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Communication and Cooperation in Cross-Border Restructuring and Insolvency Matters in the EU

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The renewed European Union (EU) Insolvency Regulation (the "EIR Recast"), which entered into force in June 2017, allows for the opening of several parallel insolvency proceedings against the same debtor.[1] Recital 48 of the EIR Recast appropriately points out that the efficient administration of an insolvency estate and the effective realization of the totality of assets require proper cooperation between the actors involved in all the concurrent proceedings.

In theory, these could be a main insolvency proceeding in one EU Member State and secondary insolvency proceedings in one or more of the other EU Member States. Proper cooperation implies that the various insolvency practitioners and the courts involved are cooperating closely, in particular by exchanging sufficient amount of information.

Cooperation and communication within the EIR Recast framework stems from the general idea of mutual trust and sincere cooperation between the EU Member States, indispensable for the EU's functioning.[2] The idea of cross-border cooperation and communication in Europe is not new. Already in the original Insolvency Regulation (EIR 2000), which entered into force in 2002, Article 31 mandates that insolvency practitioners in main and secondary proceedings communicate information to each other.

However, the EIR Recast introduces a comprehensive framework for cooperation and communication between insolvency practitioners, between the courts, and between insolvency practitioners and the courts.[3] Such a framework should enable the efficient and effective deployment of the debtor's assets and protection of creditors' rights.

In addition to specific provisions addressing the issue of communication and cooperation in insolvency, the EIR Recast makes a reference to best practices. It notes that when cooperating, insolvency practitioners and courts should consider the best practices for cooperation in cross-border insolvency cases, as set out in the principles and guidelines on communication and cooperation adopted by European and international organizations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL) (Recital 48 EIR Recast). Among such guidelines are European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines, 2007; a revision is due in 2019),[4] the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines (EU JudgeCo Principles and Guidelines, 2015)[5] and the UNCITRAL Practical Guide on Cross-Border Insolvency Cooperation (2009).[6] These authoritative texts form the groundwork for the EIR Recast provisions on communication and cooperation.

Cooperation and Communication Among Insolvency Practitioners

According to Article 41 EIR Recast, an insolvency practitioner in main insolvency proceedings and insolvency practitioner(s) in secondary proceedings concerning the same debtor shall cooperate with each other, as long as it is compatible with the rules applicable to the respective proceedings. Similar wording can be found in the original EIR 2000. However, Article 41 EIR Recast adds that such cooperation might take any form, including the conclusion of agreements or protocols.

The practice of entering into such protocols dates back long before the EIR's adoption. The "mother of invention" of a protocol is the *Maxwell* case.[7] Maxwell Communication Corp. plc was a U.K.-based media holding with a large U.S. presence. Unable to perform its obligations under the U.K. credit facilities, it filed a preemptive chapter 11 petition in the U.S. on Dec. 16, 1991. The next day,

1 Regulation (EU) 2015/848 of May 20, 2015, on insolvency proceedings (Recast).
2 Article 4 Treaty of the European Union; Article 81 Treaty on the Functioning of the European Union.
3 Articles 41-43 EIR Recast. These articles have their match in Articles 56-59 EIR Recast in matters of cooperation and communication in insolvency proceedings relating to two or more members of a group of companies.
4 *See* "CoCo Guidelines 2.0 on Its Way," *available at* bobwessels.nl/links/coco-guidelines-2.0 (unless otherwise specified, all links in this article were last visited on Oct. 22, 2018).
5 More publications are available at tri-leiden.eu/publications.
6 *See* "UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)," *available at* uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html.
7 *See In re Maxwell Comm. Corp.*, Case No. 91-15741 (Bankr. S.D.N.Y. Jan. 15, 1992).

Maxwell's directors also petitioned for an administration order in the U.K. Uncoordinated handling of two simultaneous proceedings could have disturbed the efficient administration of the insolvency estate. Instead, a protocol was negotiated.

Under the protocol, the U.K. joint administrators and the U.S.-appointed examiner undertook to coordinate insolvency proceedings (*e.g.*, by requiring the examiner's consent for certain actions performed by the administrators). In February 1993, the joint administrators (with the examiner's agreement) filed their reorganization plan in the U.S. and scheme of arrangement in the U.K. Both instruments were approved by the vast majority of Maxwell's creditors and led to the orderly realization of the debtor's assets.

A similar practical approach was taken in the insolvency of the Lehman Brothers Group, the largest bankruptcy in history with more than US$600 billion in liabilities, more than 75 separate proceedings and more than 16 official representatives. In order to coordinate multiple insolvency proceedings opened against Lehman Brothers Holdings Inc. and its affiliated debtors worldwide, the protocol was signed by some official representatives of the companies belonging to Lehman Brothers Group from Australia, The Netherlands, The Netherlands Antilles, Switzerland, Luxembourg, Germany, Hong Kong, Singapore and the U.S. Notably absent was the U.K. The protocol served the purpose of ensuring proper notification, communication and data-sharing among insolvency practitioners appointed in insolvency proceedings of the Lehman Brothers Group.[8]

It also set rules outlining the rights of official representatives (the name for insolvency practitioners used in the protocol) and creditors. For example, it authorized official representatives and creditors to appear in all relevant proceedings, and to share and receive certain types of information (*e.g.*, on debtors, their assets and liabilities). In addition, the protocol incorporated by reference the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (the "ALI-III Guidelines") and established the rules on communication of nonpublic (confidential) information, asset-preservation and special procedures for intercompany claims. For example, to avoid lengthy disputes, the protocol included a possibility for representatives to agree on a common set of financial accounting records that form the basis of intercompany claims, which should be considered *prima facie* valid. Separate provisions concerned submissions of winding-up or reorganization plans, amendment, adherence and execution of the protocol. Even though not all protocols are equal in the level of their scope and detail, the authors expect similar items to be covered by protocols concluded under the EIR Recast.

The EIR Recast facilitates the conclusion of protocols or insolvency agreements as tools supporting the cross-border coordination of insolvency proceedings opened in different EU Member States. At the same time, it does not define such agreements or protocols, thus granting substantial leeway for insolvency practitioners to negotiate the form and scope of such arrangements in order to better suit the circumstances of a given case.

As soon as possible, insolvency practitioners should communicate to each other any information that might be relevant to other proceedings. In particular, it should concern any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings (Article 41(2)(a) EIR Recast). Examples of issues on which information should be exchanged (related to liquidation and winding-up proceedings) include composition of assets, actions planned or under way in order to recover assets, actions to obtain payment or actions for setting aside certain transactions, possibilities for liquidating assets, claims lodged, verification of claims and disputes concerning them, the ranking of creditors, planned reorganization measures, proposed compositions, plans for the allocation of dividends or the progress of operations in the proceedings.

As rescue and restructuring proceedings relate to current policy preferences toward saving economically viable but distressed businesses, the EIR Recast mandates that insolvency practitioners explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a restructuring plan (Article 41(2)(b)). Thus, not only can the insolvency practitioners in main insolvency proceedings intervene in the course of secondary proceedings (*e.g.*, by proposing a restructuring plan or applying for a suspension of the realization of assets), they should in good faith negotiate with other insolvency practitioners to restore the debtor's financial stability.

If the debtor's restructuring is not possible or liquidation of the debtor's assets is contemplated, insolvency practitioners must coordinate the realization of assets. To achieve this, insolvency practitioners in secondary proceedings should give the main insolvency practitioner an early opportunity to submit proposals on the realization or use of assets in secondary insolvency proceedings (Article 41(2)(c)). The CoCo Guidelines elaborate on this point, noting that the sale of (large parts of) assets is the most common method used in liquidation. A coordinated and aligned approach across national borders is likely to produce greater value. The piecemeal sale of the debtor's assets or a "crown jewel" asset crucial for the continuation of its business can hinder restructuring attempts in main insolvency proceedings and diminish the total value that is available to creditors.

Cooperation and Communication Among the Courts

The original EIR did not contain specific provisions prescribing cooperation and communication among courts in insolvency proceedings; it only referred to insolvency practitioners (using the term "liquidators"). Nevertheless, the need for cooperation among courts was evident. In this respect, there is the notable case of *Bank Handlowy*, decided by the Court of Justice of the European Union (CJEU).[9]

The CJEU faced a situation in which main insolvency proceedings (French *sauvegarde* proceedings) were opened in France against a Polish company called Christianapol. These proceedings were aimed at permitting solvent companies to restructure themselves under court protection at a pre-

8 *See* "Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies," *available at* bobwessels.nl/site/assets/files/1522/crossborderprotocol-lehman-bros.pdf.

9 Case C-116/11, *Bank Handlowy v. Warszawie SA v. Christianapol sp. z o.o.*, ECLI:EU:C:2012:739 (Nov. 22, 2012).

continued on page 106

from page 33

insolvency stage. Some of Christianapol's creditors, including Bank Handlowy, petitioned a court in Poland to start secondary proceedings. The opening of such proceedings could have jeopardized the restructuring plan agreed upon in the main proceedings, since under the original EIR 2000 secondary proceedings could solely be winding-up proceedings.

The CJEU did not dispute the possibility of opening secondary proceedings in a situation when main proceedings serve a protective purpose. However, it noted that the principle of sincere cooperation laid down in the Treaty of the EU required the court having jurisdiction to open secondary proceedings to regard the objectives of the main proceedings. It also committed the court to consider the scheme of the regulation, which aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings, guaranteeing the priority of the main proceedings.

Under the EIR Recast, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, is obliged to cooperate with any other court faced with the issue of opening insolvency proceedings or has already opened such proceedings. Thus, cooperation extends in time before the opening of insolvency proceedings and therefore ensures better coordination, and precludes abusive forum-shopping. It covers all sorts of proceedings, including territorial (independent) proceedings, and is in principle limited only to the extent that the cooperation is incompatible with the rules applicable to each of the proceedings.

Court-to-court cooperation might take various forms and can be implemented by any means that the court considers appropriate. For example, it can result in the coordination related to the appointment of insolvency practitioners. In that context, courts could appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor, provided that this is compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner (Recital 50 EIR Recast). In practice, the latter requirement constitutes a serious impediment to the appointment of the same insolvency practitioners in multiple insolvency proceedings opened against the same debtor.

Besides, courts might communicate information, coordinate the administration and supervision of the debtor's assets and affairs, and synchronize the conduct of hearings and the approval of protocol where necessary (Article 42(3)). Under the EU JudgeCo Guidelines, courts might consider conducting joint hearings (Guideline 10) and utilizing various means of electronic communication (Guideline 8).

To facilitate court-to-court cooperation, the courts could, when appropriate, appoint an independent person or body acting on their instructions (Article 42(1) EIR Recast). This follows the EU JudgeCo Principles, which approve the appointment of one or more independent intermediaries with appropriate skills, qualifications and professional knowledge. Such intermediaries should be able to perform their duties in an impartial manner, without any actual or apparent conflict of interest (Principle 17).

Cooperation and Communication: The New Global Paradigm

There are presently three principal sets of guidelines for court-to-court communication. These are, foremost, the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (ALI-III Guidelines 2012), which aim to be applied globally.[10] Courts in the U.K. and U.S. have found inspiration in the principles that accompany the ALI-III Guidelines.[11] The other two are the already-mentioned EU Cross-Border Insolvency Court-to-Court Communications Guidelines of 2015 (founded on the ALI-III Guidelines)[12] and the Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016). The JIN Guidelines mainly apply in the circle of "common law" jurisdictions. Presently these are designated courts in Argentina, Australia, Brazil, Bermuda, British Virgin Islands, Canada, Cayman Islands, England and Wales, Hong Kong and Singapore, as well as the U.S. Bankruptcy Courts for the District of Delaware and Southern District of New York.[13] All three sets are provided in the Chancery guide, the legal guidance on how to bring a case to London's Chancery Division of the High Court of Justice.[14]

Cooperation and Communication Among Insolvency Practitioners and Courts

In addition to court-to-court (Article 42 EIR Recast) and insolvency practitioner-to-insolvency practitioner (Article 41 EIR Recast) cooperation and communication duties, the EIR Recast has also introduced court-to-insolvency practitioner duties (Article 43 EIR Recast). In particular, it mentions three situations in which such duties arise.

First, an insolvency practitioner in a main insolvency proceeding shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or that has opened such proceedings. Second, an insolvency practitioner in a territorial or secondary insolvency proceeding shall cooperate and communicate with the

10 *See* "ALI-III Global Principles for Cooperation in International Insolvency Cases 2012," International Insolvency Institute (August 2017), *available at* iiiglobal.org/sites/default/files/ALI-III%20Global%20Principles%20booklet_0.pdf. Its authors are Prof. Ian Fletcher, who passed away in July 2018, and Prof. Wessels.

11 Conjoined Appeals in (1) *Rubin & Anor v. Eurofinance SA & Ors* and (2) *New Cap Reinsurance Corp. Ltd. & Anor v. Grant* and others [2012] UKSC 46; U.S. Court of Appeals, Third Circuit, in *In re ABC Learning Centres Ltd., n/k/a ZYX Learning Centres Ltd.*; *A.B.C. USA Holdings Pty. Ltd.*, Debtors in Foreign Proceedings RCS Capital Development LLC, Appellant, No. 12-2808, Aug. 27, 2013.

12 *See* "EU Cross-Border Insolvency Court-to-Court Cooperation Principles," *available at* universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/fiscaal-en-economische-vakken/cross-border.pdf.

13 *See* "Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (as promulgated by the Judicial Insolvency Network Conference)," *available at* www.gov.uk/government/uploads/system/uploads/attachment_data/file/612376/JIN_Guidelines.pdf. In the first half of 2018, in the restructuring of Ezra Holdings, both the Singapore court and a bankruptcy court in New York approved to put in place a cross-border protocol based on the JIN Guidelines.

14 *See* "Chancery Guide," February 2016, *available at* assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737931/Chancery-Guide-09.18.pdf.

court before which a request to open main insolvency proceedings is pending or has opened such proceedings. Third, an insolvency practitioner in a territorial or secondary insolvency proceeding shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or has opened such proceedings. Particular forms of court/insolvency practitioner cooperation might entail coordination in the administration of the debtor's assets or the approval of protocols.

However, the scope of cooperation and communication might be limited by the mandatory rules applicable to each of the proceedings concerned. Such a limitation is general in character and applies to all types of cooperation duties within the framework of the EIR Recast. Article 43(1) EIR Recast adds that cooperation and communication should not entail any conflict of interest. The definition of what constitutes a "conflict of interest" is lacking.

Recital 21 EIR Recast notes that insolvency practitioners who are appointed without the involvement of a judicial body should, under their national law, be appropriately regulated and authorized to act in insolvency proceedings. The national regulatory framework must provide for proper arrangements to deal with potential conflicts of interest. Presently, not all EU Member States have reached the state of appropriately regulating professional and ethical arrangements. In this respect, national insolvency practitioners' associations should engage more firmly in developing a set of duties for practitioners.

The EIR Recast does not signify a revolution, but rather an evolution of approaches to international insolvencies in the EU. However, it contains some remarkable new topics, such as coordination of insolvency proceedings for members of groups of companies, the interconnection of countries' insolvency registers and the mandatory rules of cooperation and communication between courts and insolvency practitioners. Contrary to the confusing state of affairs after the entry into legal force of the EIR 2000 some 15 years ago, the EIR Recast is hardly accompanied by any legal noise.

As opposed to the EIR 2000, the new regulation clearly mandates cooperation and communication between courts, as well as between courts and insolvency practitioners. Understandably, this can be difficult for judges in some civil law jurisdictions that have no historical background of cooperation with foreign courts. As the EIR Recast applies to proceedings opened after June 26, 2017, many proceedings remain governed by the former regulation, which can explain the absence of any notable examples of protocols or agreements reached by insolvency practitioners under new rules.

At least no conflicts related to them have been reported. The authors are also not aware of any cases of group coordination proceedings as of this date. However, if European practice would need a workable system for communication and cooperation in cross-border matters, the legal framework is present and should provide practical and workable solutions. abi