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Executive Summary: Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation

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Introduction

As an accompanying text to Chapter 6 of Report 2, this Executive Summary seeks to provide a summary of the findings in that Chapter based on the survey of principles, recommendations, and guidelines described in the chapter. The guidelines and principles described in Chapter 6 of Report 2 have either focused solely on judicial cooperation in matters of cross-border insolvency or have included this matter in a broader context. This document seeks to provide a summary of the various guidelines, principles and recommendations encountered as part of the research carried out by the Project, which may be helpful and provide guidance to courts and practitioners in cases of this nature. However, it must be noted the content of these guidelines are not necessarily endorsed by the research of the Project nor are expressed as views attributable to the EU Commission. Furthermore, as a summary of guidelines and recommendations, this document should compliment and enhance - as distinct from contradict - existing rules on actions that are permissible for a court to take and any specific obligations of the judiciary, particularly those which are well established in common law courts. It should also be noted that during our research judges expressed a continued

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preference for implementing their own protocols on a case by case basis. This is the context in which this summary is considered.

Following the analysis of this material in Chapter 6 of Report 2, the Executive Summary is divided into four themes addressing the following aspects of judicial cooperation in the cross-border insolvency context:

- 1) the sharing or obtaining of information and disclosure requirements;
- 2) asset coordination;
- 3) cooperation and communication methodology; and
- 4) the mechanism of notification or service of official documents.

The ‘principles’, ‘standards of good practice’ and ‘recommendations’ which are outlined in detail in Chapter 6 and from which the summaries of general recommendations in this Executive Summary have been derived will be abbreviated as follows:

- The UNCITRAL Model Law on Cross-border Insolvency (‘Model Law’);³
- The ALI-III Global Principles for Cooperation in International Insolvency Cases (‘ALI-III Global Principles’);⁴
- The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (‘World Bank Principles’);⁵
- The EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (‘JudgeCo Principles and Guidelines’);⁶
- The European Communication and Cooperation Guidelines for Cross-Border Insolvency (‘CoCo Guidelines’);⁷
- The European Law Institute Project on the Rescue of Business in Insolvency Law (‘ELI Report’).⁸

1. The Sharing or Obtaining of Information and Disclosure Requirements

As highlighted in JCOERE Report 1 and Report 2, the availability of information is vital in the context of cross-border insolvency coordination and cooperation – both between courts and between courts and insolvency practitioners. Information relevant to such cases includes the status of the procedure opened in a foreign country, the number and quality of the debtor’s assets, its liabilities and, in general, data that may help foreign creditors and their

³ ‘UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation’ (United Nations 2014) (hereinafter referred to as the ‘UNCITRAL Model Law’).

⁴ ‘ALI-III Global Principles for Cooperation in International Insolvency Cases’ (International Insolvency Institute 2017) (hereinafter referred to as the ALI-III Global Principles). publications of principles and recommendations from a variety of global or territorial organisations between 2000 and 2006.

⁵ ‘Principles for Effective Insolvency and Creditor/Debtor Regimes’ (World Bank 2011) (hereinafter referred to as the ‘World Bank Principles’).

⁶ ‘EU Cross-Border Insolvency Court-to-Court Cooperation Principles’ (Tri Leiden, University of Leiden, and Nottingham Law School 2014) (hereinafter referred to as the ‘JudgeCo Principles and Guidelines’).

⁷ Bob Wessels and Miguel Virgos, ‘European Communication and Cooperation Guidelines for Cross-Border Insolvency’ (INSOL Europe Academic Wing 2007) (hereinafter referred to as the ‘CoCo Guidelines’).

⁸ Bob Wessels, Stephan Madaus, and Gert-Jan Boon, *Rescue of Business in Insolvency Law* (European Law Institute 2017) (hereinafter referred to as the ‘ELI Report’).

representatives to interact effectively with each other and with the courts of the main and secondary proceedings.⁹ To this end, various international institutions have developed principles and best practices that offer guidance to legislators, judges, insolvency practitioners, and parties involved in cross-border cases, in order to create a common ground - primarily stemming from shared information - on which they can build effective cooperation.

Of the 'principles', 'standards of good practice' and 'recommendations' surveyed, the UNCITRAL Model Law, ALI-III Global Principles, World Bank Principles, JudgeCo Guidelines and Principles, and CoCo Guidelines in particular offer recommendations pertaining to the sharing or obtaining of information and disclosure requirements. These can be summarised as follows:

Summary of General Recommendations

- Courts ought to be subject to a cooperation duty and should therefore be encouraged to communicate, cooperate, and exchange information directly to the maximum extent possible.
- Direct communication between foreign courts is recommended with a view to harmonising the proceedings and reducing obstacles to court-to-court co-operation, provided that the consent of all parties affected is obtained in advance.
- The representative of the foreign proceeding should inform the court about any substantial change regarding such proceeding; direct communication is recommended.
- Insolvency practitioners involved in a cross-border insolvency case should disclose fully all the relevant information about the proceedings to both courts and insolvency practitioners, subject to appropriate confidentiality arrangements surrounding commercially sensitive information, including non-public information.
- Relevant information should be disclosed promptly and should be available and accessible.
- Insolvency practitioners should be allowed to use the same methods to obtain information that are available to the insolvency actors of the country where the proceeding is pending.

2. Asset Coordination

In order to ensure effective coordination in a cross-border insolvency or restructuring case, it is necessary to regulate, in so far as is possible, the treatment of the debtor's assets in all jurisdictions, so that the actions of one creditor or group of creditors against the debtor's estate do not frustrate the efforts to restructure the debtor's business or maximise its value

⁹ Antonio Leandro 'Amending the European insolvency regulation to strengthen main proceedings' (2014) 2 *Rivista di diritto internazionale privato e processuale* 317, 317.

in a liquidation.¹⁰ In this respect, coordination is also required to allow the courts and insolvency practitioners of the parallel proceedings to act in concert and, therefore, to avoid adopting measures or plans that are incompatible with the main or other proceedings.¹¹

Of the ‘principles’, ‘recommendations’ and ‘standards of good practice’ surveyed, the UNCITRAL Model Law, ALI-III Global Principles, World Bank Principles, JudgeCo Guidelines and Principles, CoCo Guidelines and the ELI Report in particular offer recommendations pertaining to effective asset coordination in situations that involve foreign, parallel proceedings. These can be summarised as follows:

Summary of General Recommendations

- In cases where one or more foreign proceedings concerning the same debtor are taking place concurrently, the courts and insolvency practitioners should support cooperation and coordination to minimise conflicts between different procedures in order to achieve the maximum value from the assets of the debtor.
- Courts may also consider whether a coordinated strategy should be adopted in a corporate group insolvency proceeding.
- A stay of actions is recommended (i) in liquidation proceedings in order to enable higher recovery from the sale of assets of the debtors or its productive unit and (ii) in reorganisation proceedings, when the collateral is needed for the reorganisation.
- It is recommended that a stay on individual actions should be available at the earliest possible time in each country where the debtor has assets, and at least as soon as the main proceeding has been recognised.
- It is recommended that a relief from such stay should be available in order to protect the interest of the creditors.
- Prior agreement from any other insolvency practitioner should be required with regard to matters concerning proceedings or assets involving that jurisdiction.

3. The Mechanism of Cooperation and Communication

Most of the best practices and guidelines considered thus far stress the importance of cooperation between courts, between insolvency practitioners, and between courts and insolvency practitioners. Cooperation between the main actors of the insolvency proceedings is recognised as the fundamental means to achieve a value maximising reorganisation or liquidation.¹² It is also key to ensuring efficiency. For this reason, some interesting provisions pertain to the mechanism by which courts and insolvency practitioners can engage in dialogue and coordinate their actions. When regulating the mechanism of cooperation, the various

¹⁰ Lucian Arye Bebchuk and Andrew T. Guzman, ‘An Economic Analysis of Transnational Bankruptcies’ (1999) 42 *J. L. & ECON.* 775; Luciano Panzani, ‘La disciplina della crisi di gruppo tra proposte di riforma e modelli internazionali’ (2016) 38(10) *Il fallimento e le altre procedure concorsuali* 1153.

¹¹ Stefania Bariatti and Giorgio Conso, ‘Il Regolamento (UE) 2015/848 del Parlamento Europeo e del Consiglio del 20 maggio 2015 relativo alle procedure di insolvenza (rifusione). Una prima lettura’ (2015) *ilfallimentarista.it* 16, at 1.

¹² Leah Barteld, ‘Cross- Border Bankruptcy and the Cooperative solution’ (2012-2013) 9(1) *Int’l L. & Mgmt. Rev.* 27, 30.

guidelines and principles also deal with methods of communication that courts and insolvency practitioners should adopt.

Of the ‘principles’, ‘recommendations’ and ‘standards of good practice’ surveyed, the UNCITRAL Model Law, ALI-III Global Principles, JudgeCo Guidelines and Principles, CoCo Guidelines and the ELI Report in particular offer recommendations pertaining to the mechanisms for cooperation and communication in cross-border insolvency scenarios. These can be summarised as follows:

Summary of General Recommendations

- Cooperation between courts can be reached mainly by means of both the appointment of a person to act at the direction of the court and the implementation of agreements or protocols concerning the coordination of two or more proceedings.
- Direct communication at an early stage amongst insolvency practitioners is recommended, where the insolvency practitioner in the main proceeding takes the initiative.
- Advance notice to counsel for affected parties is recommended when courts are communicating with one another.
- In the event of communications between courts by electronic means, counsel for the parties should be allowed to participate in the sharing of such information.

4. The Mechanism of Notification or Service of Official Documents

The final fundamental aspect of cooperation addressed by the international best practices and guidelines and examined in Chapter 6 of the JCOERE Report 2 is the mechanism by which the relevant parties are notified of content or served documents. Arguably, the development of a simple and effective set of rules governing notification, where two or more proceedings are opened in different countries, is essential to reduce costs and delays. The relevant best practice and rules are also developed with a view to ensuring and incentivising the prompt exchange of information and participation of the actors in the insolvency proceedings, starting with the insolvency practitioners and creditors.

Of the ‘principles’, ‘recommendations’ and ‘standards of good practice’ surveyed, the UNCITRAL Model Law, ALI-III Global Principles, JudgeCo Guidelines and Principles and the CoCo Guidelines in particular offer recommendations pertaining to the mechanisms of notification of service of official documents in cross-border insolvency cases. These can be summarised as follows:

Summary of General Recommendations

- It is recommended that appropriate steps maybe taken by courts to ensure that all foreign creditors are notified by the parties involved in order to permit them to have

a full and fair opportunity to file their claims. Such notification should be made individually, except when the circumstances require otherwise.

- Notice of court hearings and court orders should be given to each of the insolvency practitioners as soon as possible.
- Publication of such notices should in the Official Gazette or other relevant publication in the jurisdictions affected by the proceedings, and should be made electronically, in an online registry or publicly accessible system.

Conclusion

The guidelines, principles and best practice standards analysed in Chapter 6 of Report 2 and summarised here demonstrate that core principles have emerged which govern the cross-border insolvency context. In particular, some central aspects have emerged:

- The recognition of the importance of removing obstacles to direct cooperation and communication between the main actors of the insolvency proceedings, namely judges and insolvency practitioners. In this regard, the need for informal methods of communication which are not overly cumbersome, and the use of electronic methods and other technologies are highlighted to be of importance.
- The need for participation among the actors involved and the need for appropriate safeguards.
- The strong focus on the need for preservation of the going concern of insolvent debtors.

Despite the existence of these guidelines, principles and recommendations, without question there exists obstacles to cooperation in preventive restructuring cases which have cross-border aspects. The use of principles, recommendations and standards of best practices in a cross-border insolvency case may be helpful to ensure that a good level of cooperation and coordination is reached between courts, practitioners, and the parties involved, but further work is also needed to overcome the obstacles that are set out in Report 1 and Report 2 of the JCOERE Project.