Communications Between Courts in Cross-Border Insolvencies: What Does Work and What Does Not

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A. Introduction by the Translator

I. General Information

This article was originally published in German in Neue Zeitschrift für Insolvenzrecht (NZI; New Insolvency Law Gazette), a prestigious German periodical on insolvency law the publisher of which is Verlag C.H. Beck oHG, Munich, Germany.
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Three authors of the article are judges of the insolvency divisions of the Local Courts (Amtsgericht) of Detmold (Busch) and Cologne (Vallender, Presiding Judge of the Insolvency Division) and of the Higher Regional Court (Oberlandesgericht) of Cologne (Rüntz); one author is the Head of the Trade, Corporate and Insolvency Law Division of the Ministry of Justice in and for the German State of North Rhine-Westphalia (Remmert).
Prof. Dr. Heinz Vallender is the co-author of one of the most authoritative and most frequently cited commentaries on German insolvency law and also a law professor. He is the chairman of INSOL Europe's Judicial Wing.
Prof. Dr. Vallender was a speaker at several German and international conferences on insolvency law.
Dr. Peter Busch has been an insolvency judge for 26 years. He has more than ten years of experience in conducting advanced training classes and giving lectures on all areas of insolvency law, e. g., at the Academy of Justice of the Federal State of North Rhine-Westphalia and at the German Federal Judges' Academy. He has also been involved in many international legal projects in several Eastern European countries, serving as an expert on insolvency law. Dr. Busch was a speaker at the 2nd Mexican National Congress on Insolvency Law in Guadalajara, Mexico, in May 2008 and lately at the IBA Annual Conference in Vancouver, Canada. In addition, Dr. Busch has authored a large number of publications on current issues of insolvency law.
Stephanie Rüntz was employed by the Ministry of Justice in and for the German State of North Rhine-Westphalia before she became a judge at the Higher Regional Court. During her employment with the Ministry of Justice, she was an important

contributor to a draft of a statute designed to simplify court control over insolvency administrators.
Dr. Andreas Remmert has been a lecturer, speaker and participant on a large number of national and international law conferences and seminars. He is the chairman of the German Working Group “Court-to-Court Communications in Cross-Border Cases”.
The translator is the Presiding Judge of the Insolvency Division of the Local Court (Amtsgericht) of Heilbronn in Germany and a certified translator for English and German. He is also the coordinator of the group of judges who drafted the “Heidelberg Guidelines” which are mentioned in the article.

II. Terminology

As the insolvency systems in the US and Canada are very different from the insolvency system in Germany, it is not always possible to find an English term that exactly represents the legal concept behind a German term.
Therefore, I have tried to use English terms which are generally understood and represent the German legal concept to the maximum extent possible.
The official translations of EU law published by the European Union are a useful resource for finding generally accepted terms, above all, the European Insolvency Regulation.
I have chosen to use “administrator” as a “catch-all term” for the words “administrator”, “liquidator”, “trustee”, and “receiver”.
All of the above terms define persons who manage the affairs of the debtor in some way although they may pursue different goals.
For the purpose of discussing court-to-court communications, it is crucial to use a term which meets the following criteria:

- it is understood by the members of all represented jurisdictions;
- the concept it represents is not limited to one or only a few jurisdictions.

As all jurisdictions know the general concept of appointing a person as an officer to at least temporarily manage the debtor’s affairs and achieve good results for the creditors, “administrator” is the term of choice for discussing court-to-court communications in cross-border cases.
The generally accepted translations of German court names used in this introduction and in the article can be found at the address listed below.
The word “Rechtspfleger” (a judicial officer mentioned under IV 3. of this introduction and in the article) has been left untranslated because there are no equivalent court officers in common law jurisdictions.

III. Approaches to Court-to-Court Communications

Court-to court communications in cross-border cases is a much discussed subject in the community of insolvency practitioners and insolvency judges.
There is wide agreement that such communications may help to manage insolvency proceedings more effectively.
The degree to which different jurisdictions accept court-to-court communications as a lawful procedural tool varies, however.
This became very clear in a discussion between German judges and members of the International Insolvency Institute’s Judicial Committee in Berlin on June 11, 2008.
The discussion revealed different approaches toward court-to-court communications taken by common law jurisdictions and by civil law jurisdictions.

Courts in common law jurisdictions seem to have included communications with other courts across borders into the box of tools they use routinely.
Courts in civil law countries seem to take a more cautious approach towards communicating with foreign courts.
In the article, the authors explain why it is less easy for courts from civil law jurisdictions to enter into communications with a foreign court than it is for courts from common law jurisdictions.
The authors of the article come to the conclusion, however, that German judges are permitted to enter into court-to-court communications to a wider extent than they may think they are.

IV. Background Information for the Reader of the Article

1.

In the article and in this introduction, the use of the male gender also includes the female gender.
I am going to explain a few basic features of German insolvency law to make the article easier to understand for readers from common law jurisdictions.

2.

Insolvency cases are heard and managed by the Local Courts (Amtsgericht).
These local courts have limited jurisdiction in civil and criminal proceedings, but unlimited jurisdiction in domestic relations proceedings and insolvency proceedings.

German insolvency proceedings have two stages which I will call the pre-opening stage and the post-opening stage.
The pre-opening stage of the insolvency proceedings is the period between the filing of an insolvency petition with the insolvency court and the signing of the judgment by which the judge opens (commences) insolvency proceedings.
The post-opening stage is the period between the opening of the proceedings and the termination of the proceedings by the court.

When the judge receives an insolvency petition (voluntary or involuntary), the first step of his work is to ascertain that the petition meets all formal requirements.
If the formal requirements are met, the judge has to decide whether insolvency proceedings are to be opened.
Should the judge be satisfied that there are no formal deficits, he has to investigate on his own initiative whether there are enough assets to cover the cost of insolvency proceedings (court fees, expert fees, insolvency administrator fees, and fees of other professionals the insolvency administrator may hire).
If that is the case, the judge will order insolvency proceedings to be opened and appoint an insolvency administrator.
Otherwise, the insolvency petition will be dismissed for insufficiency of existing assets and the case will be closed.

Unlike in proceedings governed by the U.S. Bankruptcy Code, effects such as the stay imposed by Bankruptcy Code § 362 are not automatic in German insolvency proceedings.
This means that creditors can generally continue enforcing judgments or liens or other rights even after a petition for insolvency has been filed.

The German Insolvency Code provides, however, that, pending its ruling on the petition, the insolvency court shall take any action it deems necessary to avoid any change in the debtor's financial situation which is adverse to the creditors' interests.
So, if the insolvency petition is filed against a business entity which is still active, the judge will probably appoint a temporary insolvency administrator.
If the business entity is no longer active, the appointment of an expert witness for evaluating the assets of the business entity will generally be sufficient.
Along with the appointment of the temporary insolvency administrator or expert witness, the judge will in most cases order a stay of all pending enforcement measures and a ban on future enforcement measures against the debtor or against the debtor's movable assets.
The insolvency judge has no jurisdiction to stay or ban the enforcement of claims against immovable (real) property, however.
The temporary insolvency administrator will have to file a motion with the court division handling the judicial sale of real property to preserve the debtor's real property.
The temporary insolvency administrator or, as the case may be, the expert witness, will have to submit an expert opinion to the court stating whether the assets are sufficient to open the proceedings.
Should the judge be convinced that the value of the assets exceeds the amount of the cost of the proceedings, he will sign a judgment by which the insolvency proceedings are ordered to be opened.
This judgment is the key procedural event during the insolvency proceedings.
Its most important effects are that:

- litigation proceedings by and against the debtor are stayed;
- the enforcement of judgments, liens, and other rights by individual creditors against the debtor or the debtor's assets is banned;
- the debtor's right to manage and dispose of the insolvency estate passes to the insolvency administrator (unless the court permits debtor-in-possession proceedings);
- the judge is no longer in charge of the proceedings because a judicial officer called "Rechtspfleger" takes over.

With regard to court-to-court communications, this means that the German court may not be represented by a judge but by a Rechtspfleger depending on whether communications are held before or after the opening of the German proceedings.
The Rechtspfleger is a specialized court officer who replaces the judge in a limited area of legal activity. Unlike a judge, a Rechtspfleger does not have to attend law school and obtain a J.D. degree.
But he has to complete a three-year college education program especially designed for the Rechtspfleger profession.
To the extent the Rechtspfleger replaces the judge, he is as independent as a judge.

3.

Table of Abbreviations Used in the Article (Alphabetical Order)

Abbreviation	German	English Translation / Web Resource in English
AG	Amtsgericht	Local Court
AG Köln	Amtsgericht Köln	Local Court of Cologne
AG Nürnberg	Amtsgericht	Local Court of Nuremberg

	Nürnberg	
EGGVG	Einführungsgesetz zum Gerichts-verfassungsgesetz	Court Organization and Governance Code Introduction Act
EIR	---	European Insolvency Regulation / http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:HTML
EU	Europäische Union	European Union
EU-Beweisauf-nahmeVO	VO (EG) Nr. 1206/2001	EU regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Regulation (EC) No 1206/2001 by the Council of May 21, 2001, Official Journal L 174 , 27/06/2001 P. 0001 – 0024) / http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R1206:EN:HTML
GG	Grundgesetz	Basic Law (German Constitution) / http://www.cgerli.org/index.php?id=50&tx_vmdocumentsearch_pi2[docID]=45
GVG	Gerichts-verfassungsgesetz	Court Organization and Governance Code
InsO	Insolvenzordnung	Insolvency Code / http://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html
ZPO	Zivilprozessordnung	Code of Civil Procedure
ZRHO	Zivilrechtshilfe-ordnung	Civil Judicial Assistance Ordinance / http://www.datenbanken.justiz.nrw.de/pls/jmi/ir_start (German version only)

Useful Websites

Institution	Website
Database of video conference systems available in German courts	http://www.justiz.de/verzeichnis/index.php;jsessionid=52771B092972371B081C77C4AECA96CB (information in German language only)
European Judicial Atlas	http://ec.europa.eu/justice_home/judicialatlascivil/html/cc_searchmunicipality_en.jsp#statePage0
German Federal Foreign Office (Court Names)	http://www.auswaertiges-amt.de/diplo/de/Infoservice/Terminologie/Gerichtsbezeichnungen.pdf
International Insolvency Institute (Collection of Cross Border Insolvency Orders and Protocols)	http://www.iiiglobal.org/component/jdownloads/?task=viewcategory&catid=574)
North Rhine-Westphalian	http://www.justizadressen.nrw.de/og.php?MD=nrw

address database	
Quality Circle of Insolvency Courts BW (Heidelberg Guidelines)	http://www.qualitaetszirkel-bw.de/43700.html

B. Article in English

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You are an Insolvency Judge or Insolvency Rechtspfleger. Your phone is ringing. Neither your office nor an insolvency administrator nor your son is on the other end of the line. New York is calling! The colleague from overseas would like to discuss an insolvency case both of you are involved in. He is presiding the insolvency proceedings against a group subsidiary, you are presiding the proceedings against the parent of the group. Cross-border communications between insolvency courts are standard procedure for him. Are they for you as well?

I. Introduction

1. Problem

This article is intended to initiate a discussion. Insolvencies do not stop at borders. This is especially true in times of globalization and of advanced economic interconnectedness of trade relations and businesses. Meanwhile, the number of cross-border insolvencies has become incomprehensibly vast. An insolvency is to be treated as "cross-border" in terms of this analysis if at least two insolvency courts in two different countries are involved in handling the insolvency. Such an insolvency may involve one and the same business entity, several business entities of the same group of business entities, or business entities associated through intense business transactions. Each such case may require that the insolvency proceedings be coordinated either to advance the progress of the proceedings or for the benefit of the parties to the proceedings. Insolvency proceedings are known to require speedy handling if the objective is to save what can be saved. Often, there will be no time for formal and lengthy correspondence between the courts of the different nations which may even require the involvement of third party agencies. So it is actually possible that your phone will ring during the next few weeks. Will you answer the call?

"Where is written that I may do that?" The reaction in Germany and other countries of continental Europe may be thus or similar. We generally work on the basis of codified laws. The courts of the so-called "Civil-Law-Countries" are used to statutory law and the limits intrinsic to it. What is the applicable rule if written law for any specific judicial conduct is nonexistent? Unlike Article 25 of the UNCITRAL Model Law, the law applicable in Germany does not provide any duty for insolvency courts to cooperate with other insolvency courts. At least explicitly, EIR Article 31 only provides for a duty to cooperate between insolvency administrators. The majority of authors in German legal literature rightfully disapproves the inference of a duty to

cooperate between insolvency courts on the basis of applying EIR Article 31 by analogy or on the basis of general principles of law. Is everything which is not expressly prescribed or permitted to be treated as prohibited merely because of that?

Not at all. There is no requirement for each and every act by an insolvency judge or insolvency Rechtspfleger to be covered by a statutory provision which expressly permits such an act. Procedural law is no end in itself but an efficient legal tool and it always serves to put substantive law into practice as expediently and as fairly as possible and, moreover, to enforce personal claims. This principle even being applicable to the construction and application of written procedural law, it must even more apply to filling out gaps and to judicial development of the law. Hence, if a need for cross-border communications between courts becomes apparent due to the increasing international interprenetration of the economies without statutory law having a provision in store which is meant to be exhaustive, then it is up to the insolvency court to develop reasonable conflict resolution mechanisms and efficient procedures on the basis of general principles and while minding the rights of the parties to the proceedings.

Especially because no statutory provision in the field of insolvency law is limiting international communications between courts, it is up to the insolvency court to draw those lines and to determine the possibilities and chances of cross-border communications between courts within the legal boundaries thus found.

InsO section 1 clause 1 which defines the best achievable satisfaction of the creditors as the objective of insolvency proceedings is to be treated as a guiding principle regardless whether the proceedings are liquidation proceedings or insolvency plan proceedings by their nature. Cross-border communications are generally permitted according to the above mentioned principles if they serve those principles. Aside from individual provisions on details and international treaties, the limits and guidelines are established by the procedural rights of the parties to any proceedings, in particular by their right of being granted a hearing pursuant to GG article 103 subsection 1. Another point of reference can be found in the principle of the court having to investigate the facts on its own initiative as provided in InsO section 5 subsection 1 clause 1. The vague wording of that statute provides the court with a broad range of options for action. Communications with foreign courts or insolvency administrators are "of relevance for the insolvency proceedings" if they may help in establishing the relevant facts, in establishing the basis for a reasonable discretionary decision by the court, in avoiding inconsistent decisions in parallel insolvency proceedings, or even if they are only held in the parties mutual interest to have dates and deadlines coordinated in a manner beneficial to both proceedings on either side of the border. But InsO section 21 may as well provide a basis or even constitute a duty for the court to contact a foreign insolvency court. According to that provision, the insolvency court may (and shall) take all action required to prevent any changes in the condition of the debtor's assets which is adverse to the creditors interests until the proceedings are opened. Such action may also include contacting a foreign insolvency court, in order to gather information, for instance.

2. Subject Matter and Program of this Analysis

The statements and arguments made hereinafter are designed to open a first door to cross-border communications in insolvency proceedings. They examine the different alternatives of such communications, their objectives and the practical problems to be considered. The "Guidelines Applicable to Court-to-Court Communications in Cross-Border Communications developed by the American Law Institute(ALI) and the

International Insolvency Institute(III) are not to be the benchmark but a basis for discussion. These "Guidelines" are not easy to comprehend for German lawyers because of the style they are written in. However, they include a valuable collection of situations arising in cross-border communications between insolvency courts. On the basis of German procedural law, their legal recommendations which are mostly based on the tradition of close cooperation between the insolvency courts in the common law countries cannot always be followed. An exact analysis shows, however, that even under German law the extent to which courts can communicate across borders is broader than expected.

By their nature, "guidelines" are non-binding (cf. guidelines 16 and 17). Therefore, someone might raise the issue whether the principles laid down in such guidelines make sense to be used as a basis for cross-border communications given the fact that compliance with them cannot be required and that non-compliance does not result in any consequences. As a response to that issue we want to draw your attention to a first example, an area of law in which non-binding guidelines have been used for a long time for the benefit of all those involved: the calculation of support payments in domestic relations cases is mainly based on the so-called "Düsseldorfer Tabelle" (Düsseldorf Support Table) and on the support guidelines established by the individual appellate courts. Regardless of the non-binding nature of all of those guidelines, the vast majority of calculations of support payments are made on the basis of the standards of those tables and guidelines. Hence, establishing such tables and guidelines makes sense under the aspect of providing a generally accepted basis all those involved (the parties, their attorneys, possibly the youth welfare offices and the courts of all levels as well) can use and also under the aspect of making out-of-court settlements much easier. The courts may choose not to use these guidelines at any time. They will, however not do so unless necessary and they will generally notify the parties of their intent not to use the guidelines so that the parties can get prepared for dealing with the changed situation. The latter is an important aspect because it shows that the parties may generally rely on the application of the guidelines by the courts. A similar concept of the purpose of non-binding guidelines can be found in the preamble of the so-called "Heidelberger Leitlinien" (Heidelberg Guidelines) for the handling of insolvency proceedings. The preamble includes the following statement:

These guidelines represent the attempt of the insolvency judges of the courts in Baden-Württemberg mentioned above to provide a common basis for the collaboration between the insolvency court and the insolvency administrator. They are designed to ensure smooth proceedings and explain at the same time what the courts expect from the insolvency administrators and, on the other hand, what the courts plan to do while they are accompanying the proceedings. The complexity of the daily insolvency work does, however, only permit us to draft general guidelines. Disregarding the guidelines may be called for from case to case. If that situation arises, the highest possible degree of transparency should be maintained for all those involved.

Guidelines or principles for cross-border communications established by courts or an agreement on their (partial) applicability in the case at hand may likewise help to make those involved in the proceedings agree on a common basis, to make them develop mutual trust, and to allow them to focus on what is really important, and that is to handle the interconnected insolvency proceedings as efficiently as possible.

II. Principles, Models, and Problems of Cross-Border Communications between insolvency courts

Below, we will examine whether the individual guidelines established by the ALI and the III are compatible with German law and whether they can be implemented into the German procedural practice. The discussion of guideline 1 will, however, (only) immediately precede the discussion of guidelines 16 and 17 because their subject matters are interrelated. Subsequently (under III.) we will introduce a sample of a "protocol", that is an arrangement with a foreign insolvency court governing mutual communications. The content thereof might as well be worded like the general guidelines of an insolvency court for communications in cross-border insolvencies.

1. Guideline 2:
Objective of Communications between Courts

A court may communicate with another court with regard to matters related to proceedings pending before that court for the purpose of coordinating and harmonizing the proceedings in its jurisdiction with the proceedings pending in the other jurisdiction.

When dealing with proceedings especially in need of being coordinated and harmonized, each insolvency court which is willing to communicate and cooperate is confronted with the fundamental question whether it is permitted to directly contact the insolvency court in charge of the proceedings needing to be harmonized (cf. above under I.). The German insolvency judge must be aware, insofar, that he is under a duty pursuant to InsO section 5 to investigate the facts on his own initiative if the petition for insolvency fulfills the procedural requirements (cf. above I 1). At the same time, he has to exercise the control function. Especially the aspect of gathering information is generally to be considered as part of the existing duty to investigate the facts on the court’s own initiative and as part of the court's control function as well. The investigations to be made on the court’s own initiative cannot be limited to communications with the court of the other country, but need to be extended to a larger group of persons. When the first contact is made, nobody knows whether any fact is relevant for the proceedings as a result of the communications and if so which one of the facts that may be. In certain procedural situations, the court's duty to make investigations on its own initiative may even turn into a duty to commence communications with another court.

According to guideline 2, the communications cover "matters related to proceedings before it". The wording of the guideline is not self-explanatory as to what the term "matter" means. A narrow approach would be inconsistent with the purpose and objective of communications in cross-border communications. Therefore, the term "matter" should be construed to include every circumstance which is relevant for handling the proceedings.

Communications between courts should primarily serve the purpose of gathering information, including without limitation the clarification of jurisdictional issues, the coordination of the courts' dockets and the selection of the insolvency administrator. We do not expect any problems insofar. For example, the appointment of insolvency administrators could be coordinated by considering the appointment of either several insolvency administrators from one and the same international firm or of only one and the same insolvency administrator for all of the respective proceedings. Doing so would result in the benefit of an uncomplicated coordination by the same organization

of insolvency administrators. Furthermore, the objectives of the proceedings (reorganization or liquidation) which are to be largely determined by the insolvency administrators can thus be agreed upon in an early stage of the proceedings.

As soon as the insolvency court has determined if entering into any contact is permissible, whether "the matter relates to proceedings before it" and whether it is ready or even obligated to enter into any direct contact, it may have to solve the mundane question whom it should and could contact. If it does not have the information required to contact the foreign court it is ready to contact, internet research will be a good choice. Within the EU, the European Judicial Atlas can, for instance, be used to research the internet. Foreign courts can research the German court of competent jurisdiction very easily by using the North Rhine-Westphalian address database. The cost to be possibly incurred for preparing the making of the contact will generally be justified given the objective of the proceedings to obtain the best achievable result for the creditors involved by coordinating and harmonizing the proceedings.

Another essential barrier to making contact is the language problem. If courts with different languages are involved, they will generally use English. This requires, however, that all those involved have a sufficient command of the English language. Normally, there is no guarantee to that. Insofar, it would make sense to have the (temporary) insolvency administrator make the contact if he is willing to do so. Depending on the circumstances, it may be necessary to use the services of an interpreter. The cost for such services are to be treated as expenses of the insolvency proceedings which include the cost of action taken on the court's own initiative. As the insolvency estates in cross-border insolvency proceedings generally include substantial assets, the cost for the services of interpreters and, as the case may be, for the services of translators (e.g., if emails need to be translated), will be justified in many cases in view of the value of the assets and of the need to distribute the assets correctly and quickly among the creditors.

Even if making an initial contact directly is considered possible and appropriate, making it by a letter or an email is preferable to an immediate contact by phone. On one hand, making the initial contact in writing has the great advantage that the content of the letter can be prepared whereas the contact made by telephone requires immediate reaction. Moreover, it is easier to prepare an additional contact by telephone by prior written communications.

Even within Germany, there have been examples of efficient or lacking communications between insolvency courts in the past. For example, the PIN-AG proceedings at the AG Köln which had been opened on February 1, 2. 2008, has been preceded by intense communications on the respective state of the proceedings between the judge in charge of the proceedings at Cologne and his colleague in Luxembourg. These communications were necessary because both courts had to rule on the opening of main insolvency proceedings at almost the same time. Following the maturity of the insolvency proceedings to be opened, the AG Köln opened the insolvency proceedings on the assets of the holding company registered in Luxembourg. The commercial court in Luxembourg was immediately notified of the decision opening the insolvency proceedings.

In cross-border proceedings between Munich and Amsterdam there had been direct contacts between the judges in charge as well.

On the other hand, the case of Hans Brochier Ltd. is a practical example showing that a direct contact between the judges in charge of the proceedings in London and Nuremberg, no matter if by phone or by letter, would have resulted in a better

coordination of the proceedings. Maybe, the High Court of Justice in London would not have made a ruling on whether or not to open proceedings due to a lack of international jurisdiction if the debtor's center of main interest had been investigated early. In that case, the AG Nürnberg would have been spared the trouble of discussing a breach of procedural public policy. As far as guideline 2 recommends communications between involved courts for the purpose of avoiding jurisdictional conflicts, we see no reasons why such communications should not be legitimate. There may be some doubt, however, if, according to German law, the terms "coordination and harmonization" of the proceedings also include a coordination of possibly required protective measures. On one hand, the latter requires insolvency proceedings to be pending before a German court as well. On the other hand, the principle of proportionality would have to be observed when deciding which measures are possible and necessary.

2. Guideline 3: Judicial Communications with an Insolvency Administrator or Authorized Representative of Another Court

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

The insolvency judge decides whether or not insolvency proceedings are opened. He checks if the requirements according to InsO sections 13 et seq. and 16 et seq. for the proceedings to be opened are met. An exchange of information between involved insolvency courts may absolutely be helpful in the process of investigating the debtor's assets and also for the purposes of the court's supervisory role (monitoring of the [temporary] insolvency administrator). If the foreign law provides for "authorized representatives of the court", communications with them may also be useful for the German insolvency court. Because of the obligation to investigate the facts on its own initiative, the German insolvency court may even be obligated to enter into communications not only with the foreign insolvency court but also with its authorized representative or with the foreign insolvency administrator (cf. above under guideline 2). Thus, the judge of the AG Köln in charge of the Automold proceedings has prepared the making of essential substantive decisions in the secondary proceedings pending before him by contacting the foreign insolvency administrators and by reaching an agreement on the date of the creditors' meeting with the foreign insolvency administrators. The English administrators of the main insolvency proceedings accommodated the interests of the German creditors in that process by their readiness to have the creditors' meeting held before the AG Köln. The meeting of the creditors in the secondary insolvency proceedings was held immediately afterwards. A creditors' meeting which was so cost-effective for the creditors involved would not have been possible without having contacted the foreign insolvency administrators.

3. Guideline 4: Communications by the Insolvency Administrator

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized

Representative of the foreign Court on such terms as the Court considers appropriate.

After his appointment the insolvency administrator holds an office which subjects him to the duty of protecting the interests of all parties to the proceedings to the best achievable degree. This duty is the standard for determining which communications are appropriate under guideline 4. If the insolvency administrator preserves the interests of all parties involved during his communications, there is neither reason nor cause for the court in its role as supervisory agency to intervene and to prohibit such communications. The German insolvency court should, however, make the foreign court aware of this condition. When doing so, the German court is recommended to mention EIR articles 31 and 32 and InsO sections 344, 357 in proceedings involving countries which are not members of the EU. According to those provisions, the insolvency administrators of the main proceedings and of the secondary proceedings shall communicate with each other and keep each other up to date.

4. Guideline 5: Receipt of Communications; Response

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

The "rules for ex parte communications" mentioned in this guideline are based on the American legal tradition of the so-called "local rules" promulgated by courts which are part of procedural law. Such "local rules" are unknown under German law. German procedural law determines whether communications are permitted. This issue has already been discussed. Under German procedural law, the receipt of communications and direct responses do generally not raise any concerns.

If a court communicates with another court or another insolvency administrator, these communications must be laid down in a memorandum for the files which is to be made known to the parties involved.This is the only way to do justice to the principle of due process.

5. Guideline 6: Transmission of Documents Pertaining to the Proceedings; Communications by Telephone and Video Conference

Communications from a Court to another Court may take place by or through the Court:

a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate.

b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such

fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guidelines 6a and 6b deal with the transmission of documents pertaining to the proceedings. Unlike verbal communications, the transmission of documents is governed by special provisions of procedural law and of court governance law which must be observed. With regard to those provisions, please refer to our analysis of guideline 9b.

The issue of communications between courts by means of telephone and video conference (guideline 6c) is discussed under guideline 7.

6. Guideline 7: Court-to-Court Communications by Telephone, Video Conference, or Other Technical Means

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guidelines 7 and 8 are designed to guarantee that the proceedings meet the standards of the rule of law. The proceedings will become impracticable, however, if the attorneys of the parties have to join each communication between the courts. On one hand, not all the parties to the proceedings have been identified yet, at least not during the pre-opening stage of the proceedings. On the other hand, the available technical capacities (room, facilities for enabling everybody to listen to the communications) would be insufficient. It appears feasible, however, to have communications including the (temporary) insolvency administrator and the creditors' committee or the "pre-provisional" creditors' committee if the latter is made possible by applicable law in the future.

Guideline 7 relates especially to preliminary or procedural orders with regard to court-to-court communications. German procedural law determines who is to be heard and who is to be involved. According to that law, it is not necessary to have the attorneys present while (preparatory) communications are had between the insolvency courts. In order to comply with the requirement of a fair hearing, the parties shall be allowed to state their positions on the intended contact and communication provided that the fast track character of insolvency proceedings is not adversely affected thereby.

Guideline 7 clause 2 relates to the preparation of court-to-court communications. Under German law, the judge and the Rechtspfleger are as well permitted to make arrangements for communications. This fact should be made clear to the foreign colleague before entering into communications.

7. Guideline 8: Communications by the Court with an insolvency administrator by telephone, video conference or other electronic means

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

With regard to guideline 8 (d), mention is made again of the fact that the parties to the proceedings do not need to be present if the communication is limited to the exchange of information and to orders preparing or directing the proceedings (such as fixing a date for a hearing).

8. Guideline 9: Joint Hearing

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

a) Each Court should be able to simultaneously hear the proceedings in the other Court.

b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given per-mission by the other Court to make submissions to it.

d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

e) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

a) Clause 1: Joint Hearing with Another Court.

German procedural law includes no provision thereon. The court providing judicial assistance on the basis of the EU-BeweisaufnahmeVO is generally not a foreign insolvency court conducting a "joint hearing" with which appears to be useful. This should be kept in mind when a court requesting judicial assistance on the basis of that regulation considers to attend the evidentiary hearing held by the court requested to provide judicial assistance.

Merely having contemporaneous hearings before the insolvency courts with video conferencing is a possible alternative in such cases.

Such hearings are, however, not to be considered a "joint" hearing in terms of the guideline discussed here. A joint hearing requires that either court can also question persons who have appeared before the other court or allow them to speak.

Holding a creditors' meeting and using modern means of communication while that meeting is held, especially video conferencing through the internet, is a way of realizing a joint hearing, however. The law does not generally prohibit a meeting of the creditors to be held in such a manner. The communications must be transmitted in a safe manner, however, not least because the proceedings are only open to the parties. At least with regard to the type of "video meeting of the creditors" discussed here, we doubt that the permission of the creditors attending that meeting is required to hold such a meeting. The typical video hearing during which the creditors join in themselves requires a technical familiarity with that type of communication on the part of the creditors and, therefore, that typical video hearing would require the creditors' permission. This discussion, however, is only about creditors' meetings related to particular proceedings which are technically serviced by the insolvency courts and their staff. A special familiarity of the creditors with the technology of video hearings is not required.

The confidentiality of creditors' meetings is a problem arising when a hearing is conducted jointly with another court. This problem can be solved, however. The

result of a joint hearing by way of video transmission is that persons will be "present" in the domestic meeting of the creditors who are only parties to the foreign proceedings but who are not parties of the domestic proceedings and who are, therefore, not originally entitled to attend the domestic meeting of the creditors. According to a generally accepted principle, the court has discretion to even grant access to individuals who are not members of the group with a legal right of attendance (InsO section 74 subsection 1 clause 2) and to thus permit them to be present in the meeting of the creditors. We recommend not to apply overly strict standards when the individuals requesting access have a justifiable interest to attend the meeting of the creditors. The attendees of the foreign meeting of the creditors or of the foreign hearing can be counted among those having such a justifiable interest. An additional aspect to be taken into consideration is that the insolvency court may at any time schedule an oral hearing to prepare a decision to be made (Inso section 5 subsection 2). Such a hearing is open to the public. A joint hearing by means of video conference would then be possible on the basis of InsO section 4 in conjunction with ZPO section 128a subsection 1.

A video conference transmitted to a foreign country, i.e. a meeting of the creditors or an oral hearing in German judicial proceedings which are in part held abroad, may affect the sovereignty of the foreign country. Therefore, some take the view that a video conference across borders may only be held if governed by international conventions or treaties (Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters) or by the EU Regulation on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. Article 17 of the EU Regulation on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters permits that the trial court takes evidence abroad directly even by using video technology. On that basis it is required, however, to take the detour over the central bodies which will result in substantial delays. Moreover, taking evidence is not necessarily always the subject matter of a joint hearing.

We doubt, however, that a video conference transmitted abroad will also violate the sovereignty rights of another country if the foreign insolvency court has agreed to the transmission. The latter mainly depends on the law of the other country. If that law permits the cooperation with foreign insolvency courts and joint hearings, then there will be no violation of sovereignty rights. A joint hearing is, therefore, permitted if parts of a German proceeding are held in another country the law of which positively permits a joint hearing. As German law is silent on the issue of a hearing across borders, proceedings held the other way round, that is to say a foreign hearing a part of which is held in Germany through a joint hearing, remain problematic. It remains uncertain whether the foreign court is permitted to question an individual attending the German meeting of the creditors who is a creditor in the domestic and the foreign proceedings as well.

But pragmatic approaches to solve the problem may be found here as well. For instance, the foreign court may beforehand and as part of permissible court-to-court communications send the German court a list of questions which may also be of interest for the German proceedings. Under the principle that the court is to investigate the facts on its own initiative, the boundaries for court action are wide. Questioning the particular individual during the joint hearing would in that case no longer constitute a part of the foreign proceedings but would constitute a part of the German proceedings. Anyhow, all those involved in the foreign proceedings would directly hear the answers to the questions and, as the case may be, would be able to

suggest additional questions to the German court and to use the answers as evidence in the foreign proceedings if permitted by the foreign procedural law.

A joint hearing requires not only the presence of interpreters, but also the availability of a video conferencing system. Video conferencing systems are only available in a limited number among German courts. Presumably, joint hearings in cross-border insolvency proceedings will only be an appropriate choice in a few, however important cases. The available video conference systems can be used in those cases. If such video conference systems are not mobile, the creditors' meeting may be relocated into the rooms of a Landgericht (Regional Court) equipped with a video conference system. Generally, a creditors' meeting would currently be transmitted abroad by ISDN and telephone lines because only these transmission methods will guarantee a sufficiently adequate video quality. However, inexpensive "over IP" transmission methods may soon be available because the development of internet based transmission technology including the services of webcam technology and livestream technology makes speedy progress which looks promising.

a) Clause 2: Recommendations on Details of Joint Hearings

aa) Simultaneous Transmission. Clause 2 of Guideline 9 requires that the proceedings are transmitted simultaneously. German procedural law does not prejudice this requirement. On the contrary, ZPO section 128a subsection 1 clause 2 also requires a hearing simultaneously transmitted in an audio-visual manner.

bb) Transmission of written materials and evidence. Clause 2 subitem b of Guideline 9 recommends to send evidence or written materials from one court to the other beforehand for the purpose of preparing the joint hearing or to make these materials available electronically in a publicly accessible system. This recommendation is based on U.S. law under which (electronic) court files are publicly accessible for everybody. German law has substantially stricter limitations in that regard, in ZPO section 299 as well as in provisions on data protection or in the rules on international judicial assistance in civil matters.

In detail:

Due to the statutory provisions of German procedural and court governance law governing such transmissions, making evidence and "written materials" available in "public systems" is not permitted. Insofar, ZPO section 299 subsection 2 includes explicit limitations on the right of third parties to access the files. Through InsO section 4, that provision is generally applicable in insolvency proceedings as well.

Unlike during the joint hearing itself and during the verbal communications held to prepare the joint hearing, the German statutory provisions applicable to the transmission of written materials and evidence must even be observed when evidence and other documents related to the proceedings are sent to another court. ZPO section 299 subsection 2 does not apply, however, because courts are not third parties in terms of this provision. Insofar as other authors do to some extent not share our view of this issue, even those authors emphasize that granting access to court files to other courts or government agencies is an act of judicial and administrative assistance and that the provisions governing that assistance are to be applied. If ZPO section 299 subsection 2 is applicable, the data protection provisions of EGGVG sections 12 et seq. are to be observed as well. Either EGGVG section 16 (transmission of data to foreign government agencies) or EGGVG section 17 subitem 2 (for international judicial assistance proceedings) are to be applied here. EGGVG section 16 explicitly requires "statutory provisions" (international treaties, generally). EGGVG section 17 requires "judicial assistance". This shows that even if ZPO

section 299 subsection 2 is treated as applicable in cases of international official and judicial assistance the achieved result is the same as the result directly achieved by the supporters of the opinion that ZPO section 299 subsection 2 is inapplicable.

Judicial assistance among courts is governed by GVG sections 156 et seq. Generally, a distinction is to be made between administrative assistance and judicial assistance.
The test is whether the action requested by the court is to be classified as an act of the judiciary or an act of the court administration. Access to files in terms of ZPO section 299 subsection 2 is, therefore, not a matter of judicial assistance. Such access is to be treated as administrative assistance. In the domain of foreign relations, the term judicial assistance is interpreted more broadly, however. Under that interpretation, judicial assistance includes any assistance provided by a court or an administrative agency for facilitating either domestic judicial proceedings abroad or foreign judicial proceedings in Germany. Hence, access to court files is an act of international judicial assistance. The procedure is generally governed by the Zivilrechtshilfeordnung (ZRHO).
Only the procedure for sending complete files to another court is directly covered by the ZRHO. At least the procedural steps to be observed when applying for judicial assistance (ZRHO section 46) should also apply to copies from files, however. The procedural steps to be observed for judicial assistance requests are governed by the treaties relevant between the jurisdictions involved. Therefore, direct communications between the involved insolvency courts which are presumed to have occurred by guideline no. 9 clause 2 subitem b, will generally not be permitted which is an undesirable result because the urgency of insolvency proceedings mostly requires that exactly such direct communications be held. In many cross-border insolvency proceedings, the procedure for requesting judicial assistance will be much too lengthy.

The above mentioned undesirable result may only be avoided if all parties to the relevant proceedings whose privacy interests are protected by ZPO section 299 and by the data protection laws agree that materials are made available as provided in guideline 9 clause 2 subitem b. The basic concept of ZPO section 299 subsection 2 (third parties can be granted access to the files of the proceedings if the parties to the proceedings agree thereto) is likely to be applicable in international judicial assistance matters as well. Otherwise, submitting files to foreign courts would be subject to stricter requirements than submitting them to foreign private persons. That does not appear to be justified.

ZRHO section 97 subsection 2 does in fact require that requests by foreign authorities to have files sent to them are submitted to the state department of justice. That provision relates to sending the original files to foreign authorities, however. We doubt that the same will apply even if the foreign authority only requests to be sent copies from files of proceedings.

c) Submissions and Applications by the Representatives of Any Party. The basic rule in clause 2 subitem c of guideline 9 is compatible with German procedural law. The exception from that rule ("unless") is available for the respective national procedural laws. During a video conference under German law, the representative of a party of a German proceeding appearing before a foreign court would be authorized to make submissions and applications in the German proceedings because he is legally present in the German hearing and can, therefore, make procedural declarations. Guideline 9 clause 2 subitem c does not constitute an obstacle to the foreign administrator who wants to, e.g., register a claim pursuant to InsO section 341

subsection 2 or who wishes to inform the German court about the foreign proceedings in accordance with InsO section 347 subsection 2 because he acts in his capacity as a party to the German proceedings which means that he not only makes an appearance before the foreign court but before the German court as well.

d)Communications between the Courts for Preparing the Joint Hearing. Under German law, the communications between the courts to establish guidelines for the orderly making of submissions and rendering of decisions by the courts provided for under guideline 9 clause 2 subitem d will only be possible to a limited extent. With regard to the making of submissions and the "rendering of decisions by courts", German procedural law is mostly binding and not available for adjustment by the court. It is not impossible, however, that the foreign court agrees to the applicability of German procedural law in the guidelines to be stipulated between the courts.

The coordination and clarification of"procedural and administrative" as well as of preliminary issues with regard to the joint hearing should, however, be permitted if German procedural law is observed. Strictly speaking, such a coordination and clarification process is even absolutely necessary. Prior communications between the courts for that purpose should be permitted even in the absence of the attorneys. In order to comply with the requirement of a fair hearing, the parties shall be allowed to state their positions with regard to the intended joint hearing and its setup provided that the fast track character of insolvency proceedings is not adversely affected thereby. Therefore, the parties need to be notified thereof.

e)Communications between the Courts after the Joint Hearing. Communications between the courts after the joint hearing has been completed should be permitted under German law if the principles mentioned above under subitem d have been complied with (fair hearing). In this case, the "presence" of the representatives of the parties is just as little required as in the case of prior communications. The mandatory provisions of German procedural law and insolvency law set limits to "coordinated orders" in a narrower sense, however. Such "coordinated orders" may under certain circumstances relate to the future coordination of the proceedings, but are, generally, not permitted to cover issues of substantive insolvency law. The situation may be different if the foreign court is bound by mandatory law to only a lesser degree and is, therefore, in a position to make flexible decisions which are compatible with German law. The foreign court's conduct and decision may conceivably have an impact on the German court's discretionary decision on substantive matters. Under German law and depending on the circumstances of any particular case, communications for the purpose of coordinating "all procedural and non-substantive" matters relating to the joint hearing are more likely to be permitted. Abstaining from taking preservation measures according to InsO section 21 may be taken into consideration if adequate and sufficient preservation measures have already been taken by the foreign insolvency court. In that case, preservation measures by the German insolvency court would no longer be "necessary" in terms of InsO section 21 subsection 1 clause 1.

9. Guidelines 10 and 11:
Recognition of Foreign Procedural Law and of Court Orders

Guideline 10.

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of

statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11.

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guidelines 10 and 11 are composed of two aspects: the recognition of the foreign rules of procedure and the extent to which the lawfulness of foreign decisions is reviewed.

The internationally recognized principle "forum regit processum" is satisfied when the foreign court conducts the proceedings according to its own domestic rules and when the German court generally neither queries those rules themselves nor the manner in which a foreign court has conducted particular proceedings. The insertion of the caveat "except upon proper objection on valid grounds and then only to the extent of such objection" can be translated as the reservation of the right to invoke the principle of public policy which is one of the basic principles of the German substantive and procedural laws of conflict of laws.

Under InsO section 343 and EIR Articles 16 and 26, the recognition of foreign judgments opening insolvency proceedings is subject to such a reservation of refusing recognition of foreign judgments on grounds of public policy. If the jurisdiction of a foreign court is recognized, the recognition of its judgments and of any other action ensues from InsO section 335 and EIR articles 25 and 4. The comprehensive recognition of the judgments handed down by foreign courts from jurisdictions in which the EIR is applicable is provided for under Article 25 with regard to procedural law and also to a large extent with regard to substantive law under Article 4. With regard to insolvency proceedings opened by courts from jurisdictions in which the EIR is not applicable, "the insolvency proceedings and its effects" are subject to the standard connecting factor mentioned under InsO section 335. "The insolvency proceedings and its effects" includes the substantive issues and procedural issues arising as part of insolvency proceedings. Several exceptions are made under InsO sections 336 et seq. and under EIR articles 5 et seq. with regard to issues of substantive law. Neither the InsO provisions nor the EIR provisions include any exception with regard to procedural law, however. Hence, the principle of "forum regit processum" which is governing the procedural conflict of laws rules is applicable here without any qualification in accordance with guidelines 10 and 11. If the jurisdiction of the foreign court is to be recognized under German law, that court may in the view held by the authors hereof conduct the proceedings according to the procedural rules of the country in which it is located.

The lawfulness of the foreign procedural ruling is not reviewed either. Such a revision au fond is not even permitted in exequatur proceedings, therefore it can even less be permitted with regard to procedural rulings by the foreign court with less drastic effects.

If the jurisdiction of the foreign court is thus established (cf. InsO section 343), there is no longer any reason for reviewing whether the foreign court had venue and

subject matter jurisdiction, whether the judge making the ruling had competence to do so according to the internal case management rules of the court, and whether the ruling had been made appropriately in accordance with the foreign procedural law. Therefore, the recognition of foreign rulings does not require that the lawful making of the ruling according to the foreign procedural laws is explained or even proved by the foreign court. If there is any disagreement between the parties or between the parties and the court insofar, that disagreement has to be resolved within the appellate system of the foreign court. That dispute may, however, not be made a part of the German proceedings by contesting the recognizability of the measure or judgment.

b) The general recognizability of judgments by foreign courts without further formalities is limited by the following exceptions:

The foreign administrator's appointment must be evidenced by submitting a certified copy of the decision appointing him or by another certificate, InsO section 347 subparagraph 1, EIR article 19.

Orders by courts from jurisdictions in which the EIR is not applicable cannot be enforced in Germany before having been recognized in exequatur proceedings according to InsO section 353 and the ZPO provisions referred to therein. In article 25 subsection 1 clause 2, the EIR includes a reference to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which now, under Article 68 subsection 2 of the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), is to be read as a reference to articles 38 et seq. of the Brussels I Regulation.

Other compulsory orders which are meant to be effective in Germany (such as a summons under threat of a fine) are not permitted.

The special provisions of InsO sections 336 et seq. and EIR articles 5 et seq. must be observed if judgments have effects on substantive rights.

c) The last subclause of guideline 11 provides that the effects of any order which has not yet become unappealable are subject to the determination of the court receiving the order. As the applicability of InsO section 335 is not limited to unappealable orders, not yet unappealable orders will be recognized in Germany subject to the limitations set out above provided that the foreign procedural law is treating them as already effective. This recognition is not discretionary to the court but is prescribed by InsO section 335.

d) Thus, the application of guidelines 10 and 11 is not viewed upon as problematic by Germany. These guidelines do largely comply with the law applicable in Germany. The abovementioned exceptions from the general recognizability of foreign judgments are covered by the provision included in the wording of the of the guidelines that the court may at any time raise "reasonable objections on valid grounds" against a recognition in any individual case. The mutuality of the recognition of judgments may, however, be effected by an agreement entered into with the foreign court stipulating the application of these two guidelines. Such an agreement may be very helpful for handling the domestic insolvency proceedings effectively.

10. Guideline 12: Notification of the Parties to the Other Proceedings

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-

Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

This guideline is again based on the public accessibility of (electronic) court files according to American law. Its compatibility with German procedural law is questionable because the German proceedings are only open to the parties (except for the oral hearing). The parties to the other proceedings are and remain third parties in terms of the applicable provision of ZPO section 299 subsection 2. From case to case, they may be permitted to access the files, however. Including them into a list of parties needing to be served would, however, constitute a perpetuated access to the files extended into the future which is probably not permissible unless the parties have agreed thereto because in the absence of the parties' agreement thereto access to the court files may only be granted if the third party has a "legal interest" in such access. It is not possible to positively forecast the latter for each future content of the file automatically and without thorough examination. The situation is probably different if the parties to the proceedings have explicitly given their agreement in terms of ZPO section 299 subsection 2 that such a list of parties to be served be prepared and that the parties to the other proceedings (each one of whom needs to be identified) be included into that list. In proceedings with a high number of creditors, the preparation of such a list will probably encounter practical problems, however.

11. Guideline 13: Appearance/Permission and Hearing of the Insolvency Administrator, of Representatives of Creditors and of an Authorized Representative of the Foreign Court

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 13 does not govern the case in which the foreign insolvency administrator participates in the German proceedings as a party and files motions and registers claims (cf. EIR article 32 subsections 2 and 3, InsO section 341 subsection 2 and 3). Insofar, he is of course subject to the "judicial jurisdiction" of the German court. The subject of guideline 13 is, on the contrary, the situation in which the persons mentioned therein are to appear and be heard only in their capacity as administrators or representatives of the foreign proceedings or of the foreign court. Against the background of the court's duty to investigate the facts on its own initiative according to InsO section 5 subsection 1, such orders or directions should be permissible to a large extent. On the basis of that provision the court may also obtain information from government agencies and, on the basis of ZPO section 273 subsection 2 subitem 2, also from private individuals who are willing to provide information. In the end, nothing else applies to representatives of foreign courts. If the court is permitted to directly communicate with the foreign court (cf. the comments regarding guideline 2), then it is also permitted to hear a representative of the foreign court.

12. Guideline 14: Limitation of Stay of Proceedings to Domestic Proceedings

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 14 relates to the interruptive effect the opening of foreign insolvency proceedings has on domestic court proceedings. Obviously, the guideline is based on the approach laid down in the very detailed provision of U.S. Bankruptcy Code section 362. This provision governs the so-called "automatic stay" which, to some extent (Bankruptcy Code section 362a), has effects similar to those provided under ZPO section 240 and InsO section 89. Unlike under German law, the American court may, on the basis of Bankruptcy Code section 362, order the suspensive/interruptive effects to discontinue if certain requirements are met. In Germany, the interruptive effect pursuant to ZPO section 240 cannot be discontinued by an order of the insolvency court (cf. ZPO section 240 InsO sections 85, 86, 352). The interruptive effect of either the foreign proceedings on the domestic proceedings or vice versa is under no circumstances available for adjustment by the German court.

13. Guideline 15: Communications with a Court in Another Proceedings

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 15 does not relate to the coordination of the pending insolvency proceedings but to their effects and impact on other sectors, such as recordations in the commercial register, or communications with criminal and civil courts in proceedings with a connection to the insolvency proceedings. Insofar, "issues and/or the parties in the proceedings" is not to be understood to have the same meaning as the term "subject matter of the controversy between the parties" in terms of German procedural law. Generally, it should be interpreted to mean "subject matter of the proceedings" or "issue" (cf. the term „issue" in the original text).
Comment by the translator: The above three sentences in this paragraph have been entered by the authors because of a problem resulting from the German version of the "Guidelines Applicable to Court to Court Communications in Cross Border Cases". These sentences would not be required if the English version had been the basis of the article.

Cross-border communications between insolvency courts and courts in "other proceedings" do generally not raise any concerns provided the comments regarding the other guidelines are observed. Moreover, the particularities of procedural rules

possibly governing the "other proceedings" must be observed. Insofar, the guideline's subclause "absent compelling reasons to the contrary" leaves enough leeway for taking such particularities into account.

The guidelines 1, 16, and 17 discussed hereinafter generally relate to the permissibility of arrangements with foreign insolvency courts on court-to-court communications ("protocols") and the (non-)binding nature and modifiability of such arrangements and of the orders made on the basis of their applicability.

14. Guideline 1:

Guideline 1 clause 1:
Verification of the Lawfulness of the Communication.
Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country.

According to article 20 subsection 3 of the Grundgesetz (Basic Law), the German insolvency court is bound by law and justice. Therefore, it has to make sure in all cases that any action it takes is in conformity with the applicable laws. An exception from that principle in urgent cases as provided in guideline 1 clause 1 is incompatible with article 20 subsection 3 of the Basic Law. Having made an erroneous decision in the wake of urgent circumstances can only personally exonerate the judge or the Rechtspfleger but the measure cannot be legitimized by the urgency. An agreement in terms of clause 2 (cited hereinafter) is not necessarily prejudiced by that limitation the German insolvency court is subject to. The foreign court may be in a position to deviate from the procedural rules applicable in its country to a larger extent. This does not preclude the German court from at first verifying the lawfulness of each measure itself.

Guideline 1 clauses 2 and 3:
Coordination of the Application and Formal Adoption of the Guidelines.
Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Clauses 2 and 3 relate to the formal adoption of the guidelines. One method which may be used is the form of general guidelines established by an insolvency court without regard to particular cross-border insolvency proceedings (cf. I 2. above). It makes sense, however, to enter into a case-related agreement with a foreign insolvency court if a continuous and not only a one-time contact is to be expected. If that is the case, the courts may first of all agree as to which guidelines may be applied, which of them will possibly have to be modified or be subject to reservations and which guidelines conflict with national law.

For the sake of avoiding confusion, any such arrangement should be laid down in writing if extensive communications are to be expected. Especially in communications with courts from common law countries, the question whether the German court is able to enter into a so-called protocol will be a matter of discussion. A protocol is an agreement signed by the respective insolvency courts in charge of the proceedings stating the fact that court-to-court communications are to be had and the principles applicable to these communications. Due to the nature of guidelines,

such an agreement is always subject to the reservation that any action by a court must have a statutory basis so an agreement can neither curtail the procedural rights of the parties to the proceedings nor have any impact on the court's international jurisdiction nor adversely affect the court in its authority to make decisions. Introductory clauses to that effect can, therefore, generally be found in the protocols which have been known and published up to now insofar as they relate to court-to-court communications.
A German court becoming a party to such a protocol does not raise any concerns if neither the personal rights of the parties to the proceedings nor the authority of the court are extended, limited or modified. As a result of the above comments, the applicability of guidelines 2,3,5,9 clause 2 subitems a, c, e, 10, 11, 13, and 15 through 17 may be agreed upon when entering into a protocol. The applicability of guidelines 4, 7, 8, 9 clause 1 and 9 clause 2 subitem d may be agreed upon in a modified form. Only the applicability of guidelines 6, 9 clause 2 subitem b, 12, and 14 should be opted out in the agreement between the courts (cf. the model agreement under III. hereinafter).

15. Guideline 16: Modification of Directions

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 16 emphasizes the reservation that any action by a court must have a statutory basis and it also emphasizes the flexibility of the guideline itself and of the stipulations made on its basis. The guideline makes it clear that either the rules for communications themselves or a result which has been jointly achieved may be modified if the determinative circumstances have changed. Primarily, a change of the underlying facts is a possible reason for a modification of the agreed upon provisions; such a modification may, however, also be be based on improved judicial knowledge or a different opinion held by the successor of the judge of the insolvency court. According to clause 2, the method to be used for making such modifications is that both courts enter into a new agreement in which the modifications are shown. This method complies with the principle of fairness and transparency which is applicable to the communications between the courts involved and also to the information of the parties to the proceedings. If the result to be modified (e.g., an agreed upon hearing) is based on an arrangement with the other court, the new date for the hearing which is to be rescheduled should , of course, also be agreed upon with the other court. If the successor of the judge of the insolvency court holds an agreement entered into by his predecessor to be incompatible with applicable law, a new agreement without the disputed text passage should be entered into.

Clause 3 takes into account that a new formal agreement cannot always be waited for, e.g., because a certain measure is urgent or also because the successor of the judge of the insolvency court has reservations towards court-to-court

communications for legal or factual reasons. If entering into a modified agreement is, thus, not possible, giving the other court notice thereof according to clause 3 of this guideline is a self-evident act of courtesy.

16. Guideline 17:
Qualified Endorsement

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

Guideline 17 verbalizes once more that the application of the guidelines is neither accompanied by a waiver of any sovereign powers nor by a limitation of the judicial powers of the involved courts nor by any restriction of the rights of the parties to any proceedings. The guidelines are not designed to obligate the courts to proceed in a certain manner or to rule on any matter in a certain way. In the introductory paragraph, we have already explained that and why it makes sense to enter into a non-obligatory agreement on certain guidelines.

III. Conclusion and Model Agreement

1. Conclusion

The German insolvency court is bound by the provisions of German procedural laws. Hence, its maneuvering room with regard to communications with foreign courts in cross-border insolvencies is not comparable with the leeway granted to courts in common law countries for designing their proceedings. The above analysis shows, however, that there are considerable options for a German insolvency court to facilitate proceedings by entering into cross-border communications with foreign insolvency courts regardless of the still absent statutory background. Communications are certainly permitted for the purposes of gathering information, of avoiding jurisdictional conflicts, of improving the investigation of assets and liabilities, and of improving the degree to which the courts' duty to control and supervise the proceedings and the insolvency administrator is met. But even a coordination of different proceedings is possible; within certain limits, however. Scheduling arrangements for joint hearings and meetings of creditors are certainly possible and permitted to the extent described above.

The German insolvency court may communicate with the foreign insolvency administrator and the foreign insolvency court as well. All standard communication methods or video conferencing may be used. The procedural rights of the parties to the proceedings must be observed during such communications. The transmission of documents which are included in the court files to the foreign insolvency court is subject to considerable restrictions. The same applies to notifications of parties to foreign insolvency proceedings who are not at the same time parties to the respective German insolvency proceedings. Against the background of the court's duty to investigate the facts on its own initiative, the insolvency court has wide leeway to hear parties of foreign insolvency proceedings as part of the German proceedings. Communication arrangements with a foreign insolvency court do neither constitute a waiver of any sovereign powers nor a limitation of the judicial

powers of the involved courts nor any restriction of the rights of the parties to any proceedings. Orders made on the basis of such arrangements may be modified, amended, or abrogated by the involved courts.

Entering into an agreement ("protocol") with the foreign insolvency court is recommended in appropriate cases in which communications with a foreign insolvency court are planned for. The model agreement included hereinafter can be used as a basis and can be adjusted to the requirements and peculiarities of each case.

Insolvency courts which deal with cross-border insolvencies on a regular basis also have the option of publicizing the content of the model agreement beforehand in the form of guidelines and without relation to any particular case.

2. Agreement (Protocol) within the Cross-Border Proceedings in Re A-AG / A-Inc.

The Amtsgericht of K. - Insolvency Division- and the Bankruptcy Court for the District of D., hereby enter into the following agreement the English and German version of which shall be equally authentic.

The "Guidelines Applicable to Court-to-Court Communications in Cross-Border-Cases" by the American Law Institute and as adopted by the International Insolvency Institute which are attached to this agreement as Schedule A are hereby made reference to and are an element of this agreement with the exception of guidelines 6, 9b, 12, and 14.

Guidelines 4, 7, 8, 9 clause 1, 9a, and 9d are an element of this agreement but shall be subject to the limitations and modifications mentioned under paragraph D hereof. In any case of a discrepancy between the guidelines and this agreement, the arrangements made in this agreement shall supersede the guidelines.

a) *Background (explanation of the intercorporate relationships and of the course of both proceedings in the model case).*

A-AG is a stock corporation under German law domiciled in K. and is registered in the commercial register of K.

A-Inc. is a company under American law domiciled in D.

On January 2, 2010 insolvency proceedings have been decreed to be opened over the assets of A-AG by the insolvency court of K. and I has been appointed insolvency administrator.

A-Inc. has filed for restructuring proceedings under Chapter 11 with the US Bankruptcy Court in D. on December 30, 2009. (Followed by definitions as the case may be.)

b) *Objective and Purpose.*

Although unlimited (main) insolvency proceedings are pending in both the German and the US-American court, both courts consider it necessary and desirable to coordinate certain aspects of both proceedings in conjunction with the guidelines shown in Schedule A. Thus, the rights of all parties to the proceedings shall be brought out to the maximum possible extent and mutual recognition of judicial decisions shall be facilitated subject to observance of the independent jurisdiction of either court. In pursuance of these objectives, this agreement is designed to provide a basis for cross-border communications between the involved courts and to serve the procedural goals mutually considered desirable which are the following:

- to harmonize and coordinate the insolvency proceedings in both courts,
- to promote the orderly and efficient administration of the proceedings including the avoidance of unnecessary costs and of any unnecessary duplication of efforts,
- to promote international cooperation between other parties to the proceedings, particularly between the debtors and the creditors, between the creditors' committees and between the insolvency administrators,
- to facilitate the open, fair, and transparent administration of the proceedings.

c) *Respect for the Jurisdiction of Either Court.*
Neither the approval nor the implementation of this agreement shall diminish the German court's and the U.S.-American court's independent jurisdiction over the proceedings pending before it. By approving and implementing this agreement neither the German court nor the U.S.-American court intends to breach the sovereignty of the United States of America or of the Federal Republic of Germany. The U.S.-American court shall retain full jurisdiction over the the proceedings before it and over the decisions and procedural action to be taken there. The German court shall retain full jurisdiction over the the proceedings before it and over the decisions and procedural action to be taken there.

Thus, the provisions of this agreement shall neither be understood nor construed to:

- increase, decrease or otherwise modify the independent jurisdiction of the German court or the U.S.-American court entering into this agreement or any other court in the United States of America or in the Federal Republic of Germany,
- require the U.S.-American court to take any action which is incompatible with U.S:-American law,
- require the German court to take any action which is incompatible with German law,
- require the debtor, the creditors, the creditors' committee or the insolvency administrator or the U.S.Trustee to take any action or refrain from taking any action which is incompatible with the duties imposed on them by the respective applicable law,
- abolish or limit any rights the debtor, the creditors, the creditors' committee, the insolvency administrator or the U.S. Trustee are entitled to under German law or U.S.-American law or under any other applicable law,
- legitimize any action by either court which, under the applicable law the other court is subject to, requires the prior approval by the other court or the completion of recognition proceedings.

d) Cooperation.
(Examples of the kind of action which is in detail considered to be fully permitted or to be only permitted under certain conditions are set out hereinafter.)

aa) As to Guideline 4.
The insolvency administrator appointed in the German proceedings exercises his office independently and is required to preserve the interests of all those involved in the proceedings at best. He does not need permission by the German court to communicate directly with the U.S.-American court in terms of guideline 4 but has

discretion to decide whether to communicate with the U.S.-American court provided the U.S.- American court agrees to have such communications. The insolvency administrator is subject to supervision by the German court, however. If the German court holds that direct communications between the insolvency administrator and the U.S.-American court have an adverse effect on the interests of those involved in the proceedings, it will take appropriate action and notify the U.S.-American court thereof. The U.S.-American court is requested to notify the German court of such circumstances which may require any action by the German court to this effect.

Subject to the reservation of subsequent limitations on the basis of reasonable grounds, the German court agrees to have the U.S. Trustee communicate directly with the German court provided the U.S.-American court agrees to such direct communications.
(If appropriate, InsO sections 344, 357 can be mentioned here if the agreement concerns main insolvency proceedings or secondary insolvency proceedings.) The U.S.-American court permits the U.S. Trustee to (to be set out in detail)

bb) As to Guidelines 7 and 8.
Under German procedural law, the parties or their attorneys need not always be present when communications are held. Generally, procedural requirements are sufficiently met if the parties or their attorneys are notified of the intended commencement of communications and of the results of these communications. The court may choose to commence communications without notifying the parties if doing so is justified by a special urgency with regard to the intended communications.

Under German law, the preparatory communications according to guideline 7 d clause 2 and guideline 8d clause 2 may also be performed by the judge.

cc) As to Guidelines 9 clause 1 and 9a.
A joint hearing in terms of guideline 9 clause 1 can, if necessary, be held after the details have been arranged for and subject to the following conditions:

The U.S.-American judge in charge of the proceedings may be present in the hearing before the German court by way of video transmission. Before the hearing, he may send questions he wishes to ask the parties of the German proceedings to the German court. The German court will decide whether the questions can be admitted under German law and ask the questions to the parties. The trustee, the debtor, members of the creditors' committee or other individuals may likewise be permitted to be present in addition to the judge or in lieu of the judge after a ruling thereon has been made on a case by case basis.

The German judge in charge of the proceedings may be present in the hearing before the U.S.-American court by way of video transmission. (to be set out in detail)

dd) As to Guideline 9b.
Due to the data protection provisions of German law, the German court is not in a position to make copies from the court files or evidence available unconditionally. No written materials can be sent to the U.S.-American court unless either all parties to the proceedings have agreed thereto or a letter rogatory according to the Hague Convention on the taking of evidence abroad in civil and commercial matters has been sent to the examining agency in Germany. If the German insolvency court is included in the decision on the letter rogatory, it will examine the letter rogatory in accordance with the objectives mentioned under III 2b hereof and agree to provide judicial assistance to the extent possible.

The abovementioned limitations do not apply to such decisions and orders of the German court which, according to German law, need to be published on the internet under www.insolvenzbekanntmachungen.de. From the U.S.-American court's point of view, guideline 9b is applicable as described hereinafter:
..... (to be set out in detail)

ee) As to Guideline 9d.
The German court has no authority to agree to guidelines for the proper filing of petitions and the making of decisions by the courts which are incompatible with German procedural laws. The German court will make efforts, however, to consult with the U.S.-American court and to achieve an agreement on a joint method of procedure which is compatible with German procedural laws and which is also considered to be useful by the U.S.-American court.

e) *Effective Date, Modifications, Expiration*.

This agreement shall have full force and effect as soon as it has been accepted by the insolvency division of the Amtsgericht (County Court) of K. and by the Bankruptcy Court for the District of D. Acceptance of this agreement is effected by mailing a copy of this agreement which has been signed by the judge in charge of the proceedings to the other court of competent jurisdiction, or by emailing an electronic file in PDF format.

Any modification of this agreement (which shall not be entered into before the parties to the proceedings have been heard) shall be subject to the agreement of both of the abovementioned judges. If either of the courts being party to this agreement is unable to effect any modification of this agreement or a modification of a modification jointly decided on the basis of this agreement, that court shall notify the other court of the intended modification as soon as possible. This agreement expires if either of the courts being party to this agreement notifies the other court that this agreement is no longer applicable.

f) Settlement of Disputes. Any dispute, disagreement or equivocality relating to the construction or application of this agreement shall be settled amicably.