Judicial Communication in Cross-Border Insolvencies: What is possible and what is not

I. Introduction

We want to stir up a discussion in Germany. In cross-border insolvency proceedings there may be a need for coordination – with a view to advancing the proceedings and for the benefit of the parties to those proceedings. However, there is often a lack of time for formal and lengthy correspondence between national courts, especially where third parties have to be involved. "Where is written that I am allowed to communicate with an insolvency court abroad?" That might be the reaction of insolvency courts in Germany or in other countries on the Continent. As a general rule, we work on the basis of codified laws and regulations. Unlike under Article 25 of the Model Law proposed by UNCITRAL, there is no obligation for insolvency courts to co-operate under the German law. Similarly, Article 31 of the European Insolvency Regulation merely provides for an obligation for administrators to communicate and co-operate. The majority of legal experts rightly reject the idea that Article 31 of the European Insolvency Regulation can be applied by analogy with a view to extending to insolvency courts the obligation to communicate or co-operate.

However, not everything that is not explicitly permitted is actually inadmissible. Procedural law is purposive law, it is designed to administer substantive law in the most efficient and fairest way and to enforce legal rights. So, if there is a need for cross-border communication between the courts, it is incumbent on the insolvency court to identify and use the permissible scope for such communication. In this respect, section 1 of the German Insolvency Act serves as a guidepost as it defines as one of the objectives of the insolvency proceedings the best possible satisfaction of the creditors. Where cross-border communication is used to achieve that objective, it can be considered admissible judging on the principles of procedural law interpreted as purposive law. Within this vast field, scope and limitations are defined by specific statutory regulations and by the parties' procedural rights.

The principle of ex officio-investigation under section 5 of the German Insolvency Act provides another starting point. The rather general formulation of that principle gives the courts some room to manoeuvre. Communication with courts or liquidators abroad is considered to be "of relevance to the insolvency proceedings" according to this provision if it can help ascertain the essential facts, clarify the bases for an appropriate discretionary decision by the court, avoid inconsistent decisions in parallel insolvency proceedings, or simply coordinate dates and deadlines in the mutual interest of all stakeholders. Moreover, an option or, if appropriate, even an obligation to establish contact with an insolvency court abroad can be derived from section 21(1) of the German Insolvency Act, too. Section 21 provides that the insolvency court can (and has to) take all measures in order to avoid any change in the debtor's assets to the detriment of the creditors until the court decides on the opening of insolvency

proceedings. Such measures may also include contacting an insolvency court in another country with a view to obtaining information.

Our study is concerned with the various options for cross-border communication, its goals and the practical problems involved. The study focuses on the "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases" developed by the **American Law Institute** (ALI) in co-operation with the **International Insolvency Institute** (III). In Germany, their recommendations, which are based on experience gathered in the context of a close co-operation between Anglo-American insolvency courts, cannot in any case be implemented on the basis of German procedural law in force. On the other hand, our analysis has shown that under German law, too, there is more scope for cross-border communication between courts than one might have thought.

II. Results

As time is short, I will confine myself to just a few important aspects:

Guidelines 2 and 3 (purpose of judicial communication, communication with administrator or representative of another court) are compatible with German insolvency law. As a basis for direct contact with a foreign insolvency court, I already mentioned the official duty of investigation (ex officio duty) referred to in § 5 InsO. The Court in this context cannot only communicate with a bankruptcy court in another state, but also with a larger group of people such as a foreign administrator or the representative of a foreign court. At the beginning it is still open which facts are relevant to the proceedings. This widens the scope for discretion as regards communication. In certain situations the ex officio principle can even include an obligation to initiate communication to gather information which is relevant to the case.

The chief aim of communication is to obtain information and to coordinate court hearings. An exchange of information can for example be helpful to clarify jurisdictional issues or to examine the opening requirements under §§ 13 ff, 16 ff InsO, such as clarification of the debtor´s assets.

Before establishing contact the bankruptcy court has to answer the simple question of whom to contact in the first place. If it does not have the contact data of the foreign court, a search on the internet might help. This can for example be carried out via the European Judicial Atlas or the addresses data base of the North Rhine-Westphalia Ministry of Justice. We think that the costs which may be incurred by contacting a foreign insolvency court will in most cases be justified by one of the objectives of the insolvency proceedings, i.e. to achieve the best results for the creditors through coordination and harmonization of the proceedings.

The language problem is another major barrier. Where different languages are spoken at the courts, people as a general rule resort to English. In case of insufficient

language skills the (preliminary) administrator might be willing to help. Otherwise an interpreter is necessary. These costs, too, will be justified in most cases because most cross-border insolvency proceedings involve a substantial bankruptcy estate the distribution of which can be significantly facilitated through court-to-court communication. This particularly applies where an insolvent company is designed to be reorganised.

There have been some examples of successful cross-border communication in Germany. Thus, in the case of the insolvent PIN Corporation in 2008 there was intense communication between the Cologne and the Luxembourg insolvency courts before a decision on the opening of insolvency proceedings was taken. This was necessary because both courts had to decide almost simultaneously on petitions to institute main insolvency proceedings. Finally, the Cologne court opened the bankruptcy proceedings concerning the holding which was registered in Luxembourg. The decision was promptly forwarded to the Commercial Court in Luxembourg. In other proceedings (Automold) the judge of the Cologne insolvency court prepared substantial decisions in secondary insolvency proceedings by contacting foreign insolvency administrators with whom he also coordinated the date of the creditors' meeting.

An example of the different legal cultures is provided by **Guideline 5** which deals with the **receipt of communications and responses by the courts**. The "local rules concerning ex parte communications" derive from the American legal tradition. In Germany, however, the nationwide uniform procedural rules prevail. Nevertheless, the German procedural law does not object to courts receiving communications from institutions and persons mentioned in guideline 5 and responding directly.

Guidelines 7 and 8 seek to ensure **due process of law in judicial communication**. In this context, the conditions under German law seem less restrictive than those of the "Guidelines". For example, it is not necessary, under German law, that the lawyers of the parties have in any case to take part in court-to-court communication. To preserve the right to be heard it will often be sufficient to give the parties an opportunity to comment on the proposed communication. In individual cases, one will even have to do without this owing to the urgency of the proceedings. In any case, the parties have to be informed about the outcome of the communication.

By the way, contrary to Guideline 7 (d) sentence 2, under German law the judges too can make arrangements for the intended communication.

Guideline 9 concerns **joint hearings by bankruptcy courts**. This is a very important issue. The German procedural law does not contain any provisions governing joint hearings. However, ways towards a joint hearing could be found through a creditors' meeting, by using new communication tools, especially the videoconference. It is not clear at present whether the consent of the participating creditors to the use of video technology is required under German law. In my opinion this is not the case.

The privacy of the creditors´ meeting is another problem. According to German law creditors´ meetings are not open to the public. The joint hearing via video transmission means that the parties to the foreign proceedings are “present” at the domestic creditors´ meeting although they are not parties to the domestic proceedings. However, under German law, persons other than the legitimate parties to the insolvency proceedings (§ 74 para 1 sentence 2 InsO) may also be allowed to attend the creditors' meeting. The eligibility criteria for attending the meeting are not too strict. From this it follows that, as a general rule, there are no reservations about the "presence" of those involved in the foreign proceedings.

However, a videoconference which is transmitted to another country, e.g. a creditors' meeting which in part takes place abroad, can affect the sovereignty of that country. Some experts are of the opinion that for this reason an international videoconference can take place only on the basis of international agreements and treaties. However, if the foreign court approves of the joint hearing in the form of videoconferencing, it is my opinion that the sovereignty of that country is not violated. Therefore a joint hearing is admissible in so far as some part of the German proceedings takes place in another country where the law explicitly provides for the use of a joint hearing. On the other hand, foreign court proceedings which, by reason of a joint hearing, are in part conducted in Germany remain problematic given that the German law does not include any regulations regarding cross-border joint hearings.

Even here, however, we can find pragmatic solutions. Thus, the foreign court could in advance transmit to the German court a list of questions that might also be of interest in the German case through the legally admissible channel of court-to-court communication. The German ex officio principle in insolvency proceedings leaves considerable room for manoeuvre for this “procedure”. In that case, the interrogation of a person during the joint hearing would form part of the German proceedings rather than the foreign proceedings. Nevertheless, the parties to the foreign proceedings would immediately know the responses which, depending on the foreign procedural law, could then be used in the foreign proceedings.

A joint hearing will require not only the services of interpreters but also video conferencing facilities. Although not all German courts do have such facilities, the existing, partially mobile devices should be sufficient to deal with the limited number of cross-border insolvencies for which a joint hearing might be relevant.

More problematic is **Guideline 9 sentence 2 (b)** which concerns the **transmission of evidentiary or written materials** in preparation of the joint hearing or the electronic provision of such material in a publicly accessible system. That proposal seems to be based on U.S. law and the PACER system in particular which ensures public access to (electronic) court records and documents. In this respect the German law is considerably more restrictive. It does not allow for the provision of evidentiary and written materials in a public system. Third parties' right to inspect court files is subject to strict limitations.

Concerning the transmission of evidentiary and other procedural documents to another court, the German standards for international legal assistance have to be observed (§§ 156 et seq. GVG; ZRHO). According to these standards the official channels of communication, which are regulated by international agreements, have to be used in all mutual assistance matters. As a result, direct transmission between the bankruptcy courts will unfortunately not be admissible in most cases. The transmission of evidentiary or written materials in accordance with Guideline 9 sentence 2 (b) can only take place where all parties to the proceedings agree to it.

The remaining provisions of Guideline 9 are less problematic. This in particular applies to **submissions and applications by party representatives, the entitlement of the courts to coordinate and resolve procedural and administrative matters as well as preliminary issues relating to the joint hearing, communication between the courts after the joint hearing, and "coordinated orders"**, provided that these do not conflict with binding substantive bankruptcy law.

Guidelines 10 and 11 (recognition of foreign law and court orders) are in accordance with the internationally recognized principle of "forum regit processum". Their application is compatible with German law. The proviso "except on proper objection on valid grounds and then only to the extent of such objection" seems to be equivalent to the duty to uphold public policy (ordre public). Under German and EU law the recognition of foreign court decisions to institute insolvency proceedings (§ 343 InsO, Art. 16 and 26 EuInsVO) is subject to the rule of public policy.
Once the jurisdiction of a foreign court is recognized, its decisions will also be recognized (cf. § 335 InsO and Art. 25 and 4 EuInsVO). In this case, the foreign court can apply domestic procedural law, and there will be no review of its decisions for conformity with German law.

There are only a few other exceptions to the recognition of foreign court decisions. It is important to note in this context that the **enforcement** of decisions by a court of a non-EU Member State presupposes prior recognition by way of an exequatur procedure (cf. § 353 InsO).

Regarding the remaining guidelines, I will confine myself to a summary of our results. **Guidelines 12 (information of Non-Resident Parties) and 14 (limitation of stay of proceedings to the domestic proceedings)** are not compatible with German procedural law. On the other hand, the applicability of **Guidelines 13 (appearance/admission of and consultation with a foreign administrator, creditors' representatives and the authorized representative of the foreign court), 15 (communication with courts in other jurisdictions regardless of the form of the proceedings), 16 (amendments and modifications of court directions) and 17 ("disclaimer")** does not cause any problems.

Finally, I would like to focus on **Guideline 1** which addresses the question of coordinating the **application and the formal adoption of the Guidelines**. Guidelines can either be formally adopted by means of general guidelines to be established by a bankruptcy court independently of any cross-border insolvency proceedings, or through a case-specific agreement ("protocol") with a foreign insolvency court. The protocol should specify in advance the guidelines that can be applied without modification, those which need to be modified and those which are incompatible with the national laws. Given the nature of guidelines, a protocol is per se subject to the reservation that it complies with the law. Procedural rights cannot be limited by the protocol nor can the court's international jurisdiction or its decision-making authority be interfered with by the protocol. Therefore, protocols relating to court-to-court communication will regularly contain a disclaimer to this effect. Bearing this in mind, there are no objections to the agreement of such protocols by a German court. **From the German perspective, the protocols might cover the full application of Guidelines 2, 3, 5, 9 sentence 2 lit. (a), (c) and (e), 10, 11, 13 and 15 to 17, whereas Guidelines 4, 7, 8, 9 sentence 1 and 9 sentence 2 lit. (d) would have to be modified. Only the application of guidelines 6, 9 sentence 2 lit. (b), 12 and 14 should be excluded altogether.**

Our working group has developed a flexible model "protocol" which will be published together with a detailed presentation of the results of our study in a German law review tomorrow.