JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 2

Report on Judicial Co-operation in Preventive Restructuring and Insolvency in the EU

Substantive and procedural harmonisation, judicial practice and guidelines.

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VI. Chapter 6: Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation

6.1 Introduction

Over the past 20 years, there have been a number of initiatives aimed at enhancing cross border insolvency law with the aim of enhancing the performance of economic and financial systems. These include formal frameworks such as the UNCITRAL Model Law on Cross-border Insolvency and less formal guidelines and principles covering both substantive and procedural matters, including aspects of cooperation between courts and insolvency professionals. Some of these initiatives have been led by international organisations such as the World Bank, the International Monetary Fund and the American Law Institute (2000 and subsequent publication in 2012).

Against the backdrop of the relatively newly imposed obligations created by the EIR Recast, described in Chapter 2 of this Report, this Chapter explores some of these reports and guidelines, which have either focused solely on judicial cooperation in matters of cross-border insolvency or, which have included this matter in a broader context.[1] The purpose of this Chapter is to extract the issues identified in these principles, guidelines, and recommendations that are relevant to court-to-court cooperation in cases of cross-border preventive restructuring. It will be divided into four areas addressing the following aspects of judicial cooperation in the cross-border insolvency context: a) the sharing or obtaining of information and disclosure requirements (section 6.2); b) asset coordination (section 6.3); c) cooperation and communication methodology (section 6.4) and, finally, d) the mechanism of notification or service of official documents (section 6.5).

The 'principles', 'standards of good practice' and 'recommendations' that will be analysed in this Chapter will be abbreviated as follows:

- The UNCITRAL Model Law on Cross-border Insolvency ('Model Law');[2]
- The ALI-III Global Principles for Cooperation in International Insolvency Cases ('ALI-III

[1] Thanks to Paul Omar, Technical Research Officer of INSOL Europe for preliminary work on collating these documents.
[2] 'UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation' (United Nations 2014) (hereinafter referred to as the 'UNCITRAL Model Law').

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Global Principles');[3]

- The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes ('World Bank Principles');[4]
- The EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines ('JudgeCo Principles and Guidelines');[5]
- The European Communication and Cooperation Guidelines for Cross-Border Insolvency ('CoCo Guidelines');[6]
- The European Law Institute Project on the Rescue of Business in Insolvency Law ('ELI Report').[7]

While projects such as CODIRE[8] and ACURIA[9] undoubtedly have recommendations or aspects that are relevant to cross-border cooperation, that relevance is perhaps less direct than the other guidelines or mechanisms, which are clearly aimed at encouraging, improving or facilitating cooperation in cross-border insolvency and restructuring cases. In a similar vein, although the Asian Development Bank Good Practice Standards for Insolvency Law may affect an EU Member State involved in a cross-border matter, those standards are not applicable if the states involved in the matter are within the EU. Consequently, it was felt that such guidelines and projects should be dealt with in an annex, rather than as a part of this Chapter.[10]

6.2 The Sharing or Obtaining of Information and Disclosure Requirements

As highlighted in JCOERE Report 1 and in this Report, the availability of complete 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 representatives to interact effectively with each other and with the courts of the main and secondary proceedings.[11] To this end, various international institutions have developed principles and best practices that offer guidance to legislators, judges, insolvency

[3] '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.
[4] 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (World Bank 2011) (hereinafter referred to as the 'World Bank Principles').
[5] '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').
[6] 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').
[7] 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').
[8] 'Contractualised distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings'
[9] 'Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement'.
[10] See 'Annex III: Chapter 6 - Additional Guidelines'.
[11] Antonio Leandro 'Amending the European insolvency regulation to strengthen main proceedings' (2014) 2 *Rivista di diritto internazionale privato e processuale* 317, 317.

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.

6.2.1 The Model Law: The sharing of information between courts and cooperation

Internationally, perhaps the most important instrument in the context of cross-border insolvency regulation is the UNCITRAL Model Law of 1997.[12] It is distinct from other documents discussed in this Chapter in the sense that it is not a series of guidelines, but instead a 'soft law' legal instrument, the purpose of which is to supply a model of 'effective mechanisms for dealing with cases of cross-border insolvency' designed with a view to implementation into domestic law by signatory states. The Preamble describes the purposes of the Model law as ensuring:

> (a) cooperation between the courts and other authorities involved in cases of cross-border insolvency;
>
> (b) greater legal certainty both for trade and investment;
>
> (c) efficient and fair management of cross-border insolvencies, which should protect the interests of all creditors and other interested persons, including the debtor;
>
> (d) protection and value maximization of the debtor's assets; and finally,
>
> (e) support to the rescue of financially troubled businesses.[13]

In this sense, the UNCITRAL Model Law can be understood as an instrument of harmonisation of national insolvency legislation.[14] In the European context, each individual Member State may be a signatory to the Model law. At present, however, there are only a handful of Member State signatories, including Poland, Slovenia, Greece, and Romania. Although the United Kingdom signed a number of years before Brexit, it may have done so with a move towards 'a global Britain' in mind given that other signatories include the United States, Australia, and Japan.[15] There are questions over the relevance of the Model Law if both or all states involved in the cross-border insolvency are members of the EU, as in such circumstances, the EIR Recast would be the applicable instrument. In reality, the main relevance of the Model Law is to a situation where one of the parties is based outside the EU and both are signatories. Nevertheless, the Model Law has informed European developments as many of the concepts are similar.

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[12] Alberto Mazzoni 'Procedure concorsuali e standards internazionali: norme e principi di fonte Uncitral e Banca Mondiale', (2018) 45(1) Giur. Comm 43.

[13] See UNCITRAL Model Law, Preamble 3.

[14] See Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016)10. see also United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (UK 2014) 9-13.

[15] Interestingly Ireland has also considered enacting the Model Law. See further Company Law Review Group, *Report on the UNCITRAL Model Law on Cross Border Insolvency* (Company Law Review Group, November 2018). Available from: <http://www.clrg.org/publications/ > [Last accessed 7 July 2020].

Amongst other aims, the UNCITRAL Model Law addresses the ability of courts to grant foreign stakeholders access to documents and information on the same basis of domestic stakeholders, as well as to permit another jurisdiction to take principal charge in the administration of an insolvency process, including reorganisation.[16]

The main features of UNCITRAL Model Law on cross-border insolvency relevant to the provision of information are:

a) Article 9 which provides for a right of direct access to the courts of an enacting State, to be granted to foreign representatives. This feature reduces, by a considerable amount, the time and costs necessary to communicate between foreign jurisdictions.

b) Article 15 providing for simplified procedures to recognise foreign proceedings, complementing the presumption that the documents submitted for recognition are authentic (see Article 16):

c) Article 25 which includes a requirement of cooperation and direct communication between courts and insolvency practitioners. This feature - above all - aims to reduce the obstacles to court-to-court cooperation (see below section 6.4.1), providing that the court 'shall cooperate to the maximum extent possible with foreign courts or foreign representatives', either directly or through a delegate. It must be noted that cooperation is not linked to recognition of the foreign proceeding, and can occur at an early stage and before the recognition takes place.[17] This mirrors the discussion regarding distinctions between assistance and recognition in Chapter 3 of this Report.

Another fundamental document related to the provision of information under the UNCITRAL Model Law is the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, which was adopted by the United Nations Commission on International Trade Law on 1 July 2009.[18] Its purpose is to 'provide information for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases' with a focus on cases that involve insolvency proceedings in multiple countries.[19]

The main obstacles to cooperation and coordination between courts is identified by the UNCITRAL Practice Guide as twofold:

- the absence of a relevant legislative framework, and

[16] See UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, p. 10.
[17] United Nations Commission on International Trade Law, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (UN, 2014), p. 30-31; Carlo Vellani, L'approccio giurisdizionale all'insolvenza transfrontaliera, (Milano, Dott A Giuffre' Editore, 2006), at 61.
[18] United Nations Commission on International Trade Law, Practice Guide on Cross-Border Insolvency Cooperation (UN, 2009). [Hereinafter 'UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation'].
[19] UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, Introduction, p. 1.

- uncertainty with regard to the scope of the legislative authorisation to pursue cooperation with foreign judges.[20]

While the Practice Guide acknowledges that the UNCITRAL Model Law provides for such a framework, it also points out that the Model Law does not specify *how* cooperation and communication can be achieved.

However, the second part of Article 25 provides that 'the court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives'. The wording of this provision, which imposes a broad duty on the cross-border insolvency actors to cooperate (and that will be examined in more detail below), shows how a consistent and complete stream of information between courts (and their representatives) is fundamental in order to ensure an effective coordination and cooperation and maximise efficiency in cross-border insolvency cases.[21]

The JCOERE Report has questioned the willingness of courts to communicate directly with each other without intermediary intervention.

An interesting example is provided in Article 18 of the Model Law which regulates 'subsequent' information that must be provided after the filing of the application for recognition of the foreign proceeding. Article 18 provides that the foreign representative must inform the court without any delay of:

> (…) any substantial change with regard to the status of the recognised foreign proceeding, the status of the foreign representative's appointment and (…) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

6.2.2 The ALI-III Global Principles: Disclosure duties and sharing of information

The ALI-III Global Principles for Cooperation in International Insolvency Cases of 2012 (hereinafter, also, 'Global Principles') is the result of a study commissioned by the American Law Institute (ALI) and the International Insolvency Institute (III). It includes some relevant principles that aim to drive the cooperation and the sharing of information between insolvency practitioners and between courts and insolvency practitioners.

- Principle 9, Point 1, of the Global Principles requires full disclosure in cross-border insolvency matters, by providing that the cooperation between the courts and insolvency practitioners 'should include prompt and full disclosure regarding all relevant information, including assets and claims (…)'. Such disclosure should also help, pursuant to Principle 9, to promote transparency and reduce fraud.

[20] UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, p. 15.
[21] Felicity Deane and Rosalind Mason, 'The UNCITRAL model law on cross-border insolvency and the rule of law' (2016) 25(2) *International Insolvency Review* 138-159.; 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

- Principle 9 also specifically refers to cooperation amongst insolvency practitioners, by providing that they should give all the other insolvency practitioners involved in the case 'prompt and full disclosure about the existence and status of the insolvency proceedings in which they have been appointed'. The required disclosure covers all the relevant aspects of the proceeding.
- Finally, the last point of Principle 9 provides that the insolvency practitioners should also share and communicate non-public information, in other words information that is not freely available on public fora,[22] to the other insolvency practitioners, while also respecting the applicable law and potential confidentiality arrangements.
- Principle 33 of the Global Principles further explores the duty of insolvency practitioners with respect to information exchange; it provides that insolvency practitioners in parallel proceedings 'should make prompt and full disclosure to each other on a continuing basis of all relevant information they have' and that, such information, should include - as a minimum - a list of all claims and claimants, with detail of their ranking and status.

6.2.3 The World Bank Principles: Access to information about the Debtor

In 2011, the World Bank drafted its own Principles for Effective Insolvency and Creditor/Debtor Regimes. This document, which does not directly address cooperation duties in a cross-border insolvency, stresses the importance of the access of all the relevant parties to information concerning insolvency proceedings. For this reason, Point D4 provides that an insolvency framework should be based on both transparency and accountability.

To this end, the World Banks provides that the rules of the relevant framework 'should ensure ready access to relevant court records, court hearings, debtor and financial data, and other public information'.[23] Interestingly, in contrast to the ALI-III Global Principles, the World Bank Principles do not include non-public information in the list of suggested data to be shared. In terms of communication, Principle C17.2 provides that the law should allow domestic courts to communicate directly with foreign courts and their representatives and, in particular, to request information from them.[24] Such a provision should contribute to reducing the delays and costs associated with the acquisition of information from proceedings opened in different countries.

6.2.4 The JudgeCo Principles and Guidelines: Disclosure and harmonisation of the proceedings

The communication of information, as described by the EU JudgeCo Principles and Guidelines (2014), produced by the Leiden Law School and the Nottingham Law School, refers to the

[22] This understanding of non-public information has been derived from Guideline 7.5 of the CoCo Guidelines, 51.
[23] It is worth noting that the same approach was adopted by the Principles of European Insolvency Law of 2003 that requires, pursuant to Point 1.4, to attribute appropriate publicity to the insolvency proceeding.
[24] See World Bank Principles for Effective Creditor/Debtor Regimes, Revised 20 January 2011, 21.

exchange of information, mainly by electronic means, between actors in different jurisdictions as the basis for coordination and cooperation in parallel proceedings. With regard to court-to-court communication, Guideline n. 3 of the EU JudgeCo Principles and Guidelines provides that a court may communicate with another court about matters related to the proceedings 'for the purposes of coordinating and harmonising proceedings before it with those in the other jurisdiction'. This Guideline also specifies that, before disclosing the information, the court should obtain the consent of all the affected parties. Additionally, JudgeCo Guideline n. 4 allows the courts involved to communicate with the insolvency practitioners of another jurisdiction for the same purpose, provided that the court obtained the consent of the parties involved in advance, as specified in Guideline n. 3.

As can be seen from these provisions, the guidelines regulating the sharing of information pay particular attention to the rights of the parties involved in the proceeding. The acknowledged need for protective measures when courts and insolvency practitioners communicate will be explained in more detail below. This need led to the development, within the guidelines and best practices analysed in this Chapter, of precautions that aim to reduce the procedural steps – and therefore association costs – required to disclose information and, more generally, to communicate, while protecting the rights of those participating to the insolvency proceeding.[25]

6.2.5 The CoCo Guidelines: The right to obtain information in a cross-border insolvency scenario

Another fundamental source of guidance with regards to court-to-court co-operation are the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines) of 2007. In the words of one of its authors, its aim was:

> [T]o provide some substantial and procedural guidance to those practitioners, struggling to communicate and coordinate main and secondary insolvency proceedings in the context of the EU Insolvency Regulation.[26]

As a result, strictly speaking, it is not overtly addressed to courts.

Guideline n. 7 refers to the information that the insolvency practitioners (liquidators) are required to disclose to all the other insolvency practitioners involved, 'including all relevant information about the existence and status of the insolvency proceedings in which they have been appointed'. This requirement, which imposes a duty on insolvency practitioners to also inform the courts involved, is periodical. The same Guideline provides that a foreign insolvency practitioner should be allowed 'to use all legal methods to obtain information that would be available to a creditor or to a liquidator in any national insolvency proceedings' to

[25] See below, section 6.4.3.
[26] Bob Wessels, 'Full Text CoCo Guidelines' (2 August 2016) < https://bobwessels.nl/blog/2016-08-doc2-full-text-coco-guidelines/>. [Last accessed 30 June 2020].

enhance, as far as possible, the right to obtain information in a cross-border insolvency scenario. Finally, similar to the ALI-III Global Principles, non-public information is included; Guideline n. 7 provides that such information should be shared by the other insolvency practitioners 'subject to appropriate confidentiality arrangements to the extent that this is commercially and practically sensible'.[27] The key concept seems to be that commercially sensitive information is not shared unnecessarily.

6.3 Asset Coordination

In order to ensure effective coordination in a cross-border insolvency case, it is necessary to regulate 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 in a liquidation.[28] 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.[29] For this reason, the relevant international institutions address this issue and provide guidelines and best practices that deal with the rules concerning the treatment of debtor's assets in situations that involve foreign, parallel proceedings.

Given that the focus of the JCOERE project is on the operation of a stay amongst the crucial elements of a restructuring process, how the obligations regarding asset coordination compliment the operation of what would in fact be a pan-European stay, if co-operation occurred, is of interest.

6.3.1 The Model Law: Stay on individual actions and relief

Article 29 of the Model Law provides that in cases where one or more foreign proceedings concerning the same debtor are taking place concurrently, the court must seek cooperation and coordination. This express duty to coordinate imposed on courts by the UNCITRAL Model Law is primarily aimed at protecting the debtor's assets during the proceeding. In fact, pursuant to Article 20 – which regulates the effects of the recognition of the foreign main proceeding – after the recognition of the main proceeding, 'the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed'. In addition, pursuant to Article 20(a)(b), the enforcement against the debtor's assets must be stayed while the right to dispose of the

[27] See the European Communication and Cooperation Guidelines for Cross-border Insolvency (CoCo Guidelines), Section 1, 9.
[28] 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.
[29] 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, 1.

assets of the debtor must be suspended. As stated above, this is of particular relevance to restructuring proceedings in view of the importance of the stay to their success.

Article 21 of the Model Law provides that the court can grant relief, upon recognition of a foreign proceeding (whether main or secondary), if it is 'necessary to protect the assets of the debtor or the interests of the creditors'. This last provision responds to the need for flexibility of the rules regarding the treatment of debtor's assets; it requires that the courts and their representatives coordinate their actions, in order to avoid granting relief on assets that are necessary for the 'global' reorganisation or liquidation of the debtor's business.

6.3.2 The ALI-III Global Principles: Coordination and value maximisation

Principle 8 Global Principles of 2012, which regulates the stay of individual enforcement actions in cross-border insolvency cases, provides that effective cooperation in this field might require 'a stay or moratorium at the earliest possible time in each state where the debtor has assets or where litigation is pending'. Tempering this, Principle 8 also requires that the moratorium imposes 'reasonable restraints' both on the debtor and creditors and the other parties involved.

In line with the UNCITRAL Model Law, the second paragraph of Principle 8 provides the following rule on relief: 'if the local law does not provide an effective procedure for obtaining relief from the stay or moratorium, then a court should exercise its discretion to provide such relief where appropriate.' The Global Principles recognise the problem of too wide a discretion in this regard that, as articulated above, might frustrate the reorganisation/liquidation efforts. Therefore, this requires that the exceptions to the stay must be limited and clearly defined.

Principle 17 pertains to the stay and moratorium in a subsequent stage of the cross-border insolvency scenario and provides that, when a court recognises a foreign insolvency proceeding as main proceeding, it should 'promptly grant a stay or moratorium prohibiting the unauthorised disposition of the debtor's assets and restraining actions by creditors'. With respect to reorganisation cases, Principle 17 provides that the stay should allow the continuation of the debtor's business. To this end, a protective approach towards the activity of the business is incorporated in one of the crucial points of the insolvency law: the stay on creditors' actions. Principle 18 regulates the harmonisation of the stays and moratorium in parallel proceedings by providing that 'each court should minimise conflicts between the applicable stays or moratoriums' and, therefore, such courts should actively coordinate their actions.

It must be emphasised, however, that as described in Chapter 5 of this Report, where a process such as the Irish Examinership or the Dutch WHOA is registered under Annex A of the EIR, the recognition obligations will effectively yield a pan-European stay; so, as observed, the relevance of soft law guidance is limited. The remaining questions will concern the cooperation on administration of assets against the backdrop of a stay on enforcement actions.

The Global Principles also consider coordination between insolvency practitioners; Principle 27 provides that when there are parallel proceedings – if that were to occur under the EIR as secondary or territorial proceedings – 'each insolvency administrator should obtain court approval of an action affecting assets or operations in that forum if required by local law'. The second paragraph of Principle 27 expands such coordination duties, by requiring the insolvency practitioners involved to pursue 'prior agreement from any other insolvency administrator as to matters that concern proceedings or assets in that administrator's jurisdiction', with the sole exception of emergency circumstances that would make it unreasonable to do so.

Finally, Principle 29 of the Global Principles provides, in relation to cross-border sales, that when assets are to be sold in a situation where there are parallel proceedings 'courts, insolvency administrators, the debtor and other parties should cooperate in order to obtain the maximum aggregate value for the assets of the debtor as a whole, across national borders'. Principle 29 also provides that the courts involved should approve sales that will maximise the value obtainable from the debtor's assets.

6.3.3 The World Bank Principles: Stay of actions to ensure higher recovery

Arguably, the World Bank Principles also broadly align with the international standards and best practices in this area; Point C5.1 provides that during the period that goes from the filing of the application to the rendering of the court's decision, 'provisional relief or measures should be granted when necessary to protect the debtor's assets and the interests of stakeholders' and that the relevant parties must be notified. Point C5.2 pertains to the unauthorised disposition of the debtor's assets; this should be prohibited after the commencement of insolvency proceedings, while actions by creditors to enforce their rights against the debtor's assets should be suspended. On the scope of the stay, the World Bank Principles provide that it should be 'as wide and all-encompassing as possible extending to an interest in assets used, occupied, or in the possession of the debtor'. This provision is in line with the Good Practice Standard 5.4 of the Asian Development Bank.[30] Finally, point C5.3 pertains to secured creditors and their actions; it provides that 'a stay of actions by secured creditors also should be imposed in liquidation proceedings to enable higher recovery of assets by sale of the entire business or its productive units, and in reorganisation proceedings where the collateral is needed for the reorganisation.'

In doing so, the World Bank requires 'a proper balance' be reached between the creditor's protection and the objective of maximising the value of the insolvency proceeding, both restructuring and non-restructuring. It is worth noting, as articulated above, that the World Bank Principles also expressly recognise the importance of coordination with respect to secured creditors in order to ensure the success of a future reorganisation. The EIR Recast, by contrast, does not; it provides that the opening of insolvency proceedings must not affect the

[30] See Annex III to this Report.

rights *in rem* of creditors (and third parties) in relation to assets situated within the territory of another Member State. This lack of coordination with regard to secured creditors, as already noted in Report 1 of the JCOERE Project, may causes serious problems, particularly in preventive restructuring, and endanger any effort to restructure a viable business given the potential for differential treatment of secured creditors in the Member State of primary proceedings and those in other Member States.[31]

6.3.4 The JudgeCo Principles and Guidelines: Moratorium and agreement from other insolvency practitioners

The JudgeCo Principles deal with the treatment of the debtor's assets in cross-border insolvency cases under Principle 8. This Principle provides that 'insolvency cooperation may require a stay or moratorium at the earliest possible time in each State where the debtor has assets' or if there is a litigation related to the debtor's assets. That said, Principle 8 also provides that the constraints on the parties must be reasonable and that the exception to the stay and the moratorium should be limited and, above all else, well defined. In this regard, Principle 19 of the JudgeCo Principles considers the duties of the insolvency practitioners involved. It provides that, in case of parallel proceedings, the insolvency practitioners involved 'should obtain court approval for any action affecting assets or operations in that forum if required by local law', with the sole exception of a different provision contained in the protocol (if present).

The second paragraph of Principle 19 requires, in any case, that the above-mentioned insolvency practitioners 'seek prior agreement from any other insolvency practitioner in relation to matters concerning proceedings or assets in that practitioner's jurisdiction'. That said, seeking a prior agreement is not required in case of emergency circumstances, which would render such requirement unreasonable. Accordingly, it can be suggested that the combination these of Principles points to the need for a balance between the required coordination and keeping intact the ability of insolvency actors to act rapidly, if necessary.[32]

6.3.5 The CoCo Guidelines: Asset coordination and cooperation between insolvency practitioners

The CoCo Guidelines consider the need for coordination when dealing with the debtor's assets and regulating cooperation between insolvency practitioners (liquidators). In fact, Guideline 12, paragraph 2, requires the insolvency practitioners involved to minimise the conflicts between the different procedures and in particular, to maximise 'the prospects for the rehabilitation and reorganisation of the debtor's business or the value of the debtor's assets

[31] See JCOERE Report 1, Identifying substantive rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations, p. 15. < https://www.ucc.ie/en/jcoere/research/report1/>

[32] Michele Maltese, 'Court-to-court protocols in crossborder bankruptcy proceedings: differing approaches between civil law and common law legal systems' (2013) *International Insolvency Institute*, p. 11, available at https://www.iii/global.org/sites/maltese_michele%20submission.pdf.

subject to realisation' if reorganisation is not feasible. This provision is of considerable interest due to the fact that it directly links the assets' value maximisation to an effective coordination and cooperation between the professionals involved in the different procedures.

Guideline 13 governs the treatment of the debtor's assets in cross-border insolvency situations where a cross-border sale of debtor's assets is concerned. Guideline 13 provides that every insolvency practitioner should seek to sell these assets 'in cooperation with the other liquidators so as to realise the maximum value for the assets of the debtor as a whole'. In connection to this cooperation duty, Guideline 13 provides that if required to act, the courts involved approve such value maximising sales.

6.3.6. The ELI Report: The need for a coordinated strategy

The European Law Institute Business Rescue Report (2017), which is the result of the collaboration between the University of Leiden and the Martin Luther University of Halle-Wittenberg, also addresses the need for coordination between parallel proceedings in a cross-border insolvency case. With specific regard to the insolvency of a group of companies, Recommendation 9.02 of the ELI Report provides that courts, when deciding on the opening of insolvency proceedings concerning a member of a corporate group, 'should verify whether a coordinated strategy is being considered for some or all of the members of the group'. This provision highlights the widely recognised importance of a coordination strategy where different proceedings are concerned and requires the court to verify such a requirement when deciding on a request to open insolvency proceedings.[33]

6.4 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.[34] 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.

As can be seen from the provisions that follow and as evident from the coverage of the EIR and the EIR Recast in the previous chapters of this Report, cooperation and communication are intrinsically connected.[35] Consequently, when regulating the mechanism of cooperation,

[33] Stephan Madaus, 'Insolvency Proceedings for Corporate Groups under the New Insolvency Regulation' (2015) 6 International Insolvency Law Review 235; S Chandra Mohan 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21(3) International Insolvency Review 199. See also Chapter 2 of this Report for a discussion of the motivating factors behind the addition of provisions relating to groups of companies in the EIR Recast.

[34] Leah Barteld, 'Cross- Border Bankruptcy and the Cooperative solution' (2012-2013) 9(1) Int'l L & Mgmt Rev 27, 30.

[35] Stefano Dominelli and Ilaria Queirolo, 'Gli obblighi di cooperazione e comunicazione tra autorità e parti del procedimento fallimentare nel nuovo regolamento europeo sull'insolvenza transfrontaliera n. 2015/848: aspettative e possibili realtà applicative' (2018) 3 Dir comm internaz 719.

the various guidelines and principles also deal with methods of communication that courts and insolvency practitioners should adopt. Therefore, in order to provide a full picture, cooperation and communication provisions will be addressed together.

6.4.1. The Model Law: Cooperation and agreements concerning the coordination of proceedings

As anticipated at the beginning of this Chapter, one of the key elements of the UNCITRAL Model Law on Cross-border Insolvency is its focus on cooperation between courts and insolvency practitioners. Article 25 requires that courts cooperate to the maximum extent possible, both with foreign courts and with foreign representatives. The cooperation required by Article 25 can occur either directly or through an intermediary. That said, in order to simplify this duty, Article 25 provides that the courts are 'entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representative'. A similar requirement is placed on insolvency practitioners involved in a cross-border insolvency proceeding in that they must cooperate to the maximum extent possible, both with foreign courts and foreign representatives (Article 26).

Article 27 of the UNCITRAL Model Law lists some possible means that can be used by courts and insolvency practitioners to implement these cooperation requirements. Under Article 27, cooperation can predominantly be achieved by means of the appointment of 'a person or body to act at the direction of the court' and the 'implementation by courts of agreements concerning the coordination of proceedings'. In the same article, the following additional means of achieving cooperation are listed: the use of communication considered 'appropriate' by the court; the enhancement of coordination when administering the debtor's assets; and 'coordination of concurrent proceedings regarding the same debtor'. This idea of 'an independent person' is reflected in the EIR and also discussed in Chapter 5 of this Report. In fact, this was a method which seemed attractive to members of the judiciary at the second meeting held with the INSOL Judicial Wing in September 2020.

It is worth noting that these points are rather general and do not clarify how, specifically, the actors in the insolvency proceeding should implement the required cooperation. Though also mentioned in the EIR Recast, it is not entirely clear what office or function the independent person would occupy. Would this be a clerk of the court? Or perhaps a third insolvency practitioner? The added value of these provisions is perhaps a harmonisation of the approach taken by the insolvency actors, when required to cooperate.[36] At least the added cost is addressed in the EIR Recast.[37] Most importantly it is not at all clear that these proposals would be acceptable in reality or as a matter of procedural law by either professionals working on any particular reorganisation or any of the courts involved in a cross-border insolvency. As

[36] Felicity Deane and Rosalind Mason, 'The UNCITRAL model law on cross-border insolvency and the rule of law' (2016) 25(2) International Insolvency Review 138, 138.
[37] See Chapters 2 and 5 of this Report.

discussed in Chapter 8 and 9, it would seem that courts, meaning judges, are resistant to imposed rules or guidelines in relation to the procedures or protocols which they adopt. This is also illustrated by the cases discussed in Chapter 4.

6.4.2 The JudgeCo Principles and Guidelines: Communication and precautions

The JudgeCo Principles and Guidelines address the issues of ensuring cooperation between courts and of avoiding potential conflicts with the procedural rights of parties within the countries in which the insolvency proceedings are opened. In this last regard, the major issues seem to involve the fundamental right of the parties to 'equality of arms' set forth by Principle 6 and the requirement, found in many European jurisdictions, to publicly administer insolvency procedures and, more generally, justice. When communicating and exchanging information, courts and insolvency practitioners may be viewed as violating the above-mentioned right, as the requirement of publicity might not be respected. This could happen especially in those situations where the insolvency's actors might discuss urgent matters informally.[38]

Guidelines 7 and 8 of the JudgeCo Principles and Guidelines provide an effective solution to the potential obstacles identified above. Guideline 7 – entitled 'method of communication' – revolves around the need for the courts involved to 'provid(e) advance notice to counsel for affected parties' when communicating with each other,[39] thereby allowing them to have complete knowledge of the documentary situation and to act on an informed basis. Guideline 8 – entitled 'court-to-court e-communication' – gives guidance 'in the event of a communication between the courts (…) by means of a telephone or video conference call or other electronic means', mainly by requiring that counsel for the parties be allowed to participate; that the communications be recorded or transcribed; and that a time and place for communication be set that satisfies both courts.

There is a view that these measures, as a whole, should overcome any domestic, procedural requirement put in place to protect the effective participation of the parties of an insolvency procedure, which may represent the major obstacle to full and integrated cooperation between courts of different Member States.[40] However, as we note in Chapter 3 of this Report, some constitutional provisions require a broader concept of publicity than one confined just to the parties. It is acknowledged that generally the public have a right to know of legal proceedings. Moreover, the nature of insolvency proceedings are such that other stakeholders, not necessarily parties *per se*, have an interest in the outcome.

[38] See also Chapter 3 of this report.
[39] By sending, for example, 'formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings' see Guideline 7.
[40] Bernard Santen 'Communication and co-operation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 ERA Forum 229, 230.

6.4.3 ALI-III Global Principles: The need for informal ways to communicate and cooperate

The Global Principles address cooperation by highlighting the potential and increasing role of protocols and agreements in enhancing effective cooperation between courts and insolvency practitioners.[41] Indeed, having provided that the insolvency practitioners involved in cross-border cases should cooperate in every respect of the case, Principle 26 specifies that 'the use of an agreement or "protocol" should be considered to promote the orderly, effective, efficient and timely administration of the cases'. Principle 26, paragraph 2, then clarifies fundamental issues that should be addressed in the aforementioned protocols, such as the coordination of requests for court approvals of decisions and actions and of communication with the creditors and the other parties involved.

It is worth noting that the Global Principles also recognise the need for faster and less formal ways to communicate and accordingly provide that the protocols should envisage 'timesaving procedures' in order to avoid 'unnecessary and costly court hearings and other proceedings'. If we combine this provision with the 'protective measures' of the JudgeCo Guidelines 7 and 8 mentioned above, it is possible to outline a framework where courts and insolvency practitioners can effectively and legitimately use a less formal tool or process to communicate, exchange information and cooperate. This hypothetical framework can become relevant especially if we consider the fact that, pursuant to the ELI guidelines discussed in section 6.4.5, the insolvency protocols should incorporate the JudgeCo and CoCo guidelines and principles in order to enhance the cooperation in a cross-border insolvency scenario.

Guideline 7(a) of the Global Principles pertains to the methods of communication from one court to another. Pursuant to it, courts can communicate by 'sending or transmitting copies of formal orders, judgments, opinions, reasons for decision (…)' directly to the other court, as long as advance notice to counsel for the affected parties is provided. Point b) of Guideline 7 provides an alternative method, which consists of directing counsel or one of the insolvency practitioners involved 'to transmit or deliver to the other Court copies of documents, pleadings, affidavits and other documents that are filed or to be filed with the Court (…)', provided that counsel for the affected parties is given notice. Finally, Guideline 7, point c), suggests additional methods of communication with the other court by means of a telephone call, video conference call, or another electronic means.

In this last regard, Guideline 8 of the Global Principles requires that, unless otherwise directed by either of the two (or more) courts, counsel for all affected parties should be entitled to

[41] With regard to the role of protocols and agreements between insolvency practitioners and courts in the cross-border insolvency context see Akshaya Kamalnath, 'Cross-Border Insolvency Protocols: A Success Story?' (2013) 2 International Journal of Legal Studies and Research 172, 174 and Paul H Zumbro, 'Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool' (2010) 11 Business Law International 157.

participate in person at such 'e-meetings' and that the communication between the courts should be recorded.[42] Guideline 9 provides the same protective measures in cases of e-communications between the courts and foreign insolvency practitioners, whereas Guideline 10 pertains to the use of joint hearings with the other courts involved.

6.4.4 The CoCo Guidelines: Direct communications and cooperation between insolvency practitioners

As previously stated in section 6.3.6, Guideline 12 of the CoCo Guidelines categorises the cooperation duties borne by the insolvency practitioners involved in a cross-border case as applicable to the coordination of the debtor's assets. Guideline 16 applies the duty to cooperate to the courts involved and requires that they 'operate in a cooperative manner'. In this regard, Guideline 16 advises that the courts consider whether the appointment of an insolvency practitioner in the main proceedings or a co-insolvency practitioner in the secondary proceedings 'would better ensure coordination'.

Guideline 6 applies to the duty to communicate, which is imposed on insolvency practitioners: first, it requires insolvency practitioners 'to communicate with each other directly and as soon as they are appointed' and, secondly, it provides that the insolvency practitioner in the main proceeding 'should always take the initiative to start or to continue communications', thereby clarifying a potential aspect of confusion. By providing a simple and clear criterion, this last provision can help solve potential impasses between different procedures and may also be useful if applied in situations of court-to-court cooperation. Finally, the last paragraph of Guideline 6 requires the insolvency practitioners to respond to the other insolvency practitioners without any delay.

6.4.5. The ELI Report: The inclusions of guidelines and best practices in the protocols

In line with the provisions mentioned in the previous points, the ELI Report stresses the importance of protocols, in order to ensure cooperation in cross-border insolvency cases. In this regard, Recommendation 9.03 specifies that communications and cooperation can take 'any form, including the conclusion of protocols', after requesting that domestic legislators ensure that insolvency practitioners and courts follow the CoCo and JudgeCo Guidelines and Principles.

Pursuant to Recommendation 9.03, the protocol should, at least, include clauses regarding the right of the parties involved in the cross-border insolvency case (insolvency practitioners included) to appear and to access data and information, as well as provisions regulating the communications and coordination between the actors in the different proceedings. It is worth noting, as anticipated above, that Recommendation 9.03 of the ELI Report also considers the

[42] In addition, Guideline 8 of the Global Principles, point c), provides that the copies of the recording should be 'made available to counsel for all parties in both Courts' and be subject to confidentiality.

possibility of including the provisions of the guidelines and principles mentioned above (CoCo and JudgeCo) in the protocol, by means of a specific clause. This last provision reflects, in general, the approach of the ELI Report, which identifies cooperation at all stages of the proceedings as the key element to a successful and value maximising procedure.[43]

Before concluding this section, it must be emphasised that guidelines are exactly that, guidelines and that none of these statements are specific instructions to domestic courts or indeed to practitioners. Other than in the situation where the Model Law has been implemented in legislation, which is rarely the case in member states of the EU, none of the guidelines discussed have legal effect. That is not to say that they will not prove useful to members of the judiciary or indeed practitioners, but it must be remembered that even where the language is couched in somewhat mandatory terms, there is no legal authority behind the statements. Their usefulness would be improved by providing quick summaries and ensuring the language is clear.

6.5 The Mechanism of Notification or Service of Official Documents

Another fundamental aspect of cooperation addressed by the international best practices and guidelines 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.

In this regard, an important advantage comes from the use of new technologies, which can now have a primary role during all the stages of the proceedings.[44]

6.5.1. The Model Law: Notification to foreign creditors

The UNCITRAL Model Law considers the regulation of notification to foreign creditors. Article 14 provides that whenever notification is to be given to creditors within that State according to the domestic insolvency laws, notification must also be given to the known creditors that do not have an address in that country. Thus, pursuant to art 14, 'the court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known'.[45] Art 14 also requires that such notification is made individually, with the exception

[43] Pedro Jose Bernardo, 'Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation' (2012) 56 *Ateneo L.J* 798, 799.

[44] James Spigelman, 'Cross-Border Insolvency: Co-operation or Conflict?' (2009) 83(1) *Australian Law Journal* 44; Bob Wessels and Ilya Kokorin, 'Cross-Border Co-operation and Communication: How to Comply with Data Protection Rules in Matters of Insolvency and Restructuring' (2019) 16(2) *International Corporate Rescue* 98.

[45] See UNCITRAL Model Law, Part I, p. 7.

of circumstances where another form of notification might be more appropriate. In order to reduce costs and save time, the Model Law does not require 'letters rogatory or other, similar formality'. This provision is in line with the general trend toward a deformalisation of communication in the context of cross-border insolvency. Finally, article 14 pertains to the content of the notification of the commencement of proceedings to foreign creditors; it provides that such a notification must indicate a reasonable time for the filing of claims by creditors – including the place for the filing – and whether secured creditors need to file their claims. The notification must also include any other information required by domestic legislation or court order.

6.5.2. ALI-III Global Principles: Electronic notices and service list

With a view to minimising costs and ensuring an effective and rapid notification of the parties involved in cross-border insolvency case, the Global Principles envisage the introduction of a 'Service List'. Guideline 13 provides that the courts can coordinate the different proceedings 'by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction'.

The Global Principles also have the availability of new technologies in mind: Guideline 13 provides that all the notices and materials to be served should be made available 'electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier' to foreign parties. This provision should help in reducing the delays in favour of foreign insolvency actors and add transparency to the proceedings.[46]

Regarding the language to be used in communication, Principle 21 of the Global Principles requires that the insolvency practitioners determine the language in which communications should take place 'with due regard to convenience and the reduction of costs'. In any case, pursuant to Principle 21, the notices should specify their nature and significance using the language that the recipients are expected to understand. Principle 28 pertains to the notice to be provided to the insolvency practitioners involved in a cross-border insolvency case, stating that they 'should receive prompt and prior notice of a court hearing or the issuance of a court order'. Clearly, such provisions aim to ensure the availability of information in relation to, and the participation of all the relevant parties involved in, a cross-border insolvency case.

[46] Bernard Santen 'Communication and co-operation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 *ERA Forum* 229, cit., p. 230

6.5.3. The JudgeCo Principles and Guidelines: The 'sufficient' notice and the online registry

In line with the UNCITRAL Model Law, the JudgeCo Principles apply to the requirements associated with notifying creditors. Principle 18 provides that, if there are foreign creditors in a country wherein an insolvency case is not pending, then the court 'should assure that sufficient notice is given to permit those creditors to have a full and fair opportunity to file claims and participate in the case'. In order to ensure that the creditors are given a fair opportunity, the court should – pursuant to Principle 18 – ask for the publication of the aforementioned notices in the Official Gazette or an applicable online registry of the relevant jurisdiction. Principle 18 also proposes a criterion for the recognition of foreign creditors for the purposes of the notification; 'known foreign creditors' are those expressly listed as creditors in the debtor's business records or those entities or persons whose address is established in such records.

Finally, Principle 20 addresses the issue of notice to an insolvency practitioner involved in a cross-border insolvency case, providing that the court must ensure that the insolvency practitioner 'receives prompt and prior notice of a court hearing or the issuance of a court order, decision or judgment that is relevant to or potentially affects the conduct of the proceeding'. This provision aims to ensure that the insolvency practitioners are given timely notice of all the relevant decisions adopted during the proceeding and, therefore, act in coordinated manner.

6.5.4. The CoCo Guidelines: Notices of court hearings and court orders

The CoCo Guidelines address a fundamental aspect of the exchange of information and the service of documents. Guideline 9 deals with situations where authentication of documents is required and provides that 'methods should be established so as to permit rapid authentication and secure transmission of faxes and other electronic communications relating to cross-border insolvencies'. Pursuant to Guideline 9, this method should develop a common basis for authentication thereby allowing the acceptance of the relevant documents by all the parties involved.

Guideline 17 provides that the notice of court hearings and court orders should be given to each insolvency practitioner 'at the earliest possible point in time where the hearing or order is relevant' to the specific insolvency practitioner. If the insolvency practitioner is unable to attend the hearing, Guideline 17 also provides that the court should invite the insolvency practitioner to communicate her/his observations before the court makes its decision. Finally, pursuant to the final paragraph of Guideline 17, the insolvency practitioners should make their record of the notices received by the court available and update it on a regular basis.

6.6 Conclusion

The description of the guidelines, principles and best practices developed by various international institutions in this Chapter has shown some interesting and important shared trends in the evolution of the core principles that govern the cross-border insolvency context. In this regard, it is worth noting three different common aspects that seem to have a central role. First, 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. For this reason, less formal and direct communications between judges and insolvency practitioners are preferred over cumbersome procedures that cause delays and increase the costs of the insolvency process.

The second aspect, which is connected to the first, is the acknowledged need for participation among the actors involved and the need for appropriate safeguards. Following our engagement with members of the European judiciary, it is not at all clear to us first, that there is much in the way of formal cross border activity in terms of litigation, second that there is much knowledge of these guidelines and finally and most importantly, that even following engagement with the guidelines, the increasingly informal nature of the exchange of information – between the representative and judges of the different proceedings envisaged by some of these guidelines would be acceptable.

Before concluding it is worth noting that the potential for new technologies is highlighted in almost every collection of guidelines and best practices, with a view to enhance the exchange of information and the communication between the insolvency practitioners and the courts.

Finally, on a more general note, it is also worth mentioning the strong focus on the need for preservation of the going concern of insolvent debtors – or those just facing financial difficulties – that is set out in almost every international report collecting guidelines and best practices in the last decade. This fundamental point, highlighted by the PRD and domestic legislation across member states, and in addition by the analysis of many scholars, is addressed in the above-mentioned guidelines, mainly with respect to the central role played by coordination and cooperation, in order to achieve a value maximising restructuring process. This is doubly important when considering the incoming preventive restructuring processes under the PRD, given their potential complexity, inclusion of sometimes controversial provisions, and the scope for key differences between the procedures implemented in different jurisdictions. Despite the attempts to provide guides to how cooperation might take place, JCOERE would take the view that the obstacles described in Chapters 3 and 5 are significant. This analysis is returned to in our concluding chapter.

The next Chapter will examine how another key federalised jurisdiction has managed issues of court-to-court cooperation. The United States has been a key player in examples of interstate and international cross-border insolvency for decades. Chapter 7 will therefore examine its nature as a federalised jurisdiction in the context of insolvency and restructuring,

drawing examples from both state-to-state cases requiring co-ordination as well as how similar problems are handled in an international cross-border insolvency context. The latter circumstances often rely on the rules of the UNCITRAL Model Law (implemented in Chapter 15 of the United States Bankruptcy Code) as has been discussed in this Chapter. Finally, Chapter 7 will discuss the United States' courts effective use of bespoke protocols and the advantages and disadvantages that have arisen to observe lessons that could be leaned in the context of the incoming PRD frameworks and their potential use of protocols over pre-existing guidelines and rules, or indeed, the obligation to co-operate under the EIR Recast given the choice of Annex A inclusion as discussed in Chapter 3 of this Report.