

Two is company, but three is a (better) crowd: the Southern District of New York joins Delaware and Singapore in adopting cross-border insolvency guidelines*

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Introduction

Recently, the Bankruptcy Court for the District of Delaware ('Delaware'), the Bankruptcy Court for the Southern District of New York (SDNY) and the Supreme Court of Singapore ('Singapore') adopted the *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters*¹ (the 'Guidelines').² The adoption of the Guidelines is timely: US Chapter 15 filings were more common in 2016 than at any point in Chapter 15's history (since its adoption in 2005).³ Delaware and the Southern District of New York are two prominent corporate bankruptcy jurisdictions in the US, making the Guidelines' adoption in Delaware and the SDNY important from the perspective of US insolvency practitioners. This article discusses the evolution of the Guidelines, details their current form and then addresses the practical effect that the Guidelines' adoption as local rules may have on international insolvency proceedings.

Background of the Guidelines

The adoption of the Guidelines by Delaware, the SDNY and Singapore followed the participation of representatives from those jurisdictions in the Judicial Insolvency Network (JIN) conference held in Singapore in October 2016.⁴ The JIN conference featured judges from ten jurisdictions: Australia (Federal and New South Wales), Canada (Ontario), the Cayman Islands, England and Wales, Hong Kong SAR (as observer), Singapore and the United States (Delaware and the SDNY). The goal of the conference and the guidelines (the 'JIN Guidelines') was and is to facilitate communication and cooperation between and among courts overseeing multijurisdictional insolvency proceedings.

The Guidelines consist of 14 individual guidelines, an introductory 'aims' section and an annex featuring additional guidelines for the conduct of joint hearings by courts. The JIN conference adapted the Guidelines, in large part, from an earlier set of 17 guidelines issued in 2003 by the American Law Institute, International Insolvency Institute and the American Bar Association, called *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (the 'NAFTA Guidelines').⁵ The NAFTA Guidelines received a minor update in 2012 when the American Law Institute and International Insolvency Institute issued a report called *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*.⁶ The report restated the NAFTA Guidelines, added an additional 'overriding objective' guideline and provided insightful commentary on the other 17 original guidelines. It is worth noting that the US Bankruptcy Code added Chapter 15 in 2005, in between the issuance of the original NAFTA Guidelines and the 2012 update. The JIN conference distilled these earlier guidelines into 14 guidelines, which were then adopted by Singapore and as local rules by Delaware on 1 February 2017⁷ and pursuant to a general order by the SDNY on 17 February 2017.⁸

The Guidelines as adopted

As adopted by Delaware, the SDNY and Singapore, the Guidelines are largely identical to the JIN Guidelines. Four subheadings partition the Guidelines into smaller groups, in addition to the introduction and annex: (1) 'Adoption and Interpretation'; (2) 'Communication Between Courts'; (3) 'Appearance in Court'; and (4) 'Consequential Provisions'. Beginning with the

‘Introduction’, the Guidelines declare their objective of enhancing coordination and cooperation and delineate six aims, including:

- efficient and timely coordination and administration;
- respecting relevant stakeholders’ interests;
- preserving and maximising the value of the debtor’s assets;
- managing the debtor’s estate according to the unique circumstances of each cross-border case;
- reducing costs via information sharing; and
- minimising litigation costs and party inconvenience.

As adopted, Delaware’s Guidelines contain an additional, pre-introduction paragraph explaining that the Guidelines may apply in any case with cross-border insolvency or debt adjustment proceedings, but that the Delaware bankruptcy court must affirmatively approve a protocol or enter an order applying the Guidelines in each case. This language largely mirrors that of Guideline 2 and seems directed at clarifying for the court how it may apply the Guidelines in a given case rather than making a substantive change to the Guidelines.

The six guidelines under the ‘Adoption and Interpretation’ subheading closely relate to several concepts from the Introduction. Guideline 1 asks courts to encourage insolvency administrators to cooperate in all aspects of a case and to inform the relevant courts as early as possible of any issues that may affect the proceedings and can be aided by court-to-court communication. Guideline 2 states that courts intending to apply the Guidelines will need to do so by approving a protocol or entering an order after application by the parties or *sua sponte* by the court, and includes a footnote emphasising that normally parties will agree on a protocol based on the Guidelines, and the protocol will then be approved by each relevant court. The SDNY added to Guideline 2’s footnote a statement to the effect that pending approval of the protocol or in proceedings where there is no protocol, administrators and other parties are nevertheless expected to comply with the Guidelines.⁹

Guideline 3 states that any such protocol or order should promote efficiency of administration through coordination and communication and avoid unnecessary and costly proceedings when possible. Guideline 4 operates in the negative, asserting that the guidelines are not intended to interfere with a court’s jurisdiction or an insolvency administrator’s ethical rules, prevent a court from acting in accordance with public policy, alter substantive rights or interfere with applicable law. The SDNY added language to Guideline 4 stating that the guidelines are not intended to prevent a court from refusing to take an action that would not sufficiently protect the interests of

interested entities, including creditors and the debtor. Guideline 5 emphasises the procedural nature of the Guidelines, a common theme. The SDNY added an exception for substantive matters specifically provided for in a particular protocol or order (as permitted by applicable law). Lastly, Guideline 6 reminds courts and parties that the Guidelines should be interpreted with regard to their international nature and the benefits of uniform application.

The ‘Communications Between Courts’ subheading¹⁰ contains three guidelines. Guideline 7 suggests methods whereby domestic courts may communicate with foreign courts, and that these communications may occur for the purpose of making submissions and rendering decisions. Guideline 8 notes that parties may normally be present during communications between courts, and also contains suggestions regarding notice and recordkeeping. In one of the main changes between the JIN Guidelines and the Guidelines adopted by Delaware, the SDNY and Singapore, the adopting jurisdictions added an exception for procedural (Delaware and the SDNY) and administrative (Singapore) matters. As a result, only communications on substantive matters expressly trigger the suggestions in Guideline 8 that the parties be present and specific notice and record-keeping procedures be followed. While the difference between substance and process is not always clear, it is not surprising that the drafters were focused primarily on the ability of the parties to be present during any communication between courts on substantive matters, leaving greater flexibility for the courts to communicate on procedural/administrative matters without the need to involve the parties (the focus in the Guidelines on reducing litigation costs may have also played into the approach taken by the drafters). Guideline 9 notes that courts can order that notice of all their proceedings be sent to parties to the foreign proceeding, whether electronically or physically.

The ‘Appearance in Court’ subheading contains two guidelines. Guideline 10 permits a court to authorise a party to appear before a foreign court, subject to the foreign court’s approval. Guideline 11 allows a court to authorise a party to a foreign proceeding to appear without subjecting such party to its jurisdiction. Both Delaware and the SDNY added language to Guideline 11 clarifying that the party or person making an appearance does so ‘on a specific matter’ and is subject to the court’s jurisdiction on that ‘specific matter’ only; Singapore did not do so. Given that becoming subject to the jurisdiction of the US courts is a common concern of non-US entities and persons, this change is important. It appears designed to give comfort to non-US parties that participating in a cross-border insolvency case

involving a US bankruptcy court will not result in US courts obtaining general, or all-purpose, jurisdiction to hear any and all claims against the foreign defendant, but rather only those relating to the specific insolvency proceedings in which it is participating. For those concerned about becoming subject to US jurisdiction, this delineation of the parameters of that jurisdiction should be helpful.

The final subheading, 'Consequential Provisions', contains three guidelines. Guideline 12 requires that a court recognise that laws, regulations and rules of the foreign court and jurisdiction are authentic and properly enacted, subject to proper objection on valid grounds. It should be noted that domestic jurisdictional rules, such as rules of evidence, will govern if contrary to the Guidelines. Guideline 13 requires that a court recognise that orders of the foreign court are duly and properly made or entered, subject to proper objection on valid grounds. Some non-US jurisdictions provide for the automatic recognition of orders once a foreign insolvency proceeding is recognised, but that is not true in the US. Guideline 14 clarifies that any protocol or order, including the Guidelines, is subject to appropriate alterations by the adopting court, provided the court notifies any other court(s) as soon as practicable of such alterations.

The annex to the Guidelines features seven additional recommendations for a court to consider when conducting a joint hearing with another court, many of which correspond to the general Guidelines. The annex contemplates simultaneous audio hearings at minimum but suggests providing the best audio-visual hearings possible, and directs the courts to consider coordination of submissions and evidence filed or to be filed in each court. Courts are also asked to consider whether or not parties will be subject to the jurisdiction and ethical rules of both courts by appearing and being heard in a joint hearing. The annex discusses court-to-court communications once more, both pre- and post-hearing. The annex expressly asks the courts to consider, post-hearing, whether matters are substantive when determining whether parties should be present and communications should be recorded and preserved.¹¹ Overall, as discussed previously, the Guidelines seem to reflect the position that court-to-court communications on arguably substantive matters should not take place without the parties being present.

Impact of the Guidelines' adoption

To fully understand the impact of the Guidelines, it is important to briefly address the role of local rules and general orders in the US federal courts. Generally, the Federal Rules of Civil Procedure (FRCP) govern civil

proceedings (including bankruptcy) in US federal courts. In addition, the Federal Rules of Bankruptcy Procedure (FRBP) govern aspects of procedure particularly relevant to bankruptcy proceedings, and override the FRCP where applicable.¹² Local rules are rules adopted by individual federal courts, after notice and an opportunity for public comment, and they apply specifically to proceedings within that federal court, carrying the force of law. Local rules must also be consistent with the FRCP, acts of Congress and rules prescribed by the Supreme Court of the United States. General orders, also known as standing orders and administrative orders, are typically adopted by district courts or bankruptcy courts and apply within that adopting district or jurisdiction. Unlike local rules, general orders do not usually include an opportunity for notice or public comment. Due to this distinction, general orders are usually used to address internal administrative matters, temporary problems and emergencies, though some courts use them for other purposes as well.¹³

Here, Delaware adopted the Guidelines as local rules, and the SDNY adopted the Guidelines pursuant to a general order. Practically speaking, the adoption of the Guidelines as a local rule or pursuant to a general order does not alter their utility or availability in an individual bankruptcy proceeding. In Delaware's Guidelines, the pre-introductory language clarifies that although the Guidelines are a local rule, they will only apply if adopted in an individual case. This optional nature is unlike many other local rules, such as filing and brief formatting rules, which apply in all cases. The optional nature of the Guidelines may have motivated the SDNY to adopt them pursuant to a general order. The Guidelines as adopted by the SDNY do not include a separate, explicit provision regarding application in an individual case like Delaware's version of the Guidelines, but rather appear to rely on Guideline 2, whereby a court intending to apply the Guidelines needs to approve a protocol or enter an order after application by the parties or *sua sponte* by the court.

Although the Guidelines' adoption is a recent development, the predecessor NAFTA Guidelines have featured prominently in protocols for cross-border insolvency cases. Dozens of cross-border insolvency cases between the US and Canada used the NAFTA Guidelines in their protocols, including as recently as November 2016.¹⁴ Prior to the Guidelines becoming local rules, courts relied upon the parties to cite and propose the NAFTA Guidelines as part of protocols. Since its adoption in 2005, Chapter 15 of the US Bankruptcy Code has specifically contemplated protocols or agreements concerning the coordination of cross-border proceedings as a form of recognised cooperation in cross-border cases.¹⁵ With the adoption of the Guidelines

as local rules and pursuant to a general order, however, their use and importance will likely increase.

Additionally, including the Guidelines in the local rules will provide a jurisdictional default rule for protocols and agreements governing cross-border insolvencies. Parties will be more likely to adopt the Guidelines or use them as a starting point because including them in the local rules or a general order centres any discussion on potential guideline provisions on those provided by the local rules or general order. Increased usage by the courts should compound the coordination and cooperation benefits sought by the Guidelines as judges and practitioners become increasingly familiar with the Guidelines, including in connection with implementing them in concert with other courts. The adoption of the Guidelines by other jurisdictions, including the other seven JIN conference participants, would further amplify the benefits.

Conclusion

The adoption of the Guidelines by Delaware, the SDNY and Singapore has occurred during an historically busy period for cross-border insolvencies. Building on the foundation of the NAFTA Guidelines, the Guidelines focus on increasing the efficiency and effectiveness of cross-border proceedings through improved communication and cooperation between courts presiding over multijurisdictional insolvency proceedings. In the US, the Guidelines' adoption as local rules and a general order in two important bankruptcy jurisdictions should further the development of a uniform approach to communication and cooperation between courts. As judges and practitioners become increasingly familiar and comfortable with their use, that will hopefully lead to greater predictability (and potentially lower litigation costs) in cross-border cases involving US bankruptcy courts.

Notes

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- 1 Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters, United States Bankruptcy Court for the District of Delaware Local Rule 9029-2; Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters, United States Bankruptcy Court for the Southern District of New York General Order M-511; Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters, Supreme Court of Singapore.
- 2 Unless specified, references to the 'Guidelines' shall mean the Guidelines as adopted generally by Delaware, the SDNY and Singapore.
- 3 American Bankruptcy Institute, 'Chapter 15 Filings (2005-Present)': https://s3.amazonaws.com/abi-org/Newsroom/Bankruptcy_Statistics/Chapter+15+Filings.pdf, accessed 26 February 2017. Chapter 15 of the US Bankruptcy Code applies to cross-border insolvency cases.

- 4 Supreme Court of Singapore, 'Judicial Insolvency Network Discusses Guidelines for Cross-Border Insolvency Matters': www.supremecourt.gov.sg/news/media-releases/judicial-insolvency-network-discusses-guidelines-for-cross-border-insolvency-matters, accessed 26 February 2017.
- 5 American Law Institute, *Transnational Insolvency Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries* (Juris Publishing, Inc 2003), Appendix F.
- 6 American Law Institute & International Insolvency Institute, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (report to ALI, 30 March 2012): www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf, accessed 26 February 2017.
- 7 Supreme Court of Singapore, 'Paving the Way for Improved Coordination of Cross-Border Insolvency Proceedings: Adoption of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters': www.supremecourt.gov.sg/news/media-releases/paving-the-way-for-improved-coordination-of-cross-border-insolvency-proceedings-adoption-of-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters, accessed 26 February 2017; United States Bankruptcy Court for the District of Delaware, '2017 Local Rules': www.deb.uscourts.gov/news/2017-local-rules, accessed 27 February 2017.
- 8 In re: Procedural Guidelines for Coordination and Cooperation between Courts in Cross-Border Insolvency Matters, United States Bankruptcy Court for the Southern District of New York General Order M-511.
- 9 At first glance this statement may appear to apply the Guidelines regardless of adoption in an individual case by the courts, but this statement is likely meant to apply in a situation where, for example, the SDNY has approved a protocol but the applicable foreign court has not yet done so.
- 10 The SDNY added a footnote to the subheading to note that communications between insolvency administrators are also expected to be consistent with the guidelines within this subheading.
- 11 The slightly different language here might suggest court-to-court communication on substantive matters discussed after a joint hearing seemed less problematic to the JIN drafters than communications on substantive matters discussed pre-hearing. For example, Annex section vi states that '[a] court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present... to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.' Conversely, Annex section vii states that '[a] court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters.' Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters, United States Bankruptcy Court for the District of Delaware Local Rule 9029-2.
- 12 Daniel R Coquillette, Mary R Squiers and Stephen N Subrin, 'The Role of Local Rules' (1989) 75-Jan ABA J 62.
- 13 Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 'Report and Recommended Guidelines on Standing Orders in District and Bankruptcy Courts': www.uscourts.gov/sites/default/files/standing_orders_dec_2009_0.pdf, accessed 27 February 2017. The SDNY, unlike some other jurisdictions, tends to use general orders for substantive matters, for example, guidelines for asset sales (M-311) and financing requests (M-274) in the SDNY are in the form of general orders.
- 14 In re: BPS US Holdings Inc, [2016] Case No 16-12373-KJC, Docket No 220 (Bankr D Del).
- 15 11 USCA s 1527(4) (West).

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