

## The JIN Guidelines: A Critical Analysis

### Author Statement

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#### DECLARATION OF HONOR:

I declare that the paper, titled "The JIN Guidelines: A Critical Analysis" is my own work, that it has been prepared independently and that all references to, or quotations from, the work of others are fully and correctly cited.



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## TABLE OF CONTENTS

<b>Introduction .....</b>	<b>1</b>
<b>The JIN Guidelines and Modalities.....</b>	<b>3</b>
<b>Criticisms of Soft Law Instruments including the JIN Guidelines .....</b>	<b>4</b>
<b>Utility of Soft Law Instruments .....</b>	<b>5</b>
<b>Use of Protocols under the JIN Guidelines .....</b>	<b>6</b>
<b>Conclusion .....</b>	<b>8</b>
<b>Bibliography .....</b>	<b>10</b>

## The JIN Guidelines: A Critical Analysis

*We live in an imperfect world where the circumstances of commerce have parted company with the logic of the law. In response to this disconnect, many have presented universalism as the perfect solution; yet the reality is that an international insolvency convention organised around this animating principle remains tantalisingly out of reach. That, however, should not lead to despair. For even though the making of hard laws may be a bridge too far for our policymakers today, there is still room for our courts to take the lead and the initiative in order to develop soft law norms that can guide the international insolvency community towards a common understanding of how parallel insolvency proceedings might be conducted. That is precisely what the JIN seeks to do. It is not, of course, a complete answer to all the challenges of cross-border insolvency. But I daresay that its practicality in the present allied with its promising vision of the future makes it as attractive a proposition as any to ameliorate the ills of fragmentation.<sup>1</sup>*

### INTRODUCTION

Globalisation has led to an increase in the complexity of dealing with corporate insolvencies, particularly where an enterprise has operations across multiple jurisdictions. It should be uncontroversial that cross-border cooperation and communication is key to ensuring the efficient administration of international or cross-border insolvencies, as well as the preservation and maximisation of value for stakeholders. This has been demonstrated in several multi-jurisdictional insolvency proceedings – perhaps most notably the Nortel bankruptcy proceedings.<sup>2</sup> Courts and parties have relied on legislation and common law principles to facilitate such cooperation and communication. In countries that have adopted the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on Cross-Border Insolvency (**Model Law**), subject to the adoption any deviations to the Model Law, stakeholders are authorised to engage in cross-border cooperation through the use of agreements.<sup>3</sup> Other jurisdictions, such as the Cayman Islands, have relied on common law principles to facilitate cross-border communication and cooperation, which may also be supported by the adoption of insolvency rules which urge stakeholders to consider the appropriateness of entering cross-border protocols.<sup>4</sup>

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<sup>1</sup> Paper presented at the World Enforcement Conference by Judge of Appeal Steven Chong, Supreme Court of Singapore, “The Judicial Insolvency Network: A Ready Response in an Imperfect World”, Shanghai, 22 January 2019, << <https://jin-global.org/content/jin/pdf/2019-jan-world-enforcement-conference-shanghai.pdf>>>, accessed on 22 February 2024.

<sup>2</sup> See also Wessels, Bob and Ilya Kokorin, *Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups*, Edward Elgar Publishing, Cheltenham (2005), ss. 10.03.

<sup>3</sup> *Ibid* at ss. 4.02-4.03.

<sup>4</sup> Companies Winding Up Rules (2023 Consolidation), Order 21 states that it “*shall be the duty of the official liquidator of a company in liquidation to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder*” and that the “*purpose of an international*

The advancement of cross-border cooperation and communication in international insolvencies can be attributed, at least in part, to the adoption of soft law instruments, which scholars have stated can comprise of principles, standards, model provisions (or model laws), guidelines and recommendations.<sup>5</sup> Wessels and Boon define soft law and differentiate it from hard law as follows:

*Various iterations exist with regard to soft law, but a general consensus is lacking. Soft law and hard law instruments are often distinguished according to the binary dimension of being either legally binding or non-binding. Hard law is typically thought of as conventions, treaties and domestic laws. However, what soft law instruments are is less clear. This terminology was developed in international diplomacy, and is usually considered to refer to quasi-legal instruments which are (formally, in a strict legal sense) non-binding.<sup>6</sup>*

Unsurprisingly, soft law instruments appear to have not only helped propel the shift from territorialism towards universalism<sup>7</sup> and modified universalism<sup>8</sup>, but have also increased in use and popularity because of this shift. In this paper, I provide a critical analysis of the Judicial Insolvency Network (**JIN**) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (**JIN Guidelines**), by first outlining the objective and aims of the JIN Guidelines, then discussing the criticisms and benefits of the JIN Guidelines and soft law instruments, followed by a discussion of case law examples of the use of JIN Guidelines' based protocols, and then concluding with a discussion on the significance of the JIN Guidelines.

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*protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder."*

<sup>5</sup> Wessels, Bob and Boon, Gert-Jan, *The Realm of Soft Law Instruments in Restructuring and Insolvency Law*, in: Omar, Paul and Grant, Jennifer (eds), *Research Handbook on Corporate Restructuring*, Edward Elgar Publishing, Cheltenham (2021), p. 420.

<sup>6</sup> *Ibid* at pp. 402-403.

<sup>7</sup> In Westbrook, Jay, "A Global Solution to Multinational Debt", 98 Mich. L. Rev. 2000, p. 2282, Professor Jay Westbrook defines territorialism and universalism as follows: "*Broadly speaking, there are three academic positions: universalism, territorialism, and contractualism. The traditional positions are the first two. According to the traditional territorialist approach, each country would seize local assets and apply them for the benefit of local creditors, with little or no regard for foreign proceedings. By contrast, universalism is considered a system where one court administers the bankruptcy of a debtor on a worldwide basis with the help of the courts in each affected country.*"

<sup>8</sup> *Ibid* at p. 2301. Professor Jay Westbrook says the following about modified universalism: "*The key difference between the two approaches is that modified universalism takes a worldwide perspective, seeking solutions that come as close as possible to the ideal of a single-court, single-law resolution, while territorialism of any sort seems to me to be defined by a conviction that local creditors have vested rights in whatever assets can be seized by their courts when insolvency looms. The first formulation of modified universalism described it thusly: [Modified universalism] accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home country procedures and to protect the interests of local creditors. The leading example is Section 304 of the U.S. Bankruptcy Code . . . .116"*

## THE JIN GUIDELINES AND MODALITIES

The JIN Guidelines<sup>9</sup> are one of the more recently adopted soft law instruments for transnational insolvencies. They are the brainchild of several leading international insolvency judges from jurisdictions including Australia, British Virgin Islands, Canada, Cayman Islands, England & Wales, Hong Kong SAR, and the United States. The overarching objective and the aims of the JIN Guidelines accord with international insolvency principles, including:

- 1) Overarching Objective: Improving the efficiency and effectiveness of cross-border insolvency proceedings in the interests of all stakeholders.
- 2) Aims: To promote the:
  - a. Efficient and timely coordination of parallel insolvency proceedings;
  - b. Administration of parallel insolvency proceedings in a manner that respects the interests of stakeholders;
  - c. Identification, preservation and maximization of a debtor's business or assets;
  - d. Management of a debtor's estate in a proportionate manner based on the number of jurisdictions, complexity of issues, number of creditors, and the quantum of money involved;
  - e. Reduction of costs by facilitating the sharing of information; and
  - f. Elimination or minimisation of litigation, costs and inconvenience to stakeholders.<sup>10</sup>

Since their inception, the JIN Guidelines have received significant international attention and acclaim, including being named as the “Most Important Overall Development” by the Global Restructuring Review in 2017.<sup>11</sup> The JIN Guidelines have been adopted in several jurisdictions, including the United States by the United State Bankruptcy Court for the District of Delaware (February 2017), Southern District of New York (February 2017), Southern District of Florida (February 2018), and Southern District of Texas (January 2019); Singapore (February 2017); Bermuda (March 2017); England and Wales (May 2017); British Virgin Islands (May 2017); Australia including the Supreme Court of New South Wales (September 2017) and the Federal Court of Australia (January 2020); Korea (July 2018); the Cayman Islands (August 2018); Canada by the Superior Court of Justice – Ontario

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<sup>9</sup> A copy of the JIN Guidelines can be accessed on the Judicial Insolvency Network website, JIN Guidelines, <<<https://www.jin-global.org/content/jin/pdf/Guidelines-for-Communication-and-Cooperation-in-Cross-Border-Insolvency.pdf>>> (accessed 23 February 2024).

<sup>10</sup> *Ibid.*

<sup>11</sup> Karadelis, Kyriaki, Global Restructuring Review, “GRR Charity Awards 2017 – The Winners”, <<<https://globalrestructuringreview.com/article/grr-charity-awards-2017-the-winners>>>, accessed on 23 February 2024.

(Commercial List) and Supreme Court of British Columbia (February 2020); the Netherlands (May 2019); Brazil (May 2021); Bahrain (June 2023); and Bahamas (December 2023).

Professor Jay Westbrook credits the formation and potential success of the JIN Guidelines to the interpersonal relationships among the judges involved, noting that:

A special virtue of the JIN initiative comes from the fact that the establishment of personal relationships among commercial judges from different countries is a key to success in multinational cases. In that regard, not the least important benefit of the JIN Guidelines is the likelihood that they will tend to produce early direct communication by judges (with due notice to all) and will incentivize professionals to act quickly as well.<sup>12</sup>

In 2018, the members of JIN agreed the Modalities of Court-to-Court Communication (**Modalities**) which seek to provide a mechanism to facilitate court-to-court communication including the timing, nature and language of the communication.<sup>13</sup> The Modalities propose the appointment of a facilitator (a judge or administrative officer) in each jurisdiction adopting the Modalities, who will be responsible for initiating and receiving communications between the restive courts. It appears that the Modalities are not as widely adopted as the JIN Guidelines, having only been adopted in the United States by the United State Bankruptcy Court for the District of Delaware (February 2020), Southern District of New York (September 2019), and Southern District of Texas (November 2019); the Cayman Islands (August 2019); Korea (January 2020); Australia by the Federal Court of Australia (January 2020); and Singapore (June 2020).

## **CRITICISM OF SOFT LAW INSTRUMENTS INCLUDING THE JIN GUIDELINES**

Notwithstanding its accolades, critics have questioned the utility of the JIN Guidelines (and other soft law instruments) and whether the JIN Guidelines will be used more widely in jurisdictions which have no long-standing tradition of court-to-court communication or cross-border cooperation. Leading international insolvency barrister and scholar, Gabriel Moss QC, who unfortunately passed away in 2019 before having a chance to see the JIN Guidelines reach maturity, noted in a comment in the Insolvency Intelligence Journal in 2017 that:

*The JIN Guidelines are in principle helpful but rather vague and appear to be designed to provide a text to enable courts to do anything sensible and just, particularly with a view to providing such a text to courts that find it difficult to do anything new without a specific text telling them that they may do it...*

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<sup>12</sup> Westbrook, Jay, "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court", U of Texas Law, Public Law Research Paper No. 691 (2018), pp. 137-138.

<sup>13</sup> A copy of the Modalities can be accessed on the Judicial Insolvency Network website, Modalities for Court-to-Court Communication, << [https://www.jin-global.org/content/jin/pdf/Modalities\\_for\\_court-to-court\\_communication.pdf](https://www.jin-global.org/content/jin/pdf/Modalities_for_court-to-court_communication.pdf)>>, accessed on 24 February 2024.

*Although the JIN Guidelines are mostly common-sense and good practice, it must be appreciated that in many countries judges would be unlikely to do any of the things described in the guidelines without some specific text saying that they could. It remains to be seen whether the text of a guideline is sufficient for this purpose...*<sup>14</sup>

There are several limitations or disadvantages to the implementation and use of soft law instruments. Most notably, soft law instruments are non-binding, and do not contain consequences for violating the instrument.<sup>15</sup> Wessels and Boon state that soft law instruments are difficult to interpret because soft law instruments have inconsistent and vague language.<sup>16</sup> The vagueness of soft laws (or even soft law incorporated into hard laws such as the Model Law) can often lead to lengthy and costly court battles. A prime example of this is the ongoing and unresolved issues in cross-border recognition proceedings over the determination of a company's centre of main interest (**COMI**) and the appropriate date on which COMI should be assessed. It is also recognised that soft law instruments are regularly fixed instruments and lack an agreed (or any) procedure for revisions, which may render that soft law instrument otiose.<sup>17</sup>

While soft law instruments are subject to various criticisms, many of the cross-border protocols under several soft law instruments have led to successful results in parallel proceedings. The next section of this paper will discuss the benefits of soft law instruments.

## **UTILITY OF SOFT LAW INSTRUMENTS**

Many scholars have recognised the importance of soft law instruments, and credit the use of soft law for the advancement of international insolvency over the past two to three decades.<sup>18</sup> Wessels and Boon note that that non-binding nature of soft law instruments does not mean that such instruments have no impact.<sup>19</sup> Leading cross-border insolvency scholars have touted several roles which soft law instruments can play in advancing cross-border insolvencies and restructurings, including but not limited to:

- 1) Providing flexibility to allow ad-hoc and tailor-made solutions;

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<sup>14</sup> Gabriel Moss QC, "Are the JIN Guidelines a Tonic for Cross-Border Insolvencies?", *Insol. Int.* 2017, 30(7), 101-103.

<sup>15</sup> Wessels and Boon, *supra* note 4, p. 419.

<sup>16</sup> Wessels, Bob and Boon, Gert-Jan, "Soft Law Instruments in Restructuring and Insolvency Law: Exploring its Rise and Impact" *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* (2019), p. 13.

<sup>17</sup> *Ibid.*

<sup>18</sup> Pottow, John, *Cross-Border Corporate Insolvency in the Era of Soft(ish) Law*, in: Barry Adler (ed), *Research Handbook on Corporate Bankruptcy Law*, Edward Elgar Publishing, Cheltenham, 369-63 (2020). Appearing to credit principally the Model Law for such advancements in cross-border insolvencies.

<sup>19</sup> Wessels and Boon, *supra* note 4, at p. 420.

- 2) The quick adoption of soft law instruments, which is usually at a low cost due to the lack of a formal legislative process;
- 3) Soft law instruments can be crafted to better coordinate transnational proceedings, including the coordination of court-to-court communication and cooperation; and
- 4) Maintaining state sovereignty and judicial authority.<sup>20</sup>

Additionally, Wessels and Boon suggest that soft law instruments play several key roles: 1) They can complement existing hard law or help develop case law (see further discussion below on cases that have explicitly considered adopting a cross-border protocol under the JIN Guidelines)<sup>21</sup>; and 2) They can lead to the extension of hard law or transformation into hard law.<sup>22</sup> For example, references to soft law instruments such as the JIN Guidelines are included in the Business and Property Courts of England & Wales Chancery Guide 2022 in respect of matters where court-to-court communication is necessary for the efficient conduct of cross-border insolvency cases.<sup>23</sup>

## USE OF PROTOCOLS UNDER THE JIN GUIDELINES

There has been a longstanding tradition of using protocols for cross-border insolvency proceedings which predates the adoption of the JIN Guidelines, as well as the Model Law and other guidelines which have been used to facilitate cross-border communication and cooperation, including: the European Communication and Cooperation Guidelines for Cross-Border Insolvency (**CoCo Guidelines**); EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines (**JudgeCo Guidelines**); and the ALI/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (**ALA/III Guidelines**). An analysis of cross-border insolvency protocols adopted before the use of the JIN Guidelines is beyond the scope of this short paper. In any event, those protocols have forged the pathway and created a comfort level in the relevant courts for the use of JIN Guidelines' based protocols. Many of the most prominent cross-border protocols were approved by courts in England and Wales, Canada and the United States, and it is no surprise that courts in these jurisdictions were among the first to adopt the JIN Guidelines.

Whilst there may be more that are not publicly known or reported, there are several cross-border insolvency protocols which have incorporated the JIN Guidelines including the Canadian Companies' Creditors Arrangement Act (**CCAA**) proceedings and US Chapter 11

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<sup>20</sup> Wessels and Boon, *supra* note 13, at pp. 10-12.

<sup>21</sup> Wessels and Boon, *supra* note 4, at p. 421.

<sup>22</sup> Wessels and Boon, *supra* note 13, at pp. 16-17.

<sup>23</sup> The Business and Property Courts of England & Wales Chancery Guide 2022, "Court-to-Court Communications in cross-border insolvency cases", <<<https://www.judiciary.uk/wp-content/uploads/2023/06/Chancery-Guide-December-2023.pdf>>>, accessed on 25 January 2024.



proceedings in *Aralez Pharmaceuticals*<sup>24</sup> and *Payless*,<sup>25</sup> as well as the multi-jurisdictional proceedings involving *LATAM Airlines*<sup>26</sup> which had Chapter 11 proceedings in the United States, and ancillary proceedings in Chile, Colombia and the Cayman Islands.

Notwithstanding the longstanding tradition of the use of cross-border insolvency protocols in jurisdictions such as the United States, England & Wales, Canada and the Cayman Islands, the JIN Guidelines have found judicial support from recent rulings by the Superior Court of Justice – Ontario (Commercial List) in Canada and the Grand Court of the Cayman Islands. While approving a cross-border protocol as part of the Initial Order in the *Payless* CCAA proceedings, Justice G. B. Morawetz, found that “*The JIN Guidelines have received international recognition and acceptance. As noted, the aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs, an objective that all parties should strive to achieve in every insolvency proceeding.*”<sup>27</sup>

In the Cayman Islands, the JIN Guidelines were adopted alongside the ALA/III Guidelines in the Grand Court’s Practice Direction No. 1 of 2018 issued by former Chief Justice Anthony Smellie on 31 May 2018. Since then, the Grand Court has also adopted the Modalities under Practice Direction 2 of 2019. The JIN Guidelines (and other soft law instruments) draw their biggest judicial support, at least in terms of published court decisions, from the Cayman Islands *LATAM* proceedings in which Justice Ian RC Kawaley discussed the Grand Court’s jurisdictional basis for approving a court-to-court communications protocol by examining the principles of modified universalism, comity, and the common law duty to assist foreign insolvency courts.<sup>28</sup> Most importantly, Kawaley J. held that:

The ... JIN Guidelines may be viewed as emerging sources of law which have been described as “*soft law instruments*”: Gert-Jan Boon and Bob Wessels, ‘*Soft Law Instruments on Restructuring and Insolvency Law: Why They Matter (or Not)*’<sup>2</sup>. It is these instruments that most directly provide a jurisdictional basis for approving the Protocol, building on the more substantive common law principle mandating assisting foreign insolvency courts as far as possible and the inherent jurisdiction of the Grand

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<sup>24</sup> CCAA proceedings: *In Re Aralez*, Court File No: CV-18-603054-00CL. Chapter 11 proceedings: *In re: Aralez Pharmaceuticals US Inc., et al*, Case No. 18-12425 (MG).

<sup>25</sup> CCAA Proceedings: *In Re: Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc.*, Court File No: CV-19-00614629-00CL. Chapter 11 proceedings: *In re: Payless Holdings LLC, et al*, Case No. 19-40883-659.

<sup>26</sup> Chapter 11 proceedings: *In re: LATAM Airlines Group S.A., et al*, Case No. 20-11254 (JLG).

<sup>27</sup> *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215.

<sup>28</sup> *In the Matter of LATAM Finance Limited et. Al* (FSD No 105, 106 and 154 of 2020 (IKJ)) (Unreported, 24 August 2020). It is worth noting that whilst Kawaley J states that the applicant sought approval of a “*Cross-Border Protocol that is a distilled version of the ALI/ABA/III Guidelines*” and noted at paragraph 34 that the “*Protocol merely sought formal approval of the already administratively pre-approved ALI/III [Guidelines]*”, the approved protocol in the *LATAM* Chapter 11 proceedings incorporates by reference the JIN Guidelines and the Modalities.

Court to manage its own processes. The main governing principles applicable to an application for this Court to approve a court-to-court communication may be summarised as follows:

- (a) the Court is under a positive duty to assist the primary foreign main insolvency or restructuring proceeding, unless there are good reasons not to do so;
- (b) there is a starting assumption that a clear framework for communication between this Court and any relevant foreign courts in cross-border insolvency cases will enhance the efficiency of the cross-border case;
- (c) there is a starting assumption that the ALI/III and/or the JIN Guidelines are suitable guides to adopt and apply in cross-border case.<sup>29</sup>

Setting aside the jurisdictional hurdles and comfort levels with approving cross-border protocols, there is an acknowledgment by the courts in Canada and the Cayman Islands that soft law instruments generally, and the JIN Guidelines more specifically, are valuable tools for transnational insolvencies because the JIN Guidelines enhance the efficiency of cross-border proceedings and maximise value for stakeholders. The above-mentioned rulings in the *Payless* and *LATAM* proceedings are clear examples of Appeal Judge Chong's prophecy in the opening quotation of this paper, of courts taking the lead in developing soft law norms to improve the conduct of parallel insolvency proceedings.

## CONCLUSION

The importance of the JIN Guidelines is that they represent a flexible international insolvency judge crafted tool which is available for courts, insolvency practitioners, lawyers, and other stakeholders to facilitate international insolvency proceedings. And while the JIN Guidelines may not be the perfect solution to all the challenges of cross-border insolvency, they represent best practises and a practical solution to the challenges which Singapore Judge of Appeal, Steven Chong, trumpeted at the World Enforcement Conference in 2019. As anticipated, the JIN Guidelines appear to be gaining in popularity and adoption, including in countries such as Brazil and Bahrain which do not traditionally have a history of court-to-court communication or cooperation, but which have experienced major international insolvencies touching upon their jurisdictions in recent years.<sup>30</sup>

Whilst there may be some merit in the criticisms of the JIN Guidelines by Gabriel Moss QC and more generally of soft law instruments by Bob Wessels and Gert-Jan Boon (that such instruments are vague), the vagueness of the JIN Guidelines can be ameliorated

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<sup>29</sup> *Ibid* at paragraph 26.

<sup>30</sup> Bahraini, Awal Bank, was placed into liquidation after a lengthy administration process in Bahrain. Awal Bank had several Cayman Islands domiciled subsidiaries in liquidation in the Cayman Islands which were involved in the massive *AHAB v Saad* litigation which is one of the longest running and most-complex litigation proceeding before the Grand Court of the Cayman Islands.

by judges having the flexibility to interpret the provisions taking into consideration the overarching objective and aims of the JIN Guidelines of improving the efficiency and effectiveness of cross-border proceedings, as well as preserving and maximising enterprise value. Further, the JIN Guidelines can be adopted by jurisdictions in a manner that provides the courts and parties with the ability to implement JIN Guidelines' based protocols with modifications which may be necessary in the circumstances.<sup>31</sup> In Canada, the Superior Court of Justice - Ontario Consolidated Practice Direction Concerning the Commercial List expressly states that the JIN Guidelines and the Modalities “*are not meant to be static but, instead, are meant to be adapted [and] modified to fit the circumstances of individual cases, and to change and evolve as experience is gained from working with them.*”<sup>32</sup>

As to the non-binding nature of soft law instruments, when the JIN Guidelines are adopted in a jurisdiction by way of practice directions or some other court procedural mechanism, courts can exercise a high level of control over lawyers, court appointed officeholders, and other stakeholders to ensure compliance with the relevance procedural rules and directions.

Only time will tell whether the JIN Guidelines survive as the go-to tool for court-to-court communication or whether they will lead to a more all-encompassing solution. In the meantime, the JIN Guidelines will continue to serve as an attractive tool to ‘ameliorate the ills of fragmentation’ caused by parallel proceedings. But one thing is certain, cross-border cooperation and court-to-court communication are key to a successful transnational insolvency. And any instrument that enhances such communication and cooperation on a more wide-spread basis (including to newer jurisdictions with limited or no experience in this area) must be considered a success.

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<sup>31</sup> For example, the JIN Guidelines are adopted in the Cayman Islands and Bahamas by way of Practice Directions and in England & Wales by way of the Chancery Guide, all of which expressly state (in different terms) that officeholders can adopt a JIN Guidelines based protocol with modifications as may be required by the circumstances of the case.

<sup>32</sup> Superior Court of Justice – Ontario, Consolidated Practice Direction Concerning the Commercial List, <<<https://www.ontariocourts.ca/scj/practice/consolidated-commercial-pd/#protocol>>>, accessed on 26 February 2024.

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