

*The Guidelines are a practical code to enhance some of the most successful cross-border initiatives of recent years, and are likely to bring such disputes before the Courts at an earlier stage which may well promote the culture of cooperation envisaged by the drafters.*

## Judges lead the way on cross-border insolvency initiatives

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The last decade has exposed the bankruptcy courts across the globe to a large volume of international work, and with that experience in mind, the Judicial Insolvency Network (*JIN*) held its inaugural meeting in Singapore in late 2016. Its intent was to formulate a set of guidelines (the *Guidelines*) that would promote cooperation between Courts. Sitting alongside common law and legislative cross-border provisions, the Guidelines are a practical code to enhance some of the most successful cross-border initiatives of recent years.

Judges from key jurisdictions for international insolvency matters participated: Australia (Federal and New South Wales), Canada (Ontario), the Cayman Islands, England & Wales, Hong Kong SAR (as observer), Singapore, and the USA (Delaware and the SDNY).

The meeting was a great success and the *Guidelines* are being considered in respective jurisdictions for implementation.

### Background and focus

The provenance for the Guidelines can be found in the *Transnational Insolvency: Principles of Cooperation among the NAFTA Countries* by the American Law Institute (2000) and adopted by the International Insolvency Institute.

The Guidelines are designed primarily to enhance communication between Courts, insolvency representatives and other parties in the context of global restructurings and insolvency. As a result of the increased efficiency, it is hoped that stakeholders will see the benefits in a reduction in delay and cost.

The Guidelines are aimed at “Parallel proceedings” where insolvency or debt adjustment proceedings have been opened in more than one jurisdiction.

### Communication between Courts

Courts are encouraged to communicate directly with one another. There has traditionally been inconsistency and caution for brother Judges to communicate and a question as to its appropriateness. The Guidelines actively promote discourse:

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- Providing for the orderly making of decision and submissions by the Courts
- Providing court documents including judgments and orders to another Court
- Directing legal teams to share documentation with other Courts

Concerns that parties might have to have “behind the scenes” communications are largely addressed by Guideline 8, which provides a default position that parties are present during discussions. Communications will be transcribed and form part of the record in the relevant proceedings.

### Court appearances

The Guidelines provide for foreign parties or appropriate persons to appear before a local Court. Importantly, any appearance will not amount to a submission to jurisdiction and this safe harbour should be useful in encouraging foreign representatives to venture into other jurisdictions. Again, the Guidelines ensure that hearing any person would require consistency with local law and an “appropriateness” test.

### Acceptance of foreign process

Guidelines 12-14 provide a “default setting” that foreign laws, regulations and orders have been properly enacted or made. This is designed to streamline the unnecessary baggage of additional evidence in confirming the validity of a foreign proceeding. A provision is also included for Courts to provide any updates to other Courts involved in parallel proceedings.

### Joint hearings

Perhaps the most ambitious aspect of the Guidelines is the provision for joint hearings. Annex A to the Guidelines predicts contemporaneous hearings via video with the ability for counsel to be heard and make submissions in the parallel proceedings Court. Unlike the safe harbour provided for those appearing in a domestic Court, consideration will be given as to whether a party appearing in a joint hearing will have submitted to the other jurisdiction.

The Courts will also have greater autonomy to communicate with one another to establish procedure for joint hearings and subsequent issues without the attendance of counsel.

### In practice

Where the Guidelines are to be implemented, they should be carried out by way of either an agreed protocol or, if required, by Court order. It is likely that existing legislative frameworks, with or without adoption of the model law on cross-border insolvency, will support the Guidelines. As a Judge-led initiative, we can expect to see adoption of the Guidelines (which are a template only and can be tailored per jurisdiction) via practice direction or commercial guides rather than secondary legislation.

### Commentary

The Guidelines are drafted deliberately flexibly and without transgression to local laws and sovereignty. They are however reflective of the judiciary’s desire to enhance coordination and cooperation, in a manner that will streamline proceedings for the benefit of stakeholders. Guideline 1 encourages Practitioners from the outset of proceedings to communicate and cooperate with their foreign counterparts.

Whilst the Guidelines may not end turf wars between appointees, they are likely to bring such disputes before the Courts at an earlier stage and that alone may well promote the culture of cooperation envisaged by the drafters.

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