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Cross-border Insolvency Protocols: A Mean of Implementation of Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast[1]

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1. Introduction

In the last 60 years, businesses have gained the possibility to develop globally with different establishments in several countries worldwide. Professor Westbrook has pointed out that insolvency law needs to adapt to the globalization of the market.[4] As a response to the possible global dimension of insolvency cases, the concepts of cooperation, coordination and communication among courts and insolvency practitioners have come to constitute the backbone of cross-border insolvency law.[5]

Similarly, in the last 30 years, transnational protocols have been developed as a tool of cooperation and communication between insolvency practitioners and courts involved in insolvency proceedings with a multinational dimension.[6] These protocols are agreements entered by the insolvency practitioners to facilitate the coordination of cross-border insolvency

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[4] Jay L. Westbrook, *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court* 96 (7) Texas Law Review 1473 (2018).
[5] Bernard Santen, *Communication and Cooperation in International insolvency* 16 ERA Forum 229 (2015).
[6] Paul H Zumbro, *Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool* 11(2) Business Law International 157 (2010); Michele Maltese, *Court-to-court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems,* https://www.iiiglobal.org/sites/default/files/media/maltese_michele%20submission.pdf.

proceedings and may be subject to courts' approval through a court order.[7] They are a phenomenon that answers the practical needs of insolvency practitioners and courts in the international context with a common-law approach.

Protocols are a practical attempt to adapt the scopes of national insolvency law to the global dimension of businesses in distress. They function as a bridge between jurisdictions in order to overcome issues of coordination and communication between insolvency proceedings that are opened in different countries and involve the same debtor or corporate group.[8] These proceedings may deal with an individual legal entity with assets in different jurisdictions, or they may concern a group of companies made up of different legal entities established in different legal systems.

The idea of cross-border cooperation in global insolvency cases was borne out of practical needs in the 1990s. Within the European Union (EU), the principles of cooperation and coordination were already encompassed within the original European Insolvency Regulation n. 1346/2000.[9] In 2015, the recast version of the European Insolvency Regulation had been equipped with the principle of communication as well.[10] Moreover, the recitals of the recast European Insolvency Regulation (EIR) mention the opportunity of concluding insolvency agreements or protocols in relation to the duties of cooperation, coordination and communication.[11] The legal practice of the EU Member States, however, is mostly unacquainted with the concept of protocols.

This article is divided into four parts. First, it analyses the EU approach to protocols introduced in the 2015 recast of the European Insolvency Regulation and the way it combines the establishment of a legal basis for the future practice of protocols with the respect for national law limitations. Second, it describes the international practice of protocols. Third, it explains the will of the EU legislator to establish the best European Practices of cooperation, coordination and communication in cross-border insolvency cases based on protocols and

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[7] Fabian Andreas Van de Ven, *The Cross-Border Insolvency Protocol; What Is It and What Is in It? From a European Union Perspective* https://www.academia.edu/15056737/The_Cross_Border_Insolvency_Protocol_what_is_it_and_what_is_in_it_From_a_European_Union_Perspective.
[8] ibid.
[9] Council Regulation (EC) No. 1346/2000 of 29 May 2000 OJ L 160, 30.06.2000, Article 31.
[10] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings OJ L 141, 05.06.2015, Recital 48 and Article 41.
[11] ibid, Recital 49, Article 41 and 56.

discusses why this has not yet succeeded. Forth, it discusses the characteristics and legal nature of protocols.

2. The European Union's Approach to Communication and Cooperation

A common internal market facilitates cross-border business activity within the EU. When businesses fail, such activity leads to cross-border elements in insolvency proceedings. The debtor's market activity all over Europe may lead to the opening of insolvency proceedings for the same debtor or affiliates in several jurisdictions. Creditors may wish to participate in insolvency proceedings across borders or initiate parallel insolvency proceedings at home. The ability to initiate parallel insolvency proceedings and the way to coordinate such proceedings is regulated by the European Insolvency Regulation.

The European Insolvency Regulation results from a political compromise reached in the early 2000s, after at least 30 years of attempts to create an international tool for addressing cross-border insolvency cases.[12] One of the compromises reached by the Regulation is the adoption of the concept of so-called modified universalism.

The idea of modified universalism arrives as a compromise between universalistic ambitions and the safeguards and sovereignty typical of the territorial approach.[13] In an ideal world, there would be only one insolvency proceeding for an insolvent debtor governing the realisation of value and its distribution for all creditors worldwide according to the norms of one single insolvency law. This universalistic ideal meets a world in which the insolvency of a debtor is able to initiate insolvency proceedings in every country where the debtor has assets under the local law. Modified universalism accepts the aspect of multiple proceedings to a certain degree while establishing a leading insolvency proceedings with potentially global – universal – effects.

The idea is implemented by a set of private international law norms that concern cross-border insolvency,[14] such as the European Insolvency Regulation (EIR). The EIR provides that insolvency proceedings can be opened where the debtor has its centre of main interest and that these proceedings are to be recognised across all EU Member States (main insolvency

[12] Gerard McCormack, *Something Old, Something New: Recasting the European Insolvency Regulation* 79 (2) The Modern Law Review 380 (2016).
[13] Irit Mevorach, *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* 27 (OUP 2018).
[14] Irit Mevorach, *Modified Universalism as Customary International Law* 26 Texas Law Review 1403 (2018).

proceedings).[15] Nonetheless, secondary proceedings can be opened in Member States where the debtor has an establishment.[16] Consequently, under the EIR rules, two or more parallel proceedings can be open simultaneously against the same debtor in different Member States.[17] A need for coordination arises.

Similarly, the EIR has also introduced a conflict of law framework for insolvency proceedings involving groups of companies.[18] When enterprises are structured as a group of companies, they may have multiple centres of main interest.[19] The rules of the EIR provide that separate proceedings may be open against each member of the group but that these proceedings need to be coordinated.[20]

Under the current policy approach, it is therefore rather common that one debtor or one group of companies is the subject of separate parallel insolvency proceedings in different European jurisdictions. The EIR seeks to modulate the relation between these different proceedings with the duties to coordinate, cooperate and communicate (the so-called three Cs) to ensure cross-border insolvency proceedings efficiently and effectively. In order to secure compliance with these duties, the EIR suggests the use of protocols.[21] The following sections will address: (i) the duty of coordination, cooperation, and communication under the EIR and (ii) the potential role of protocols within the European Union.

2.1. The Duty of Coordination, Cooperation and Communication under the EIR(R)

Following the 1997 UNCITRAL model law example,[22] the EIR encompasses the duty of cooperation, coordination, and communication in Articles 41 ff and 56 ff. However, the Regulation does not provide for a definition or delimitation of these duties. In practice, these duties are considerably intertwined in the EIR approach. The following section seeks to distinguish the three duties and highlight their junctions.

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[15] Regulation 2015/848 *supra* n 10, Article 3 (1) and 19.
[16] Ibid, Article 3(2).
[17] Ilaria Queirolo, Stefano Dominelli, *Cooperation and Communication Between Parties in the Management of Cross-Border Proceedings under the European Insolvency Regulation Recast* in Vesna Lazić and Steven Stuij eds Recasting the Insolvency Regulation: Improvement and Missed Opportunities loc 3585 (Berlin, Springer 2020).
[18] Regulation 2015/848 *supra* n 10, Chapter 5.
[19] Robert van Galen, *The Recast Insolvency Regulation and Groups of Companies* 16 ERA Forum, 241 (2015).
[20] Regulation 2015/848 *supra* n 10, Article 56.
[21] ibid, Recital 49.
[22] UNCITRAL Model Law on Cross-Border Insolvency (New York; 1997), Articles 25-27.

2.1.1. Coordination as a Phenomenon and The Lack of a Duty of Coordination

The coordination of proceedings opened against the same debtor, or the same group of companies is factually necessary to ensure the efficient, value-maximising management of the insolvency estate.[23] Especially in the case of a (partially) viable business, it is unlikely that any restructuring or going concern preserving process can even take place if not in a coordinated manner.[24] One of the EIR aims is to lay down rules for the coordination of insolvency proceedings that relate to the same debtor or members of the same group of companies.[25] The concept is cardinal within the Regulation as the word 'coordination' is mentioned eighty-two times thought its text.

Nevertheless, the Regulation does not define the concept of coordination, which can be deemed to have a broad meaning.[26] Coordination can be seen as an (often informal) agreement of the stakeholders (mainly insolvency practitioners and courts) concerning the activities to be carried out in cross-border proceedings in order to achieve the common interest of the best management of the insolvency estate. What is the best management of the estate varies from case to case, and it can include goals such as the maximisation of creditors' wealth or the rescue of employment.

For example, the insolvency practitioner appointed in the main proceedings can exercise their powers in other EU jurisdictions in compliance with the local rules.[27] These powers are limited, however, by the powers of insolvency practitioners appointed in secondary proceedings over the same set of assets. Where a value maximising liquidation requires a sale of all of the debtor's assets in both jurisdictions, the practitioners need to coordinate the execution of their powers.

In the case of group insolvency, coordination refers to the relationship between several proceedings against different companies belonging to the same group.[28] In this case, coordination between several main proceedings is even more essential in managing the group

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[23] Ilya Kokorin, *Conflicts of Interest, Intra-group Financing and Procedural Coordination of Group Insolvencies* 29(2) International Insolvency Review 32 (2020).
[24] 'Insolvency Proceedings in Case of Groups of Companies: Prospects of Harmonisation at EU Level' Briefing Note 2011, 7.
[25] Regulation 2015/848 *supra* n 10, Recital 6.
[26] van Galen *supra* n 20.
[27] Regulation 2015/848 *supra* n 10, Article 21.
[28] ibid, Article 57.

legal structure and the intra-group economic relations emerging in different *fora*. The coordination of this type of proceedings is regulated explicitly by article 61 EIR.[29]

Article 61 EIR provides that any insolvency practitioner may request the opening of a particular procedure called group coordination proceedings, which constitute a new formal way to secure coordination amongst group proceedings.[30] Under this special procedure, a coordinator is appointed to manage a coordination plan that implements an integrated approach to the insolvency of the members of the group. This may involve measures such as *ad interim* finance, the intra-group settlement and agreements with insolvency practitioners dealing with a member's insolvency.[31]

Participation in the formal coordination procedure takes place on a voluntary basis.[32] It is a discretionary choice of each of the insolvency practitioners of a group company, who have to balance the costs and benefits of taking part in the special procedure.[33] If an insolvency practitioner decides not to take part in the coordination proceedings, they are not required to cooperate or communicate with the coordinator; Article 74 EIR limits such obligations to those participating in coordination proceedings.[34]

The Regulation does not impose a duty of coordination *per se* in a specific article. Nevertheless, Recital 23 states that "mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union."[35] These rules are found in several different articles on "cooperation and communication".[36] It can be said that under the EIR, there is no proper duty of "coordination", but that the need for coordination implies either the duty of cooperation or communication.[37] The organisation of these concepts resembles a set of matryoshkas dolls where coordination contain cooperation and cooperation contains communication. Indeed, there cannot be coordination without cooperation, and there is hardly cooperation without communication between the parties.

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[29] ibid, Article 61.
[30] ibid.
[31] ibid, Article 72.
[32] ibid, Recital 56.
[33] ibid, Recital 58.
[34] See Marc Lienau, in Moritz Brinkmann (ed.), *European Insolvency Regulation* Art. 74 para 2 (Munich, Beck Hart Nomos, 2019).
[35] Regulation 2015/848 *supra* n 10, Recital 23.
[36] Ibid, Articles 41-43, 56-58.
[37] Santen *supra* n 5, 231.

The duty to coordinate arises only as a consequence of the duties of cooperation and communication that are expressly provided in the EIR. Together with the courts, the insolvency practitioners are imposed by the duty to cooperate and communicate with the other practitioners and courts.[38] Also, the insolvency practitioners, especially the one of the main proceedings, have a series of duties and rights, which realise the principle of coordination.

2.1.2. The Duty of Cooperation

The duty of cooperation is functional to coordination.[39] Cooperation can be seen as how coordination among insolvency proceedings is achieved. Like for coordination, the EIR does not define the specific content of the duty of cooperation. Also, the terminology of the EIR is not necessarily coherent or precise when using terms like "coordination", "cooperation", or "communication".[40] However, from the overall use of the word throughout the Regulation, cooperation can be understood as the working together of the players involved in several insolvency proceedings.[41]

In particular, under the EIR, cooperation is instrumental to the enhancement of the realisation of the assets in multistate insolvency. Recital 48 of the EIR provides that:

> "Main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings. Proper cooperation implies the various insolvency practitioners and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information."[42]

The EIR supplies the duty of cooperation in individual insolvency with main and secondary proceedings as well as in the case of insolvency proceedings of members of a group of companies.[43] Moreover, the EIR distinguishes between the duty of cooperation between insolvency practitioners and the duty of cooperation between courts.

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[38] Regulation 2015/848 *supra* n 10, Article 43.
[39] Santen *supra* n 5, 231
[40] See Dominik Skauradszun and Andreas Spahlinger, in Brinkmann (ed.), *European Insolvency Regulation* (Munich, Oxford; Beck Hart Nomos, 2019), Art. 41 para 4.
[41] Regulation 2015/848 *supra* n 10, Recital 48.
[42] ibid.
[43] ibid, Article 41ff for individual debtors; Article 56 ff for groups of companies.

Concerning proceedings against an individual debtor, Article 41(1) EIR imposes on the insolvency practitioners of main and secondary proceedings the duty to cooperate among themselves. The cooperation may take any form, and it is limited only by its compatibility with the local law.[44] The Regulation provides some examples of how cooperation may take place in Article 41(2). These involve the communication of relevant information, the joint elaboration and implementation of restructuring plans and the coordination of the administration of the debtor's assets either for use or realisation.

Concerning the cooperation between courts, Article 42(1) EIR provides that courts involved in proceedings opened against the same debtor have to cooperate within the limits imposed by the rules applicable to the proceedings. Cooperation under article 42 EIR includes the communication between the courts, the coordination of the appointment of the insolvency practitioners, the administration and supervision of the debtor's assets, the conduct of the Court's hearings (not necessarily joint hearings) and the approval of a protocol. Courts can also decide to appoint a person or a body representing them while working together with the other courts.[45]

Additionally, Article 43(1) EIR establishes the duty of cooperation between insolvency practitioners and courts both before and after the opening of the proceedings. Article 43(2) EIR specifies that the cooperation between courts and insolvency practitioners can take place in the same modalities as the cooperation between courts.

Cooperation is even more essential in insolvency proceedings involving members of a group of companies. Article 56(1) EIR imposes a duty to cooperate within the limits imposed by the applicable law and possible conflicts of interest. Intra-group cooperation may be implemented through (i) communication, (ii) coordination of the administration and supervision of the affairs of the insolvent members of the group, (iii) development of a proposal and negotiation of a coordinated restructuring plan, and (iv) the conclusion of a protocol.[46]

Similarly, courts are required pursuant to Article 57(1) EIR to cooperate in proceedings that relate to groups of companies to the extent that such cooperation is not incompatible with the applicable procedural framework and does not constitute a conflict of interest. Article 58(1)

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[44] ibid, Article 41(1). See also Skauradszun and Spahlinger, in Brinkmann *supra* n 40, Art. 41 para 11.
[45] Regulation 2015/848 *supra* n 10, Article 42(2).
[46] Ibid, Article 56(2).

EIR provides for the duty to cooperate among courts and insolvency practitioners along the lines established in Article 43.

Overall, the factual need for coordination in the two principal scenarios of parallel insolvency proceedings for the same business, which are main and secondary proceedings for the same single debtor and several main proceedings for companies of a corporate group, has led to the enactment of mostly similar rules regarding the cooperation between the insolvency practitioners and courts involved in Articles 42 to 43 and 56 to 58 EIR. In both instances, the use of protocols is explicitly mentioned.[47]

2.1.3. The Duty of Communication

The duty of communication refers to the exchange of information concerning the proceedings among insolvency practitioners and courts.[48] The duty of communication can be seen as means of implementation of the broader duty of cooperation among the parties.[49] Article 41(2)(a) EIR provides that insolvency practitioners should communicate any relevant information to the other insolvency practitioners as soon as possible. The Regulation specifies in this provision that insolvency practitioners should share up-to-date information concerning the lodging and verification of the claims and rescuing or restructuring measures. Moreover, the Regulation provides here that they should also devise arrangements for the protection of confidential information. However, there is no specification on which information should be deemed confidential.

Article 42(2)(a) extends the duty to communicate in principle to "any" information of relevance before mentioning examples of such information ("progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings"). The Virgo-Schmit report, developed in 1996 about the attempted Convention on Insolvency Proceedings, which was a precursor of the original European Insolvency Regulation, contained a more detailed list of facts that insolvency practitioners should share:

- "The assets,
- the actions planned or under way in order to recover assets: actions to obtain payment or actions for set aside,

[47] ibid, Articles 41(1) and 56(1), also Articles 42(3)(e) and 57(3)(e).
[48] Santen *supra* n 5, 231; also see Skauradszun and Spahlinger *supra* n 40, Art. 41 para 18.
[49] ibid.

- possibilities for liquidating assets,
- claims lodged,
- verification of claims and disputes concerning them,
- the ranking of creditors,
- planned reorganisation measures,
- proposed compositions,
- plans for the allocation of dividends,
- the progress of operations in the proceedings."[50]

This list is still able to illustrate the content of a duty to share information as described in Article 41(2)(a) EIR.[51] As for the duty to cooperate, the duty to communicate is also provided separately, but with similar words, for insolvency practitioners appointed in main and secondary proceedings of the same debtor in Article 41(2)(a) EIR and for insolvency practitioners in parallel main insolvency proceedings in case of an insolvent group of companies in Article 56(2)(a) EIR. For courts, the duty to communicate information is expressed in Articles 42(3)(b) and 57(3)(b) EIR.

There is also no difference with regards to the costs of communication. Article 44 EIR provides that Court shall not charge costs or fees amongst them as this would disincentives communication and cooperation. They are free, however, to charge costs as parts of the overall regime of court fees in their insolvency proceedings under national insolvency law. Article 59 EIR explicitly details this fact by providing that costs of the cooperation and communication incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective insolvency proceedings.

Finally, the means of communication and cooperation are not detailed by the Regulation. Courts may communicate among each other by any means deemed appropriate by the courts themselves.[52] The insolvency practitioners' means of communication and cooperation may take any appropriate form.[53]

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[50] Miguel Virgos and Etienne Schmit, Report on the Convention on Insolvency Proceedings (1996), para 230.
[51] Bob Wessels, in Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation* Art. 41 para 41.61 (OUP Oxford 2016).
[52] Regulation 2015/848 *supra* n 10, Article 42(3)(b) and 57(2)(b).
[53] ibid, Article 41(1) second sentence and 56(1) second sentence.

2.2. The Role of Protocols within the European Union's Approach

The use of protocols is mentioned in several provisions of the Regulation in the context of the duties to cooperate and communicate,[54] but the term itself is not defined there. Instead, the instrument of a protocol is introduced in the context of

> "best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral)."[55]

The European Legislator intends to enable insolvency practitioners and courts in EU Member States to make use of an instrument that has proven to be effective and efficient in securing cooperation and communication in international insolvency practice for more than 30 years. EU practice is invited to adopt established best practices from global insolvencies in order to develop a best "European practice for cooperation and communication".

2.2.1. A Legal Basis for Protocols

The EIR's regulation of duties to cooperate and communicate expressively mentions the use of protocols and thereby provides a sound legal basis for the practitioners to conclude a protocol and for courts to approve such a protocol even in jurisdictions where the domestic insolvency legislation does not explicitly provide for such powers to the insolvency practitioner. The Regulation is directly applicable in all EU Member States (except Denmark).[56]

Articles 41(1) and 56(1) EIR provide the legal basis of a duty to coordinate and legitimacy to the option of using a protocol. The articles also limit coordination when the practice is inconsistent with the applicable law. The delimitation of the coordination depending upon the applicable law reflects the practice emerging in the protocols. Indeed, protocols generally safeguard the jurisdiction and independence of the Court and the rights and obligations of the insolvency practitioners (see below at 3.2.). Therefore, under both the EIR and the most

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[54] ibid, Articles 41(1) and 56(1), also Articles 42(3)(e) as well as 57(3)(e) and, most notably, in Recital 49.
[55] ibid, Recital 48, last sentence.
[56] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Article 288. The Regulation does not apply to Denmark by reason of Articles 1 and 2 of the Protocol No 22 on the position of Denmark as annexed to the TFEU and reflected in Recital 88 EIR.

common law practice of protocols, the independence of the courts and the *lex forum* are valued and protected above the need for coordination.

It is necessary to remark that the conclusion of a protocol is an option, not mandatory under EU law. It is not the only possible form of compliance with the duties to cooperate and communicate. Similarly, the mere conclusion of a protocol is not sufficient to establish compliance with the duties.

2.2.2. A Regulatory Sandbox for Cross-border Insolvency Practice

In the European context of strictly binding EU law, the need for protocols expressed in the EIR provisions may surprise given the extensive regulation of duties to cooperate and communicate in Articles 41 to 44 and 56 to 59 EIR. It derives from the gaps left and the broad terms used by the Regulation. The duties of coordination, cooperation, and communication, in particular their content, limits, means and costs, are formulated in such general terms that allow the insolvency practitioners and courts considerable room of manoeuvre in deciding when, how and to what extent to coordinate. Is any given information relevant to the other proceedings? Is the sharing of information or the coordination of measures incompatible with the rules applicable to the respective proceedings? Which part of the information is confidential and should remain – and to what extent – confidential? Which means of communication are appropriate?

The Regulation does not regulate these detailed aspects of coordination. Instead, Recitals 48 and 49 envisions courts and insolvency practitioners to develop "best practices" in line with existing best practices in this area. The European legislator took no position in relevant doctrinal matters such as the question of the legal nature of protocols[57] as this could hinder the effort. Instead, the wording in Recital 49 as well as in Articles 41(1) and 56(1) EIR differentiates "agreements and protocols", which allows for any type of coordination between participants.[58]

The Regulation does explain, however, the legal limits of this exercise in Articles 41(1) and 56(1) EIR: applicable law. Relevant issues in the area of information sharing and acts of

[57] Bob Wessels *supra* n. 51, para. 41.47.
[58] Aurora Martínez Flórez, *Meaning, Function and Nature of the Protocols or Agreements among Insolvency Practitioners*, in Daniele Vattermoli, Stephan Madaus, Federica Pasquariello, Andrés Recalde Castells (eds.), Transnational Protocols: A Cooperative Tool for Managing Cross-border Insolvency (Milan, Wolters Kluwer 2021), pages 35-37.

cooperation are already regulated by (other) EU law, in particular with regards to the sharing of private personal information, or domestic law, in particular insolvency law.

But even where the multiplicity of legal requirements establishes different legal standards for insolvency practitioners or courts in parallel insolvency proceedings, efforts of coordination are able to achieve a value-maximizing result by preventing losses that occur simply due to the fact that parties in one proceeding are not aware of the different legal standard for parties in another. It should be noted that the binding rules under domestic laws may actually result in a need for coordination in insolvency proceedings. Protocols are able to organise the coordination needed within, not against the current EU and domestic legal framework.

The EIR does not provide for legal consequences of possible breaches of the duties of cooperation and communication by the insolvency practitioners and courts.[59] It is up to the Member States insolvency laws and the national courts to enforce them based on the remedies available in their legal system. Similarly, the national legal system should provide remedies for the breach of these duties under effectiveness and equivalence principles.[60] Consequently, any breach of the duty of coordination and cooperation can be enforced by the national Court with remedies equivalent to other breaches of the insolvency practitioner duties. EU law does not require the Member States to enable the private enforcement of these duties, in particular by foreign courts or insolvency practitioners.

The lack of specification of remedies in the EIR itself may create issues of legal certainty for the parties involved in the proceedings, especially those involved in proceedings other than those where the breach occurs. Nevertheless, this open-end of the provision is in line with the Regulation's private international law nature and the respect of the autonomy of the Member States' judicial systems.

In the general legal context, protocols may facilitate the enforcement of the rather general duty of cooperation and communication under the Regulation. Indeed, the parties can use the protocols to clarify their common expectations with regards to the content, the means, the extent, and the limits of any duty to cooperate and communicate. Moreover, they can also

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[59] ibid.
[60] Koen Lennarts, *National Remedies for Private Parties in the Light of the EU law Principles of Equivalence and Effectiveness* 46 Irish Jurist 13 (2001).

design an alternative dispute resolution system to resolve the lack of predictability caused by the formulation of the duties under the EIR.

Finally, protocols may present the only viable way of establishing any common ground with regards to coordination when parallel insolvency proceedings in third states are involved. Here, the duties formulated in the EIR provisions only apply to courts and insolvency practitioners in the EU Member States as they are intended to be mutual.[61] They have no relevance with regards to third countries. Parallel insolvency proceedings opened in countries such as the US, Canada, or Singapore, but also in European countries such as the UK, Switzerland, or even Denmark would be coordinated with EU insolvency proceedings only to the extent that such coordination is enabled or even mandated by the domestic laws and organised by protocols. As far as domestic cross-border insolvency rules in these countries reflect the standards set by Articles 25 to 27 of the UNCITRAL Model Law on Cross-border Insolvency, general duties to cooperate and communicate similar to those in the Regulation may exist, and the practice of protocols may even be long-established.[62]

3. The Global Experience with Cross-Border Insolvency Protocols

Protocols are a phenomenon that has been developed in insolvency practice mostly outside the EU to answer issues of coordination among courts and practitioners involved in multistate insolvencies. They are not regulated by national law either in the European Union or in the United States, where the practice has originated.[63] Instead, there are several national and international soft law instruments that address and guide the use of protocols.[64] This section aims to analyse the aims, principles, and standard features of the protocols emerging in practice[65] and soft law instruments.

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[61] Skauradszun and Spahlinger *supra* n 44, Art. 41 para 8 and Art. 56 para 6.
[62] UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (New York, 2012), page 48.
[63] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (hereinafter Practice Guide), page 7.
[64] International Bar Association Cross-Border Insolvency Concordat 1995; American Law Institute (ALI) and International Insolvency Statute (III) Global Principle for Cooperation in International Cases 2012 including: (i) the Global Principles for Cooperation in International Insolvency Cases and; (ii) the Global Guidelines for Court-to Court Communications in International Insolvency Cases; Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters; Practice Guide (n 63).
[65] (i) *The Maxwell Protocol* between the United States and the United Kingdom. United States Bankruptcy Court for the Southern District of New York (Hon. Tina L. Brozman) Case No. 91 B 15741 (15/01/1992) and the High Court of Justice, Chancery Division, Companies Court, Case No. 0014001/1991 (31/12/1991); (ii) *The Olympia & York development Protocol* between Ontario Court of Justice, Toronto (Mr. Justice R.A. Blair) Case No. B125/92 (26/07/1993) and United States Bankruptcy Court for the Southern District of New York (Hon. James

3.1. The Phenomenon of Protocols

Protocols are 'agreements entered into for the purpose of facilitating cross-border cooperation and coordination of multiple insolvency proceedings in different States concerning the same debtor'.[66] These agreements do not have a specific format, and they may be concluded orally or in writing.[67] However, the written format prevails in practice, most likely for reasons of legal certainty and enforceability.[68] Moreover, in the current international practice, the protocols are almost always deemed to be binding on the concluding parties.[69]

Generally, the protocols are signed by the insolvency practitioners, who have the capacity and authority to agree on behalf of the insolvency estate.[70] Occasionally, the debtor in possession, major creditors or the creditors' committee may be involved as a party. In contrast, the courts are never parties to a protocol. However, they may have a role in encouraging the insolvency practitioners to seek an agreement with the relevant counterparties.[71]

L. Garrity Jr.) Case No's 92B4269842701 (15/07/1993); (iii) *The Commodore Protocol* between United States Bankruptcy Court for the Southern District of New York (Hon. James L. Garrity, Jr.) and the Supreme Court of the Supreme Court of the Bahamas and Reasons for Decision, Supreme Court of the Bahamas (Case No. 473/1994; 27/05/1995); (iv) *The Everfresh Protocol* between Ontario Court of Justice Toronto (Mr. Justice J.M. Farley), Case No. 32077978 (15/05/1996) and United States Bankruptcy Court for the Southern District of New York (Hon. Burton R. Lifland) Case No. 95 B 45405 (20/12/1995); (v) *The Nakesh protocol* between United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840 (23/05/1996) and District Court of Jerusalem, Case No. 1595/87 (23/05/ 1996); (vi) *The Loewen Protocol* between United States Bankruptcy Court for the District of Delaware (Chief Judge Peter J. Walsh) Case No. 991244 (30/06/1999) and Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley) Case No. 99CL3384 (01/06/1999); (vii) *The Livent Protocol* between United States Bankruptcy Court for the Southern District of New York (Hon. Arthur Gonzales), Case No. 98B48312 and Ontario Superior Court of Justice, Toronto (Mr. Justice J.D. Ground), Case No. 98CL3162, (11/06/1999); (viii) *The Inverworld Protocol* between United States District Court for the Western District of Texas (Hon. Frederick Biery), Case No. SA99C0822FB, (22/10/1999) and U.K. High Court of Justice, Chancery Division and the Grand Court of the Cayman Island; (ix) *The Manhattan Investment Fund Protocol* between United States Bankruptcy Court for the Southern District of New York (Hon. Burton R. Lifland), Case No. 0010922BRL (04/2000) and High Court of Justice of the British Virgin Islands (Chief Justice Austin Ward), Case No. 19 of 2000 (04/2000) and Supreme Court of Bermuda (Mr. Justice Kenneth A. Benjamin), Case No. 2000/37 (04/2000); (x) *The AgriBio Tech Inc Protocol* between Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley), Case No. 31OR371448 (16/06/2000) and United States Bankruptcy Court for the District of Nevada (Hon. Linda B. Riegle), Case No. 50010534 LBR (28/06/2000) (xi) *The Systech Retail System Corporation Protocol* between the Ontario Court of Justice, Toronto (Mr. Justice J.D. Ground), Court File No. 03CL4836 (20/01/2003) and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division (Hon. A. Thomas Small), Case No. 03001425ATS (30/01/2003) and; (xii) the Lehman Brother Protocol United States Bankruptcy Court for the Southern District of New York (Hon. James M. Peck) Case No. 08-1355 JMP (17/06/2009). A list of protocols was also collected by Ilya Kokorin and Bob Wessels, *Cross-border Protocols in Insolvencies of Multinational Enterprise Groups* (Edward Elgar 2021), pages XVIII-XIX and 200 ff.

[66] Practice Guide *supra* n 63, part III/A para 4.

[67] ibid, para 24.

[68] ibid.

[69] ibid, para 5.

[70] ibid, para 19.

[71] ibid, paras 16-17.

The capacity and authority of the insolvency practitioner to negotiate and sign a protocol depends on the powers granted to them by the applicable law. In some jurisdictions, this capacity falls under the powers granted to them by insolvency law. In contrast, in other, the insolvency practitioner may have to seek the consent of the creditors or authorisation of the Court. [72]

Additionally, a court may be required to find an appropriate statutory basis to sanction the protocol. This aspect may be problematic within the European Union as not all jurisdictions may provide courts with the necessary discretion to approve a protocol. The UNCITRAL Practice Guide on Cross-Border Cooperation suggests that the adoption of the model law may be a sufficient statutory basis for such discretion. However, few EU Member States have adopted the model law.[73]

Alternatively, the legal authorisation may come from insolvency provisions with broad scopes of application, such as the obligation to prevent actions detrimental to the estate.[74] Section two of this paper argues that within the European Union, a possible statutory basis for the use of the protocols could be found within the duties of coordination, cooperation, and communication of the EIR(R).

Protocols are designed to assist the cross-border management of insolvency proceedings through *ad hoc* harmonisation of procedural rules between the jurisdictions involved.[75] They address issues emerging in specific circumstances, and therefore, their content is tailored to the needs of the cases. For example, the protocol may be used:

'(a) To promote certainty and efficiency with respect to management and administration of the proceedings;

(b) To help clarify the expectations of parties;

(c) To reduce disputes and promote their effective resolution where they do occur;

(d) To assist in preventing jurisdictional conflict;

(e) To facilitate restructuring;

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[72] ibid.
[73] Namely Greece, Poland, Romania, and Slovenia https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.
[74] Practice Guide *supra* n 63, part III/A para 20.
[75] *The Nakesh protocol supra* n 65, Whereas.

(f) To assist in achieving cost savings by avoiding duplication of effort and competition for assets and avoiding unnecessary delay;

(g) To promote mutual respect for the independence and integrity of the courts and avoid jurisdictional conflicts;

(h) To promote international cooperation and understanding between judges presiding over the proceedings and between the insolvency representatives of those proceedings;

(i) To contribute to the maximisation of value of the estate'.[76]

3.2. Principles and Commonalities

As previously stated, it is essential to note that the protocols respond to practical instances, and, therefore, their content should be built to respond to the specific circumstances of the individual cases.[77] However, common themes and developments can be appreciated in the case law. For instance, the Maxwell protocol provides a slim template for the mere coordination of the insolvency practitioners, while the Loewen protocol constitutes a more developed example of a cross-border insolvency agreement.[78]

The Loewen protocol has been recognised as a model for sixteen subsequent protocols.[79] However, there are also instances of protocols that do not necessarily follow the Loewen structure. This section seeks to highlight the principles and commonalities developed in practice and recognised by the soft law instruments as key features of a protocol.

3.2.1. Comity and Independence

Comity and independence are principles of law available in common law countries that support a protocol in the international legal framework. If a protocol can be seen as a bridge between jurisdictions (and insolvency proceedings), the principles of comity and independence represent the pillars that support the bridge.

At the same time, these principles aim to limit the effects of a protocol towards any court in the relevant proceedings. Indeed, although the Practice Guide recognised the abstract

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[76] Practice Guide *supra* n 65, part III/A para 8.
[77] Bruce Leonard, *Co-ordinating Cross-Border Insolvency Cases* (2001) International Insolvency Institute, https://www.iiiglobal.org/sites/default/files/media/Coordinating_Cross_Border_Insolvency_Leonard.pdf.
[78] Michele Maltese, *Court-to-court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal systems,* 12-16, https://www.iiiglobal.org/sites/default/files/media/maltese_michele%20submission.pdf.
[79] ibid, 15.

possibility of courts signing a protocol as a party, this does not often occur in practice.[80] The courts simply facilitate the agreement between insolvency practitioners and approve it through a court order, if necessary under the applicable law.

The term comity comes from the Latin word *comitas*, which translate as "courtesy," "mutual respect," or "mutual convenience."[81] In modern times, the word comity expresses "a practice among different political entities involving the mutual recognition of legislative, executive, and judicial acts".[82] More specifically, judicial comity is the activity of the courts that governs the relationships between legal systems where statutory provisions do not already regulate them.[83]

The common law principle of comity can be seen as a more discretional equivalent of the principle of mutual trust elaborated within the European Union.[84] Indeed both principles aim to regulate judicial cooperation in cross-border scenarios.[85] The similarities between mutual trust and comity include the necessary reciprocal nature of the relationship between courts.

Additionally, both comity and mutual trusts constitute the basis for the recognition and enforcement of a judgment. However, while the recognition based on the principle of comity is granted on a discretional basis according to international law principles, the principle of mutual trust embodied in the *aquis communautaire* allows the automatic recognition of judgments among, and exclusively among, the EU Member States. [86]

On the other hand, the principles of independence and authority of the national courts provide that nothing contained in a protocol should be deemed to interfere with the independent exercise of jurisdiction of the courts according to the national law and public policies.[87]The concept of independence of the Court is a key element of the modern democratic states.[88] At

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[80] ibid, 16.
[81] Elisa D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?* 9(2) International Journal of Constitutional Law 394, 398 (2011).
[82] Black's Law Dictionary, (Thompson Reuters, St. Paul, MS; USA, 10th ed. 2014) p. 324.
[83] D'Alterio *supra* n 81, 396.
[84] Adrian Briggs, *The Principle of Comity in Private International* 354 Collected Courses of The Hague Academy of International Law - Recueil des cours 67, 88 (2012).
[85] William S. Dodge, *International Comity in Comparative Perspective* in Curtis A. Bradley ed, *The Oxford Handbook of Comparative Foreign Relations Law* 701 (New York, OUP 2019).
[86] ibid.
[87] ALI/III Global Principles *supra* n 64, Principle 3.i and 3.iii.
[88] Consultative Council of European Judges, 'The Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy' Opinion No. 18 (2015), https://rm.coe.int/16807481a1.

the same time, there is not a universal theory of judicial independence, nor does it seem achievable.

Instead, judiciary independence can be appreciated as a multifaced concept. First, independence has a national and international dimension. Nationally, democratic principles require the judiciary powers to be separated from the legislative and executive powers.[89] Additionally, independence translates also into the autonomy of a judge from the national and international judiciary community.[90] Similarly, courts' independence means that the judges need to be impartial to the parties who are presenting a dispute in front of it.[91]

Internationally, the concept of independence of the courts comes into consideration in the process of cooperation, and there is a clear tension between these two concepts. On the one side, the courts are required to work together and possibly reach a comprise to bring together different aspects of multinational proceedings. On the other side, the protocols seek to safeguard the principle of independence of the courts in relation to the other Court. This means that a protocol should not interfere with the independence of the judge that approves it.

Nevertheless, it has to be noted that some aspects of the protocols may affect the European concept of independence. In particular, the tool of deferral may be seen as hindering the autonomy of judges. The deferral is 'one court accepting the limitation of its responsibility with respect of certain issues (…) in favour of another court'.[92] This may also encompass the circumstances when a court waits for the decision of another court and subsequently and independently takes a decision similar to the one of the other Court in order to avoid conflicting ruling.[93]

The deferral can take place in specific or general terms. For specific issues, the parties may provide that one Court would address all the disputes arising under the protocol. In contrast, the protocol may provide a deferral in general terms, meaning that a court may be asked to defer a matter to the other Court only when it deems it feasible and appropriate.[94] For example, in the Commodore protocol, the parties agreed on the mutual independence of the courts. At

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[89] ibid.
[90] ibid.
[91] Peter H Russels, *Towards a General Theory of Judicial independence* in Peter H. Russell, David O'Brien, David M. O'Brien eds, Judicial Independence in the Age of Democracy: Critical Perspectives from around (Constitutionalism and Democracy Series) 1 (University of Virginia Press, 2001).
[92] Practice Guide *supra* n 63 part III/A para 75.
[93] Ibid.
[94] Ibid, para 77.

the same time, the parties provided the possibility for the courts to defer some matters to the other Court when deemed appropriate. [95]

The deferral is a controversial topic as it touches upon the delicate balance between cooperation on the one side and the Court's independence on the other. In order to maintain a fair balance, the protocol may provide a deferral only on a reciprocal basis.[96] Moreover, limitations of sovereignty may be justified by the interest of the creditors to have the best possible outcome out of the coordinated insolvency proceedings.

Due to the sensitivity of the topic, a protocol can provide for an effective deferral only if such protocol is going to be sanctioned by the Court with a court order. Indeed, the signatory parties (i.e., the insolvency practitioners) generally lack the authority to limit the competencies and responsibilities of the courts. Additionally, the ability of the courts to approve the deferral may be limited by the national law.[97]

In order to protect the cardinal principles of comity and independence, protocols often provide safeguard clauses**.** Generally, these clauses provide safeguards concerning two distinct issues. On the one hand, these safeguards protect the autonomy and independence of the Court, stating that nothing in the agreement affects the jurisdiction of the Court.[98]

On the other hand, these clauses may seek to preserve the rights of the individuals involved in the protocols. A protocol may provide that 'its terms or any actions taken pursuant to it should not prejudice or affect the powers, rights, claims and defences of the debtor and its estate, the insolvency representative, the creditors or equity holders under applicable law nor preclude or prejudice the right of any person to assert or pursue their substantive rights against any other person under applicable law'.[99]

Additionally, the protocol may include limitations of liabilities and provisions relating to warranties. In the first case, the protocol may exempt insolvency practitioners and professionals involved in the dealing of the insolvency proceedings from any liability incurred under other jurisdictions.[100] In the second situation, the parties may provide a warranty in the protocol that

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[95] *The Commodore Protocol supra* n 65, para E.
[96] Practice Guide *supra* n 63, part III/A para 75.
[97] ibid, para 76.
[98] ibid, para 196.
[99] ibid.
[100] ibid, para 199.

the execution, delivery, and performance of the protocol fall within their power and authority.[101]

3.2.2. The Administration of the Proceedings

Protocols may coordinate the administration of the insolvency proceedings in the following aspects: (i) priority of the proceedings; (ii) stays of the proceedings and: (iii) applicable law; (iv) communication and notice and (v) the option of joint hearings.

3.2.2.1. Priority of the Proceedings

Within a protocol, the insolvency proceedings are generally deemed parallel without a scale of priority among them.[102] This parallelism may occur even when, in practice, the coordination takes place between the main proceedings and the ancillary (or secondary) ones. However, to avoid potential conflicts, the parties may agree to determine the priority of one Court over another in certain matters (deferral).[103]

3.2.2.2. Stays of the Proceedings

Protocols generally address the issue of the stay of the proceedings. A stay provides for a suspension of any civil proceedings for a period of time to allow the Court to evaluate the insolvency matter and avoid the dispersion of the assets by individual actions.[104] The suspension of the proceedings depends on the national legislation, which may limit the ability of the Court to respect a foreign stay.[105] However, in the coordination of multistate proceedings, the recognition of a foreign stay may avoid conflicting rulings, dissipation of the assets and other negative consequences of multistate insolvency. Therefore, a protocol may impose to a court the recognition of the foreign stay. Such a protocol would require the Court's approval as would interfere with its independence and jurisdiction.[106]

A stay may be necessary at the earliest stages of the proceedings in all countries where the debtor's assets are located or where litigation concerning the debtor or their assets is pending.[107]

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[101] ibid, para 200.
[102] ibid, para 91.
[103] ibid.
[104] ibid, para 93.
[105] ibid.
[106] ibid.
[107] ALI/III Global Principles *supra* n 64, Principle 8.1.

Principle 8 of the Global Principles prescribes that the stay should be reasonable, and its exemptions clearly identified and limited.[108]

Principle 17 of the Global Principles establishes that a court recognising the opening of the proceedings shall grant a stay to avoid dissipation of the assets unless such a stay is already in place according to the national law.[109] It also provides that in the case of reorganisation procedures, the stay should allow the operation of the debtor's business.[110] The Global Principles also suggest that courts should always coordinate their stays in order to minimise possible conflicts.[111]

In practice, the parties may agree on the recognition of the stay on a reciprocal basis or only to the extent the recognition is necessary and appropriate.[112] Moreover, a protocol may not mention explicitly the duty to recognise the stay but may envisage a general obligation of assistance between courts.[113] Courts may deem the recognition of the stay included within this general duty. Additionally, the parties may agree to suspend any proceedings brought by them against the debtor outside the timeframes of the national statutory stay.[114]

On the other hand, protocols may also address the issue of relief from the stay for specific parties, for a certain period of time or in special circumstances (e.g., in case of an emergency event). Alternatively, a protocol may authorise the insolvency practitioner to apply for relief from the state in the appropriate jurisdiction.[115] Moreover, under the Global principles, the courts are encouraged to exercise discretion to provide relief from the stay where appropriate even when the applicable law does not provide for it.[116]

3.2.2.3. Applicable Law

A protocol may address the issue of which law should apply to a claim brought to Court within coordinated proceedings. The question becomes problematic when the assets or the parties are located in a different jurisdiction from the one where the insolvency proceedings have been

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[108] ibid, Principle 8.2.
[109] ibid, Principle 17.1.
[110] ibid, Principle 17.2.
[111] ibid, Principle 18.
[112] Practice Guide *supra* n 63, part III/A para 95.
[113] ibid, para 96.
[114] ibid, para 97.
[115] ibid, para 98.
[116] ALI/III Global Principles *supra* n 64, Principle 8.2.

opened.[117] National private international law rules will generally be used to answer the question of applicable law, which in turn may cause conflicts among courts.[118] Protocols seek to avoid such conflicts by identifying the law applicable to specific issues.[119] The Practice Guide illustrates the most common topics discussed with regard to the applicable law, such as: 'the treatment of claims; right to set-off and security; application of avoidance provisions; use and disposal of assets; and distribution of proceeds from the sale of the debtor's assets'.[120]

3.2.2.4. Communication and Notice

Another common trait of the protocol is to provide a framework for communication among courts and notice to the parties. Under the global principles, insolvency practitioners are required to share information regarding the existence and status of the insolvency proceedings they are administering.[121] They also should disclose to other insolvency practitioners the development of the insolvency proceedings[122] and share non-public information, subject to national rules and confidentiality arrangements.[123]

Protocols can also address the issue of communication between courts. Courts that are actually or potentially involved with the insolvency case should communicate with each other directly or through their insolvency practitioners.[124] The use of emails is suggested as a reliable and speedy means of communication.[125] Principle 23 also advises the use of protocols for the appointment of an independent intermediary.[126] This intermediary should: (i) 'have the appropriate skills, qualifications, experience and professional knowledge, and should be fit and proper to act in an international insolvency proceeding';[127] (ii) 'be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest';[128] (iii) 'be accountable to the court which appoints him or her';[129] (iv) 'be compensated from the estate of the insolvency case in which the court has jurisdiction'.[130]

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[117] Practice Guide *supra* n 63, part III/A para 100.
[118] ibid.
[119] ibid, para 101.
[120] ibid, para 102.
[121] ALI/III Global *supra* n 65, Principle 9.2.
[122] ibid, Principle 9.6.
[123] ibid, Principle 9.3.
[124] ibid, Principle 23.1
[125] ibid, Principle 23.3
[126] ibid, Principle 23.3/4.
[127] ibid, Principle 23.5.
[128] ibid.
[129] ibid.
[130] ibid.

The communication among the courts should be consistent with all applicable procedural rules of the Court, except for emergency cases.[131] The courts can also adopt international standards of Court-to-Court communication (such as the EU CoCo Guidelines or the ALI/III Court Guidelines) before engaging in communications.[132]

For example, Guideline 7 addresses the methods of communication. Accordingly, communications may take place by (i) sending relevant documents directly to the other Court; (ii) instructing either the national or the foreign insolvency practitioner to file the relevant documents in the proceedings pending before the other Court; (iii) two-way communication by phone or video call with either the other courts or their insolvency practitioners.[133]

Similarly, the JIN Guidelines put forward facilitating rules concerning communication among courts. Guideline 7 allows courts to communicate and respond directly to each other. The communication can take place by sending copies of relevant documents from one Court to another or instructing the counsel of the parties to file the documents in the other forum. In both modalities, advance notice should be given to the counsel of affected parties.[134] Communication can also take place in a two-way manner.

In the latter circumstances, Guideline 8 suggests that parties may be present and should be notified in advance. The communications should be recorded, transcribed and – under the approval of both courts – considered as an official transcript. The official transcript can be filed as an official record and be available to the parties.[135] Moreover, the courts are deemed to be free to arrange communications, and such arrangements do not require the parties' presence. In contrast, Guideline 9 deals with notice to parties involved in proceedings opened in another jurisdiction. It advises that notice may take place electronically in a 'publicly accessible system'[136] or by certified mail according to the applicable procedural rules of the Court giving notice.[137]

[131] ibid, Guideline 2.1.
[132] ibid, Guideline 2.2.
[133] ibid, Guideline 7.
[134] ibid, Guideline 7.
[135] ibid, Guideline 8.
[136] ibid, Guideline 9.
[137] ibid.

3.2.2.5. The Option of Joint Hearings

Lastly, protocols may facilitate maximum cooperation among courts through joint hearings. The Global Guideline 10 suggests that hearings should take place simultaneously, and each Court should be able to hear the proceedings of the other Court.[138] Evidentiary and written documents should be exchanged between the courts without subjecting the parties to the jurisdiction of the other Court.[139] Submissions and applications should be made exclusively to the relevant Court unless the other Court permits otherwise.[140] Moreover, before and after joint hearings, the courts can communicate with each other to coordinate and tackle issues that may or have arisen at the hearing.[141]

The JIN Guidelines address the matter of joint hearings in Annex A, suggesting the parties to deal with the issue in a protocol. Annex A re-states that the joint hearings should respect the independent jurisdiction and sovereignty of the courts.[142] It also advises that each Court should retain sole and exclusive jurisdiction and power over its own proceedings.[143] Paragraph III of the Annex suggests the courts hold simultaneous proceedings with 'the best audio-visual access possible'.[144] Moreover, coordination is recommended concerning (i) the 'process and format for submissions and evidence filed or to be filed in each court;'[145] and (ii) the application of jurisdiction and professional Regulation to foreign counsel or parties.[146] Additionally, the Annex allows courts to communicate with each other before and after the joint hearing to coordinate or resolve procedural and substantial matters.

In practice, several protocols provided for the possibility to hold joint hearings. The Solve-Ex protocol allocated the responsibilities of the courts, providing that the courts may conduct joint hearings by a telephone link. Also, the Loewen protocol encompassed a duty of communication between the Court, and it allowed them to hold joint hearings.[147] The Loewen procedure simply required a telephone or video link to be established between the courts. The protocol allowed

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[138] ibid, Guideline 10(a).
[139] ibid, Guideline 10(b).
[140] ibid, Guideline 10(c).
[141] ibid, Guideline 10(d) and (e).
[142] JIN Guidelines *supra* n 64, Annex A (i).
[143] ibid (ii).
[144] ibid (iii).
[145] ibid (iv).
[146] ibid (v).
[147] ibid.

parties to submit their documents ahead of the hearing without submitting to personal jurisdiction.

Similarly, the Livent protocol permitted joint hearings and provided a specific procedure similar to the one displayed in the Loewen Protocol for when assets were located in both countries involved (Canada and USA).[148] The Inverworld protocol allowed joint hearings concerning any matter related to 'the conduct, determination or disposition' of any of the proceedings.[149] It also specified the procedural framework, which was similar to the one described in the Loewen case. In the Inverworld protocol, the parties agreed to suspend the pending petitions until the parties could better coordinate the hearings.[150]

Particularly relevant for the aspect of joint hearings is the AgriBio Tech Inc Protocol.[151] The protocol provided the procedure for holding joint hearings concerning any matter related to the 'conduct, administration, determination or disposition' of the proceedings. The procedure that was used was fairly similar to the one discussed by the Loewen protocol. The procedure established that joint hearings could be held by phone or video calls. It also specified rules relating to the filing of documents to the courts. Moreover, the courts were allowed to discuss the application before the hearings without giving notice to counsels or with counsels being present.[152]

3.2.3. Allocation of Responsibilities among Courts

Generally, courts are not a formal party to the protocols. However, they may approve a protocol through a court order, and a protocol may address their responsibilities. A protocol may organise the allocation of responsibilities amongst courts or provide general principles that govern the distribution of future matters arising in the development of the insolvency proceedings. The method of allocation of responsibilities varies case by case. The allocation can take place in general terms or be limited to specific issues.[153] For instance, a protocol may provide that the sale of the assets would be managed under the control of one Court, or they

[148] *The Livent Protocol supra* n 65, para 6.
[149] *The Inverworld protocol supra* n 65, para 26.
[150] ibid, para 27.
[151] *The AgriBio Tech Inc Protocol, supra* n 65 Section 3.01 ff.
[152] ibid, Section 3.03.
[153] Practice Guide *supra* n 63, part III/A para 59.

may allocate to one Court only the duty of verification and admission of claims related to specific transactions.[154]

Equally, a protocol may provide that the Court, appointed to deal with certain matters, should consider the views of the other courts. At the same time, this courtesy could be excluded if the approaches of the courts are antithetical concerning specific issues. In the latter scenario, allocating full responsibility to only one selected Court may be more economical.[155]

Moreover, as mentioned above, protocols may not provide for the direct allocation of certain matters to certain courts, but they may encompass factors to determine the competence of the Court. For example, a protocol may use factors such as: 'the location of the debtor, its assets, or creditors; the application of conflict of laws rules; agreement as to the governing law; or other connecting factors'.[156]

Furthermore, the courts may be called to share the competencies and have joint responsibility over specific issues.[157] For instance, the protocol may allocate joint responsibility of the courts concerning the sale of the debtor's assets.[158] This type of allocation, however, requires deeper and stronger coordination between the courts, as they could be required to conduct joint hearings to resolve some specific issues.[159]

Generally, a protocol may provide some guidance in the coordination of the following matters: (i) treatment of claims; (ii) avoidance proceedings; (iii) the relationship of the Court with the insolvency players; (iv) disagreements and resolution of disputes; and (v) residual administrative issues.

3.2.3.1. Treatment of Claims

A protocol may specify how and by whom the verification, admission and classification of claims should be addressed.[160] Additionally, the parties may decide to allocate claims that have been filed in multiple jurisdictions to only one Court.[161] Alternatively, the parties may design

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[154] ibid.
[155] ibid, para 60.
[156] ibid, para 62.
[157] ibid, para 63.
[158] *The Everfresh Protocol supra* n 65, para 6.
[159] Practice Guide *supra* n 63, part III/A para 63.
[160] ibid, para 65.
[161] ibid, para 66.

a procedure to allocate all claims or specific claims between the courts involved.[162]

For example, the *Livent* protocol provided exclusive jurisdiction of each Court over the assets located within their territory and joint jurisdiction over assets located in both countries. In the latter circumstances, the protocol allowed joint hearings and provided a specific procedure.[163] Furthermore, the protocol addressed the filing of the claims and their proof.[164] It established that the creditors should file their claims in their respective forum, but a timely filed claim under one jurisdiction was deemed filed in both *fora*. The courts retained exclusive jurisdiction over the claims filed to them.[165] In particular, they retained the power to adjudicate 'the amount, the value, allowability, priority, classification and treatment of the claims in any plan of reorganisation.'[166]

3.2.3.2.Avoidance Proceedings

A protocol may identify which Court is competent to deal with transaction avoidance claims, which in turn may depend on relevant provisions of the applicable law.[167] The IBA Concordat specifies that transaction avoidance rules have 'no greater applicability than the laws of any other nation'[168] and that they do not apply to transactions that 'have no significant relationship with the plenary forum.'[169] Instead, the Global Principles for cooperation in international insolvency cases suggests that insolvency practitioners should reach a common position on this type of claims.[170]

The *Livent* protocol also covered transaction avoidance actions. In this regard, it specified that a person should not be subjected to the substantive laws of a forum unless it would be subject to them in a non-insolvency context, according to the private international law rules of the forum.[171] Moreover, the exercise of avoidance powers by the Canadian insolvency practitioner was subject to the written consent of the debtors or consent of the Court.[172]

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[162] ibid.
[163] *The Livent protocol supra* n 65, para 6.
[164] ibid, para 9.
[165] ibid, para 10.
[166] ibid.
[167] Practice Guide *supra* n 63, part III/A para 67.
[168] IBA Concordat *supra* n 64, Principle 8(c).
[169] ibid (d).
[170] ALI/III Global Principles *supra* n 64, Principle 32.
[171] ibid, para 14.
[172] ibid.

3.2.3.3.The Relationship of the Court with the Insolvency Players

Protocols can also outline the relationship between the courts and their insolvency practitioners, the foreign insolvency practitioners, and the parties of the insolvency proceedings, including their right to appear and be heard.[173] Generally, protocols may grant access to the foreign Court to insolvency practitioners. Moreover, the right to be heard can be granted to the creditors, the creditors' committee, the debtor, and post-commencement lenders.[174]

The right to appear and to be heard can be conferred in different ways, and its extent depends on the national law of the courts involved.[175] The rights granted to the foreign party can extend to the same degree as those of the parties domiciled in the competent forum. Alternatively, protocols can provide access to a court regardless of where the claim has been lodged.[176]

Moreover, a protocol may stipulate the right to appear in the proceedings of a different forum without the obligation to do so.[177] At the same time, protocols can design procedures to deal with the inability or impossibility of the foreign parties to appear. Lastly, the parties may not agree on direct access but on the reciprocal support of the insolvency practitioners to get access in foreign proceedings.[178]

The insolvency practitioners should have the right to access foreign courts upon the recognition of the proceedings.[179] Generally, they should be able to access any court of the recognising state to the extent necessary for the exercise of their legal right.[180] Additionally, if the insolvency practitioner is the administrator of the main proceedings, access should be granted on the same basis as local insolvency practitioners (including the right to request the opening of local insolvency proceedings).[181]

Courts may allow their insolvency practitioner or the creditor's representative to appear and be heard in the other Court's proceedings.[182] Similarly, they can authorise the foreign insolvency practitioner or creditor representative to appear and be heard in their jurisdiction.[183] In both

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[173] Practice Guide *supra* n 63, part III/A para 68.
[174] ibid, para 80.
[175] ibid, para 79.
[176] ibid, para 80.
[177] ibid, para 81.
[178] ibid.
[179] ALI/III Global Principles *supra* n 64, Principle 20
[180] ibid, Principle 20.1
[181] ibid, Principle 20.2/3.
[182] ibid, Guideline 14; JIN Guidelines *supra* n 64, 10.
[183] ALI/III Global Principles *supra* n 64, Principle 20; JIN Guidelines *supra* n 64, 11.

cases, the parties are generally exempted from the personal application of the Court's jurisdiction.[184]

Instead, the *Livent* protocol recognised that the creditors could appear in any forum, regardless of where they filed the claim. This possibility, however, subjected the individual creditors to the personal jurisdiction of the Court where they appeared. In contrast, the protocol specified that the appearance by the creditors' committee did not constitute a base for personal jurisdiction over its members.[185]

3.2.3.4.Disagreements and Resolution of Disputes

A protocol may be a useful tool to address a situation of disagreement between the courts. On the one hand, a protocol can equip the courts with the deferral mechanism described above. On the other hand, it can provide a framework of dispute resolution. A dispute may relate to the 'intent, interpretation, implementation or enforcement'[186] of the protocol or concerns conflicts emerging during the development of the insolvency proceedings.[187]

The parties are free to choose the most suitable method of dispute resolution. This may require the parties 'to make all reasonable attempts to reach an agreement before referring the matter to a court'.[188] Also, this may involve the selection of a specific court among the ones involved to enforce the terms of the protocol. Alternatively, all courts may be deemed jointly responsible for resolving the disputes.[189] Finally, the protocol may envisage an alternative dispute resolution system, such as mediation or arbitration.[190]

The *Manhattan Investment Fund* protocol designed a specific dispute resolution procedure potentially involving an independent mediator.[191] The procedure put forward by the protocol envisages two stages. First, the insolvency practitioners are required to resolve the issue through good faith negotiation. In case of unsuccessful negotiations, the insolvency practitioner can start a procedure that involves a mediator invoked by phone call.[192]

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[184] ALI/III Global Principles *supra* n 64, Guideline 14.
[185] *The Livent Protocol supra* n 65, para 3.
[186] Practice Guide *supra* n 64, part III/A para 69.
[187] ibid.
[188] ibid, para 70.
[189] ibid, para 71.
[190] ibid, para 72.
[191] *The Manhattan Investment Fund Protocol supra* n 65, para 16-21.
[192] ibid.

3.2.3.5.Residual Administrative Issues

Finally, protocols also address residual administrative issues such as the issue of expenses, fees, and costs. Generally, the agreement provides that fees, costs and expenses of insolvency practitioners and professionals would be paid from the respective insolvency estate. Parties may also stipulate the procedure for accounting or the procedure applicable to the exchange of information regarding the estate accounts.[193]

3.2.4. Allocation of Responsibilities among IPs

Protocols' main purpose is to regulate the allocation of responsibilities amongst the insolvency practitioners. The protocols may provide general principles that govern the distribution of future matters arising in the development of the insolvency proceedings among the parties.[194] Alternatively, the parties may agree that certain responsibilities fall upon one insolvency practitioner and the other insolvency practitioners have a concurrent duty to oversee and supervise the operations of the former.[195] The main topics concerning the responsibilities of the insolvency practitioners generally addressed by the protocols are: (i) general means of cooperation; (ii) commencing of the proceedings (iii) treatment of assets (iv) treatment of claims; (v) reorganisation plans and; (vii) post-commencement finance.

3.2.4.1.General Means of Cooperation

A protocol may establish general means of cooperation among insolvency practitioners. Under the IBA Concordat, the insolvency practitioners should be allowed to exercise the administrative rules of any forum involved, even though similar rules are not available under the law of their appointment.[196] Similarly, insolvency practitioners should be able to use transaction avoidance rules available under the applicable law of any of the *fora* involved. [197]

Insolvency practitioners are required to share information regarding the existence and status of the insolvency proceedings they are administering.[198] They have to disclose to other insolvency practitioners the development of the insolvency proceedings.[199] Insolvency practitioners are

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[193] Practice Guide *supra* n 63, part III/A paras 191-193.
[194] ibid, para 106.
[195] ibid, para 107.
[196] IBA Concordat *supra* n 64, Principle 6.
[197] ibid, Principle 7.
[198] ibid, Principle 9.2.
[199] ibid, Principle 9.6.

also required to share non-public information subject to national rules and confidentiality arrangements.[200]

Moreover, the recognition of the opening of the insolvency proceedings allows the insolvency practitioner to pursue information about the debtor's assets in all jurisdictions where the assets could be located.[201] Furthermore, any party 'filing an insolvency case or seeking recognition of a foreign insolvency proceeding'[202] should disclose the existence and status of other known insolvency proceedings opened against the same or related debtor.[203]

3.2.4.2.Commencing of the Proceedings

A protocol may concern the allocation of responsibilities amongst insolvency practitioners regarding the commencement of secondary insolvency proceedings as well as other types of proceedings (e.g. avoidance actions) against the debtor or third parties.[204] In any case, they will be subjected to the conditions set out by the *lex fori* (i.e. the place where the proceeding has been brought), but the protocol may cover procedural matters such as deadlines and impose a requirement to produce documents in accordance with the applicable law.[205]

3.2.4.3.Treatment of Assets

Protocols can be used to distribute responsibilities concerning the issue of treatment of the assets.[206] On the one hand, the parties may agree on cooperation for the investigation of the assets in general terms or on a case-by-case basis.[207] Moreover, when the responsibilities to investigate the assets are placed upon one insolvency practitioner, the parties may agree on their duties of consultation and communication of the results of their investigations with the other insolvency practitioners.[208]

On the other hand, protocols can design specific rules for the use and disposal of the assets such as: 'requirements for approval, allocating responsibility between the different parties in interest and specifying details concerning the procedures for use or disposal'.[209] A protocol can

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[200] ibid, Principle 9.3.
[201] ALI/III Global Principles *supra* n 64, Principle 9.
[202] ibid, Principle 9.5.
[203] ibid.
[204] Practice Guide *supra* n 64 part III/A para 126.
[205] ibid, para127.
[206] ibid, para 118.
[207] ibid, para 119.
[208] ibid.
[209] ibid, para 121.

even put forward a schedule of meetings to discuss the developments of the investigations and consequent work-plan.[210]

The supervision of the use and the disposal of the assets can be allocated to the courts or insolvency practitioners.[211] When allocated to the courts, the responsibility would generally fall to the Court that has jurisdiction over the assets or the Court where the debtor is domiciled. Alternatively, and especially for protocols covering group insolvencies, different courts may have shared supervision over the assets.[212] The supervisory Court could be required to approve every transaction individually or, conversely, to make a general order covering all disposals of the assets.[213] Additionally, court approval could be unnecessary for certain types of transactions or transactions below a specific value.[214]

Otherwise, the supervision over the assets may be allocated to insolvency practitioners.[215] Protocols may explicitly authorise insolvency practitioners to use and dispose of the assets without court approval. Prior consent of the other insolvency practitioners, however, may be necessary.[216] Moreover, in the case of a debtor in possession, the insolvency practitioner would have to approve the sale or disposal of assets outside the ordinary course of business.

3.2.4.4.Treatment of Claims

Protocols often deal with the issue of treatments of claims. A protocol may cover aspects such as 'the place and time of submission, responsibility and procedure for verification and admission, handling objections provisions of the notice of claims submitted and cross-border recognition of admission'.[217] The protocols may design a procedure to follow to lodge the claims in accordance with the applicable law, or they may simply anticipate that a subsequent document will detail the procedure. Moreover, protocols can be beneficial to deal with intra-company claims in insolvencies of groups of companies. This can be achieved, for instance, by establishing a committee that coordinates the approach to these types of claims.[218]

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[210] ibid.
[211] ibid, para 122.
[212] ibid, para 122.
[213] ibid, para 123.
[214] ibid.
[215] ibid, para 124.
[216] ibid.
[217] ibid.
[218] ibid.

Concerning the submission of claims, a protocol may identify the proceedings to which the parties should submit their claims. Additionally, they can cover the issue of claims submitted in multiple forums. In these circumstances, the protocol may allocate the responsibility to a single court or provide that submission in one proceeding is automatically transposed in the other proceedings.[219]

Protocols may also address the issue of verification and admission of claims, which may be particularly problematic as different jurisdictions may manage this matter differently.[220] Protocols may allocate this task either to the courts or to insolvency practitioners. When the task is allocated to the Court, different approaches may take place. The verification and admission of the claims can be allocated to a single court, regardless of where they were submitted.[221] This may require the acceptance of the debtor, and it may impose a duty of recognition of the decision on the claims upon the other courts.[222] Otherwise, the parties may agree that each Court will verify and admit only those claims submitted in their respective forums. The latter approach requires mutual recognition of those decisions for all the courts involved. [223]

Furthermore, the allocation of verification and administration upon the courts may require the insolvency practitioners or the debtor to take the necessary procedural steps to achieve recognition of the decisions. Alternatively, it may be necessary to exchange a register of claims submitted under their respective jurisdiction.[224] Generally, protocols provide that the Court will judge the claims according to the applicable law.[225] However, the parties can establish a committee for the evaluation, admission, and categorisation (in terms of priority) of the claims. Moreover, protocols may address the topic of rejection of claims and the procedure of their appeal.[226]

With regard to distribution, protocols can be essential to avoid double payment of creditors. The problem can be addressed either by a general provision stating the prohibition of double payment or by practical cooperation such as the exchange of the draft distribution or - if the

[219] ibid, para 131.
[220] ibid, para 132.
[221] ibid, para 133.
[222] ibid, para 134.
[223] ibid.
[224] ibid.
[225] ibid, para 135.
[226] ibid.

distribution has already occurred – a list of recipients.[227] While distribution should take place according to the applicable law, which is often mandatory, protocols may share information between the parties about how the distribution will take place and who is the person responsible for it.[228]

The IBA Concordat specifies that the classification and distribution to secure and privileged creditors should take place according to the relevant national rules. However, coordination would be necessary for common claims. For these claims, the distribution should take place '*pro-rata* regardless of the forum from which a claim receives a distribution.'[229]

The distribution of common claims can be more complicated in the case of a forum with a territorial approach that refuses to release assets. In this situation, it is suggested that all the claims are filed in the proceedings with a territorial scope and in one of the other proceedings that will adjust accordingly.[230] Furthermore, the Concordat safeguards national public policies affecting local assets. It prescribes that these local assets should be used to satisfy local creditors protected by the relevant policy.[231]

3.2.4.5.Reorganisation Plans

Protocols are particularly useful tools concerning reorganisation plans as their coordinated approach should maximise the value of the estate. Protocols generally provide for the joint development of reorganisation plans and the separate submission of the plan – or similar plans - by each insolvency practitioner to the respective courts.[232] Under the IBA framework, the submission of a joint restructuring plan is recommended even if one of the procedures does not allow for debt composition.[233]

The *Everfresh* protocol allowed for the submission of a reorganisation plan on a similar basis in both jurisdictions.[234] Also, the protocol reserved the jurisdiction of the courts over matters related to the insolvency practitioner in Canada and the US debtor in possession.[235] Additionally, the *Livent* protocol dealt with the possibility of a reorganisation plan. The

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[227] ibid, para 141.
[228] ibid.
[229] IBA Concordat *supra* n 64, Principle 4(e).
[230] ibid.
[231] ibid, Principle 4 (g).
[232] Practice Guide *supra* n 64, part III/A para 113.
[233] IBA Concordat *supra* n 64, Principle 9.
[234] *The Everfresh Protocol supra* n 65, para 13.
[235] ibid, para 15.

agreement provided that the insolvency practitioner and the debtors were required to submit substantially similar reorganisation plans to the two courts involved.[236] The debtors were also required to take the necessary steps to seek an extension of the date to file the plans, if necessary and without prejudice of the creditor's right to oppose.[237]

The restructuring plans may be subject to national procedural rules that require the creditors' approval for the plan. It is suggested that the creditor's rights under the national law should always be respected by the provisions of the protocols.[238] A protocol may cover several issues, such as:

> '(the) preparation of the plan or plans; classification and treatment of creditors; procedures for approval, including solicitation and voting; and the role to be played by the courts (where applicable), particularly with respect to confirmation (if required by the insolvency law) of a plan approved by creditors and its implementation.'[239]

The preparation and submission of the reorganisation plan can take place using different approaches. It can be developed by the debtor or by the insolvency practitioner according to the applicable law. The debtor may be asked to cooperate with the insolvency practitioners of all the jurisdictions involved. Alternatively, another approach involves the debtor interacting and coordinating with one selected insolvency practitioner, referring to the others only for consultation and approval.[240]

Where there is a lack of specific provisions in the national law, a protocol may provide that the debtor (with the support of the insolvency practitioners and in accordance with the applicable law) should attempt to coordinate the development of the reorganisation plan. In any case, the protocols and the reorganisation plan should pursue the equal treatment of the creditors in each jurisdiction and avoid creditors from one forum being treated less favourably than others.[241]

3.2.4.6.Post-commencement Finance

By means of a protocol, insolvency practitioners and courts should facilitate post-insolvency financing for reorganisation purposes.[242] Post-insolvency financing is a critical aspect for

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[236] *The Livent Protocols supra* n 65, para 17.
[237] ibid.
[238] Practice Guide *supra* n 63, part III/A para 114.
[239] ibid.
[240] ibid, para 117.
[241] ibid.
[242] ALI/III Global Principles *supra* n 64, Principle 31.

reorganisation purposes, but often it has not been mentioned in protocols.[243] Nevertheless, parties may agree on the allocation of responsibilities for refinancing a company in distress and set out the conditions for allowing such financing. For instance, the competent Court may need to approve the lending contract, or the insolvency practitioner may have to seek the approval of the other courts, or other insolvency practitioners or the creditors' committee.[244]

4. The European Best Practices

Recital 48 EIR encourages insolvency practitioners and courts to consider the best practices emerging at the international level in the field of cooperation, which are described in the previous part. The Recital also mentions principles and guidelines developed based on these experiences by European organisations. This reference is understood to point at (i) the European Communication and Cooperation Guidelines for Cross-Border Insolvency developed by Professor Bob Wessels and Professor Miguel Virgós in 2007 (CoCo Guidelines), and (ii) the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines developed by Professor Bob Wessels, Professor Jan Adriaanse and Paul Omar (EU JudgeCo Principles and Guidelines, 2015).[245] These European initiatives aim at adapting best practices in cross-border cooperation and communication developed in a mostly common law background to the civil law reality of most EU Member States.

4.1. European Communication and Cooperation Guidelines for Cross-Border Insolvency

The European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines) seek to facilitate coordination of the proceedings involving the same debtor.[246] The Coco Guidelines lay out standards of cooperation and communication as well as a minimal checklist for the content of a potential protocol. They address courts and 'all interested parties in the cross-border insolvency proceedings,'[247] including the insolvency practitioners of the main and secondary proceedings and the debtor in possession.

Guideline 6 encourages prompt and direct communication between the insolvency practitioners.[248] Moreover, it reinforces the dominant position of the insolvency practitioner of

[243] Practice Guide *supra* n 63, part III/A para 144.
[244] ibid.
[245] Skauradszun and Spahlinger *supra* n 40, Art. 41 para 2.
[246] European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007) Guideline 2.
[247] ibid, Guideline 1.
[248] ibid, Guideline 6.1 and 6.3.

the main insolvency. It suggests that they 'should always take the initiative to start or continue communication with other liquidators' [249]

Within the duty of communication, the Guidelines require the insolvency practitioner to share promptly, periodically, and in full, all relevant information to the other insolvency practitioners.[250] Moreover, they expand the duty to communicate with the foreign Court to the same extent as with their own national Court.[251] Similarly, the insolvency practitioners of secondary proceedings are encouraged to communicate and provide advice to the main insolvency practitioner.

On the other hand, in relation to the duty of cooperation, Guideline 12 suggests that insolvency practitioners 'are required to cooperate in all aspects of the case' to minimise possible conflicts among procedures.[252] The guideline specifies that such cooperation may be formalised in a protocol, for which the document supplies a checklist.

The checklist for the protocol provides that, first, a protocol should always contain a clause of safeguard of court independence, sovereignty, and jurisdiction.[253] Second, the protocol should also identify the insolvency practitioner, the debtor, and the procedure. With reference to the insolvency practitioner, the protocol should specify to which jurisdiction the practitioner belongs and provide for the possibility to be heard in the foreign proceedings without subjection to jurisdiction. Moreover, the insolvency practitioners should commit to communicate with each other according to the guidelines. In regard to the debtor, the protocol should specify their type and degree of involvement in the proceedings. In relation to the procedures, the proceedings should be identified under the domestic nomenclature and classified as main or secondary.[254]

Third, the protocol will have to deal with preliminary and core issues. On the one hand, preliminary issues related to language, costs, communication methods and additional parties that may be involved in the cooperation. On the other hand, the core content of the protocol would address specific issues where cooperation is necessary in the case at stake. These are,

[249] ibid, Guideline 6.2.
[250] ibid, Guideline 7.1 and 7.2.
[251] ibid, Guideline 7.3.
[252] ibid, Guideline 12.
[253] ibid, Appendix I.
[254] ibid.

for instance, the location and disposal of assets, the lodging of the claims and the exercise of voting rights.[255]

4.2. The EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines

Similarly, under the EU JudgeCo Principles and Guidelines, a protocol is identified as a possible appropriate means to implement coordination of the proceedings[256] and communication among courts.[257] The EU JudgeCo Principles and Guidelines have a more limited scope of application than the CoCo Guidelines since they only address courts involved in cross-border insolvency proceedings and do not deal with communication between the parties of the proceedings.

Nevertheless, a protocol is also deemed useful in this type of cooperation. On the one side, a protocol may nominate an independent intermediary who liaises with both courts.[258] On the other side, a protocol may facilitate cooperation among insolvency practitioners and courts by exempting the former from requesting the latter's approval for actions affecting assets or operations in that jurisdiction.[259] In this sense, a protocol can be a useful tool to override non-`mandatory national procedural rules whenever these hinder the efficiency of cross-border judicial cooperation.

Moreover, the EU JudgeCo Principles and Guidelines suggest that a protocol can design a report mechanisms for insolvency practitioners, who should inform the courts on the development of the coordination, cooperation, and communication with the other proceedings, including practical problems encountered.[260] Finally, the EU JudgeCo Principles and Guidelines recommend the use of a protocol to design procedural rules for the Courts to have the ability to hold joint hearings.[261]

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[255] ibid.
[256] EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines (EU JudgeCo Principles and Guidelines, 2015) Principle 4.1
[257] ibid, Principle 16.5.
[258] Ibid, Principle 17.1.
[259] Ibid, Principle 19.1.
[260] Ibid, principle 19.4.
[261] Ibid, Guideline 10.

4.3. Court-approved Protocols and Court Guidelines for Communication and Cooperation

The principles and guidelines developed in the two EU initiatives reflect the fact that the term "protocol" is used for two rather different means. Following the experience in international insolvency practice, a protocol is a form of, often non-binding, agreement or memorandum of understanding concluded by interested insolvency practitioners on behalf or in the interest of their estate and, often, approved by the supervising insolvency court (or creditor committee) pursuant to national insolvency laws.

In contrast to such traditional protocols, courts have begun to adopt procedural guidelines for communication and cooperation in cross-border insolvency cases. While the purpose of such guidelines is similar to protocols, there are no parties to such guidelines and no need for approval exists. Instead, the proclamation of their application is solely governed by national law, not linked to a specific case, and intends to signal to interested parties in a potential cross-border case that the Court is able and willing to actively communicate and cooperate with foreign courts and insolvency practitioners. An example can be found in the proclamation of the District Court Midden-Nederland of Utrecht. The Court not only recognised the EU Cross-border Insolvency Court-to-Court Cooperation Principles and Guidelines but also adopted the Judicial Insolvency Network Guidelines for the purpose of communication and cooperation among courts outside the European Union on 1 May 2019.[262]

While these two types of best practice CoCo guidelines must be differentiated, they pursue the very same aim and are meant to complement each other. The adoption of court guidelines can initiate and facilitate the development of a protocol and its approval, while the content of the protocol can refer to a commonly adopted guidance. Alternatively, the guidelines themselves may be adopted by means of incorporation into a protocol.[263]

4.4. The European Model Protocol

All of these new developments were reflected in the design of a European Model Protocol (EMP), which was published in 2021 both in print[264] and online.[265] The EMP comprises two

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[262] See https://www.rechtspraak.nl/English/Pages/International-Insolvency.aspx#cb01f363-fd8e-4073-8fe3-1113887a8b5a5a3194d6-d64d-45e7-929b-bc40836492a26

[263] JIN Guidelines *supra* n 64, Guideline 2.

[264] Daniele Vattermoli, Stephan Madaus, Federica Pasquariello, Andrés Recalde Castells (eds.) *supra* n 58.

[265] See https://www.project-top.eu/; European Model Protocol form: https://stephanmadaus.de/wp-content/uploads/2021/06/European-Model-Protocol-with-guide-to-implementation-2021-ebook-English.pdf.

distinct parts. The first offers a template of clauses to insolvency practitioners in order to facilitate the negotiation and conclusion of a protocol based on the experience made in cross-border practice and the guidance by UNCITRAL and EU initiatives mentioned above. The second part offers court guidelines for adoption by courts. All clauses collected for the EMP derived from best practices and vetted them specifically to fit within the EIR framework in accordance with the international standards and guidelines. A detailed discussion is published in the accompanying materials. The research project was funded by the European Commission and led by Professor Vattermoli of the Università degli Studi di Roma "La Sapienza" with contributions from the Universidad Autónoma de Madrid (Partner), the Martin Luther Universität Halle-Wittenberg (Partner), and the Università degli Studi di Verona (Partner).

In comparison to the guidelines mentioned above, the model provides samples that practitioners can adopt straight into a protocol. Moreover, it presents the insolvency practitioner with options that they can pick in accordance with the degree of cooperation they are seeking to achieve. The model, therefore, should facilitate the adoption of a protocol as means to implementation of the three C.

5. Characteristics and Legal Nature of Protocols

The previous parts have demonstrated that protocols are a well-established practice in international insolvency proceedings, mostly outside today's EU. The phenomenon appears difficult to adopt, even difficult to understand for many who are active in the field of insolvency in the EU.[266] In order to address some confusion, the characteristics of protocols are summarized here before their legal nature is addressed to conclude this article.

5.1. Characteristics

Protocols are designed to reduce uncertainties and, if possible, prevent the loss of value in the administration of insolvency cases with parallel, even multiple insolvency proceedings in different jurisdictions. Where a business is international, the going concern value may only be realised in a coordinated sale or restructuring. And even in a piecemeal liquidation of such a business, the mere explanation of means of communication (e.g., mail addresses, phone

[266] A survey showed that only a handful of people in the relevant area of insolvency practice in Italy, Spain and Germany have had actual experience with protocols; see Stephan Madaus, *The Topic of Protocols: An Empirical Study*, in Daniele Vattermoli, Stephan Madaus, Federica Pasquariello, Andrés Recalde Castells, *supra* n 58, pages 103-105. Kokorin and Wessels *supra* n. 64, page 80, identified only six protocols that included an EU civil law jurisdiction.

numbers, languages or forms available) may save the administrator and all creditors extra costs and time.

The recognition of the efficiency of the three C in a cross-border context spurred the development of protocols in practice as described above. These developments have been supported by Working Group V of UNCITRAL when they provided in their Model Law for Cross-border Insolvency that courts and insolvency practitioners shall cooperate to the maximum extent possible with foreign courts or foreign representatives in Articles 25 and 26. The European legislator even adopted a legal duty to communicate and cooperate along the same lines in Articles 41 to 43 and extended it to cases of corporate groups in Articles 56 to 58 EIR.

Protocols are not to be understood as an option to avoid these duties or limit their application. To the contrary, protocols are a means to describe the precise modality in which the parties intend to discharge their duty to communicate and cooperate *ex ante*. The effect of a protocol is to reduce uncertainty. If, for instance, an insolvency practitioner is clearly obliged to share a certain set of information (e.g., the list of verified claims) under a legal duty to communicate, protocols explain *ex ante* when and in which form this information is provided through which channels of information to which group of recipients. Also, if an insolvency practitioner is clearly not obliged to share information based on the law applicable (e.g., classified information), protocols may nonetheless *ex ante* designate channels, forms, and timeframes for the timely information of other representatives that no information about certain issues may be shared. In many other instances, insolvency practitioners and courts enjoy discretion about how or when to exercise competence, e.g., schedule meetings, initiate or close an auction, present, vote or confirm a plan, etc.). Again, the modality of communication of intended actions is a possible content of a protocol, even if it contains no provision about how to coordinate such actions with parallel proceedings abroad, which it may in many legal frameworks and possibly should.

The characteristics of protocols to mostly describe factual means (email addresses, languages available) and modalities (timelines, forms, special means to communicate, cooperate) explain why most protocols do not require any enforcement. They simply provide for means and options when parties intend to discharge their legal competencies and duties, and these options need to be consistent with these legal requirements. Whether parties may actually agree on binding and even enforceable means of communication and cooperation, for instance, a dispute

resolution mechanism, would probably only depend on their actual consensus and the extent to which all of them are legally able to be bound to the intended means.

5.2. The effects of mandatory insolvency law both in the EIR and Member States' laws

Because the working space of protocols is defined by the discretion or *ex ante* uncertainty in how insolvency practitioners and courts shall discharge their legal duties, the extent to which such discretion or uncertainty even exists for a court or insolvency practitioner in a specific jurisdiction under its local laws directly affects the ability to conclude protocols with certain content. Protocols fill the space of uncertainty left by the law applicable. They are not designed to alter their limits unless the applicable law enables them.

The multilevel type of regulation of cross-border insolvency law in the EU Member States, which is provided both in the EIR and in domestic laws, may reduce the ability of EU insolvency practitioners to actually include certain "best practice" clauses in their protocol.[267] As provided in Articles 41(1), 42(2), 56(1) and 57(1) EIR, the content of these instruments must meet the legal requirements of the EIR and remain within the boundaries of the applicable national law.[268]

The requirements of EU law do not present significant hurdles for most of the content. On the contrary, the provisions of the EIR mandate coordination by means of cooperation and communication and advise the use of agreements and protocols in line with soft law guidance (see above sections 2. and 4.). The rather general principles advocated in these soft law documents of UNCITRAL, or European initiatives are largely coherent and fully compatible with any hard law rule as they all insist on the primacy of any hard law rule.

To give an example, a protocol would be a useful tool to coordinate the stay of enforcement actions in both main and secondary insolvency proceedings. Also, a protocol may be beneficial to lay down an agreement concerning the stay of the opening of secondary proceedings under Article 38(3) EIR and detail the measures deemed suitable to protect the interests of local creditors. Similarly, a protocol could be used to regulate the request, renewal, and termination of the stay of the process of realisation of assets in the secondary proceedings possible under Article 46 EIR.

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[267] Kokorin and Wessels *supra* n. 64, para. 6.22 (page 81).
[268] ibid, para. 8.30.

The provisions of the EIR may, however, also limit the legal content of any protocol or court guideline. For instance, the EIR already regulates that the law applicable to these aspects is the lex fori concursus[269] with possible defences of otherwise applicable law for set-off rights[270] and avoidance actions.[271] That leaves no space for any deviating agreement in a protocol[272] , and a protocol would only be able to reflect the governing law and inform all parties, including practitioners from third countries.

A less clear picture is available with regards to the ability of guidelines or protocols to organise joint court hearings. The EIR does not mention the option of joint hearings. Articles 42(3)(d) and 57(3)(d) EIR suggest, however, that acts of cooperation between courts may include the coordination of the conduct of the hearings. Consequently, a protocol could design the coordination of hearings in several forms, including the option of joint hearings.[273] And even where joint hearings are not legal pursuant to the national law, a protocol can clarify the extent and limitations to cooperation provided by the lex fori concursus.

The latter example already introduces the complexity that the applicable national insolvency law adds to the evaluation and use of protocols in the EU. Their content is limited to subject matters that are not directly regulated by any hard law. Any protocol clause thus requires the consideration of the laws of all of the insolvency proceedings participating in the protocol whenever a clause is negotiated. This may hinder or limit the ability to reach an agreement, and protocols are left to merely describe legal differences, contact details and timelines.

Any protocol clause detailing the allocation of responsibilities of the insolvency practitioners would, for instance, need to reflect the provision of the EIR for parties from the EU Member States and national law rules for all parties to the protocol. Consequently, a protocol may provide for certain common or similar procedures for the treatment of claims or certain assets. If, however, a provision under national law does not allow for such a treatment, the protocol may need to exempt the party concerned or modify the negotiated treatment accordingly.

Overall, it may therefore hardly come as a surprise that protocols were developed and thrive in jurisdictions with flexible applicable laws regarding the ability of insolvency courts and

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[269] Regulation 2015/848 *supra* n 10, Article 7.
[270] ibid, Article 9.
[271] ibid, Article 16.
[272] Kokorin and Wessels *supra* n. 64, para. 8.42.
[273] Skauradszun/Spahlinger *supra* n 40, Art. 42 para 29 and Art. 57 para 20; but also see *Moss, Fletcher, Isaacs on the EU Regulation on Insolvency Proceedings* (OUP Oxford, 3rd ed. 2016), para 8.700.

practitioners to administer the estate and conduct the procedure.[274] The provision in § 105(a) of the US Bankruptcy Code is a role model in this respect as it enables the bankruptcy court to make any order necessary or appropriate to carry out the provisions of the Bankruptcy Code. Such flexibility in the administration of proceedings provides the Court and the insolvency administrator with a wide range of options for a solution that is in the best interest of all parties and may be found in the conclusion of a protocol. As such flexible rules are typical for common law jurisdictions, protocols have so far mostly included insolvency proceedings from such jurisdictions – with the *Lehman* Protocol being the most prominent exception. Civil law legislators should consider providing for a similar level of flexibility to their insolvency courts and practice with regard to protocols. For the EU Member States, the indication in Recital 48 EIR should be understood as a mandate for such action, if not a duty to act.

Such action would need to consider one clear distinction. Articles 41(1) and 56(1) EIR suggest that insolvency practitioners conclude agreements or protocols, while Articles 42(3)(e) and 57(3)(e) EIR define the role of courts as competent to approve protocols. Courts are not meant to become parties to a protocol, and judges in the EU are indeed reluctant to become a party to a protocol.[275] Courts are, however, invited to adopt and publish guidelines regarding their duties to communicate and cooperate in Recitals 48 and 49. EU Member States should revisit their rules of procedure in order to explicitly enable their insolvency courts to comply with the expectation of EU law.

5.3. The legal nature of protocols

The clarification of the phenomenon of protocols also allows for a contribution to the academic discussion of their legal nature. Most importantly, protocols concluded by insolvency practitioners should be differentiated from protocols issued by courts. Any publication of a protocol or guideline or principles for (court-to-court) communication issued by insolvency courts is a determination by a court in a specific case or a general resolution. It is to be governed by the rules of procedure (*lex fori*) and in the specific case of insolvency proceedings by the *lex fori concursus*. The legal nature of such determinations is found here: as a unilateral act of a court that shows no immediate effect on substantive rights of parties to a procedure, it can be qualified as a mere internal yet published determination of modalities.[276]

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[274] Kokorin and Wessels *supra* n. 63, para. 6.22 (page 80).
[275] See the survey findings published by Stephan Madaus *supra* n. 266, page 108.
[276] See, for instance, the "Modalities for court-to-court communications" of the Judicial Insolvency Network.

While the legal nature of court protocols can be identified rather straightforwardly, a number of competing approaches have been developed to explain the legal nature of protocols concluded by insolvency practitioners.[277] First, the mechanism for the conclusion of such protocols is the mechanism of an agreement. All parties to the protocol need to reach a consensus about its content and close a deal. Without such agreement, no protocol exists. It seems self-evident to conclude that protocols agreed by insolvency practitioners are contracts.[278] Any consideration about the validity of the consensus, the interpretation of protocol clauses or the applicable Private International Law rule would be based on the contractual nature of protocols.[279]

Alternatively, the purpose of protocols could be considered as quintessentially procedural. Protocols serve their parties to discharge duties in insolvency proceedings. Their content is defined and limited by the law applicable to insolvency proceedings.[280] Their parties are insolvency officeholders and, in many jurisdictions, officers to the Court. The dominant procedural context would lead to the conclusion that, similar to court protocols, insolvency practitioner protocols are procedural agreements governed by procedural rules, hence public law, not contract law.[281]

Finally, the special purpose of organising coordination in parallel international insolvency proceedings could be understood as characterising protocols. It would be neither the procedural context of the parties to a protocol nor the mechanism of an agreement but the cross-border

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[277] It should also be noted that the dispute about the legal nature could be left undecided by awarding protocols the status of truly "atypical legal transactions"; see Daniele Vatermoli, *Los protocolos concursales en las operaciones de reestructuración de grupos de sociedades en crisis*, 48 ADCo, (2019), section II. There is, however, little insight from such an approach as it would not provide any guidance about the general legal regime applicable to protocols.

[278] Anthony V. Sexton, *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation* 12 Chicago Journal of International Law 811, 818 (2012); also, Mathias A. Wittinghofer, *Der nationale und internationale Insolvenzverwaltervertrag* (Gieseking 2004) pages 121-169. See also Bob Wessels *supra* n. 51, para. 41.21 ("means of agreeing"). The German insolvency code (Insolvenzordnung) refers to protocols as a contractual agreement between insolvency practitioners, see § 269h (2) no. 3 InsO ("vertragliche Vereinbarung zwischen Insolvenzverwaltern").

[279] Kokorin and Wessels *supra* n. 64, para. 7.10 ff and 7.19 ff. See also Bob Wessels, *International Insolvency Law Part II* (Wolters Kluwer, 4th ed. 2017) para. 10843q (page 581).

[280] Aurora Martínez Flórez supra n. 58, pages 73 and 89 ff; Salvatore Orlando and Giuseppina Capaldo, *The Legal Nature of the Insolvency Protocols between Insolvency Practitioners under the EIR 2015/848 and the "comply or explain" regime*, in Daniele Vattermoli, Stephan Madaus, Federica Pasquariello, Andrés Recalde Castells *supra* n 58, page 16.

[281] Horst Eidenmüller, *Der nationale und der internationale Insolvenzverwaltungsvertrag* 114 Zeitschrift für den Zivilprozess 3, 29-30 (2001). See also Orlando and Capaldo supra n. 280, page 20. A similar approach is suggested by Aurora Martínez Flórez supra n. 58, page 95 (sole application of the lex fori concursus).

element that defines a protocol. Signed by competent officeholders and often approved by courts, protocols seem to resemble a treaty[282] that organises the application of the competing rights of several sovereigns.

In our view, a protocol concluded between insolvency practitioners should principally be understood as a memorandum of understanding. It is an agreement concluded between two or more parties (contract mechanism) outlined in a formal document. Principally, it is not legally binding but provides information and signals the willingness of the parties to act in a certain way when discharging their duties as insolvency officeholders. A memorandum of understanding is not an instrument exclusive to private law. It is a well-established means in organising the coordination, communication, and cooperation between government agencies of different countries[283] and reflects all three key characteristics of protocols.

The classification as a memorandum of understanding is also able to explain that protocols are effective while not legally binding. If parties agree to include a binding clause in relation to a matter rather than a mere sincere willingness to act, a protocol transmutes into a legally binding contract of officeholders from different jurisdictions, and contract law principles would apply to it. This would include their ability to select the law applicable to the contract[284] and the *forum* competent to resolve disputes.[285]A better understanding of the legal nature of protocols may promote a wider use of them in the EU Member States.[286]

6. Conclusion

The EIR and EU law soft instruments suggest protocols as possible means of securing compliance with the duties to cooperate and communicate. The paper argues that the provisions in the EIR detailing the duties of cooperation and communication constitute a solid legal basis for adopting cross-border protocols among insolvency fora of the EU Member States.

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[282] Sean Dargan, *The Emergence of Mechanisms for Cross-border Insolvencies in Canadian Law* 17(1) Connecticut Journal of International Law 107, 124 (2001); Evan D. Flaschen and Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols* 33 Texas International Law Journal 587, 589 (1998); Anne-Marie Slaughter, *A Global Community of Courts* 44(1) Harvard International Law Journal 191, 193 (2003).

[283] See, for instance, the Memorandum of Understanding for supervisory cooperation between the European Central Bank and the Bank of England and the Financial Conduct Authority, 19 February 2021; available at the ECB's website: https://www.bankingsupervision.europa.eu/legalframework/mous/html/index.en.html.

[284] See Article 3(1) Rome I Regulation as an expression of this principle.

[285] See Article 4(1) Brussels Ibis Regulation as an expression of this principle.

[286] Kokorin and Wessels *supra* n. 63, para. 6.22 (page 83).

Cross-border insolvency protocols have addressed a wide range of issues in the practice of international insolvency cases. They have proven to be a useful tool for coordination, cooperation, and communication. The provisions of the EIR enable the use of protocols but do not safeguard a specific content as developed in international best practice, although EU-sponsored initiatives and projects have detailed a coherent set of guidelines and, more recently, even a European Model Protocol with default protocol clauses for both insolvency practitioners and courts.

Today, the main hindrance for a (wider) use of protocols is found in national insolvency law provisions that remain too inflexible when asked to enable insolvency practitioners to conclude and insolvency courts to approve cross-border protocols with best practice clauses. EU Member States should review their insolvency laws in this respect and consider special regulations in order to give the EIR the intended effect.