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(Concept) richtlijnen voor grensoverschrijdende samenwerking tussen curatoren en rechtbanken

Mr. W.J.B. van Nielen , datum 01-06-2007

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Voor een betere coördinatie van grensoverschrijdende insolventieprocedures binnen de EU ter bevordering van hun reorganiserend vermogen en doelmatige afwikkeling

1 Inleiding

De Europese insolventieverordening ('EIV')[1] kent de mogelijkheid dat ten aanzien van een schuldenaar met vermogensbestanddelen in andere lidstaten meerdere insolventieprocedures in meerdere lidstaten geopend worden: 'hoofdprocedures' en 'secundaire procedures'.[2] De hoofdprocedure wordt uitgesproken in de lidstaat waar het centrum van de voornaamste belangen van de schuldenaar is gelegen (Centre Of Main Interest, 'COMI'). Parallel met de hoofdinsolventieprocedure kan in een ander lidstaat waar de schuldenaar een 'vestiging' heeft een zogenaamde 'secundaire insolventieprocedure' worden geopend die beheerst wordt door het recht van die lidstaat (art. 4 EIV). De procedure is beperkt tot de goederen van de schuldenaar die zich in de lidstaat van de vestiging bevinden (territoriale werking). De secundaire procedure is tevens beperkt tot een procedure die een liquidatie-karakter heeft. In Nederland zijn dat het faillissement en de schuldsaneringsregeling natuurlijke personen.
Deze parallelle grensoverschrijdende procedures dienen, voor een doelmatige afwikkeling en het bereiken van hun doelen, onderling goed te worden gecoördineerd. Daartoe heeft de Insolventieverordening wederzijdse communicatie- en samenwerkingsverplichtingen in het leven geroepen voor de curatoren die in de verschillende insolventieprocedures van dezelfde schuldenaar zijn benoemd. Overweging 20 EIV:

'Een essentiële voorwaarde tot die coördinatie is een nauwe samenwerking van de diverse curatoren, in het bijzonder een nodige uitwisseling van informatie. Het overwicht van de hoofdprocedure moet verzekerd zijn doordat de curator van de hoofdprocedure in gelijktijdige aanhangige secundaire procedures kan ingrijpen, bijvoorbeeld door een herstelplan of akkoord voor te stellen of om schorsing van de afwikkeling van de boedel in de secundaire procedure te verzoeken.'
[3]

Deze verplichtingen gelden voor zowel de 'kleinere zaken' (bijvoorbeeld vermogensbestanddelen van een natuurlijk persoon in Nederland en Spanje), maar ook voor meer complexe zaken, zoals auto-onderdelenleverancier Collins & Aikman (meer dan 4000 werknemers in tien Europese landen) of Eurofood/Parmalat.

2 De CoCo-Guidelines in de 'Public Draft'

Omdat de samenwerkingsverplichtingen in de verordening summier en abstract zijn geformuleerd, hebben professor Miguel Virgós (Universiteit van Madrid) en professor Bob Wessels (Vrije Universiteit, Amsterdam) het initiatief genomen om (niet-bindende) richtlijnen (de zogenaamde 'CoCo-guidelines', waarbij CoCo staat voor 'Co-operation and Communication') te ontwikkelen. Zij zijn daarbij gesteund door een groep van zo'n twintig top-insolventiespecialisten, waaronder curatoren, rechters en academici uit tien landen. Het eerste concept ('public draft') van de CoCo-guidelines, bevat achttien guidelines met betrekking tot o.a.:

- hun niet-bindende karakter;
- de professionele vereisten waar de curatoren aan moeten voldoen;
- in welke taal de grensoverschrijdende communicatie dient plaats te vinden;
- hoe de kosten van de beloning van de curator die betrekking heeft op meer dan één boedel moeten worden behandeld;
- hoe de samenwerking tussen curatoren dient plaats te vinden (met een 'check list' voor een overeen te komen protocol), alsmede;
- hoe de samenwerking tussen rechtbanken onderling dient plaats te vinden.

De guidelines zijn geïnspireerd door andere praktijkregels, zoals de UNCITRAL Model Law on Cross-border Insolvency en de Principles of Cooperation in Transnational Insolvency cases van het American Law Institute.

De 'public draft' is eind september 2006 door professor Virgós en professor Wessels gepresenteerd tijdens de jaarconferentie van Insol Europe in Boekarest (300 aanwezigen uit vijftien jurisdicties). Het bestuur en de aanwezige leden van Insol Europe hebben de 'public draft' omarmd. Voorts hebben de deelnemers aan het congres - door elektronisch te stemmen - zeventien vragen over de guidelines beantwoord en zijn een paar guidelines besproken in workshops.[4] Enkele uitkomsten hiervan bespreek ik kort.

Een meerderheid was het niet eens met de stelling *dat de rechtbank de hoofdcurator als curator dient te benoemen in de secundaire procedure*. Daarbij is gesignaleerd dat dit problemen zou kunnen geven in rechtsstelsels waar strikte toelatings- en benoemingseisen voor curatoren bestaan. Tijdens een van de workshops was de vraag aan de orde: *ten laste van welke boedel kunnen de curatoren hun kosten declareren indien deze gerelateerd zijn aan een andere boedel dan hun 'eigen' boedel?*

Volgens guideline 11, die handelt over kosten, dienen de kosten van de curator in beginsel gedeclareerd te worden ten laste van de boedel van hun 'eigen' insolventieprocedure. Echter, guideline 11.2 bepaalt dat, indien deze kosten betrekking hebben over de periode voordat de secundaire procedure is geopend en deze kosten aan deze secundaire procedure zijn gerelateerd, zij ook door deze secundaire procedure dienen te worden gedragen. Tijdens de workshops kwam naar voren dat een dergelijke regel kan botsen met lokale regels in bijvoorbeeld Australië en Duitsland, volgens welk recht 'pre-insolventie' kosten niet kunnen worden gedragen door de boedel. Tevens kwam daar aan de orde dat het soms grote verschil in beloningstructuren van curatoren uit de verschillende lidstaten tot problemen kan leiden. Tot slot stemde een ruime meerderheid van 73% ermee in dat Insol Europe een '*Committee Model Protocol*' in het leven zou moeten roepen, die de draft protocol (bijlage bij de CoCo guidelines) verder kan uitwerken.

3 Input van de lezer voor de verdere ontwikkeling van de guidelines

Professor Wessels en professor Virgós zullen aan de hand van de input uit Boekarest en andere ontvangen reacties de draft guidelines aanpassen. De public draft is hieronder integraal opgenomen. De secretaris-generaal van Insol Europe (Marc Udink) heeft tevens het initiatief genomen tot de instelling van een Commissie Best Practices. Deze zal naar verwachting op basis van de aanbevelingen van professor Wessels en professor Virgós verder uitgewerkte samenwerkings- en coördinatieregels ter begeleiding van Europese insolventiezaken ontwikkelen en een programma ontwerpen om deze te promoten (training, publicaties). Als secretaris van dit CoCo-project zou ik de lezer willen vragen na te denken over verdere suggesties, voorbeelden of problemen uit de praktijk, ter completering van de public draft. Dit kan door - uiterlijk vóór oktober 2007 - een e-mail te sturen naar of naar de redactie van TvI die uw reactie desgewenst kan plaatsen in dit tijdschrift. Desgevraagd ontvangt u het rapport met de complete uitslag van de stemming in Boekarest. De CoCo-Guidelines zijn ook te raadplegen op www.insol-europe.org.

4 European Communication and Cooperation Guidelines For Cross-border Insolvency (Public draft September 2006)

Developed Under the aegis of Academic Wing of INSOL Europe by Professor Bob Wessels and Professor Miguel Virgós

Guideline 1 Overriding objective

1.1

These Guidelines embody the overriding objective of enabling courts and liquidators to efficiently and effectively operate in cross-border insolvency proceedings within the context of the EC Insolvency Regulation.

1.2

All interested parties in cross-border insolvency proceedings are required to further the overriding objective as set out above in Guideline 1.1.

Guideline 2 Aim

2.1

The aim of these Guidelines is to facilitate the coordination of the administration of insolvency proceedings involving the same debtor, including through the use of a governance protocol.

2.2

In particular, these Guidelines aim to promote:

(i) The orderly, effective, efficient and timely administration of proceedings;

(ii) The identification, preservation and maximisation of the value of the debtor's assets (which includes the debtor's undertaking or business) on a world-wide basis;

(iii) The sharing of information in order to reduce the costs involved;

(iv) The avoidance or minimisation of litigation, costs and inconvenience to creditors and other parties affected by proceedings.

Guideline 3 Status

3.1

Nothing in these Guidelines is intended:

(i) To interfere with the independent exercise of jurisdiction by each of the national courts involved, including their respective authority over a liquidator;

(ii) To interfere with national rules or ethical principles by which a liquidator is bound according to applicable national law and professional rules;

(iii) To confer substantive rights or to interfere with any function or duty arising out of the EC Insolvency Regulation or to impinge on applicable national law.

Guideline 4 Liquidator

4.1

A liquidator is any appointed person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs, either in reorganisation or in liquidation proceedings.

4.2

A liquidator is required to act with the appropriate knowledge of the EC Insolvency Regulation and its application in practice.

4.3

A liquidator is required to act objectively, fairly and expeditiously in dealing with all parties concerned,

including the courts.

Guideline 5 Direct Access

5

A liquidator should be granted direct access to any court necessary for the exercise of legal rights to the same extent that a national liquidator is so permitted.

Guideline 6 Communications

6.1

Liquidators in related cases are required to communicate with each other directly and as soon as they are appointed.

6.2

The main liquidator should always take the initiative to start or to continue said communications.

6.3

Substantive replies to queries from duty bound liquidators should be dealt with always *as soon as reasonably practical*. The same rule applies to queries from creditors or the debtor.

Guideline 7 Information

7.1

Liquidators are required to provide prompt and full disclosure, to all other liquidators involved, of all relevant information about the existence and status of the insolvency proceedings in which they have been appointed.

7.2

The liquidators are required to periodically provide information which may be relevant to the other proceedings, detailing the conduct of the proceedings, in particular the progress made in lodging and verifying claims, the ranking of the admitted claims, the calling of creditors meetings, planned actions regarding realisation of relevant assets, and all measures aimed at terminating proceedings, including a composition or rescue plan. The information may include details of the debtor's assets and past transactions, specially those taking place during an applicable suspect period, and such other particulars as the other liquidators may reasonably require.

7.3

Liquidators in possession of such information are required, insofar as they are subject to any reporting

duties under national law, to inform the courts of any material development in any such other proceedings.

7.4

A foreign liquidator should be permitted to use all legal methods to obtain information that would be available to a creditor or to a liquidator in any national insolvency proceedings.

7.5

To the fullest extent permissible under any applicable law, any relevant information not available publicly should be shared with other liquidators subject to appropriate confidentiality arrangements insofar as this is commercially and practically sensible.

Guideline 8 Information by a liquidator in secondary proceedings

8.1

The liquidator in any secondary proceedings should provide without any delay all relevant information to the liquidator in main proceedings so as to facilitate the submission of proposals on the liquidation or use of assets in secondary proceedings.

8.2

The liquidator in any secondary proceedings is encouraged to provide advice to the liquidator in main proceedings concerning any views on how to best proceed.

8.3

The liquidator in main proceedings is encouraged to involve liquidators in any secondary proceedings in devising those proposals referred to above in Guideline 8.1.

8.4

Where a reorganisation plan can be adopted in secondary proceedings that would give better value to creditors in main proceedings or reduce the overall debt, the liquidator in main proceedings and the courts shall take advantage of the opportunity to promote the adoption of this plan.

Guideline 9 Authentication

9.1

Save as otherwise provided under any law applicable, where existing authentication of documents is required, methods should be established so as to permit rapid authentication and secure transmission of faxes and other electronic communications relating to cross-border insolvencies on any basis that

permits their acceptance as official and genuine communications by liquidators and courts in other jurisdictions.

9.2

To the extent permissible under national law, courts are encouraged to provide or publish judgements, orders or rulings also in languages other than those regularly used in proceedings or encourage as much as possible to allow translations to be made.

Guideline 10 Language

10.1

The liquidators shall determine the language in which communications take place on the basis of convenience and the avoidance of costs.

10.2

Courts are encouraged, to the maximum extent permissible under national law, to accept any documents related to those communications in this language, without the need for a translation into the language of proceedings before them.

Guideline 11 Costs

11.1

Obligations incurred by the liquidator during proceedings and the liquidator's fees are funded from the assets within those proceedings in which the liquidator is appointed.

11.2

Obligations and fees incurred by the liquidator in the main proceedings prior to the opening of any secondary proceedings but concerning assets to be included in the secondary estate will be funded by this estate.

Guideline 12 Cooperation

12.1

Liquidators are required to cooperate in all aspects of the case.

12.2

Cooperation takes place, to the maximum extent permissible under national law, with other liquidators with a view to minimising conflicts between parallel proceedings and maximising prospects for the rehabilitation and reorganisation of the debtor's business or the value of the debtor's assets subject to

realisation, as may be the case.

12.3

Cooperation is intended to address all issues that are important to the actual case, including but not limited to:

(i) Publication of the proceedings and notice to creditors;
(ii) Organising creditors meetings;
(iii) Continuing operation and management of the business;
(iv) Disposal of relevant assets;
(v) Raising of new finance;
(vi) Preparing and implementing composition or reorganisation plans;
(vii) Realisation of the estate in liquidation and distribution to creditors.

12.4

Cooperation may be best attained by way of an agreement or 'protocol' that establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such agreement or 'protocol'.

12.5

A protocol for cooperation between proceedings should include, at the very least, provisions for the coordination of court approval for decisions and actions whenever required and for communications with creditors as required under any applicable law. It should also include a statement of the various cross-border issues to be addressed (e.g. reorganisation, treatment of claims, realisation of assets) and any questions in respect of which the liquidators are required to seek agreement in advance from other liquidators.

12.6

In cases where any matter is not specifically provided for within the protocol, the parties shall act in a manner designed to promote the overriding objective set out above in Guideline 1.1.

Guideline 13 Cross-Border Sales

13.1

Where during any period of cooperation between liquidators in main and any secondary proceedings assets are to be sold or otherwise disposed of, every liquidator should seek to sell these assets in cooperation with the other liquidators so as to produce the maximum value for the assets of the debtor as a whole.

13.2

Any national court, where required to act, should approve those sales or disposals that will produce such value.

Guideline 14 Assistance in Reorganisation

14.1

Where main proceedings are aimed at ensuring the rehabilitation and reorganisation of the debtor's business, all other liquidators shall cooperate in any manner consistent with the objective of reorganisation or the sale of the business as a going concern wherever possible, without however prejudicing interests protected by local insolvency proceedings.

14.2

Liquidators should cooperate so as to obtain any necessary post-commencement financing, including through the granting of priority or secured status to reorganisation lenders as may be appropriate and insofar as permitted under any applicable law.

Guideline 15 Coordination between secondary proceedings

15

Liquidators in all secondary proceedings are required to comply with these Guidelines.

Guideline 16 Courts

16.1

Courts are advised to seek to give effect to the overriding objective as set out above in Guideline 1.1. wherever they:

(i) Exercise any power given to them by the law applicable or by the EC Insolvency Regulation;

(ii) Interpret any of these Guidelines in light of the requirements set out above in Guideline 2.

16.2

Courts are advised to operate in a cooperative manner to resolve any dispute relating to the intent or application of the terms of any cooperation agreement or protocol.

16.3

Courts are advised to consider whether a joint appointment of the liquidator in main proceedings or a nominated agent thereof to function as a liquidator in secondary proceedings would form an appropriate way of ensuring cooperation between liquidators in different proceedings under the court's supervision.

16.4

To the maximum extent permissible under national law, courts supervising insolvency proceedings or

requests for assistance or any matters relating to communications from other courts should cooperate with each other directly, through liquidators or through any person or body appointed to act at the direction of the court.

16.5

Courts should encourage liquidators to report periodically, as part of national reporting duties, on the way these Guidelines and/or agreed Protocols are applied, including any practical problems which have been encountered.

Guideline 17 Notices

17.1

Notice of any court hearing or the making of any order by a court should be given to each of the liquidators at the earliest possible point in time, where the hearing or order is relevant to that liquidator.

17.2

Where a liquidator cannot be present in person before the court, the court is advised to invite the liquidator to communicate any observations to the court prior to any order being made.

17.3

The liquidators should provide for the keeping of an accessible record of such notices, which shall be regularly updated, to note the dates and relevant descriptions of any legal documents communicated, including those filed or transferred electronically.

Guideline 18 Scope

18

Where the aim of these Guidelines is to facilitate the coordination of the administration of insolvency proceedings involving the same debtor, including through the use of a governance protocol, liquidators, administrators and courts outside the scope of the EC Insolvency Regulation are encouraged, wherever possible, to use these Guidelines so as to facilitate or increase the prospects of cooperation in other proceedings taking place.

Checklist Protocol

A Protocol is designed to apply within the framework of the EC Insolvency Regulation and all liquidators should be acquainted with the terms referred to in the Regulation, the Guidelines and in a Protocol. See Guideline 4.1. In practice, cooperation - and therefore a Protocol - will particularly refer to certain basic requirements and to specific issues to be addressed in the cross-border insolvency case at hand.

Basic requirements with regard to liquidators

1

Statement of the status of the liquidators

2

Statement that each of the liquidators is subject only to the jurisdiction of its own court

3

Statement of the right of each of the liquidators to be heard as a foreign representative in the other insolvency proceedings

4

Statement of each of the liquidators that they will communicate and cooperate with each other as best as possible under the application of the European Communication and Cooperation Guidelines For Cross-border Insolvency

Basic requirements with regard to the debtor

1

Statement of identity of the debtor and its management

2

Statement of the involvement of the debtor prior to certain steps taken

Basic requirement with regard to the proceedings

1

Statement of type (main, secondary) and nature (domestic name) of the insolvency proceedings

2

Statement of specific topics, like mandatory involvement of certain third parties or bodies and to certain mandatory forms to use

3

Statement of the use of language

4

Statement of division of costs

5

Statement relating to methods of exchanging and sharing information

Basis requirements with regard to courts

1

Statement confirming the sovereignty and independence of the courts involved

2

Statement on recognition by each court of the proceedings opened by the other, any other judgments or preservation measures and of any stays granted

3

Statement of each of the courts that they will, while respecting the sovereignty and independence of each other, communicate and cooperate with each as best as possible under the application of the European Communication and Cooperation Guidelines For Cross-border Insolvency

Specific issues for cooperation

1

The goal of co-operation;

2

The performance of certain acts and timescales to realise this goal;

3

The coordination of issuing information to be communicated to creditors;

4

The coordination of lodging of claims

5

Information on claims lodged, the verification and disputes concerning claims

6

The ranking of creditors

7

The description and disposal of relevant assets;

8

The actions planned or underway in order to recover assets;

9

The location of assets when not covered by the location rule of Article 2(g), e.g. shares, IP rights or inter-company accounts;

10

The actions to obtain payment from debtors

11

The initiation of actions to set aside detrimental acts;

12

The filing of actions against third parties in relation to the insolvent company;

13

The exercise of the an option (to continue; to terminate) in case of reciprocal agreements;

14

The exercise of any voting rights;

15

The termination of contracts;

16

The decisions relating to (post-commencement) borrowing or the provision of security;

17

The filing of additional insolvency petitions concerning establishments in other Member States;

18

The process of drawing up or the submission of a liquidation or reorganisation plan;

19

The submission of an insolvency plan (of reorganisation or liquidation) or a composition;

20

The distribution of any dividends;

21

The application of the hotch-pot rule;

22

The applicable law on certain issues;

23

The closure of secondary proceedings and the change in applicable law

Voetnoten

[*]
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[1]
Van kracht sinds 31 mei 2002.

[2]
Indien een secundaire procedure aan een hoofdprocedure voorafgaat, betreft dit een territoriale procedure.

[3]
Deze regels zijn opgenomen in art. 31 EIV.

[4]
De eerste stemming liet zien dat de meeste aanwezigen een redelijk lange ervaring hadden in de insolventiepraktijk: (0-5 jaren (12%), 6-10 jaren (24%), 11-20 jaren (38%), 21-30 jaren (18%), en meer dan 30 jaren (8%)).