A Global Approach to Cross-Border Insolvency Cases in a Globalizing World

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1. Introduction

On the date of publishing this contribution, Professor Ian F. Fletcher (University College London) and I will have issued our Report containing a set of Global Principles for Cooperation in International Insolvency Cases. These Global Principles reflect a non-binding statement, drafted in a manner to be both used in civil-law as well as common-law jurisdictions, and aim to cover all jurisdictions in the world.1 In 2006, Fletcher and I were appointed by the American Law Institute (ALI) and the International Insolvency Institute (III) to prepare this Report. The ALI is a renowned legal academic institute, established in 1923 by judges, legal practitioners and academics, who collaborated as the “Committee on the Establishment of a Permanent Organization for the Improvement of the Law”. ALI’s general aim is “to promote the clarification and simplification of the law and to secure the better administration of justice”. In Europe, ALI is known mainly for its role in the realization of so-called Restatements, comprehensive descriptions and explanations of certain major topics of law, such as the Restatements on the Law of Agency, Conflict of Laws, Contracts, Judgments, and Foreign Relations, for which ALI has a deservedly prominent place within the development of North-American law.2 The III is, according to its tag line, a “Non-Profit Corporation Dedicated to the Improvement of International Insolvency Systems and Procedures”. The III was established in 2000 as a “limited member organization”. In 2012 the maximum number of members will be 300, including insolvency practitioners, scholars and judges.3

To a large extent the said Global Principles for Cooperation in International Insolvency Cases (“Global Principles”) build further on the ALI’s Principles of Cooperation among the member-states of the North American Free Trade Association (the “ALI NAFTA Principles”). These Principles have evolved from the ALI’s Transnational Insolvency Project, conducted between 1995 and 2000, for which the Reporter was Professor Jay L. Westbrook, University of Texas, at Austin, Texas, USA. The objective of that Project was to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states of the United States, Canada and Mexico. The ALI NAFTA Principles were published as a separate volume in the four-volume text of the Transnational Insolvency Project (2003).4 In 2002 III had decided to accept the ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases and to promote its use.

In this contribution I will describe the structure and content of the Report, its relation to other initiatives in the world to create a better legal infrastructure for dealing with cross-border insolvency (reorganization or liquidation) cases, the scope of the Global Guidelines and the method used to arrive at where we are today. I will provide two illustrations of what Fletcher and I feel are important principles to further international insolvency law not only as a scholarly domain, but to assist judges and international insolvency practitioners in their approach to the conduct in these cross-border insolvency matters. Finally, I will conclude with emphasizing the Global Principles’ aim and purpose.5

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1. The final Report, as presented to the American Law Institute in May 2012, is available via <www.bobwessels.nl>, weblog document 2012-06-doc1. I am grateful to Ian Fletcher for commenting on the draft version of this contribution.

2. For its website, see <www.ali.org>. On ALI’s work, see Traynor 2007, pp. 145 et seq.

3. Most of its members actively participate in internal study groups and committees. III maintains a website, which contains one of the richest sources (“hard law”, “soft law”, “articles”, and “protocols”) of international insolvency law. For its website, see <www.iiiglobal.org>.

4. See American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, New York: Jurs Publishing, Inc., 2003, hereinafter “ALI NAFTA Principles”. As in the NAFTA Principles, the terms “bankruptcy” or “insolvency” are herein used as synonyms, although in worldwide English-language usage “insolvency” is the more common term for such proceedings where a business debtor is involved, whilst in the North American region “bankruptcy” is at least as often used for business proceedings as for those involving consumers. See NAFTA Principles Report 2003, at 1.

5. The final Report has been discussed and approved at the 89th Annual Meeting of ALI, 23 May 2012, Washington, D.C. It has been unanimously approved by the membership of III at the 12th Annual Conference of III, 22 June 2012, Paris.
2. Structure and Contents

The Global Principles for Cooperation in International Insolvency Cases cover mainly three areas. After an introduction, Section II constitutes the heart of the statement, the Global Principles for Coordination of International Insolvency Cases. These Global Principles are the result of a global research survey that established the extent to which it is feasible to achieve a worldwide acceptance of the ALI NAFTA Principles, either in their existing form or, if necessary, with modifications or variations. Then follows Section III, which includes a review of the appreciation of the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (“Court-to-Court Guidelines”). These Guidelines in their original form were included in Appendix B of the ALI NAFTA Principles and represent procedural suggestions for increasing communications between courts and between insolvency administrators in cross-border insolvency cases. These Guidelines have been used in many cross-border cases, recently in such cases as Nortel Network and Lehman Brothers, in which some 70 insolvency proceedings in 17 countries all over the world are pending. The existing Guidelines have been revised in the light of subsequent developments in relation to this important form of cross-border cooperation that have been strongly influenced by the original Guidelines themselves. The text of the result of this review is recorded in Section III, with the heading Global Guidelines for Court-to-Court Communications in International Insolvency Cases.

An Appendix to the Report provides a glossary of terms and descriptions. As is explained in the Report, in recent times many states, regional public institutions, international non-governmental organizations, and practitioners’ associations have produced many laws, regulations, principles, guidelines and statements of best practices, all aiming for the better coordination of insolvency measures or proceedings concerning economic enterprises that have operations, assets, activities, debtors or creditors in more than one state. The resulting complexity is compounded by a bewildering variety of technical terms and expressions used in the various texts. The Appendix aims to promote the development of a uniform global legal terminology in matters relating to insolvency and therefore to assist insolvency practitioners, courts and legislators in their efforts to improve the components to smooth cross-border communication and coordination.

In a separate Annex we present a Statement of the Reporters, setting out our proposals for Global Rules on Conflict of Laws Matters in International Insolvency Cases. These proposals are not included in the Global Principles for Cooperation in International Insolvency Cases, but have been submitted to ALI and III as a useful starting point for further debate on a global level, bearing in mind the necessity to have these proposals tested against existing treaties or conventions and ALI’s other work products and ongoing work on Principles related to other topics with conflict of law consequences. As Reporters, Fletcher and I feel that the Global Rules on Conflict of Laws Matters in International Insolvency Cases serve as legislative recommendations in general and sometimes in more detailed terms. They may also serve as a guide for courts, insolvency practitioners and creditors in those circumstances where applicable law with regard to international insolvency cases fails to deal with a certain point in issue or is vague. They do not purport to employ specific statutory language, however, as expressing conflict of laws rules in an appropriate way is a challenge for national or regional legislators. The main goal is to demonstrate that globally there is a wide measure of support for the enactments of rules of this nature, based on the given principle to avoid miscommunication, to prevent uncertainty, to provide accurate translation and to ensure smooth cross-border cooperation. A primary benefit brought about by achieving uniformity in the area of conflict of laws is that parties’ legitimate expectations can be more consistently fulfilled, thereby reducing the levels of uncertainty and instability that have a key influence on the assessment of risk by those engaging in international transactions.

3. Background of the Global Principles

As indicated, the ALI NAFTA Principles were created some 10 years ago, with the focus on USA, Canada and Mexico. Having laid the groundwork for a wider dissemination of the ALI NAFTA Principles and their accompanying Guidelines, the ALI and the III considered in 2005 that it would be timely and appropriate to undertake a systematic evaluation of the possibility of adapting them so as to provide a standard statement of principles suitable for application on a global basis in international insolvency cases. The ALI NAFTA Principles, though written with the specific needs of the three NAFTA states primarily in mind, are necessarily of an international nature, and the Reporters for that project had expressed the hope that the Principles “may be helpful to our colleagues in other countries as well”.

Nine years ago, Professor Lance Liebman, Director of ALI, as well as Professor Jay Westbrook (as the ALI Reporter) were of the opinion that these ALI Principles could be of use also beyond the NAFTA-countries. I quote:

“Although this Project seeks to take advantage of regional relationships to advance closer cross-border cooperation, it does not seek to exclude or limit coop-

6. See American Law Institute 2003, Reporter’s Preface, p. xxi. See Westbrook 2005, p. 515. As a reminder, contrary to USA and Canada, Mexico belongs to the family of civil code countries.

eration with countries outside of the NAFTA. On the contrary, many of the principles and procedures discussed below can be applied by courts in the NAFTA countries to cooperate with proceedings in non-NAFTA jurisdictions. The bench and bar are encouraged to draw on those principles to increase cooperation in those instances as well, even though we cannot expect as high a level of cooperation as we hope to achieve within the NAFTA.”

The Global Principles Project was conceived and approved as a joint venture between ALI and III. In February 2006 ALI appointed Fletcher and me as Reporters for the project, initially titled “Transnational Insolvency: Principles of Cooperation”, which during the course of research and discussions was changed to: “Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases”. The most important objective within the remit of the project was to establish the extent to which it is feasible to adopt “at a global level” the ALI NAFTA Principles together with the Guidelines, including their alignment with certain comments received. The Reporters therefore developed a systematic consultation exercise, conducted with the help of experts drawn from a wide range of jurisdictions and legal traditions around the world and able to pronounce authoritatively on the feasibility of applying the Principles (or conversely, any obstacles to doing so) from the perspective of each state and legal system with which they have direct personal experience. In addition, we considered it to be both appropriate and necessary to take account of the considerable volume of work that has already been carried out in this field in recent years. In the text, the terms “cooperation”, “coordination” and “communication” play a major role. Within the ALI NAFTA Principles, “cooperation” encompasses “a variety of approaches to make legal systems work together better in addressing multinational problems, without necessarily making the systems more similar”. The term “coordination” is sometimes used to mean “….a limited harmonization aimed at making two different systems work better together, without being fully harmonized”. “Communication” relates to certain forms of exchange of information between different jurisdictions via various role players (courts, insolvency office holders, court clerks, certain other authorities) as well as to coordinate pending insolvency proceedings or developments within an international insolvency case. In the approach taken in the ALI NAFTA Principles, the Global Principles project is directed primarily at cooperation, but in its recommendations seeks a measure of coordination as well.

4. Relation to Current and Future Developments in Soft (International) Insolvency Law

A number of projects and studies that either directly or indirectly relate to national and cross-border insolvency matters have been conducted by such organizations as the Asian Development Bank, the World Bank, the IMF, the European Bank for Reconstruction and Development, the United Nations Committee on International Trade Law (UNCITRAL), and by other bodies of experts (for example, the Principles of European Insolvency Law 2003 and the European Communication and Cooperation Guidelines for Cross-border Insolvency 2007). As a result of the work of these organizations and bodies, there have emerged a number of texts, variously called “principles”, “guidelines”, “good practice standards” or “recommendations”. These texts amount to a striking demonstration of the globalization of commercial activity in the insolvency era, and the raised awareness internationally of the need to address the issues associated with insolvency in a cross-border context.

8. See Wessels 2009, pp. 587-611.
10. Where the Reporters aim to further build on the accepted concepts and terms of the ALI NAFTA Principles, the report does not follow the distinctions recently made by the Austrian author Geroldinger, to use the term “coordination” as the result of “collaboration”, which term itself covers all topics of information exchange (“communication”), all other matters in which different proceedings pending in different states can influence each other (“intervention” possibilities), “cooperation” (actually aligning approaches to pending proceedings) and “harmonization” or “uniformization” (as found in certain provisions of the EU Insolvency Regulation, such as Arts. 7(2) (reservation of title), 20 (return and imputation), 29 (right to request the opening of secondary proceedings), 30 (advance payments of costs and expenses), 31 (duty to cooperate and to communicate), 32 (exercising creditors’ rights), 33 (stay of the process of liquidation in secondary proceedings), 34 (measures ending secondary proceedings), 35 (assets remaining in the secondary proceedings), 39 (right to lodge claims) and 40 (duty to inform creditors). See Geroldinger 2010, pp. 25 et seq. See Wessels 2011a, pp. 27 et seq.
5. Relation to Current and Future Developments in (International) Insolvency Legislation

Furthermore, account has been taken of the fact that some of the central issues addressed in the original ALI NAFTA Principles (including recognition, relief, and cooperation) have, since ALI’s adoption of the text in 2000, found their way into national or federal legislation. In the USA, since 17 October 2005, Chapter 15 of the US Bankruptcy Code has been in place. It enacts virtually all the provisions of the UNCITRAL Model Law on Cross-Border Insolvency of 1997 and thereby encapsulates several of the ALI’s Principles. In Great Britain an amended version of the Model Law became effective as of 4 April 2006. Other states have also enacted legislation within which the Model Law, and hence some aspects of the ALI Principles, are reflected. These states include Australia, British Virgin Islands, Canada, Cayman Islands, Colombia, Greece, Japan, Ireland, Mauritius, Mexico, Montenegro, New Zealand, Poland, Romania, Serbia, Slovenia, South-Africa and South Korea.

Since 2002 a significant contribution to the process of international insolvency has been made by the entry into force of the EU Insolvency Regulation. Several topics dealt with in ALI’s Principles are now applicable on a compulsory basis in 26 of the 27 EU Member States. These topics include, e.g., cooperation (between “liquidators”) in parallel proceedings, recognition, access to court, information and communication, claims filing and avoidance actions, as well as rules governing — for intra-Union cases — jurisdiction to open insolvency proceedings and jurisdiction in respect of insolvency-related matters, the recognition of foreign proceedings, and uniform rules of conflict of laws. In 2004 the UNCITRAL published its Legislative Guide on Insolvency Law, which forms a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features. As a novelty, the Guide contains certain recommendations regarding applicable law in international insolvency cases. Like the ALI NAFTA Principles, the Legislative Guide contains considerations and suggestions with regard to group consolidation. In July 2009 UNCITRAL adopted the Practice Guide on Cross-Border Insolvency Cooperation (“UNCITRAL Practice Guide”) containing information for insolvency office holders and judges on practical aspects of cooperation and communication in cross-border insolvency cases. The Guide’s recommendations regarding applicable law in international insolvency cases sparked our intention to suggest our personal proposals for such matters in our work, laid down in a separate Annex to the Report, which sets out Global Rules on Conflict of Law Matters in International Insolvency Cases. Here, another source should be mentioned that has facilitated the Reporters’ work, namely the steadily growing body of in-depth studies devoted to many varied topics of international and comparative insolvency law in this decade.

Hence, as an integral part of the Global Principles Project, we thought it would be a challenging but valuable and necessary task to identify such core values and principles as can be discovered from a comparative analysis of the available texts, evaluated in the context of the consultative debate among the participating experts. As a result, Fletcher and I believe that the Global Principles for Cooperation in International Insolvency Cases are therefore in line with other international developments and other attempts of developing modes of international cooperation in the area of international insolvency.

6. What Was Excluded

As Reporters, we were conscious of the fact that our research, from which the Global Principles were produced, could have included other matters that it would have been appropriate to explore with a view to ascertaining the prospects for acceptance of global standards to be applied in the transnational insolvency process. A number of issues that have an important bearing upon the overall quality and efficiency of the international insolvency “process” were either not directly addressed in the context of the earlier project that yielded the ALI NAFTA Principles, or were dealt with on a somewhat tentative basis. These include the principles and procedures to be applied where insolvency occurs within multinational corporate groups (the subject of the original Procedural Principles 23 and 24 of the ALI NAFTA Principles). Further issues that we believe to be in need of study and development are the elaboration of internationally tenable standardized principles of professional behaviour of insolvency office holders. Although of direct relevance to the goal of promoting effective cooperation in international insolvency cases, it was decided that these and other issues should be studied and

13. Pursuant to Recommendations 1 and 6, see American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003, pp. 99, 99.

14. These countries are listed by UNCITRAL as having enacted legislation based on the Model Law, see <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>. It should be noted, however, that also the Ley Concursal of Spain (2003), and draft legislation in the Netherlands (2007) have been inspired by the Model Law, see Wessels 2008, p. 19, and Aurelio Esplugues & Barona-Vilar 2011. Available at SSRN: <http://ssrn.com/abstract=1952782>.

15. See Clift 2009, pp. 405 et seq.

16. However, on the basis of the languages at the Reporters’ command, only a selection written in German, French or Dutch could be analysed, along with those published in an English version.

17. For a recent overview of this area, see Wessels 2012.
dealt with by other international institutions or associations, which have taken these topics on their respective agendas.  

Regarding multinational corporate groups the Reporters welcome UNCITRAL’s publication, in July 2010, of Part Three of the Legislative Guide (“Treatment of enterprise groups in insolvency”). In the light of this development, which started in the period the Reporters were appointed, it was decided that it was unnecessary to undertake a parallel exercise as part of the Global Principles Project. In line with Procedural Principles 23 and 24 of the ALI NAFTA Principles, we feel that it should be permissible to commence an insolvency proceeding for an insolvent subsidiary in the same jurisdiction as the parent’s insolvency, and to have either procedural or substantive coordination or (partly) consolidation under applicable law, absent a proceeding involving the subsidiary in the state of its main interests. Where the subsidiary is in a parallel proceeding in the state of its main interests, coordination between the two proceedings should achieve the benefits of consolidation where possible. The principles of coordination and cooperation should include parallel proceedings involving a subsidiary of a foreign parent debtor to the same extent as with parallel proceedings involving the debtor, although certain decisions, such as allocation of value, may be differently determined because of the need to honour the corporate form. We consider this approach to be fully consistent with the overall spirit and substance of the surrounding Global Principles and therefore would encourage, wherever possible, the use of these Principles so as to facilitate or increase the prospects of cooperation in other proceedings taking place. We are, however, obliged to acknowledge that the responses of our consultants and interviewees have indicated that it cannot be claimed that this point of view commands widespread acceptance in national law and practice at the present time.

In formulating their proposals we have used texts or explanations to their meaning without taking into account the nature of a debtor or its particular status under national or regional law. However, we must acknowledge that certain categories or types of debtor will possess characteristics that mark them out for distinctive treatment in the event of insolvency. These include financial institutions and natural persons. With regard to financial institutions (credit institutions, insurance undertakings, (collective) investment undertakings, etc.), several international standard setting organizations or national and regional legislatures have developed or are in the process of developing rules or recommendations that – in a variety of ways – stress the paramount importance of the stability of the (international) financial markets, including the protection of financial interests of a large number of individuals concerned, and the prevention of systemic risks. These goals often result in specific regulatory regimes and in specific aims of the respective legislation or recommendations, including swift and targeted actions of authorities and specific international rules regarding cooperation, given the public nature of supervisory institutions involved. Although some of the Reporters’ recommendations may serve the purposes mentioned or could assist in earlier phases of financial distress of such institutions or some of its entities, which are excluded from said specific rules, the present proposals make no claim to deal with these financial institutions. The same approach has been chosen with regard to natural persons (sometimes also “consumers”, “non-merchants” or “non-traders”). Although in recent years several states have adopted special insolvency regimes for non-traders or natural persons, such rules are lacking in many countries, including – in Europe – Italy, Hungary and Latvia. Also in the area of natural persons some other purposes in legislation have a primary attention, such as the protection of a certain minimum of assets and income, available for an individual natural person (and his household) or the “financial rehabilitation of over-indebted individuals and families and their reintegration into society”. While some of these recommendations could provide guidance in certain matters, we have not primarily addressed such natural persons as insolvent debtors. Overall, the Global Principles apply to those groups of (legal) persons which play their part in (international) commerce and business.

7. Method of the Project

The aim of the Project, as outlined above, is to have a global reappraisal of the ALI NAFTA Principles and its accompanying Court-to-Court Guidelines from the perspective of a wide and diverse array of national insolvency systems and legal traditions, in order to test the feasibility of their being endorsed as the embodiment of “global best practice” or “world standard” in the matters addressed therein. The approach chosen has been an open-minded spirit, aiming at transparent and open

18. An overall view, also describing UNCITRAL’s developing work regarding “enterprise groups”, is provided by Sarra 2008, p. 73. The European Bank for Reconstruction and Development (EBRD) has released the “EBRD Insolvency Office Holder Principles” (June 2007), intended to assure that member-countries employ qualified, regulated and impartial persons for positions that are key in insolvency proceedings, see <www.ebrd.com/country/sector/law/insolve/princip/princips.pdf>. See Walten 2009, pp. 49-56.


20. See recommendation 4(f) of the Council of Ministers of the Council of Europe (20 June 2007) to its (over 40) member states “[t]o introduce mechanisms necessary to facilitate rehabilitation of over-indebted individuals and families and their reintegration into society in particular by: … f. encouraging effective financial and social inclusion of over-indebted individuals and families, in particular by promoting their access to the labour market”, Recommendation CM/Rec(2007)18, <https://wcd.coe.int>. See Kilborn, see <http://ssrn.com/abstract=1663108>.

debate, to ensure that any aspects of the Principles that may give rise to difficulties of transposition into the legal culture of any particular state or region can be properly and sensitively considered. This approach resulted in the formation – in line with the applicable rules governing publications of the ALI – of consultative groups and in the convening of discussions and debates in many international gatherings, seminars and lectures. The consultative process was based on two questionnaires, set out in 2006 and 2007, specifically relating to the ALI NAFTA Principles and the accompanying Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, and a third questionnaire concerned with choice of law questions.

As the Global Principles Project is a combined effort of ALI with III, the following groups were formed:

1. International Advisors, 12 in number, appointed by ALI and III, chaired by Professor Jay Westbrook, University of Texas at Austin;
2. Members’ Consultative Group, formed by some 50 other ALI Members with an interest in the project;
3. III Working Group, formed by over 20 III Members with an interest in the project, chaired by E. Bruce Leonard (Toronto, Canada), Chair of III;
4. International Consultants (some 20 coming from 18 countries), consisting of recognized experts with an interest in the project, not being members of ALI or III, chaired by us as the Reporters.

We have thus had the privilege of collaborating with a wide circle of international advisers who volunteered to participate, notably by supplying expert advice about the suitability (or otherwise) of the Principles for application in systems of which they have first-hand knowledge, and also by commenting on the evolving drafts of our report at various stages of its gestation. The support thus provided by our collaborators, being practitioners, scholars and judges, has enabled us to base our report on surveys of more than 30 separate jurisdictions representing a variety of legal traditions. Between summer 2006 and summer 2011 six half-day or one-day seminars were held wherein members of all the consultative groups and invited guests debated and discussed several topics of the project. These meetings were held at Columbia University (New York) on four occasions, at Humboldt University (Berlin) and in Rome (Italy).

In April 2010 the project entered into the next phase, as the Preliminary Draft of the Report of the Global Principles Project was circulated on a restricted basis among the panels of international advisors, and this text provided the focus of the meetings held in 2010 and 2011. In addition to the meetings each year of the consultative groups, certain parts of the project have been discussed at a number of academic conferences organized under the aegis of INSOL International or INSOL Europe’s Academic Forum, at which one or both of the Reporters were in attendance. The latter included international conferences arranged in Scottsdale (Az., USA), Cape Town (South Africa), Shanghai (PR of China), Vancouver (Canada), Singapore and regional conferences in North America, Kelowna (Canada) and in Europe, in London (England), Barcelona (Spain), Riga (Latvia), Leiden (the Netherlands), Cologne (Germany), Helsinki (Finland), Athens (Greece), Stockholm (Sweden), Oslo (Norway) and Philadelphia (USA). Also during other occasions, Fletcher and I were able to discuss items with groups of academics, practitioners, law students and judges. The feedback from all these sessions has been particularly instructive. The final text is therefore based on the cumulative results of discussions in these meetings and suggestions communicated by individuals to the Reporters.

The mechanism for decision that has been adopted by the Reporters has been the following: if any particular issue cannot be resolved on the basis of a text of universal application acceptable to all members of the consultative groups, accommodations have been sought by means of a proviso to allow the main principle to operate subject to certain necessary local modifications. In the course of this process, the extant array of internationally generated texts mentioned earlier have been studied with a view to ascertaining additional, complementary principles of law and practice that are considered to command general support. Both institutes share the aspiration that the recommendations within this report shall accurately represent a consensus shared among a large group of leading consultants from a large group of jurisdictions. Where this mechanism led to recasting the original ALI NAFTA Principles into a form suitable for fully global application, references to “NAFTA country” in the ALI-NAFTA Principles have been reformulated so that they refer to “a state which … has jurisdiction for that purpose”.

On the whole, the Reporters are of the opinion that the texts of the Global Principles reflect such a consensus. No term, principle, guideline or legislative recommendation has been adopted that was substantially opposed by two or more of the consultants. The Global Principles for Cooperation in International Insolvency Cases therefore represent a truly international, global consensus among the consultants, not always reflecting unanimous agreement on every particular, but expressing agreement on fundamental values and general standards,

22. As engaging in work for ALI may create tension between the best interest of lawyers’ clients and ALI’s vision and philosophy, both the Reporters and all advisors and consultants (lawyers, judges, professors and other scholars) were asked to make appropriate disclosure of ways in which the position they take may be influenced by their professional obligations and relations. Altogether, the advisers and consultants, whose names are listed in the Report, originate from over thirty jurisdictions in five continents.

23. We have also consulted the larger legal community to communicate experiences or wishes to us, see, e.g., Fletcher & Wessels 2010a, pp. 149-153; Wessels 2010b, p. 154.
preventing disagreement on certain matters. Furthermore, the Global Principles’ aim is, in general, to be compatible with the pursuit of a variety of ultimate outcomes in terms of the method of administering an insolvent estate including, if appropriate, the distribution of the debtor’s worldwide assets, while ensuring the protection of creditors’ rights. Given the variety of legal systems and policies and values reflected in different types of legal tradition, the Global Principles leave room for states with differing systems of insolvency law to make common cause in ensuring that the debtor’s assets are administered in the most efficient way achievable, while reserving the ultimate right to determine the mode of distribution of such assets as they are able to subject to their local jurisdiction and control.

8. The Result

The Global Principles for Cooperation in International Insolvency Cases contain 37 Global Principles for Cooperation in Global Insolvency Cases and 18 Global Guidelines for Court-to-Court Communications in International Insolvency Cases, accompanied, in each case, by commentary. The commentary contains – comparative – elucidations and provides informed background on how a certain rule, including its specific terms, is applied in a certain legal context. Often the considerations at stake are outlined and balanced, whilst many times a specific chosen rule is illustrated by examples or illustrations. In this way users of the Global Principles are able to understand more fully the background and meaning of a certain rule or its application in a certain situation. The commentary forms an integral part of the Global Principles. Notes (or “Reporters’ Notes”) have been used to set forth or discuss legal and other sources, the legal position in certain national or regional legal systems and, where relevant, the current position on certain matters in instruments of soft law. When provided, they appear at the end of a segment of black-letter commentary. The Reporters’ Notes should enable readers to better evaluate the background of certain principles and sometimes suggest avenues for further investigation or additional research.

We demonstrate in our Report that the essential provisions of the ALI’s Principles of Cooperation Among the NAFTA Countries, subject to certain necessary modifications, are fully capable of acceptance in jurisdictions across the world. On the other hand, the challenge of our present day should not be ignored and our ambition has been to make real progress. Professor Bufford, as reviewer on behalf of III, reported in November 2011 that he was especially pleased with some of the innovations we proposed, such as the principles on case management (Principle 4), equality of arms (Principle 5), cooperation (Principle 26) and coordination (Principle 27), while he particularly supported principles on which there is not full agreement, such as assistance to reorganization (Principle 30), limits on priorities (Principle 35), and making a plan binding on the creditors (Principles 36 and 37).

To give a sense of what we regard as particularly important principles I have selected two of them, which I will briefly explain now.

8.1 Language in Cross-Border Cooperation

Global Principle 21 relates to the most important channel of communication, language. The text is as follows.

Principle 21 Language

21.1. Where there is more than one insolvency case pending with respect to a debtor the insolvency administrators should determine the language in which communications should take place with due regard to convenience and the reduction of costs. Notices should indicate their nature and significance in the languages that are likely to be understood by the recipients.

21.2. Courts should permit the use of languages other than those regularly used in local proceedings in all or part of the proceedings, with due regard to the local law and available resources, if no undue prejudice to a party will result.

21.3. Courts should accept documents in the language designated by the insolvency administrators without translation into the local language, except to the extent necessary to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties.

21.4. Courts should promote the availability of orders, decisions and judgments in languages other than those regularly used in local proceedings, with due regard to the local law and available resources, if no undue prejudice to a party will result.

In June 2011 Professor Zimmermann from the Max Planck Institute in Hamburg, Germany, delivered an address at the Inaugural Congress of the European Law Institute. He pointed at the much more difficult task of the ELI than that of the ALI as the European Union alone has 23 official languages. In addition, one is confronted too many times with improper translations into other official languages of the EU or what originally had been developed in one of the EU’s working languages. Where in many other sciences, such as medicine, psychology or economics, English is the prevailing language, this is not so obvious for Europe. Twenty years

24. As Reporters, we are of the opinion that the Global Principles have as their foundation, in the words of Paul L. Friedman, Chair of the ALI Program Committee: “the Institute’s traditional and primary goals: achieving coherence, reflecting current best practices, and better adapting the law to social needs”, see “The President’s Letter”, 32 The ALI Reporter 2, Winter 2010, p. 3.

25. The reviewer on behalf of ALI, U.S. Bankruptcy Judge Elisabeth Stong (Eastern District of New York), was particularly helpful in suggesting comments with the goal of internal coherence and consistency with the kind of statements that ALI customarily receives or issues.

26. Prof. Bufford is a professor at Penn State (Dickinson School of Law) and former US Bankruptcy Judge – Central District of California, Los Angeles.
ago, as Zimmermann recalls, in Brussels two languages were used: good French and poor French. Now English is on the rise, not the Jane Austen or Winston Churchill English, but a simplified form of it spoken by people from the European continent, sometimes referred to as Eur-English. This language is not bad, but often simple, with a limited vocabulary, generally accepting two flaws: this language will only generally or imprecisely reflect notions that are very common in English, such as “comity”, a “stay”, providing “relief” or the use of a “trust”, but in other languages may not have equivalents; this language does not always capture the true meaning of foreign legal terms or expressions that are common in a national legal language, such as the Dutch word bindend advies (a third party charged with a fully binding opinion), goederechtelijke overeenkomst (a specific requirement in transferring assets) or financiele zekerheidsovereenkomst (which is one word in Dutch for a specific security contract).

It is obvious that in an international insolvency case, which involves for instance courts in the USA, Switzerland and Japan, or neighbouring courts in Bulgaria and Turkey, or courts in Canada, Guatemala and Norway, an understanding has to be in place on what language to use.

In our Report, Fletcher and I have included two recommendations, a general one and a recommendation for each individual case. Where several international non-governmental organizations and practitioners’ associations have produced many best practices and soft law, but using a large variety of technical terms and expressions used in the various texts, in the Report’s Appendix we have included over 150 terms and expressions to promote the development of a uniform global legal terminology.

On an individual level we have suggested Principle 21, cited above, with the heading “Language”, in which the first paragraph provides:

21.1. Where there is more than one insolvency case pending with respect to a debtor the insolvency administrators should determine the language in which communications should take place with due regard to convenience and the reduction of costs.

This is a new Global Principle, which has no exact counterpart in the original ALI NAFTA Principles. Global Principle 21 has its origin in Europe, where under the application of the EU Insolvency Regulation, administrators have a duty to communicate in parallel cross-border insolvency proceedings. In 2007 in Europe, CoCo Guideline 10 has been designed to accommodate the choice of an agreed language for purposes of communication, which is based on international practice, convenience and agreement. Global Principle 21 is based upon this European text, which text itself found its inspiration in Article 6 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 2004.

In the other paragraphs, we recommend, under certain conditions, that courts (i) should permit the use of languages other than those regularly used in local proceedings, (ii) should accept documents in the language designated by the insolvency administrators without translation into the local language, and (iii) should promote the availability of orders, decisions and judgments in languages other than those regularly used in local proceedings. Where a choice of language is made, for instance in a case between Germany and the Netherlands, a choice for German, or in a US-Brazilian case, a choice for English, we recommend that a native speaker of that language should be sensitive to the fact that the person(s) he or she is speaking to may be communicating in what is for him or her a second or third language.27

8.2 Independent Intermediary
Global Principle 23 introduces an independent intermediary, a new professional function to overcome any hurdles in global communication.

Principle 23 Communications between Courts; Intermediaries
23.1 Courts before which insolvency cases or requests to recognize foreign insolvency proceedings or requests for assistance are pending should, if necessary, communicate with each other directly or through the insolvency administrators to promote the orderly, effective, efficient and timely administration of the cases.

23.2. Such communications should utilize modern methods of communication, including electronic communications as well as written documents delivered in traditional ways. The Global Guidelines for Court-to-Court Communication, set out in Section III of these Global Principles should be employed. Electronic communications should utilize technology which is commonly used and reliable.

23.3. Courts should consider the use of one or more protocols to manage the proceedings with the agreement of the parties, and approval by the courts concerned.

23.4. Courts should consider the appointment of one or more independent intermediaries within the meaning of Global Principle 23.5, to ensure that an international insolvency case proceeds in accordance with these Global Principles. The court should give due regard to the views of the insolvency administrators in the pending insolvency cases before appointing an intermediary. The role of the intermediary may be set out in a protocol or an order of the court.

27. Acting in the spirit of achieving effective and efficient international insolvency cases will, in general, mean the use of simple and clear words spoken with careful articulation, and the avoidance of dialect words, over-sophisticated language, linguistic puns, euphemisms, topical references or nationally-derived cultural allusions that may be incomprehensible to those from outside the state in question.
23.5. An intermediary:
(i) should have the appropriate skills, qualifications, experience and professional knowledge, and should be fit and proper to act in an international insolvency proceeding;
(ii) should be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest;
(iii) should be accountable to the court which appoints him or her;
(iv) should be compensated from the estate of the insolvency case in which the court has jurisdiction.

Principle 23 (Communications between Courts; Intermediaries) has been developed from Procedural Principle 10 of the ALI NAFTA Principles and takes as a starting point that communications through courts in different states take place directly or through the respective insolvency administrators, under appropriate circumstances by using electronic means, including teleconferencing, electronic mail or video-link conferencing, sometimes with the use of a written framework that expresses the objectives of the cooperative process on which the respective courts, together with all parties in interest, are engaged. Global Principle 23.4 recommends a court to “consider the appointment of one or more independent intermediaries within the meaning of Global Principle 23.5, to ensure that an international insolvency case proceeds in accordance with these Global Principles”.

In the reality of everyday life under certain circumstances the court may wish to refrain from conducting direct communications with another foreign court, or even from doing so through the insolvency administrators who are conducting the respective proceedings in the states concerned. Reasons for considering such a course of action could be simply the unavailability of such e-technological means, especially in smaller, local courts. A more obvious consideration may be the anticipated complexity of multilingual communications in different time-zones, with more than two insolvency cases pending simultaneously (e.g. in such cases as Madoff or Lehman Brothers). Some may even think that cross-border communication with courts and administrators in three jurisdictions is simply impossible. Another reason could be the court’s genuine desire to maintain full impartiality, particularly if there are perceived to be conflicts between the administrators. In any such case the court could consider appointing an independent intermediary.

An intermediary’s general task is to help ensure that an international insolvency case is operated in accordance with these Global Principles and with any specific provisions that are either set out in a protocol or specified in the order made by court, see Global Principle 23.4. third line. The court should give due regard to the views of the insolvency administrators in the pending insolvency cases before appointing an intermediary, see Global Principle 23.4. second line. Global Principle 23.5. sets out the intermediary’s legal position and sets some professional and ethical rules for his role.

The role of an independent intermediary is new compared with the ALI NAFTA Principles, but the appointment of an independent intermediary fully fits within the structure of Articles 25-27 UNCITRAL Model Law,28 whilst the UNCITRAL Legislative Guide of 2010 has adopted the figure of a “court representative” having a similar function as an intermediary.29

9. Conclusion

The goal of the Global Principles is not to provide a complete charter for law reform. We believe we can fairly claim that our Report fulfils the commission ALI and III entrusted to us. We believe too that we have further built on the existing ALI Principles and the useful “soft law” work done by other organizations and drafted Global Principles that are tangible, practical and realistic. The main goal of the ALI and the III is for the Global Principles to provide a standard statement of principles suitable for application on a global basis in international insolvency cases. As in the ALI NAFTA Principles, a “principle” is a statement of value serving as a guideline for behaviour in cross-border insolvency cases. While the Global Principles are linked to the ALI NAFTA Principles, the present Report is to be regarded as an independent text. Fletcher and I think that the Global Principles may serve several purposes. They are worded in language that permits courts to apply them in a flexible way, tailored to the specific circumstances of each individual case. Where the Global Principles reflect a non-binding statement, we have chosen – contrary to several examples of soft law documents – not to include words such as “to the maximum extent possible” or “as far as possible”, which allows the application of any national rule with which a given principle would conflict.

The Global Principles may serve as an indication for insolvency office holders of the best, or preferred, approach in cross-border cases. Both for judges (and sometimes arbitrators) and for practitioners, the Global Principles may apply in cases where (international) insolvency legislation has been formulated in general, open terms or provisions or in cases where the existing body of binding legislation does not cover a specific matter.

Furthermore, the Global Principles may serve as non-binding codified customs and norms that may assist in preparing legal advice, in drafting contracts or in mat-

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28. Art. 27(a) Model Law allows a court to implement cooperation by any appropriate means, including the appointment of a person or body to act at the direction of the court.
29. A court representative is a person who may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions, see UNCITRAL Legislative Guide, Part Three: Treatment of Enterprise Groups 2010, para. 37.
ters of interpretation. They may therefore indicate an alternative or a solution in cases where it proves to be impossible to determine a specific rule of the law applicable or the law relating to (insolvency) proceedings. In this way too the Global Principles may stimulate convergence and coherence between several regional or national legal systems.

We also are of the opinion that the Global Principles could assist as a model or a guide for national or regional legislators. Finally, it is suggested that the Global Principles could form a part of courses and classes in academia all over the world and in post-graduate programs (of continuing education), so students and other interested professionals could be taught some of the principles that guide or steer international approaches. Both Fletcher and I firmly believe that the true aspiration for cooperation in international insolvency cases will be stimulated by educating younger generations within the spirit that the Global Principles aim to reflect: the embodiment of what is globally perceived as the best solution in certain matters of international insolvency cases.

In these ways it is hoped that, as embodied in the final text, the Global Principles possess persuasiveness, as they are supported by a large global consensus, and will obtain the approbation of governmental authorities, domestic and international organizations, practitioners, and (most importantly) courts in their search for suitable solutions and their approach to the conduct of international insolvency matters in the future.

Bibliography


B. Wessels, “Harmonization of Insolvency Law in Europe”, 8 European Company Law 1, 2011a, pp. 27 et seq.


In relation to Europe, the Global Guidelines could be considered in the context of the work following from the European Parliament resolution of 15 November 2011 with recommendations to the European Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)).