote mediation will likely leverage off the success of the Singapore International Mediation Centre and the Singapore Convention on Mediation.[[7]](#footnote-7)
7. Seen in the context of these developments, the Guidelines can be regarded as a Singapore-initiated tool in judicial diplomacy[[8]](#footnote-8) which add lustre to Singapore’s legal hub status. Indeed, the Guidelines play off Singapore’s reputation for neutrality as a “honest broker” to nations.[[9]](#footnote-9) They however also shrewdly capitalize on the fact that Association of South East Asian Nations (“ASEAN”) which Singapore is a member of will be the world’s fourth fastest growing economy in 2030. The amount of capital which ASEAN will attract in the near future makes it a prime candidate for cross border insolvencies. It makes sense for there to be a set of guidelines to improve court-to-court coordination to pave the way for the orderly handling of such insolvencies.
8. The fly in the ointment is that the jurisdictions which are key to this strategy ie the ASEAN nations, are not adopters of the Guidelines. There is an unspoken wariness in these countries of such developments emanating from Singapore.[[10]](#footnote-10) It remains to be seen if this attitude will change in the future.
9. This short paper will however leave aside these extra-legal issues in assessing the Guidelines. Instead, this paper will seek to assess the efficacy of the Guidelines in terms of the ease of its adoption and the scope of its provisions.

*Ease of adoption*

1. Structurally, the Guidelines are in the nature of a court-to-court Memorandum of Understanding with the purpose of facilitating communication across different jurisdictions where there are proceedings in relation to a cross border insolvency. Such memoranda have no binding legal effect.[[11]](#footnote-11) Being a multi-court understanding as opposed to legislation, there is no parliamentary approval required to adopt the Guidelines. This in itself paves the way for easy adoption. This method of adoption contrasts with the Model Law which requires enactment by statute. As a result of the relatively easier path to adoption, it is entirely conceivable that jurisdictions may adopt the Guidelines without the Model Law (*for eg* the National Commercial Court of Argentina has adopted the Guidelines even though it has not enacted the Model Law). Even though the Guidelines were intended to supplement the Model Law (indeed Singapore promulgated the Guidelines in the same year that the Model Law was given force of law in Singapore), they are capable of operating independently and in such instances may serve as *Model Law*-lite for jurisdictions that find the Model Law too cumbersome to enact. It is possible that in such a context, the Guidelines would give a foretaste of the benefits of the Model Law.
2. Further, the simplicity of the Guidelines and their uncontroversial nature, promotes adoption. Thus:
   1. Guidelines 7-9, which are the centrepiece of the Guidelines, provide for communications between courts and the attendance of parties when such communications take place. Guideline 7 sets out the purpose of such communication (the orderly making of submissions and the rendering of decisions by the courts) as well as the modes and subject matter of the same. In June 2020, the JIN published a further elaboration on the Modalities of Court-of-Court Communication to supplement the Guidelines. There is to be a Facilitator (in Singapore’s case, the Deputy Registrar of the Supreme Court has been designated as the Facilitator) designated to initiated communication on behalf of an Initiating Judge who will approach a Receiving Judge with certain details for the proposed communication to take place. These modalities are intended to overcome any judicial hesitation in initiating communication. In exceptional circumstances, there is provision for an Initiating Judge to contact a Receiving Judge directly.

* 1. Guidelines 10 and 11 allow a Court to authorise a party or appropriate person to appear in a foreign court subject to the foreign court’s approval and vice versa for a party in a foreign proceeding to be heard by it. The attendance by a party to a foreign proceeding may take place without any submission to jurisdiction. These Guidelines thus facilitate information sharing between different proceedings by having parties or their counsel attend before different courts. This serves as a second channel of communication over and beyond that envisaged in Guidelines 7-9.

1. When either or both channels of communication are employed, a Court is expected to enter a protocol or order either at the application of parties or on its accord.
2. In Guideline 5, there is express preservation of a Court’s powers to determine the rights of the parties before it in a manner which accords with the jurisdiction’s substantive laws. This echoes Guideline 4(iii) which states that the Guidelines, when implemented, are not intended to confer or change jurisdiction, alter substantive rights, interfere with any function of duty arising out of any applicable law or encroach upon any applicable law. Indeed, Guideline 5 states that any protocol or order under the Guidelines is purely *procedural* in nature. This again is conducive to adoption since it ostensibly removes any concern that a Court may be compelled to apply substantive laws which are contrary to its own. As we shall see, however, there are other provisions[[12]](#footnote-12) which may be interpreted as limiting a Court’s ability to refuse to take action which is not “manifestly” contrary to the policy of the jurisdiction. It is arguable that insofar as a ruling of a foreign Court is concerned, an adopting Court may have a limited basis to refuse the application of that ruling on its own soil.

*Efficacy of Provisions*

1. As already alluded to in the previous paragraph, Guideline 4(iii) provides that the Guidelines are not intended to prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction. This may be interpreted as limiting the basis for an adopting Court to refuse to take an action unless such action is manifestly contrary to public policy.[[13]](#footnote-13) The use of word “*manifestly*” suggests that unless such action is an obvious contradiction of a jurisdiction’s public policy,[[14]](#footnote-14) a Court should not refuse to carry out the same. To interprete this harmoniously with the Guidelines that seek to preserve a Court’s power to apply its own substantive laws (see (Guideline 4(iv) and Guideline 5), the scope of Guideline 4(iii) is necessarily limited to preclude a Court from refusing to take action in relation to a decree or ruling of a foreign Court.

1. This exposes one conundrum that underlies the Guidelines. It is ostensibly drafted to deal with communication and in that sense would have no teeth in facilitating cooperation where the substantive laws of different jurisdictions do not permit the same. Even between common law jurisdictions, there are enough differences in the substantive law (for e.g. the United Kingdom continues to apply the *Gibbs* rule which other common law jurisdictions such as the US have disavowed) for significantly different outcomes to emanate from the application of the laws of different jurisdictions. These differences, however, limit the ability to achieve uniformity in decisions between jurisdictions and ultimately undermine the need to communicate in a bid to achieve such uniformity. This of course encroaches on the *raison d’etre* of the Guidelines.[[15]](#footnote-15) The problem is likely exacerbated between common law and civil law jurisdictions given the greater potential for differences to arise. The use of the word “*manifestly*” to qualify what is contrary to public policy appears to be attempt to reduce obstacles to cooperation. It is noteworthy that the same language appears in Article 6 of the Model Law and Principle 2 of the EU JudgeCo Principles.[[16]](#footnote-16) The qualification may be regarded as one embodiment of modified universalism in these instruments.
2. Unlike the Model Law and EUJudgeCo Principles and Guidelines[[17]](#footnote-17), the Guidelines lack any content relating to recognition or assistance. Whilst this is part of the attraction of the Guidelines as they are more readily adoptable, it also removes an incentive for coordination. In this regard, the utility of the Guidelines may also be contrasted with the EU JudgeCo Principles and Guidelines. These Principles and Guidelines operate in conjunction with the EU Insolvency Regulation which provides for automatic recognition to insolvency proceedings across the EU. Insolvency proceedings initiated in one member state are legitimized in other member states and orders made in these proceedings may be binding across states. Such provision for recognition is an impetus towards coordination between different jurisdictions.
3. Under Article 31 of the EU Insolvency Regulation, it is the duty of insolvency office holders to provide for cross-border coordination between main and secondary insolvency proceedings. The EU JudgeCo Principles also provide for the role of the insolvency practitioner to facilitate coordination in cross-border proceedings.[[18]](#footnote-18) Such a feature is absent in the Guidelines. Whilst it may be argued that an order made by a Court under the Guidelines will have the ultimate effect of compelling insolvency practitioners not to act in a manner to interfere with the order, it is clear the express provisions of the EU JudgeCo Principles will have a more direct impact in ensuring coordination between insolvency practitioners.
4. Another notable difference is the provision for equality of arms in the EU JudgeCo Principles.[[19]](#footnote-19) It appears that this is left to the adopting Courts in the Guidelines and hence is assumed.
5. A key objective of the Guidelines is the avoidance and minimization of litigation, costs and inconvenience to the parties.[[20]](#footnote-20) Whilst such litigation, costs and inconvenience may be minimized once an order is made or protocol agreed upon under the Guidelines, the process of getting to such an order or protocol could entail not insignificant litigation and/or costs. However, this may be something which Courts hearing an application for an order may sensibly try to curtail through the exercise of its case management powers.
6. The case which sparked the development of such court-to-court communication guidelines was *Re Nortel Networks Corporation et al*. In that case, communication and joint hearings between the Ontario Superior Court and the US Bankruptcy Court in Delaware paved the way for an eventual settlement to distribute USD 7.3 billion in assets to the creditors. However, such coordination arose in circumstances where the laws of both jurisdictions are not so different and there was no time difference which inhibited the holding of the joint hearings. The success of *Re Nortel* in court-to-court communication therefore may not be repeatable in other cross-border insolvencies. The joint hearings which took place in *Re Nortel* will be much more difficult to organize between say the UK and Singapore. In such cases, the efficacy of the Guidelines insofar as court-to-court communication (Guidelines 7-9) is concerned may be limited to information sharing. Greater utility may be derived from the Guidelines (Guidelines 10-11) which permit the attendance in court by foreign counsel. Such Guidelines allow a Court to hear firsthand from counsel involved in the foreign proceedings without concern by that counsel that he/she/the party represented is submitting to jurisdiction with all the attendant consequences. The Court will be at liberty to probe and understand better various issues that may not be apparent from written documentation. This can put that Court in a better position to coordinate with its counterpart elsewhere.

*Conclusion*

1. Thus whilst the Guidelines may bring parties closer to more uniform results in proceedings in different jurisdictions, it is not a panacea to do so. Different substantive laws and logistical difficulties may still stand in the way of achieving the tight coordination needed for such uniformity. Still the Guidelines are to be lauded as being a step in the right direction towards this objective.

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5. EU Cross-Border Insolvency Court-to-court Cooperation Principles and Guidelines
6. Hague Choice of Court Convention
7. Singapore Convention on Mediation
8. *China Fishery Group Ltd* [2017] HKEC 2174
9. *Re Zetta Jet* [2018] 4 SLR 801
10. *Re Taisoo Suk* [2016] SGHC 195
11. *Re Nortel Networks Corporation et al.*
12. Steven Chong Judge of Appeal, “*The Judicial Insolvency Network: A ready response in an imperfect world”*.
13. E Lee and EC Ip, *“Judicial diplomacy in the Asia-Pacific: theory and evidence from the Singapore-initiated transnational judicial insolvency network”*
14. A Kumar & WL Koh, *Court-ordered mediation in restructuring proceedings: the next reform?*

1. In *China Fishery Group Ltd* [2017] HKEC 2174, Justice Jonathan Harris of the Hong Kong Court remarked that: “*If the Court in New York considers that it is desirable that they are released to the United States trustee this is a matter to which I would have regard and, if it were considered helpful, the parties can consider a protocol for expediting this process. They might have regard to the JIN Guidelines.*” This is even though Hong Kong has not adopted the Guidelines. [↑](#footnote-ref-1)
2. See for e.g. Article 8 of the Model Law and Guideline 6 of the Guidelines. [↑](#footnote-ref-2)
3. See Articles 19, 20 and 21 of the Model Law. [↑](#footnote-ref-3)
4. Article 25 of the Model Law provide for cooperation and coordination between Courts (and between Courts and foreign representatives). Although Article 27 has relatively sparse content on the nature of that cooperation and cooperation, there was further elaboration in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the “Practice Guide”). Para 10 of the Practice Guide encourages the adoption of Court-to-Court Guidelines “*to coordinate their activities, foster efficiency and ensure that stakeholders in each State are treated consistently.”* [↑](#footnote-ref-4)
5. See the similarity between Principle 4 of the EU JudgeCo Principles and Introduction para C of the Guidelines. [↑](#footnote-ref-5)
6. ### See 6 January 2021 article by A Kumar & WL Koh, *Court-ordered mediation in restructuring proceedings: the next reform?*

   [↑](#footnote-ref-6)
7. This is a multi-lateral treaty that allows the enforcement and invocation of international settlement agreements resulting from mediation. As of 12 February 2024, there are 55 signatories to this Convention including the United States and China. [↑](#footnote-ref-7)
8. See E Lee and EC Ip, *Judicial diplomacy in the Asia-Pacific: theory and evidence from the Singapore-initiated transnational judicial insolvency network. Cf* Guideline 6 which provides that in the interpretation of the Guidelines or any protocol or order under the Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in the application. [↑](#footnote-ref-8)
9. This is an oft-repeated statement made by the Singapore Government. See for e.g. statement made by Foreign Minister Vivian Balakrishnan on 2 February 2018 when Singapore assumed the position of chair of ASEAN. [↑](#footnote-ref-9)
10. This may be one of the reasons why the SICC has not gain much traction in these countries. Notably, none of them have acceded to the Hague Choice of Court Convention which would have paved the way for the enforcement of SICC judgments in these countries. Under the Hague Convention, judgments by the chosen court must be recognized in all states where the Hague Convention is applicable. Most of the EU, the United States, Mexico, China and Singapore are signatories to the Hague Convention. [↑](#footnote-ref-10)
11. For other examples of such Memoranda see the Memorandum of Guidance between the Supreme People’s Republic of China and the Supreme Court of Singapore on the Recognition of the Enforcement of Money Judgments in Commercial Cases entered into on 31 August 2018. [↑](#footnote-ref-11)
12. See Guideline 4(iii) [↑](#footnote-ref-12)
13. Article 6 of the Model Law contains the same language. Some guidance may be drawn from the Guide to Enactment and Interpretation of the Model Law which states (at [104]) in relation to Article 6 that: “*The purpose of the expression “manifestly”, used also in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.*” [↑](#footnote-ref-13)
14. The Guide to Enactment and Interpretation of the Model Law acknowledges that the notion of public policy changes from State to State but also points out at [103] that “*a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy.*” [↑](#footnote-ref-14)
15. One notable difference in the stated objectives of the Guidelines compared with the EU Cross-Border Insolvency Court-to-court Cooperation Principles is that the latter provides under Principle 3.2 that “due regard should be given to the interests of creditors, including the need to ensure that similarly ranked creditors are treated equally…”. Such language indicates that an aim to ensure uniform treatment between creditors in different jurisdictions. Similar language is missing from the Guidelines which instead refers to administering parallel proceedings with a view to “ensuring that relevant stakeholders’ interests are respected.” It is however clear that uniformity of treatment is an objective that underpins the Guidelines. The promulgation of the Guidelines is heralded by the decision of the Singapore High Court in *Re Taisoo Suk* [2016] SGHC 195, a decision to recognise the rehabilitation proceedings of Hanjin Shipping Co Ltd taking place in Korea. The Court remarked on the need to ensure that foreign or international creditors should be treated fairly and equitably. Also see paper delivered by Judge of Appeal Steven Chong at the World Enforcement Conference in 2019 titled “*The Judicial Insolvency Network: A ready response in an imperfect world*”. [↑](#footnote-ref-15)
16. Singapore in enacting the Model Law left out the term “manifestly”. This permitted the Singapore High Court in *Re Zetta Jet* [2018] 4 SLR 801 to refuse to recognize Chapter 11 proceedings on the basis that they were commenced in breach of a Singapore injunction. The recognition of the Chapter 11 proceedings would have interfered with the administration of justice and was thus contrary to public policy. The Chapter 11 proceedings were recognized in subsequent application after the injunction was discharged. [↑](#footnote-ref-16)
17. Articles 9, 11, 19, 20 and 21 of the Model Law; Principles 8, 9 and 13 of the EU JudgeCo Principles; Guideline 5 of the EuJudgeCo Guidelines. [↑](#footnote-ref-17)
18. See Principle 5.3 [↑](#footnote-ref-18)
19. Principle 6 of the EU JudgeCo Principles. [↑](#footnote-ref-19)
20. See C(iv) of the Introduction to the Guidelines [↑](#footnote-ref-20)