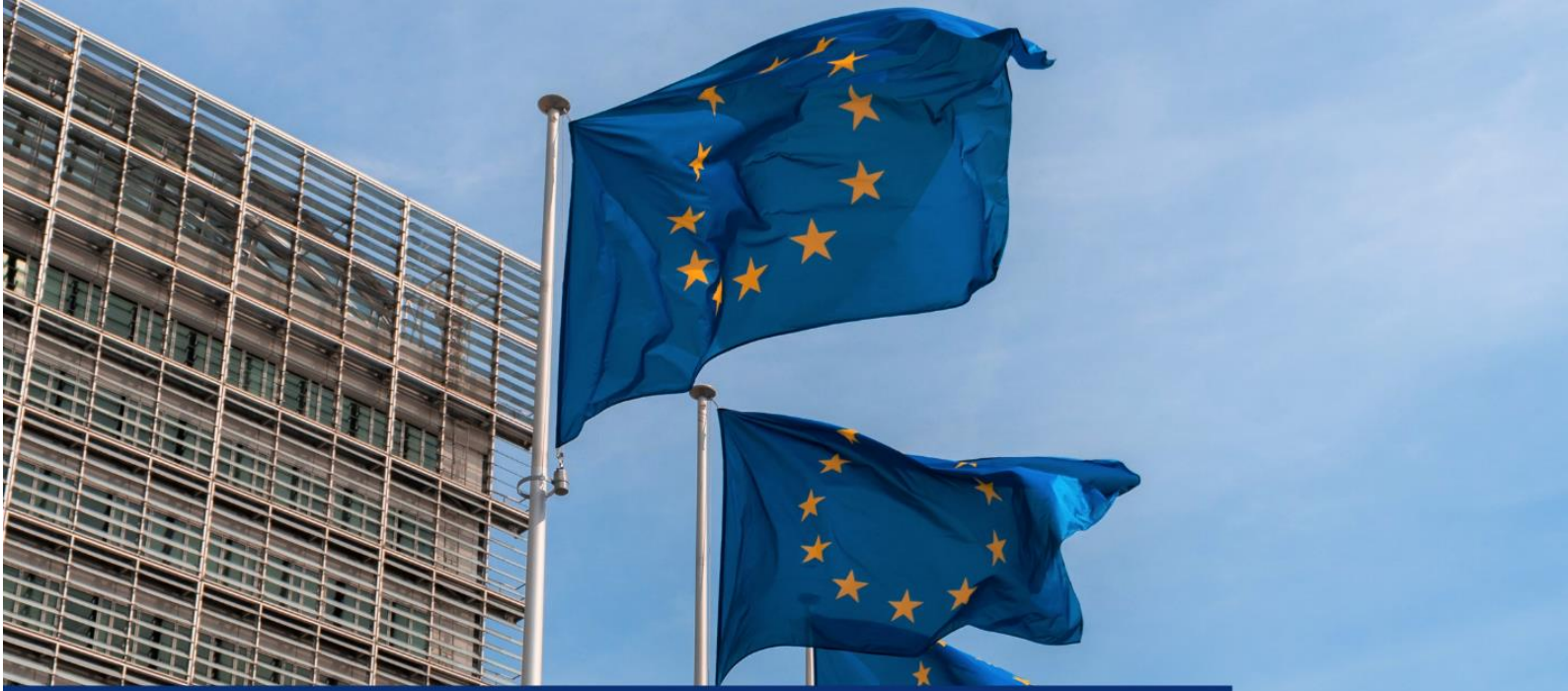

JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 2

Report on Judicial Co-operation and European Harmonisation and Integration in Preventive Restructuring

Published September 2020

https://www.ucc.ie/en/jcoere/

Project no 800807 is funded by the European Union's Justice Programme (2014-2020)

Judicial Co-operation Supporting Economic Recovery in Europe (JCOERE)

DG Justice Programme Project No. 800807

Report 2: Report on Judicial Co-operation and European Harmonisation and Integration in Preventive Restructuring

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

Table of Contents

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

Acknowledgments

We extend our sincere thanks to all of our partner teams and their leaders, Dr Paul Omar and Caroline Taylor at INSOL Europe; Professor Lorenzo Stanghellini, Professor Andrea Zorzi, Dr Iacopo Donati, and Niccoló Usai at UNIFI; and Judge Nicoleta Nastasie, Dr Cristian Drăghici, Professor Ioana Panc, Professor Smaranda Angheni and Ioana Duca at UTM for their unyielding support and hard work on the JCOERE project. In particular, we are extremely grateful to the project team at UNIFI for their skilled research and work on chapter 6 of this report.

We are also extremely grateful to our Advisory Board members, the Honourable Judge Michael Quinn and his judicial assistant Lorna Reid, Adjunct Professor Jane Marshall, Professor Gerry McCormack, Dr Emilie Ghio, Declan Walsh and Judge Anthony Collins, all of whom have generously provided their time and assistance to the project and the production of Report 2.

An important aspect of the research for Report 2 was facilitated through the distribution of a judicial survey, the completion of which would not have been possible without the generous assistance of a number of people in facilitating contact with European judiciary.

The JCOERE Project Team would like to express its gratitude to the Honourable Judge Michael Quinn of the Irish High Courts and Lorna Reid for facilitating the contact with both the INSOL Europe Judicial Forum and the group of Irish judges hearing commercial cases in Ireland.

We would also like to express our gratitude to Professor Lorenzo Stanghellini of Università degli Studi di Firenze for facilitating the contact with the network of Italian Judges.

We would also like to express our gratitude to Judge Nicoleta Mirela Nastasie of the Bucharest Tribunal for facilitating the contact with the network of judges among the Romanian Magistracy.

We are extremely grateful to all of the judges from the INSOL Europe Judicial Forum, the Irish Judiciary and the Italian and Romanian Magistracies who took the time to complete the

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

survey. We were delighted with the engagement that we received from you and your contribution to the project cannot be understated.

Finally, we extend our sincere gratitude to our national contributors Dr Emilie Ghio (France), Gert-Jan Boon (The Netherlands), Dr Antonio Sotillo Marti and Javier Vercher, with additional input from Nuria Bermejo and Professor Francisco Garcimartin (Spain). Dr Susanne Fruhstorfer (Austria), Sylwester Zydowicz with additional input from Michał Barłowski (Poland), Professor Dr Stephan Madaus (Germany), and Assistant Professor Line Langkjær (Denmark) who have responded so generously to our follow up queries from the research pertaining to Report 1 and the accompanying questionnaire.

Professor Irene Lynch Fannon, Principal Investigator, Dr Jennifer LL Gant, Post-Doctoral Researcher, Aoife Finnerty, Research Assistant and Molly O'Connor, Project Manager

I. Chapter 1: Judicial Co-Operation and Economic Recovery in Europe (JCOERE) Report 2: Introduction

1.1 Introduction

The JCOERE Project is focussed on the concept of co-operation[1] between courts and between courts and practitioners across Member States of the European Union. The specific subject matter of the JCOERE Project concerns the obligations imposed by the European Insolvency Regulation[2] on courts in European Member States to co-operate in cross-border insolvency matters. Additional obligations are placed on insolvency practitioners to co-operate. Furthermore, in light of new initiatives in the area of corporate restructuring[3] the JCOERE Project focussed on this important policy initiative and hypothesised that the nature of the rules typically involved in preventive restructuring frameworks might present further obstacles to co-operation between courts. These rules were both substantive and procedural in nature. Because the JCOERE Project focussed on co-operation and communication obligations contained in the European Insolvency Regulation (Recast) it was appropriate to choose a type of insolvency process covered by this Regulation.[4] However, many of the issues raised in this part of the Project and described in this second Report are equally applicable to a broader range of initiatives concerning judicial and court co-operation in the European Union. This broader issue is fundamental to continued European integration. Where an

[1] Throughout this report, it should be noted that the spelling of co-operate (cooperate) and co-operation (cooperation) will alternate. This is because they are used interchangeably within the documentation and literature that we have used and referred to throughout the Report. For example, Chapter 2 utilises 'cooperate', as that is the spelling found in the EIR Recast. The JCOERE Project itself, by contrast and as articulated above, has 'co-operation' in its title. This is also true for words such as co-ordinate (coordinate) and co-ordination (coordination).
[2] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19. [Hereinafter EIR Recast]. See a full discussion of the EIR Recast in Chapter 2.
[3] European Commission, 'Recommendation of 12 March 2014 on a new approach to business failure and insolvency' [2014] OJ L 74/65, COM (2014) 1500 final.
[4] As we examined how Member States approached preventive restructuring in their domestic frameworks both prior to and in anticipation of implementation of the Preventive Restructuring Directive 1023/2019 it became apparent that some domestic legislative processes aimed at corporate rescue were already covered by the European Insolvency Regulation (Annex A) whilst others were not. This in effect means that some preventive restructuring frameworks in Member States will benefit from co-operation obligations in the Regulation, others will not. It is also important to note that the Preventive Restructuring Directive itself allows Member States the choice of whether or not to include the implementing process in Annex A of the Regulation. See Recital 13 and 14 of the PRD. See further Lorenzo Stanghellini and Andrea Zorzi, 'Coordinating the Prevent Restructuring Directive and the Recast European Insolvency Regulation' *Eurofenix* (Autumn 2019) 22.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

obligation is imposed on courts to co-operate the obvious question is whether there is a specific obligation imposed on members of the judiciary specifically to co-operate. This question is answered affirmatively by some commentators but this report takes the view that this issue is open-ended. (Chapters 3 and 5).

1.2 The European Project and Judicial Co-operation

At the time of writing the issue of corporate and business insolvency and rescue has unfortunately become acute due to the COVID 19 pandemic. The broader public health and economic threats have yet again raised high level issues concerning the nature of the European project. As President Emmanuelle Macron has observed, the debate focusses on whether the European Union is simply a market project or a political project[5] and has stated *inter alia* that: 'If the European Union is to succeed as a political project sustained and continued attention must be paid to issues of co-operation and co-ordination in legal spheres.'

1.3 A European Judiciary

While Chapter 4 of this Report considers matters relating to legal and judicial culture in detail, this section will briefly consider the question of whether there is a distinctive European legal tradition or culture or alternatively if this is not the case there is a real aspiration to create such a culture. This is the context in which co-operation obligations will operate.

As is commonly known, the European Union sets out membership criteria for each accession state which are set out in the 1992 Treaty of Maastricht (Article 49).[6] A subsequent declaration was made in June 1993 by the European Council in Copenhagen[7] which led to the denomination of these more detailed criteria as the 'Copenhagen criteria.' The criteria address three areas that form the basis of negotiations with a particular candidate state, namely the political, economic and legislative areas. These areas are used to guide accession states towards EU membership. The legislative criteria focus on what are called 'rule of law' issues that are in turn governed by the Rule of Law Framework.[8] The Framework was introduced by the European Commission in March 2014 and has three stages, namely a Commission Rule of Law Assessment, a Commission Rule of Law Opinion and a Commission Rule of Law Amendment.[9] The official view is that the entire process is based on a continuous

[5] Roula Khalaf, 'Transcript, Emmanuel Macron: 'We are at a moment of truth' (English)', *Financial Times* (Paris, April 14th, 2020) <https://www.ft.com/content/317b4f61-672e-4c4b-b816-71e0ff63cab2> [Last accessed April 30th, 2020].

[6] Council Treaty of Maastricht on European Union [1992] OJ C 191/1, Article 49. See further accession criteria explained at: European Commission, 'Conditions for Membership' (06 December 2016) <https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en> [Last Accessed April 27th, 2020].

[7] European Council, 'Conclusions of the Presidency, European Council in Copenhagen, 21 and 22 June 1993' (1993) < https://www.consilium.europa.eu/media/21225/72921.pdf>. [Last Accessed 27 April 2020].

[8] European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 0158 final. Venice Commission of the Council of Europe, 'Rule of Law Checklist', CDL-AD (2016)007.

[9] This is explained in a graphic attached to the European Commission Press Release regarding the position of Poland below.

dialogue between the Commission and the Member State concerned, with the Commission keeping the European Parliament and Council informed.

1.3.1 Enforcing the Copenhagen criteria

When agreed in 1993, there was no mechanism for ensuring that any country that was already an EU Member State was in compliance with these criteria. However, arrangements have now been put in place to police compliance with these criteria, following the 'sanctions' imposed against the Austrian government of Wolfgang Schüssel in early 2000 by the other 14 Member States' governments.[10] This process can end with the invocation of Article 7(1) of the TFEU which was threatened in relation to Poland some years later.[11]

More recently the Commission took action in 2016 and 2017 against Poland in relation to the treatment of members of the judiciary. In its statement on the 26th July 2017[12] it stated that the reform of the judiciary in Poland 'amplifies the systemic threat to the rule of law in Poland already identified in the rule of law procedure started by the Commission in January 2016.' The Commission went on to request that the Polish authorities address the identified problems within a month of this decision and particularly requested the Polish authorities 'not to take any measure to dismiss or force the retirement of Supreme Court judges.' The Commission stated that it was ready to implement 'the Article 7(1) procedure'[13] – a formal warning by the EU that can be issued by four fifths of the Member States in the Council of Ministers.

At the time a specific connection was made between this issue, the rule of law generally, and the importance of an independent judiciary as an essential precondition for EU membership. The statement of the Commission President Jean Claude Juncker at the time emphasised that a system which included the ability of a state to dismiss judges at will could not operate in the EU, noting that: 'Independent courts are the basis of mutual trust between our Member States and our judicial systems.' In other words, a commonly created judiciary is essential to mutual trust between Member States and obviously to detailed co-operation. Vice President Franz Timmermans set out the issue even more explicitly, describing that the courts of each Member State, in this case the courts of Poland, are expected to provide an effective remedy in case of violations of EU law, in which case they act as the 'judges of the Union.' This statement sets up an interesting situation whereby Member States have their own

[10] See further, *Schüssel v Austria*, Ap no. 42409/98 (ECHR 21 February 2002). See also European Parliament, 'Motion for a Resolution on the Political Situation in Austria' (2 February 2000) B5-0101/2000.
[11] See further below.
[12] European Commission, 'Press Release: European Commission acts to preserve the rule of law in Poland' (Brussels, 26 July 2017) < https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2161>. [Last Accessed 27 April 2020].
[13] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Article 7(1). [Hereinafter TEU]. Article 7.1 of the Treaty on European Union provides for the Council, acting by a majority of four fifths of its members, to determine that there is a clear risk of a serious breach by a Member State of the common values referred to in Article 2 of the Treaty (see Annex II). The Commission can trigger this process by a reasoned proposal.

independent system for appointing judges, but once appointed judges and courts become in some way judges of the European Union.

1.3.2 The Tampere Council

The vision for further integration of the European Union was underpinned by the holding of the Special Council meeting in Tampere Finland in 1999 addressing the need to create a 'European Area of Justice'. Amongst the milestones articulated by the Council the following statement is made regarding the mutual recognition of judicial decisions at Article 33:

> Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.[14]

The Tampere Council provided a platform for the development of mutual recognition of judgements and consequent co-operation between judicial and administrative authorities in Europe. Many areas of law ranging from criminal law, to family law, to commercial law are now subject to specific rules regarding co-operation as between Member State courts in different areas of law.[15]

1.4 Co-operation, Trust, Recognition, and Harmonisation

The idea of co-operation is recognised as being underpinned by concepts such as trust in and recognition of member state legal systems in addition to the pursuit of a harmonisation agenda.[16] The levels of harmonisation may vary as we have seen in relation to the doctrinal part of the JCOERE project. Combining all four elements will lead to integration of the European Union, but no assumptions are made in this project as to the optimal levels of integration. When the JCOERE Project focussed on preventive restructuring frameworks in Report 1 it became apparent that there were strong underlying differences regarding policy and implementation of rescue processes for corporations and businesses in Europe. Report 1 of the JCOERE Project demonstrated that there were significant differences between policy makers and thought influencers (academics) across the European Union on the theory of preventive restructuring. In surveying 11 jurisdictions within the EU, benchmarked against the newly passed preventive restructuring directive,[17] it was clear that there was also significant

[14] European Council, 'Conclusions of the Presidency, European Council in Tampere, 15 and 16 October 1999,' (1999) <https://www.europarl.europa.eu/summits/tam_en.htm#c?textMode=on> [Last Accessed 27th April, 2020].
[15] See for example European Commission, 'Compendium of European Union legislation on judicial cooperation in civil and commercial matters (2018 Edition)', (European Commission, 19 July 2019).
[16] This is also addressed in the context of the text of the European Insolvency Regulation in Chapter 2.
[17] Council Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency

variation in existing processes. Furthermore the PRD itself allows for continued variation within Member States ranging from what this Project has termed robust restructuring processes, exemplified by the use in practise of the English Scheme of Arrangement processes and the Irish Examinership process (based on the US Chapter 11 process), to much less aggressive restructuring.[18] The EIR Recast recognises the reality of 'widely differing substantive laws' in the insolvency laws of Member States.[19] At the same time however, the EIR Recast also expresses the aspiration that harmonisation projects will successively bring domestic frameworks together, thereby underpinning the elements necessary for further co-operation. Nevertheless, as we have seen in Report 1, the PRD expressly supports widely differing variations in Member State legislative frameworks with the provision of a range of choices allowing for significant variations in types of restructuring processes.

1.4.1 Co-operation and the EIR Recast 2015

Whilst Chapter 2 of this Report will outline the terms of the EIR-Recast in relation to co-operation obligations, Chapter 5 will explore some case law on how this may operate. However, in the context of this Chapter it is worth emphasising how the obligations imposed in the specific insolvency regulation are based on Article 81 TFEU regarding judicial co-operation in civil matters with cross-border implications.[20] Furthermore this specific obligation is based on the even broader principle of sincere co-operation outlined in Article 4(3) TFEU.[21]

Despite these observations and indeed European aspirations, our empirical observation is that court-to-court co-operation is a matter with which members of the European judiciary are not familiar. Even though we certainly found that there was a general understanding of recognition provisions incorporated in the Regulation and in the EIR- Recast, there was much less experience, if any of co-operation during the hearing of a case, or indeed expectation that such an issue would arise.[22] However, the specific co-operation obligations are relatively new, having been introduced in the EIR Recast which although passed in 2015 only began to apply on 26 June 2017 (in accordance with art 92) and so it is possible that discussion and consideration of these issues will become more common over time.[23]

---

and discharge of debt, and the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18. [Hereinafter Preventive Restructuring Directive or PRD].

[18] See Chapter 3 below for further categorisation of the Member States surveyed.

[19] EIR Recast, Recital 21.

[20] See further Renato Mangano, Bob Wessels, Reinhard Dammann, 'Secondary Insolvency Proceedings (Art 34-52), in Reinhard Bork and Kristin van Zwieten (eds) *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).

[21] See the discussion by Dominik Skauradszun and Andreas Spahlinger, 'Chapter III Secondary Insolvency Proceedings, Articles 40 – 44', in Moritz Bninkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019).

[22] Discussion at the INSOL Judicial Wing, INSOL European Annual Congress, held in Copenhagen, September 26th, 2019. See further Chapter 8 of this Report.

[23] Interestingly some commentators assumed that there was an implied obligation to co-operate under the general schema of recognition and enforcement in the original 2000 Insolvency Regulation. See Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016), at para 8.402. See also the cases that are discussed in Chapter 5 of this report.

1.5 JCOERE Project Summary to Date

Before considering the nature and development of judicial and court co-operation in the European Union, this section will summarise the research of the JCOERE Project to date. As noted above this concerns the development of the theory and law regarding preventive restructuring and rescue within the European Union. In our first Report we described the debate within the Member States regarding the concepts which are fundamental to restructuring. These concepts were explained in an academic context in Chapter 4 of our first Report, relying heavily on commentary from US academics familiar with Chapter 11[24] type restructuring processes. Our first Report demonstrated the heated nature of the debate which is taking place in European academic circles triggered by the passing of the PRD.

Second, we concluded that the academic debate has clearly influenced the development of the PRD itself (given that the Commission-DG Justice established and consulted with a range of academic commentators- Commission Group of Experts on restructuring and insolvency law (E03362), in addition to reflecting pre-existing preventive restructuring frameworks in various Member States including for example Ireland's examinership, the Italian processes and the French *sauvegarde*. The various iterations of the PRD as described in Chapter 5 of the first JCOERE Report underline this. The contribution of various academic projects including the CODIRE[25] project to the development of the PRD is also important.

Third, in picking some controversial provisions in preventive restructuring we pursued the hypothesis that court-to-court co-operation would be challenged by the very nature of restructuring. We saw that the intellectual liveliness of the academic debate was both an influence in terms of continued divergence but also reflective of quite divergent approaches to restructuring leading up to, and following, the passing of the PRD. Some of this divergence also arises from the challenge of matching quite diverse legal systems with a harmonising piece of legislation. It was clear that even in terms of terminology there are misunderstandings which we highlighted in Chapter 2 of the first Report.

In addition, as we surveyed different state responses to restructuring it became clear that disagreement and lack of clarity was not only limited to terminology but also existed in relation to key concepts.[26] Key concepts included what is termed 'the threshold question', namely the question of which companies (those which were tending towards insolvency and / or those which were insolvent but not formally declared to be) could avail of a restructuring process; the application of a stay or moratorium to other creditors; the treatment of creditors

[24] Title 11 of the US Federal Code concerns Bankruptcy Law. Chapter 11 of Title 11 concerns the restructuring process known by the same name. For detail on Chapter 11 of the US Federal Bankruptcy Code see: US Courts, 'Chapter 11 – Bankruptcy Basics' (*United States Courts)* <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [Accessed April 1st, 2020].

[25] Lorenzo Stanghellini, Riz Mokal, Christoph G. Paulus, Ignacio Tirado (CODIRE Project), *Best practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer, 2018).

[26] See Renato Mangano, on legal certainty being a key element underpinning co-operation: 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 *IIR* 314.

throughout the process in relation to pre-existing priority;[27] and approval processes. We concluded that even following implementation of the PRD divergence would persist even in relation to these most basic concepts, aggravated in this context by extensive scope within the PRD for differential implementation of its provisions.

Fourth, the peculiar interplay between the EIR Recast and the PRD and other restructuring processes raises a range of questions for the potential for mutual recognition under the EIR Recast, let alone co-operation. We will expand on this in this Report.

1.6 Framework of the Second Report

The following Chapter 2 considers the evolution of the EIR Recast with particular emphasis on co-operation and co-ordination obligations imposed on courts and on insolvency practitioners.[28] Our focus is on corporate rescue. The Regulation addresses obligations to co-operate in relation to insolvency processes affecting a single debtor, in our case a single corporate entity, but goes on to describe similar obligations in relation to corporate groups.[29] In Chapter 3 the Report will return to our survey of the Member States to firstly place substantive differences in the broader context of judicial and court co-operation and secondly to describe what we broadly define as procedural rules that present obstacles to court-to-court co-operation. This Chapter will be supported by information gathered in the second half of Part III of the JCOERE Questionnaire distributed during the first phase of our research. Accordingly, in Chapter 3 of this Report, we will combine our assessment of the level of disagreement regarding key concepts and substantive rules with our discussion of procedural rules to indicate the potential challenges to co-operation.

1.6.1 Engaging with the European Judiciary

During the JCOERE Project we have been fortunate enough to have access to the Judicial Wing of INSOL Europe. We first met the Judicial Wing at the INSOL Europe Annual Conference in Athens in 2018 where an initial presentation of the Project was made and greeted with considerable interest from members of the judiciary present. The presentation covered both the expected enactment of the PRD (which was passed the following June in 2019) and the idea of court-to-court cooperation and the consequent obligations imposed to co-operate which is found in the EIR Recast 848/2015. At that time the members of the judicial wing were extremely interested in engaging with the Project. In fact, the concept of judicial co-operation in insolvency processes was also the subject of a presentation by members of the judiciary at

[27] For a discussion on APR V RPR, see Irene Lynch Fannon, ''An Irish Perspective on the Cram-down provisions in the Preventive Restructuring Directive 1023/2019 EU, Guest Editorial' (2019) 27(3) *International Insolvency Review* 1; Stephen Lubben, "The Overstated Absolute Priority Rule" (20 March 2015), available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581639>; Riz Mokal, "The New Relative Priority Rule" (paper presented at the International Insolvency Institute, 17 June 2019, slide 4). This point was repeated by Mokal at the INSOL Europe Academic Forum, Copenhagen 25th and 26th September, 2019). See further Chapter 4 of this Report.

[28] EIR Recast, Recital 20 and Articles 41-44.

[29] *idem*, Recitals 53, 54 and 61 and Articles 56-61.

the main INSOL Europe Congress held in the following days in Athens. At that point, the judicial members on the panel expressed some reservations about the burden of being obliged to co-operate in cross-border insolvency cases.[30] Practical difficulties were also discussed including language barriers and knowledge of Member State processes. In addition, in terms of protocols facilitating co-operation, a matter which is the subject of Chapter 6 of this Report, the participating members of the judiciary expressed a preference for developing protocols in which such co-operation could take place on a case by case basis,[31] views which are also reflected in the Responses to the Judicial Survey discussed in Chapter 8.

At the second meeting in which JCOERE presented its findings to the INSOL Judicial Wing, this time at the INSOL Europe Annual Congress in Copenhagen, the JCOERE Project was well advanced. At a special meeting the JCOERE Project presented a case study based on an Irish examinership case.[32] At this meeting the views of the members present were that once the process was covered in Annex A of the Regulation there would indeed be co-operation. However, practical barriers to co-operation were raised, in particular, the difficulty of accessing information on other member state's domestic processes. In some jurisdictions for example, judges were directed to specific, approved sources of information, whereas in other jurisdictions this process was considerably more open-ended. As it happens, one of the final tasks of this Project is to create a database of cases for members of the judiciary to access. In addition, language and equivalence of legal terms and concepts was also considered an issue.

In the latter part of the Project a judicial survey has been distributed regarding knowledge of processes and responses to obligations to co-operate and calls for co-operation. In particular, the survey required information on awareness of existing protocols on co-operation. All of this is discussed in both Chapters 6 and 8 of this Report.

The JCOERE project has been invited to present its findings at a virtual meeting of the INSOL Judicial Wing in September and has been accepted to present an open panel to the Society of Legal Scholars (again to be held virtually this year) on differences in judicial reasoning in European courts. Finally, all going well the JCOERE project will conduct its final event live in Dublin in November 2020.

1.6.2 Common and Civil Law cultures

During the Project we also became aware of continuing differences between jurisdictions regarding judicial function broadly described. Lawyers from a common law tradition place great emphasis on the role of the judicial branch in interpreting legislation. It has always been part of the accepted tension within the European Union that there was some difference

[30] See proceedings of the INSOL Europe Annual Congress, Athens, 2019. INSOL Europe, 'Past Events: INSOL Europe Annual Congress 2018: Athens, Greece' (*INSOL Europe* 2018) < https://www.insol-europe.org/events/past_events/0/start_date/asc/2018> [Last Accessed April 27th 2020].
[31] This seems to reflect experience of actual cases as described in Chapters 3, 5 and 7 of this Report.
[32] These documents are available on the JCOERE website. <www.ucc.ie/en/jcoere>, and in Annex I of this Report.

between common law countries within the EU[33] and civil law countries (which represent the majority of Member States) on the scope of judicial discretion, although this difference was not considered to be generally significant. To our surprise, however, this difference emerged in discussions surrounding the PRD, pre-existing domestic restructuring processes and the role of the courts. Civil lawyers expressed distrust of the role of courts as described by their common law colleagues as arbiters of technical evidence regarding the viability of an enterprise,[34] described the development of tests of fairness in domestic restructuring frameworks as being 'random' [35] where common lawyers described a case by case development of these tests. In one conference a commentator described the role of the US courts as 'capricious' in interpreting the terms of Chapter 11.[36] We consider these ongoing differences arising from legal culture in Chapter 4.

1.6.3 Differences in qualification and training

In addition, the creation of a European judiciary- a phrase which has emerged in European policy documents- is quite a challenging project given differences in training, practical backgrounds and cultures. We return to these ideas in Chapter 4. In the meantime, it is worth noting that the EU continues to monitor judicial functions generally within the EU as a whole, issuing documents such as the EU Justice Scoreboard for public consideration. In preliminary remarks in the 2019 edition of this document Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality states that:

> We all should share the same objective of improving our European judiciary, as without independent and efficient justice systems, there can be no rule of law, no trust from citizens, and no business and investment-friendly environment.[37]

1.6.4 Independence

The independence of the judiciary is one of the key concepts addressed in the Justice Scoreboard. Interestingly, scores in relation to the perceived independence of the judiciary amongst companies illustrate that Ireland and the Netherlands (both with proactive rescue

[33] England and Wales, Northern Ireland within the UK (excluding Scotland) are traditionally described as common law countries. England and Wales being a particularly dominant jurisdiction insofar as corporate rescue was concerned during the recession from 2007-2012/13. Similarly, the Republic of Ireland is a common law jurisdiction with a written Constitution. Cyprus is a third common law jurisdiction within the EU and Malta a final jurisdiction whose laws have roots in common law and civil law combined.

[34] Tomáš Richter, 'Negotiating a restructuring plan: confirmation, cross-class cram-down and valuation' (Paper presented at ERA Conference, Trier, 7 November 2019).

[35] Discussions at YANIL arising from the delivery by Aoife Finnerty (JCOERE) of a paper on the Irish Examinership Process entitled 'Preventive Restructuring – Is Ireland a leader in the EU?' (YANIL Conference, Copenhagen, 24 September 2019).

[36] Observations by Nicolaes Tollenaar at the ERA Conference in Trier, November 2019. Nicolaes W.A. Tollenaar, 'The concept of a restructuring – the underlying economic and legal principles' (Paper presented at ERA Conference, Trier, 7 November 2019).

[37] See for example European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. This is the 7th edition of this document.

processes) score highly,[38] the UK a little less so. Cyprus as a common law country scored well below these figures.[39]

1.7 The Judiciary and Cross-border Insolvency Co-operation

However, as the Project continued, and our engagement with members of the judiciary and the practising communities increased, more interesting questions arose. For the main part these focussed on the presence of any formal types of co-operation, the frequency of these issues arising in reality, and how the issue of co-operation or otherwise was pre-empted in a number of different ways. These developments will lead to a consideration of the obligations themselves in the body of this Report and whether there is actually any need for the imposition of formal obligations, such as those present in the EIR Recast. Chapter 5 of this Report highlights some of these issues through a discussion of case law which, in turn describes real commercial situations where these issues have arisen. As we progressed in our research, we realised the nature of co-operation in EU insolvency matters remains unclear. It seems that a lot of assumptions have been made regarding this matter which will be explored further as case law develops into the future. That said we are conscious of the fact that the EIR Recast (with its enhanced co-operation obligations) is a relatively new piece of legislation, dating back only 3 years from the time of the beginning of the project in 2018 and so perhaps it is too early to say what its real effects are, or indeed how these enhanced obligations to co-operate will be interpreted over time, particularly in the even newer context of a pan European preventive restructuring framework.

1.8 Co-Operation Guidelines, Examples, and Experience

In keeping with our original research agenda (as indicated to the EU Commission DG Justice) we will also consider awareness of, and the application of, existing best practice guidelines for cooperation in cross-border insolvency cases. Chapter 6 will provide an account of these current existing guidelines on co-operation in cross-border insolvency cases, particularly those applicable in the European sphere. Chapter 6 will also explore how co-operation is envisaged under the UNCITRAL Model Law which includes provisions on co-operation that are similar to the EIR Recast. Chapters 5 and 8 of this Report will include information on judicial awareness and use of these guidelines gleaned from our engagement with members of the European judiciary through the Judicial Wing of INSOL Europe.[40]

[38] *Ibid* at p. 45. In Ireland 30% rated judicial independence as very good with 70% as fairly good. In the UK these figures were 20% and 60% approximately. The Netherlands the figures were 25% and 73% approximately. Other common law countries such as Cyprus scored lower with 12% and just over 50% scoring very good and fairly good perception of judicial independence.

[39] This is also interesting as Cyprus introduced a rescue procedure which is similar to Ireland's examinership process which has been judged a failure. See further Kayode Akintola and Sofia Ellina, 'The Use and Abuse of Corporate Insolvency Rescue Procedures: A Contextual Evaluation of the United Kingdom and Cyprus' in Jennifer L. L. Gant (ed), *Party Autonomy and Third Party Protection in Insolvency Law* (INSOL Europe 2019) 137-154. See generally Michael Peel, 'Moscow on the Med: Cyprus and its Russians' *Financial Times* (Limassol and Nicosia, May 15th, 2020), and see further Council of Europe, *Anti-money Laundering and Counter-terrorist Financing Measures in Cyprus, Fifth Round Mutual Evaluation Report December 2019* Moneyval (2019) 27.

[40] Materials of relevance, which were presented at these meetings, are attached in an Annex to this Report.

Chapter 7 will then give an insight into how the United States, as a federalised jurisdiction similar in some respects to the structure of the EU, deals with interstate insolvencies, particularly with regard to forum determination and cross-border case coordination. The latter of these two aspects will mainly explore how coordination occurs often through bespoke protocols created on a case-by-case basis.

The final substantive Chapter 8 of this Report will present our findings of a survey distributed among three judicial focus groups in English, Italian, and Romanian. The purpose of this survey was to determine the experience of members of the European judiciary with both court-to-court cooperation in cross-border cases and their awareness and utilisation of the guidelines discussed in Chapter 6.[41]

The final Chapter will then offer our conclusions and reflections on the content of this Report.

1.9 Chapter 2: Transition

The next Chapter will give an exposition of the European Insolvency Regulation- Recast 848/2015 applicable from 26 June 2017[42] developing from the original Regulation 1346/2000[43] It provides an explanation of the policy and regulatory framework within which the obligation placed on courts to co-operate arises. It will focus in particular on the evolution of the co-operation obligations under both versions of the EIR, including how the EU views the meaning of judicial co-operation and what kinds of actions are expected or recommended in this area. These obligations will be examined in terms of both the recitals and the articles within which they are seated and how they developed between the two Regulations, along with a close analysis of the same provisions for corporate groups.

[41] A copy of this survey distributed through domestic networks of our partner researchers UNIFI, who accessed an Italian network of insolvency judges, UTM who accessed those in the Romanian Magistracy having experience in hearing insolvency cases, and Ireland and through the Judicial Wing of INSOL Europe is attached in an Annex II to this Report.

[42] EIR Recast, art 92.

[43] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1.

II. Chapter 2: Court-to-court and Judicial Co-Operation in the European Union

2.1 Introduction to Chapter 2

In Chapter 3 of Report 1 we considered the evolution of the European Insolvency Regulation[1] and the subsequent European Insolvency Regulation Recast (848/2015)[2] from various conventions and discussions which had taken place since the 1960s in the context of further integrating the European Union. During those early decades, but particularly during the period immediately pre-ceding the adoption of the EIR Recast, the discussion between universalism and territorialism which had taken place in the United States academy sparked the interests of some academics on this side of the Atlantic.[3] However, no EU policy documents proactively engage with this theoretical debate[4] and it is clear that the incrementalist approach[5] was adopted in the European Union, thereby avoiding a binary classification of approaches to issues of recognition and cooperation.

This Chapter will trace the evolution of the EIR Recast and, in particular, the evolution of the cooperation obligations. In doing so it will consider how the EU addresses what is meant by judicial cooperation and what kinds of action are envisaged. Section 2.2 is broken into three parts; first, the Chapter begins with a discussion of the EIR and considers its historical background and some of the factors that prompted its introduction. The next section progresses to considering the specific cooperation obligations for individual debtors found in the EIR and discusses the changes to these requirements, which were introduced by the Recast. The third part of section 2.2 considers the changes made to the EIR Recast during the

[1] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1. [Hereinafter EIR].
[2] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19. [Hereinafter EIR Recast].
[3] See for example Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) J Legal Studies 325; 'US Exceptionalism and UK Localism: Cross-Border Insolvency Law in Comparative Perspective' (2016) 36 Legal Stud 136; Reinhard Bork 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 Int Insolv Rev. 246.
[4] See for example Emilie Ghio, 'Cross-border Insolvency and Rescue Law Theory: Moving Away from the Traditional Debate on Universalism and Territorialism' (2018) 29(12) ICCLR 713.
[5] A phrase adopted by Emilie Ghio in the European context from American insolvency academic, John Pottow. See John Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45(4) Va J Int'l L 935.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

inter-institutional negotiations and highlights some of key differences between what the Commission proposed and what was eventually passed. Section 2.3 considers the relationship between the EIR, the Recast and groups of companies. It is split into three parts; the first considers cooperation obligations for groups of companies, the second discusses the regulation of proceedings for groups of companies and the third looks at the differences between the Commission Proposal for the EIR Recast and what was finally agreed, giving some context to the divergent views of the institutions.

2.2 The European Insolvency Regulation and the Obligation to Cooperate

2.2.1 Introduction to the EIR and its Recast

Amongst others, Reinhard Bork, Paul Omar and Kristin van Zwieten trace the history of the EIR back to the 1970 draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings, wherein those drafting the Convention recognised that insolvency proceedings in one State had to produce effects in other States in order to be in any way effective.[6] As appears to be common in relation to insolvency matters (and indeed other matters subject to regulation) within the EU, it was concluded that the unification of domestic laws would be too time-consuming and laborious. Instead, the drafters chose to adopt a procedural framework based upon on the concept that one proceeding opened in one Member State would have effect across the EU (or EEC, as it was then).[7] Despite a long negotiation period, a subsequent draft convention and a EC Council Working Party review in the 1980s, consensus on the matter could not be reached, resulting in the endeavour being shelved.[8] The idea was revived in the 1990s and resulted in the 1995 Convention on Insolvency Proceedings, which envisaged *inter alia* the operation of main and secondary proceedings and the interaction and coordination of the two. The 1995 Convention was not ratified by the United Kingdom, in other words it was not ratified by all Member States, as was required. Interestingly, Denmark, which opted out of the EIR – and by extension the Recast – in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, signed the

[6] Kristin van Zwieten 'Introduction' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016) (para 15). For other discussions, see Paul Omar 'Genesis of the European Initiative in Insolvency Law' (2003) 12 Int. Insolv. Rev. 147. Reinhard Bork 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 Int. Insolv. Rev. 246, 251. See also JCOERE Report 1, section 3.2 'History and Development of European Insolvency Coordination'. For a fuller historical overview, see also Chapter 3 of Report 1 of the JCOERE Project.

[7] European Economic Community 'Preliminary Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings' COM (1970) 3.327/1/XIV/70-E, art 2: 'The proceedings specified in this Convention, when instituted in one of the Contracting States, shall have full legal effect in the other Contracting States and shall be a bar to the institution of any other such proceedings in those States.'

[8] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings of 3 May 1996', EC Council Document 6500/96, 7. In the early 1990s, the 'Istanbul Convention' was presented by the Council of Europe, as distinct from the Council of the European Union or the European Council. It differed from the previous attempts at a convention in that it would permit multiple insolvency proceedings related to a single debtor to be opened across states, instead, regulating aspects of such proceedings. It too, was unsuccessful, however, Paul Omar argues that it may have provided a 'fresh impetus' to the EU to pursue a convention; Paul J Omar, *European Insolvency Law* (Ashgate 2004) 73. See also Kristin van Zwieten 'Introduction' in R Bork and K van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).

1995 Convention.[9] In 1999, the Convention returned – or more accurately the text of the Convention returned – in the form of a Council Regulation, namely the Council Regulation on insolvency proceedings (1346/2000) or the 'EIR'. Its purpose, as far as preceding conventions and bilateral agreements were concerned, was clear – it was to replace such agreements from the point at which it entered into force –[10] and in general, it has been viewed as not only achieving its central aim of coordinating insolvency proceedings in Europe but also, constituting an important step toward judicial cooperation within the European Union.[11]

The review of the EIR and its subsequent overhaul, which took place in 2015, was mandated by the Regulation itself. Article 46 mandated the Commission to report on the application of the EIR to the Parliament, Council and the EESC within a specified timeline. If necessary, the Commission report was to be accompanied by a proposal for the modification of the EIR.[12] Generally, the aim of the amendment to the EIR was considered to be an exercise in filling 'perceived gaps in the original instrument' rather than a tearing down and rebuilding of the EIR, perhaps reflecting the idea that the EIR was generally viewed to be fit for purpose.[13] As was the case with the introduction of the Preventive Restructuring Directive, the overall stated objective of the revision of the EIR was 'to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of ensuring a smooth functioning of the internal market and its resilience in economic crises'.[14] The Commission itself noted in the Proposal for the Recast that the EIR was 'functioning well in general' but that it was desirable to improve upon the application of certain provisions 'in order to enhance the effective administration of cross-border insolvency proceedings'.[15]

2.2.2 EIR & EIR Recast: Cooperation obligations

The principle of cooperation is not exclusive to the EIR or its Recast; rather as Reinhard Bork has pointed out, it has 'its foundations in the European law principle of EU Member States assisting one another', for example in Article 4(3) of the TEU.[16] A considerable difference between the EIR and the EIR Recast was the addition of new and stronger cooperation

[9] See Report 1 of the JCOERE Project and in the JCOERE Country Report on Denmark for further information on Denmark and the EIR and Recast <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiondenmark/>.

[10] EIR, art 44. Examples of the agreements that were replaced were the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979 and the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977 (EIR, art 44 (e)(g)).

[11] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 16.

[12] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1, art 46.

[13] Kristin van Zwieten 'Introduction' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016). See also Gerard McCormack 'Reforming The European Insolvency Regulation: A Legal And Policy Perspective' (2014) 10 Journal of Private International Law 41 and Francisco Garcimartín 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' available at <http://www.ejtn.eu/PageFiles/6333/Rules_on_jurisdiction.pdf>.

[14] Proposal for a Regulation of the European Parliament and of the Council COM744 final of 12 December 2012 amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (2012) 2012/0360 (COD), 3.

[15] ibid 12.

[16] Reinhard Bork 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 Int. Insolv. Rev. 246, 259. See also the judgment in the Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v. Christianapol sp. z o.o.* ECLI:EU:C:2012:739, where the relationship between Article 4(3) of the TEU and cooperation in insolvency matters was acknowledged. See also chapter 3 of this Report for a discussion of article 81 of the TEFU (judicial cooperation in civil matters with cross-border implications) as a potential basis for the (increased) cooperation requirements in the regulation.

obligations, something that Renato Mangano contends is consistent with both 'a commonly shared idea that private international law is based on cooperation' and 'an established tradition of common law courts and practitioners dealing with cross-border cases'; this theme of the relationship between cooperation and the rules of private international law will be considered in more detail in Chapter 5.[17] In the EIR, there was a duty to cooperate, but this was confined to cooperation between liquidators. Article 31(1) of the EIR stated:

> Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

Article 31(2) stated:

> Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate.

Furthermore, article 31(3) of the EIR required that the liquidator in the main proceedings be given an early opportunity by the liquidator in the secondary proceedings to submit proposals on the liquidation or use of the assets in the secondary proceedings. The intention behind these articles was clear; to require communication and cooperation in order to coordinate multiple proceedings, so as to increase efficiency and clarity and decrease cost. The cooperation requirements in the EIR were not without their issues, however. First, the cooperation requirements only specified liquidators. Although the cooperation requirements in the EIR were interpreted more broadly by some courts[18] and despite many Member States having domestic legislation requiring cooperation between national courts and the foreign insolvency court presiding over the main proceedings[19], it still remained that only liquidators were explicitly bound to cooperate. Accordingly, the EIR Recast was drafted, in part, to solve this issue.

Second, it could be suggested that there are issues of clarity, particularly with the applicable recital, Recital 20. Bernard Santen, for example, argues that 'neither the recitals nor the articles provide[d] insight into the application of 'cooperation' or 'coordination'.[20] He goes on

[17] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 315.
[18] Case C-116/11, Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o., ECLI:EU:C:2012:739: '[T]he principle of sincere cooperation laid down in Art 4(3) TEU requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which, as observed in paragraphs 45 and 60 of this judgment, 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.'
[19] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 199.
[20] Bernard Santen 'Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 ERA Forum 229, 231.

to query if there was actually any difference between the two or if they are '(largely) identical concepts'.[21] While his argument that 'no insight' is provided could be considered a little harsh – Recital 20 of the EIR does give explanations of how coordination[22] and cooperation[23] can be achieved – it is perhaps fair to say that the language employed lacked precision. For example, the explanation of cooperation provided by Recital 20 could be construed as meaning 'communication', as it refers to 'exchanging a sufficient amount of information'.[24] 'Coordination' is primarily explained as being achieved through cooperation[25], which is in turn explained as above, as potentially meaning communication ('exchanging a sufficient amount of information'). Renato Mangano contends that the lack of specific provisions allowing liquidators to conclude agreements and protocols meant that in civil law jurisdictions, at least, there was evidence of liquidators being hesitant to enter into such arrangements and no evidence of cooperation between courts.[26] In other words, the absence of certainty resulted in an unwillingness to cooperate.[27] The Recast, as will be demonstrated below, goes some way to ameliorating any perceived issues of clarity.

The EIR Recast specified two *types* of cooperation and coordination. First, it added a requirement for cooperation and coordination between courts,[28] something which was viewed as preferable to leaving such cooperation 'to the realm of implication and inference'.[29] Plainly, as Gerard McCormack asserts, this is because courts may interpret the existence and extent of such a requirement differently were it not specifically provided for in the Regulation. Arguably, this potential for difference in inference would be particularly acute within the common and civil divide; it might be remembered that Renato Mangano contends that a major difference between common law and civil law courts was the 'established tradition' of the former dealing with cross-border cases and cooperating therein.[30] This importance of the difference in legal cultures and traditions will be described in more detail in Chapter 4. Article 42(1) of the EIR Recast requires that a court that has opened insolvency proceedings, which are included in Annex A, or before which there is a request to do so, is obliged to cooperate with any other court that has opened insolvency proceedings, or before which there is a request to do so. The only exception to this requirement is where cooperation would be incompatible with the rules applicable to the proceedings in question, an exception which one

[21] ibid.
[22] 'In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time.' Coordination is also explained as being achieved by cooperating.
[23] '[I]n particular by exchanging a sufficient amount of information'.
[24] EIR, recital 20.
[25] 'Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely …'; EIR, recital 20.
[26] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 317.
[27] ibid.
[28] As will be discussed in more detail in Chapter 3, in view of article 2(6)(ii) of the EIR Recast, 'court' can also be interpreted to refer to 'administrative authority' or more broadly, a body legally empowered to open insolvency proceedings.
[29] Gerard McCormack 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) J Private Int'l L 41, 54.
[30] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 315.

could argue defers appropriately to the domestic courts and national rules. While it may be unlikely that there would be provisions contained within a domestic framework that would explicitly prohibit cooperation – arguably, a jurisdiction with such a framework would do as the Dutch have and create it with the intention that it to be outside the EIR – examples of national rules, comprised of both rules of a substantive and procedural nature, which may have the result of impeding cooperation will be discussed in more detail in Chapter 3. The remainder of article 42 expands on and further explains how this duty to cooperate may be fulfilled.[31]

Second, the EIR Recast added a requirement for cooperation between insolvency practitioners and courts. Article 43(1) requires that an insolvency practitioner in main insolvency proceedings cooperate and communicate with any court that has opened secondary proceedings, or which has a request to do so. The same requirement applies to an insolvency practitioner in territorial or secondary insolvency proceedings *vis-à-vis* the court of main jurisdiction. Finally, it also mandates that an insolvency practitioner in territorial or secondary insolvency proceedings cooperates and communicates with a court that has also opened territorial or secondary insolvency proceedings, or one which has a request to do so. Article 43(2) then refers to the means of cooperation laid out in article 42(2) & (3).

In addition, the Recast amended the original article 31 duty to cooperate – now article 41 – which was outlined above. The primary change from the EIR was the inclusion of an additional means of how the cooperation should occur via article 41(2)(b), namely that the insolvency practitioners shall 'explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a restructuring plan'.[32] Naturally, in light of the PRD being passed in 2019, an interface between these two legal instruments exists, something which will be discussed in more detail in Chapter 5.[33] The other aspects of the article were refined, or reworded without substantial change; for example, the second sentence of the original article 31[34] became:

> [A]s soon as possible communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at

[31] EIR Recast, art 42(2): 'In implementing the cooperation set out in paragraph 1, the courts … may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.'
EIR Recast, art 42(3): 'The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern: (a) coordination in the appointment of the insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) coordination of the conduct of hearings; (e) coordination in the approval of protocols, where necessary.'
[32] EIR Recast, art 41(2)(b).
[33] Aspects of this interface were also touched upon in Chapter 4 of Report 1 of the JCOERE Project. See also Stephan Madaus, 'Leaving the Shadows of US Insolvency Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 Eur Bus Org L Rev 615.
[34] 'They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.'

terminating the proceedings, provided appropriate arrangements are made to protect confidential information.[35]

The requirement in article 31(3) that the liquidator (main proceedings) be given an early opportunity by the liquidator (secondary proceedings) to propose the liquidation or use of the assets (secondary proceedings) saw minor changes. It became a requirement to 'coordinate the administration of the realisation or use of the debtor's assets and affairs', which when explained, in practical terms, broadly meant the same as the old article 31(3).[36]

The recitals applicable to cooperation also saw significant changes between the EIR and the Recast. Two new recitals, Recitals 49 and 50, were added, presumably with the intention of expanding on the ideas of cooperation, communication and coordination within insolvency proceedings. Recital 49 applies to cooperation between insolvency practitioners and the court, emphasising the view that their entry into agreements and protocols with a view to facilitating 'cross-border cooperation' of multiple cross-border proceedings concerning the same debtor (or members of the same group of companies) should be permitted. The Commission explained the inclusion of explicit reference to agreements and protocols in the Recast as a means of acknowledging their practical importance and promoting their use.[37] It explains that such arrangements may (i) take a variety of forms, in other words be written or oral; (ii) they may vary in scope, ranging from generic to specific; and interestingly (iii) they may cover parties taking or refraining from taking certain steps or actions. Recital 50 pertains to court-to-court cooperation, providing that cooperation and coordination in that instance may be achieved by the appointment of a single insolvency practitioner for multiple insolvency proceedings concerning the same debtor or for different members of a group of companies.[38]

2.2.3 The evolution of the EIR Recast: European Union institutions[39]

It is worth noting that the Proposal for the EIR Recast did not sail through the various EU institutions; rather, the Proposal went through considerable EU negotiations before being passed, a process which took two and a half years, two European Parliament readings, four Council debates and inter-institutional negotiations (trilogue), amongst other input. With that said, much of the debate centred elsewhere and not around the issues, articles, and recitals directly relevant to cooperation; however, there were some changes of note. As discussed in

[35] EIR Recast, art 41(2)(a).
[36] EIR Recast, art 41(2)(c): 'coordinate the administration of the realisation or use of the debtor's assets and affairs; the insolvency practitioner in the secondary insolvency proceedings shall give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary insolvency proceedings.'
[37] Proposal, 9; Just for clarity, it is worth noting that the Proposal did not originally contain a recital referring to agreements and protocols. The reference was only included in article 31 (now article 48).
[38] The caveat is that such an appointment must be compatible 'with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner'. See EIR Recast, recital 50.
[39] This section discusses the changes to the cooperation obligations in the EIR Recast.

the previous section, the review of the EIR and resulting changes were mandated by the Regulation itself.

Before examining the specific amendments made to proposed recitals and articles, it is worth bearing one overarching change in mind: across the Regulation, there was a change in terminology from 'liquidator' to 'insolvency practitioner', reflecting the fact that perhaps an update in terminology was needed from the EIR and indeed, from the proposal for its reform. Arguably, this change in terminology was desirable in order to reflect the shift in scope that took place between the EIR and the Recast; a focus on insolvency procedures in the former to encompassing restructuring and pre-insolvency procedures in the latter. A related possibility is that it was not envisaged that rescue processes would be included in the EIR when it was originally drafted, particularly given the wording of article 1.[40] Across the procedures contained in Annex A, however, are frameworks that do not require a 'liquidator' and instead utilise a different professional; thus, 'insolvency practitioner' is certainly a more appropriate term for these professionals. For example, the Irish Examinership procedures uses an 'examiner', who is an insolvency practitioner; liquidation, which requires a liquidator, is a separate procedure entirely. While a liquidator is an insolvency practitioner in Ireland, the corollary is not always the case, as a liquidator is just one of the roles that can be held by an insolvency practitioner. There are a number of other procedures in Annex A, both in the EIR and the Recast, that do not necessarily have 'liquidators', such as the Italian *concordato preventivo*, the French *Sauvegarde*[41] and the Dutch *surséance van betaling*.[42] Article 2 of the Commission Proposal was amended; rather than defining 'liquidator',[43] as had been the case in the Proposal, the EIR Recast defines an 'insolvency practitioner'.[44] Practically, the change may have been minimal, as 'liquidators' in the EIR were understood in line with a prescribed list of professionals (Annex C) that clearly included a range of insolvency practitioners other than liquidators. For example, it included the Irish examiner and *commissario* (Italy) and when recast, included the *Administrateur judiciaire* and *Mandataire judiciaire* (France), amongst others.[45] The question does, however, legitimately arise as to why certain procedures were

[40] 'This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.'

[41] And its variations; Sauvegarde accélérée, and Sauvegarde financière accélérée,

[42] The public procedure under the WHOA, which is intended to be included in Annex A, is another example. For further information on the procedures in France, Ireland, Italy and the Netherlands, amongst others, see JCOERE Report 1, Chapters 6-8.

[43] Defined by the Proposal as: '(i) any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C; (ii) in a case which does not involve the appointment of, or the transfer of the debtor's powers to, a liquidator, the debtor in possession.' Commission Proposal (COM) 744 final for a Regulation of the European Parliament and of the Council COM744 final of 12 December 2012 amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [2012] 2012/0360 (COD) [Hereinafter 'Commission Proposal for the EIR Recast'] art 2(b).

[44] An '"insolvency practitioner" means any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor's affairs. The persons and bodies referred to in the first subparagraph are listed in Annex B'; EIR Recast, art 2(5).

[45] For the full list of professionals included coming within the meaning of 'liquidator', see EIR, Annex C and for 'insolvency practitioner', see EIR Recast, Annex C.

included in the EIR, which did not appear to fit comfortably, or at all, in the scope of the regulation as outlined in article 1.

Aside from the change in terminology proposed by both the Council and the Parliament, the changes to recitals and articles relevant to this research emanated principally from the Council. Arguably, the amendments to the recitals were relatively minor, appearing to be more for the sake of clarity rather than substantive change. For example, the Commission Proposal for recital 48[46], which stated that main and secondary insolvency proceedings could *only* contribute to 'the effective realisation of the total assets' if proceedings were 'coordinated', was expanded and softened a little:[47]

> Main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings.[48]

Recital 48 then goes on to define 'proper cooperation' in a similar manner to how 'coordinated' was defined in the Proposal, namely as the insolvency practitioners and courts 'cooperating closely' by exchanging 'sufficient … information'.[49] Finally, as was articulated above, the references to 'liquidator' were removed and replaced with 'insolvency practitioner'.[50]

Interestingly, neither recital 49 nor 50 were included in the Commission Proposal and thus, were added during the inter-institutional negotiation process. Even though the Commission referred to agreements and protocols in the relevant article, perhaps the addition of recital 49 was to further emphasise an important status for such arrangements in order to eliminate the reluctance of practitioners in civil law countries to their use, which was identified as an issue by Renato Mangano.[51]

As articulated previously, the primary articles pertaining to cooperation in the EIR Recast are articles 41 – 43. Before discussing the amendments to those articles, it is interesting to note that article 44, which prohibits courts from charging costs to each other for cooperation and communication, was neither a standalone article in the Commission Proposal nor was the requirement written with the same specificity. The Commission had required that cooperation be 'free of charge' as part of article 31a (now article 42).[52] Arguably, this amendment goes a long way towards eliminating any confusion as to the intention of the

[46] Recital 20 from the Proposal was renumbered recital 48 in the final EIR Recast.
[47] Commission Proposal for the EIR Recast, Recital 20.
[48] EIR Recast, Recital 48.
[49] ibid.
[50] This was the only change suggested by the European Parliament, though it suggested use of the term 'insolvency representative' rather than the agreed term 'insolvency practitioner'.
[51] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 317.
[52] Article 31a(2) originally read: 2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.

article, which one could describe as a prohibition on one court from charging another in a different Member State for the *privilege* of cooperation.

As explained above, the function of article 41 is to lay out the provisions that govern cooperation between insolvency practitioners. The only amendment to article 41 was the insertion of subsection 3, which extends the cooperation requirements contained in the first two paragraphs to 'situations where … the debtor remains in possession of its assets'. Perhaps it could be argued that this change is another reflection of the regulation moving scope from predominantly insolvency and liquidation to also encompassing pre-insolvency and rescue.

The change made to article 42(1) appears to be relatively minor; it was amended to add the requirement that the appointment of the independent person or body acting on its instructions must not be incompatible with the rules applicable to them. Across articles 42 and 43, 'territorial proceedings' were added to the list of proceedings concerning the same debtor that should be coordinated where possible. Finally, article 42(3) was amended to include 'coordination in the appointment of the insolvency practitioners' as a means of implementing the court-to-court cooperation requirement;[53] the others being communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor's assets and affairs; coordination of the conduct of hearings and coordination in the approval of protocols.[54] Arguably, this addition demonstrates consistency with the additional recital 50.[55]

The primary amendment to article 43(1) was an extension of the obligation of insolvency practitioners in territorial or secondary insolvency proceedings to cooperate and communicate with courts, which had opened or had a request to open other territorial or secondary insolvency proceedings. In the Commission Proposal the obligation only explicitly applied to the insolvency practitioner in the main proceeding vis-à -vis the court with a secondary proceeding (request) or the insolvency practitioner in the secondary proceeding vis-à -vis the court with main proceedings. Naturally, the omission may have resulted in the insolvency practitioner involved in secondary or territorial proceedings having no obligation to cooperate with a court in another Member State also involved in a secondary or territorial proceeding.

2.3 EIR & EIR Recast: Cooperation Obligations and the Regulation of Groups of Companies

[53] EIR Recast, art 42(3)(a).
[54] EIR Recast, art 42(3)(b)-(e); 'where necessary' was added to art 42(3)(e).
[55] 'Similarly, the courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners. In that context, they may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies, 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.'

2.3.1 EIR & EIR Recast: Cooperation obligations for Groups of Companies

As described in the introduction, a significant issue with the EIR appeared to be connected to its effectiveness where groups of companies were concerned; the primary issue being that 'coordination' in the EIR was not explicitly and effectively regulated for groups of companies. Thus, where the previous section (2.2) outlined and discussed the changes to cooperation and coordination requirements for single debtors, this section will discuss the EIR and the Recast, its articles and recitals, with groups of companies as the focus. In its Proposal for the EIR Recast, the Commission acknowledged that almost half of respondents that took part in the public consultation process viewed the EIR as failing to work efficiently for insolvencies consisting of members of a multinational group of companies.[56] Furthermore, it was noted that the lack of regulation was diminishing 'the prospects of successful restructuring of group[s] [of companies] as a whole' resulting instead in their break-up.[57] In spite of this clear sentiment expressed by the Commission, its Proposal for amending the EIR did not contain express provisions on coordinated group proceedings, arguably a notable omission; as will be discussed in section 2.3.3, the framework for group coordinated proceedings was added during the inter-institutional negotiation of the Recast.

Perhaps it goes without saying that the types of insolvency proceedings that most need effective coordination, efficiency and organisation are those concerning large groups of companies with potentially intricate structures, as evidenced by complex and challenging cases such as *Eurofood*.[58] *Eurofood* concerned the resolution of a dispute over the COMI of Eurofood IFSC, a subsidiary of the Italian parent company, Parmalat SpA. This case will be discussed in more detail in Chapter 5, however, cases such as this illustrate, albeit it briefly in this Chapter, the challenges that arose from the lack of regulation of groups of companies in the EIR and highlight 'bitter clashes between courts and insolvency practitioners belonging to different jurisdictions'.[59] In spite of the legislative void where groups were concerned, there was some evidence that certain domestic courts overcame the lack of regulation by adopting an 'integrated economic unit' approach.[60] This refers to the practice of considering the affairs of the group of companies as a whole, which in turn can lead to a finding that related companies have their COMI in the same state despite being incorporated elsewhere.[61] With that said, however, differences in inferences still posed a problem as this use of the integrated economic unit approach was not universal, thereby leading to potential discrepancies in how different group proceedings could be treated. Furthermore, on foot of *Eurofood*, the CJEU seemed not to interpret the issue the way some of the domestic courts had.[62] Accordingly –

[56] Commission Proposal for the EIR Recast, 5.
[57] Commission Proposal for the EIR Recast, 3.
[58] C-341/04 [2006] ECR I-3813.
[59] Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 318.
[60] Gerard McCormack 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) J Private Int'l L 41, 55.
[61] ibid. See also *Re MPOTEC Gmbh* [2006] BCC 681.
[62] Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-03813.

and in line with the stated intention of the Commission to create a 'specific legal framework to deal with the insolvency of members of a group of companies while maintaining the entity-by-entity approach' – the regulation was amended to expressly apply to groups of companies to attempt to avoid disputes concerning groups of companies from arising.[63]

The first step in achieving the aim of express regulation of groups of companies, the opening gambit as it were, was to create new recitals to make a clear statement as to the intention of the Recast over and above merely referring to 'groups of companies' in other recitals.[64] Recital 51 made an unequivocal statement about the purpose of the Recast regarding groups of companies, wherein it was stated that the EIR Recast should ensure efficient administration of the insolvency proceedings of those companies forming part of a group. Recital 52 provides that there should be 'proper cooperation' between participants – courts and insolvency practitioners – involved in group insolvency proceedings in the same way as is required in the case of a single debtor. Recital 54 introduced the ideal of the coordinated group proceedings, for which procedural rules were to be introduced by the Recast, with recitals 55-59 providing more detail on their operation. Interestingly, despite the noted advantages of coordinated group proceedings, recital 56 provides an 'out' in the interest of preserving their 'voluntary nature'; it states that insolvency practitioners involved in coordinated proceedings 'should be able to object to their participation'.[65] Thus whilst the Recast certainly encourages coordination, it does not make it obligatory; perhaps, once again, leaving the door open to the potential for inconsistencies across the EU for the sake of compromise.

To reinforce the intentions expressed by the recitals, the EIR was amended to add articles regulating groups of companies. Chapter V of the EIR Recast, which is entitled 'Insolvency Proceedings of Members of a Group of Companies' is divided into two sections. Section 1, entitled 'Cooperation and communication', regulates cooperation between courts, insolvency practitioners and courts and insolvency practitioners for groups of companies in a manner similar to the way articles 41-43 did for single debtors. The insolvency practitioners are obliged to cooperate; such cooperation can be achieved *inter alia* by communicating relevant information as soon as possible and where possible in the circumstances, coordinating the creation and implementation of a restructuring plan.[66] Additionally for practitioners in proceedings concerning a group, additional powers may be granted to insolvency practitioners appointed in one of the proceedings by (some of) the others in order to coordinate the administration and supervision of the affairs of the group members and to coordinate restructuring efforts, both of which are desirable if feasible per articles 56(2)(b)(c). The courts are obliged to cooperate in proceedings concerning groups of companies 'to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings'. Aside from the addition of 'appropriateness' as a *test* or standard, the articles

[63] Commission Proposal for the EIR Recast, 59.
[64] For example, the revised recital 6, recitals 49-50.
[65] This is supported by article 64 of the EIR Recast, which will be discussed in more detail in the coming paragraphs.
[66] EIR Recast, articles 41 and 56.

concerning court-to-court cooperation for single debtors and groups are virtually identical. Finally, insolvency practitioners and courts are obliged to cooperate, again to the extent that such cooperation is appropriate to achieving the aims of effective management of the proceedings. Interestingly, in proceedings concerning groups, the insolvency practitioner is empowered to request information concerning the proceedings of other member of the group from the relevant court, again provided that the request is appropriate to achieving its aims.[67] One could question the necessity of such a provision if the cooperation mandated under article 56 was being achieved.

2.3.2: EIR & EIR Recast: The regulation of proceedings for Groups of Companies

Section 2 of Chapter V of the EIR Recast regulates the concept of 'coordinated group proceedings' referred to in recitals 54-59. Article 61 states that coordination proceedings may – as distinct from 'must' or 'shall' – be requested before any applicable court[68] by any insolvency practitioner appointed to a member of the group. Therefore, such articles create a framework for opening coordinated proceedings, rather than making such proceedings mandatory. Article 61 goes on to regulate the contents and form of the request to open coordinated group proceedings; first, it must comply with the applicable national law.[69] Second, it must be accompanied by details of the proposed 'group coordinator',[70] an estimate of and proposed division of costs[71] and a list of the appointed insolvency practitioners and where relevant, the courts and competent authorities.[72] Third, an outline of the proposed group coordination must also be included with specific reference to how the coordination fulfils the article 63(1) criteria.[73]

Article 63(1), in turn, details the conditions that should be satisfied by the request for the opening of coordinated proceedings, namely its appropriateness to facilitate the effective administration of the group insolvency proceedings;[74] the absence of a likelihood that any creditor expected to participate in the proceedings will be financially disadvantaged by such participation[75] and that the group coordinator meets the eligibility criteria to be appointed per article 71.[76] Once the required time of 30 days, as specified by article 64(2), has elapsed and the court is satisfied that the conditions laid out in article 63(1) are met, then the court

[67] EIR Recast, art 58(b).
[68] 'Applicable court' refers to 'any court having jurisdiction over the insolvency proceedings of a member of the group' (EIR Recast, art 61(1)).
[69] EIR Recast, art 61(2): 'The request referred to in paragraph 1 shall be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed.'
[70] EIR Recast, art 61(3)(a): 'a proposal as to the person to be nominated as the group coordinator ('the coordinator'), details of his or her eligibility pursuant to Article 71, details of his or her qualifications and his or her written agreement to act as coordinator'.
[71] EIR Recast, art 61(3)(d).
[72] EIR Recast, art 61(3)(c).
[73] EIR Recast, art 61(3)(b).
[74] EIR Recast, art 63(1)(a).
[75] EIR Recast, art 63(1)(b).
[76] EIR Recast, art 63(1)(c). These eligibility criteria are: 1. 'The coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner.' 2. 'The coordinator shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members.' (EIR Recast, art 71).

may grant the request.[77] This results in the court appointing a coordinator, deciding an outline of the coordination and deciding on the estimation and division of costs.[78]

Article 64 allows for any appointed insolvency practitioner to object to the inclusion of its part of the group in the coordinated proceedings or to object to the proposed coordinator within a 30-day period.[79] Critically, this objection is determinative and results in the relevant part of the group being excluded from coordinated proceedings.[80] Furthermore, there appears to be no guidance or limitations on the reasoning behind such an objection. Thus, it may be possible for insolvency practitioners to object on the basis that they do not wish to relinquish any of the value of the proceeding to their business – 'to keep the business' so to speak – perhaps providing scope for an objection to be lodged on grounds that directly concern neither the debtor nor its creditors.[81] This concern is not exclusive to the EU; a similar point will be made in Chapter 7 (section 7.3) in relation to participation in centralised coordination for insolvency practitioners in the United States. Perhaps, more honourably, the reticence to be involved in coordinated proceedings may be as a result of the view that local interests – creditors and the debtor – can be better served by an uncoordinated approach. Even still, however, the lack of a requirements for the insolvency practitioner to provide a justification for requesting exclusion from the group coordinated proceedings arguably undermines its effectiveness and exposes it to the potential for abuse.

There is also a specific cooperation requirement pertaining to group coordinated proceedings; similar to the previously discussed cooperation obligations within insolvency proceedings, article 74 requires the appointed insolvency practitioners and the coordinator to cooperate with each other provided that such cooperation is not incompatible with the rules governing the proceeding.[82] This requirement specifically obliges the appointed insolvency practitioners to communicate information that may be needed by the coordinator to perform his or her role.[83]

The changes to the EIR brought about by its Recast, though generally viewed as positive, are not without criticism. Horst Eidenmuller, for example, comments that the EIR Recast – or Proposal for the EIR Recast as it was at the time – 'falls short' when it comes to manging group insolvencies i.e. the coordinated group proceedings approach.[84] A much better administration

[77] EIR Recast, art 68(1).
[78] EIR Recast, art 68(1)(a)-(c).
[79] EIR Recast, art 64(1) & (2).
[80] EIR Recast, art 65(1).
[81] Renato Mangano argues something similar in relation to choice of jurisdiction in insolvency matters: 'In fact, if each court and insolvency practitioner can individually establish which law should apply to and which court should be competent in each cross-border legal relationship and which judgments of which other Member States are to be recognised, each court and each insolvency practitioner have an incentive to act opportunistically and to pursue the interest of those parties that are located in their own jurisdiction, that is, to overprotect local debtors, local creditors, local employees, local company directors, etc.' Renato Mangano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 *IIR* 314, 319.
[82] EIR Recast, art 74(1).
[83] EIR Recast, art 74(2).
[84] 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' (2013) 20 Maastricht *J Eur & Comp L* 133, 148.

of group insolvencies, he argues, would be achieved by consolidating the procedures, as opposed to the entity-by-entity approach used by the EIR and its Recast.[85] Whether Eidenmuller is correct is perhaps irrelevant to an extent; perhaps consolidated proceedings would work better, however without both the flexibility of implementation and the retention of some control by Member States offered by the Regulation and other similar instruments, agreement on their introduction and subsequent amendment would be extremely challenging, if not impossible, to reach within the EU. Thus, while he may have a point, perhaps it is fair to say that his argument is more about the compromises and concessions almost endemic in intra-institutional negotiations and less about a failure to choose the best available option. Or perhaps as Gerard McCormack argues succinctly, such policy choices 'reflect an approach that, in this particular area, progress is best achieved by a series of small steps rather than by a great leap forward'.[86]

2.3.3 The Evolution of the Chapter V: European Union Institutions

As was articulated in the opening of section 2.3, a notable omission from the Proposal was a clear framework on coordinated group proceedings. Although the Commission noted the lack of effectiveness of the EIR where groups of companies were concerned, it did not propose a model of coordinated proceedings; instead the Commission additions to the EIR were predominantly the articles that eventually made up Chapter V, Section 1 – articles 56-60 – which saw some minor changes during the negotiation process. For example, the primary change to article 57, which pertains to cooperation between courts in proceedings concerning groups of companies, was the addition of 'coordination in the appointment of insolvency practitioners' to the means by which the courts could communicate. Arguably, this amendment was somewhat unsurprising given that a similar change was made to article 42, as discussed previously. While other parts of article 57 were revised, the amendments were of little significance as they neither altered its overall meaning or intention.[87] The same can be said to the changes made to articles 56 and 58.

The addition of the articles pertaining to group coordinated proceedings was the most considerable change during the intra-institutional negotiations. The addition was advanced by the Parliament in the first instance; the report by the Committee on Legal Affairs proposed six new articles that, when reformulated during the negotiation process, became Section 2 of Chapter V. Interestingly, the Parliament and Commission appeared to be at odds regarding the approach that should be taken to remedy the issues with the EIR where groups of

[85] ibid. He explains 'procedural consolidation' as one insolvency court being 'designated in charge of the multiple (main) insolvency proceedings over the assets of multiple debtors within the group setting' and one insolvency practitioner being appointed with respect to the multiple proceedings. The powers of insolvency practitioners in group proceedings are laid out in article 60.

[86] Gerard McCormack 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10(1) J Private Int'l L 41.

[87] For example, the provision allowing the appointment of an independent person or body to act on the instructions of a court in order to facilitate cooperation, which is in both the final text of the EIR and the Commission Proposal had the caveat 'provided that this is not incompatible with the rules applicable to them' added by the Parliament; European Parliament Committee on Legal Affairs 'Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' (2013) A7-0481/2013 COM(2012)0744 – C7-0413/2012 – 2012/0360(COD).

companies were concerned. In the explanatory statement accompanying its report, the Parliament stated that the Commission '[was] not following the recommendations of Parliament but [focusing] on enhancing the coordination and communication of different insolvency proceedings'.[88] This was a contrast to what the Parliament had requested from the Commission, namely a 'flexible proposal for the regulation on the insolvency of groups'.[89] Through the additions it proposed, the Parliament viewed itself as 'formulating a more ambitious solution on insolvency of groups of companies', something which it viewed as a compromised between its position and that of the Commission.[90] It appears that this compromise was desirable all round, as the final text from the Council also contained the provisions pertaining to group coordinated proceedings.[91]

2.4 Conclusion and Transition

This Chapter has traced the evolution of the EIR between its 2000 version and its Recast with a particular focus on the emergence of the cooperation obligations contained in the Recast version. While the EIR Recast is sometimes viewed as lacking in the provision of specific instructions on how cooperation should occur, it also acknowledges that courts and practitioners may create protocols to assist in this task, examples of which are discussed in greater detail in Chapters 6 and 7 section 7.3. That said, there remains criticism that the EIR Recast has not gone far enough, as discussed in section 2.3.2 of this Chapter.[92] Given the value-laden characteristics of insolvency and restructuring, it remains a difficult area of law to harmonise due to the jurisdiction specific policy arguments that often conflict in where the greatest emphasis should lie in the rationale underpinning the mechanisms to resolve financial distress.

The next Chapter 3 will summarise the JCOERE Project's findings from Report 1 on substantive principles in restructuring (preventive or otherwise) mechanisms within the framework of the Preventive Restructuring Directive that it was determined may present obstacles to cooperation when they are implemented by the Member States. It adopts a taxonomic categorisation of Member States in terms of their observed approach to preventive restructuring in terms of underlying policy and implementation of the PRD. It will also provide pertinent observations on the relationship between harmonisation and cooperation within the paradigm of cross-border insolvency. Finally, Chapter 3 will provide a summary of the JCOERE Project's findings in relation to procedural obstacles to court-to-court cooperation, including those revealed in the responses to the JCOERE Questionnaire noting that most of

[88] European Parliament Committee on Legal Affairs 'Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' (2013) A7-0481/2013 COM(2012)0744 – C7-0413/2012 – 2012/0360(COD), 48.
[89] *ibid*.
[90] ibid.
[91] Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast) dated 12 March 2015 2012/0360 (COD).
[92] Horst Eidenmuller, 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' (2013) 20 Maastricht J Eur & Comp L 133, 148.

the responses to the JCOERE Questionnaire have been discussed in detail in Chapters 6-8 of Report 1.

III. Chapter 3: Potential Obstacles to Court-to-court Co-operation in Preventive Restructuring Cases

3.1 Introduction

The JCOERE Project began with the hypothesis that differences between Member States on policy and legal principles (including both substantive and procedural rules) might be particularly acute in the context of preventive restructuring. Such differences can present obstacles to court-to-court co-operation, practitioner-to-practitioner co-operation and practitioner-to-court co-operation. The next subsection (3.1.1) will describe the policy objectives behind preventive restructuring. The Chapter will then proceed in section 3.2 with a summary of our findings from Report 1 on substantive law principles that will present obstacles to co-operation arising from the Preventive Restructuring Directive (1023/2019)[1] and similar restructuring frameworks. As we continued with our research, including a survey of chosen Member States and participation in various colloquia and conferences, our hypothesis was proven to hold true. We found significant differences between Member States which we categorised in terms of approach to preventive restructuring, the taxonomy of which we developed, as we discuss substantive principles in the PRD. The categorisation of Member States adopted in this Chapter and described in 3.3 relied on the identification of fundamental differences in policies and approach to preventive restructuring generally, which will affect the implementation of the PRD. The Chapter will continue in section 3.4 with observations on the relationship between harmonisation and co-operation. The EIR Recast[2] acknowledges the tension between harmonisation, or lack thereof, and co-operation or indeed disruptions to the potential for co-operation. For example, it countenances the opening of competing or secondary proceedings where:

[1] Council Directive (EU) 2019/1023 of 26 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18. [Hereinafter PRD or Preventive Restructuring Directive].
[2] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19. [Hereinafter EIR Recast].

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

> [T]he differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located. For that reason, the insolvency practitioner in the main insolvency proceedings may request the opening of secondary insolvency proceedings where the efficient administration of the insolvency estate so requires.[3]

The findings in relation to procedural obstacles to court-to-court cooperation revealed in the responses to the JCOERE Questionnaire will then be discussed and analysed in section 3.5, along with other observations in relation to the institutions (administrative or judicial) that hear cross-border cases and the difficulties differences here may cause to co-operation and mutual trust (3.6). A number of additional potential obstacles will then be discussed in the last few sections, including a summary of the views of members of the judiciary expressed to researchers during the JCOERE project. This last section complements the findings of the survey of the judiciary in Chapter 8.

3.1.1 A summary of policy objectives relating to preventive restructuring

Chapter 5 of Report 1 describes the evolution of the Preventive Restructuring Directive 1023/2019. In reflection of this work, this section summarises key substantive concepts as they evolved. The principle underlying policy document relating to the Preventive Restructuring Directive is the European Commission Recommendation: *A New Approach to Business Failure* (2014).[4] Of importance was the idea of improving the efficiency of insolvency laws to support economic recovery across the EU.[5] We have discussed this at length in Report 1, but it is worth reminding ourselves of the specific policy objectives outlined in 2014 and which ultimately led to the PRD. These included:

a. Maximising value to the economy as a whole through the protection or benefit of those (these could be individuals or other businesses) connected with businesses at risk of insolvency. Individuals could include other businesses as creditors, employees of these businesses and owners of businesses.
b. Saving jobs.
c. The provision of a 'second chance' to ordinary individual sole traders…or entrepreneurs. At the time bankruptcy laws in many Member States including Ireland and Germany were really restrictive as compared with the framework pertaining in other jurisdictions, for example, England and Wales.[6]
d. The recovery of non-performing financial loans. Although not at the forefront of policy concerns in 2014, by the time the Preventive Restructuring Directive was passed in

[3] *idem,* recital 40.
[4] For a discussion of the other policy documents relevant to the PRD, see JCOERE Report 1, Chapter 5, which gives an account of the history of the PRD chronologically.
[5] The policy objective was to 'ensure that viable enterprises in financial difficulties…have access to national insolvency frameworks, which enable them to restructure at an early stage with a view to preventing their insolvency…'. European Commission, Recommendation COM (2014) 1500 of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L 74/65.
[6] Irene Lynch Fannon, 'Bankruptcy Tourism in the UK: Why and How?' (2013) 26(6) Insolvency Intelligence 85.

June 2019, another key concern was that restructuring process would allow specifically for the restructuring of corporate debt to the benefit of the banking sector and the support of the capital markets union. This was a policy issue that was more clearly articulated later in the day, very near to the adoption of the Directive and particularly afterwards. It was reiterated by Commission officials at various meetings following the passing of the Directive. For example, in June 2019 the importance of addressing the restructuring of non-performing loans was described by Salla Saastomonien.[7] A key related issue articulated by the Commission representatives was what they perceived to be 'the significant variance' between Member States regarding attitudes to corporate restructuring and the actual legal frameworks involved. This is borne out by our research in Report 1. The view of the Commission was that these variances in turn led to a reluctance on the part of businesses to expand across the European Union, either by virtue of the increased costs or uncertainty as to their level of exposure in other Member States, and very different recovery rates for creditors.

e. A particular focus on SMEs reflecting sectoral concerns with providing a 'second chance' for entrepreneurs as described above. Discussion of costs of existing restructuring processes was of particular importance and reflected the experience of practitioners in many countries. The idea that a rescue process should be available to the SME sector was and is of concern to many but whether this is in reality a true reflection of the possibilities of such processes is a key and seemingly irresolvable question.[8]

In its document, the Commission highlighted the following substantive elements which were considered to be desirable for a harmonised approach and which were eventually reflected in the PRD:

- Flexibility of procedures, namely limiting the need for **court formalities** to where they are necessary and proportionate;[9]
- Provision for **a stay** of individual enforcement actions;[10]
- Protection of the interests of **dissenting creditors**, namely that the court should reject any restructuring plan that would likely reduce the rights of dissenting creditors below

[7] This point was made by Director Saastomonien at the European Insolvency & Restructuring Conference, held in Brussels, 27th and 28th June 2019. The key message was the concern to prevent the build-up of non-performing loans, thereby freeing up capital reserved to address non-performing loans- which amounted to between 167-520 billion euro - across the European Union. Salla Saastamoinen, Director for Civil and Commercial Justice, DG Justice. EIRC Meeting June 27th.

[8] It was felt that this particular aim would help to combat the 'social stigma' and legal consequences of an on-going inability to pay off debts. Part IV of the Recommendation concerns 'second chance' provisions; the Commission recommended that entrepreneurs should be fully discharged of their debts within three years from either the date on which implementation of a payment plan began or the date on which the court approved the opening of bankruptcy proceedings (Section 30). Per Section 32, however, it was indicated that Member States were entitled to introduce more stringent provisions in certain circumstances, for example to discourage entrepreneurs who have acted in bad faith or failed to adhere to a repayment plan, or to safeguard the livelihood of the entrepreneur by allowing him / her to keep certain assets.

[9] PRD, art 4(6).

[10] PRD, art 6.

what they could reasonably expect to receive, were the debtor's business not restructured. This is indeed where the genesis of the priority debate began;[11]

- Provision for 'second chance', namely that provisions should be made for a full discharge of debt after a specified period of time – these are more applicable to entrepreneurs (bankrupts);
- That the preventive restructuring process depended on the **debtor in possession** model;[12]
- That even though there was a recognition of the need to protect dissenting creditors, the preventive restructuring framework would also include the possibility for **cram-down** provisions. Thus, a tension was established from the outset between the idea of protecting dissenting creditors and the characteristics of a robust restructuring framework. In turn this led to the divergence amongst Member States, which is categorised in the following section;[13] and
- Protection for new financing. [14]

This summary informed the areas where we felt it was necessary to interrogate the approach of individual Member States, which we have done in our JCOERE Questionnaire.[15] Even at this time, Commission policy documents emphasised the goal of harmonisation of these complex principles across Member States stating that:

> the creation of a level playing field in these areas would lead to greater confidence in the systems of other Member States for companies, entrepreneurs and private individuals, and improve access to credit and encourage investment.[16]

The development of the Preventive Restructuring Directive from these policy beginnings through various iterations and debates in the European legislative process culminating in the Directive, which was passed in June 2019, is described in detail in Chapter 5 of Report 1 of the JCOERE Project. It is possible to see how the substantive rules that are considered to be core to restructuring emerged and became part of the PRD. The following section of this Chapter summarises our findings regarding differences on substantive legal principles which we consider will prevent co-operation. As the Commission has acknowledged, harmonisation is important and without it, the chances for co-operation diminish.

[11] PRD, art 11. For a discussion of APR V RPR, see Irene Lynch Fannon, 'An Irish Perspective on the Cram-down Provisions in the Preventive Restructuring Directive 1023/2019 EU, Guest Editorial' (2019) 27(3) International Insolvency Review 1; Stephen Lubben, 'The Overstated Absolute Priority Rule' (20 March 2015), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581639>; Riz Mokal, 'The New Relative Priority Rule' (paper presented at the International Insolvency Institute, 17 June 2019, slide 4). This point was repeated by Mokal at the INSOL Europe Academic Forum, (Copenhagen 25th and 26th September, 2019). See further Chapter 4 of this Report.
[12] PRD, art 5.
[13] PRD, art 11.
[14] PRD, art 17.
[15] See JCOERE Report 1, Chapters 6, 7 & 8: <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/>.
[16] European Commission, Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency' (Staff Working Document) SWD (2014) 61 final 1. [Hereinafter Impact Assessment of Recommendation].

3.2 Obstacles Arising from Substantive Law: Findings from JCOERE Project Report 1

The following is a brief summary of the findings of Report 1. The questionnaire focussed on key rules central to preventive restructuring to assess both current rules and planned implementation. These key rules included the following principles:

- The imposition of a stay which in the Directive is envisaged as being up to 4 months normally with a possible extension to 12 months.
- The creation of structures where there is intra class cram-down - this is simply a majority rule principle.
- The optional creation of legal structures where there is inter class cram-down, where dissenting creditors may be brought into the restructuring plan (with court approval).
- The best interests of creditors test which allows the creditors to expect a dividend from the restructuring which is at least as good what they can expect in alternative scenarios. This would mean that in the money creditors would be treated at least as well as in alternative scenarios.

As we proceeded in our survey of the member countries and participated in debates at various conferences and fora, we realised the depth of differences between legal cultures, policy approaches and preferred outcomes across the Member States we surveyed and in other Member States with which we engaged during these debates.

3.2.1 The Member States surveyed and why

The Project began with Member States which we knew to have 'robust restructuring processes'. These included Ireland and the UK (but in reality, England and Wales). In the former, the Examinership process[17], modelled on Chapter 11 of the US Bankruptcy Code had operated for 30 years and in the UK, the English Scheme of Arrangement[18] had achieved some notoriety as a rescue device for large distressed companies during the recent great recession. What is interesting is that the Irish model was not well known in Europe, but the UK framework was extremely well known. A key difference, which we think might explain this discrepancy, is that the former was covered by the EIR Recast[19] and therefore subject to COMI[20] requirements, whereas the latter was not. As discussed in Chapter 3 of JCOERE Report 1, this allowed companies to avail of the English court system once English law tests regarding

[17] See Companies Act 2014, Chapter 2 to Chapter 5.
[18] Companies Act 2006, Part 26. See also Jennifer Payne, *Scheme of Arrangement: Theory Structure and Operation* (CUP, 2014).
[19] Annex A, EIR Recast.
[20] EIR Recast, Recitals 23, 25, 27, 28, 30, 31, 33 and Articles 2(9)(viii), 2(11), 3(1), 3(2) and 3(4)(a).

jurisdiction were satisfied.[21] In addition the English courts exercise fairly flexible rules regarding jurisdiction which are not replicated elsewhere.[22]

As outlined in Report 1, our partner countries included one major European country with a civil law code, namely Italy to which we added France and Spain, and a former Eastern bloc country, Romania to which we added Poland. Following on from that, we added Germany and Austria, where we suspected approaches to preventive restructuring differed from the countries we had included in our survey to that point. We added the Netherlands because of innovations introduced there in anticipation of the PRD and finally, we added Denmark in light of its continuing engagement with the EU despite treaty protocols described below in section 3.3.7.

3.2.2 The contributors and their roles

In terms of garnering information on these countries we relied on a range of contributors and additional sources where any doubts arose. Of course, the danger is that a particular representative or commentator, whether practitioner or academic, is not entirely representative of the 'official' position and so we engaged in specific questions regarding substantive legal rules. These were separated out from observations regarding projections of legal initiatives or assessments of the policy debate. However, we found that the differences in legal approaches were often reflected in differences in policy and opinion. Even within jurisdictions we found differences in the characteristics of the commentary. To that end academics, for example, were often less pragmatic regarding the role of courts in adjudicating matters relevant to insolvency.[23] Differences also arose regarding the willingness of judges to cede jurisdiction where the EIR Recast might apply even in the face of dramatic rules such as a stay, whereas practitioners were less content with the loss of jurisdictional reach, for reasons that are discussed below.[24]

3.3 The Classification of States – Our Perspective

As indicated, it is not proposed to go through the various different approaches to the elements of a preventive restructuring framework displayed by Member States and the various legal players within those states. Instead we have adopted a classification of Member States which is reflective of our findings that formed part of Report 1, which is available on our website.[25] This classification is original and is presented as part of our research. It is not intended to be the final arbiter of the approach of Member States to corporate restructuring but is simply

[21]Please see JCOERE Report 1 Chapter 3 Section 3.5 for a detailed discussion on the flexibility of the English Scheme jurisdiction: <https://www.ucc.ie/en/jcoere/research/ report1/report1chapter/report1chapter3/> See also this Report, Chapter 7 section 7.4.
[22] ibid.
[23] These points were made by Nicolaes W A Tollenaar and Tomáš Richter, at the ERA Conference, held in Trier, 7th and 8th November, 2019.
[24] Discussed in more detail in para 3.10 of this Chapter.
[25] JCOERE Consortium, Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations (December 2019) < https://www.ucc.ie/en/jcoere/research/report1/> [Last Accessed June 25th 2020].

designed to provide a comparative perspective on Member States in the context of corporate restructuring.[26] Within Europe, the issue of COMI shifting will become central to issues of mobility of corporate debt restructuring schemes.

3.3.1 Member States with robust restructuring processes: The Common Law countries

It was clear from the beginning of our research that the common law countries within the EU had adopted what is described in this Chapter as 'a robust' approach to corporate rescue. It is difficult to know why this is the case, as there is no reason inherent in the nature of the common law as a generator of legal rules, as compared with the civil law which would suggest that one system is more favourable to the creation of rules which impose a stay, or protection for dissenting creditors and other characteristics typical of a robust restructuring process. There is the possibility of more influence from the US and the perceived importance of Chapter 11 of Title XI of the US Bankruptcy Code because of the commonality of systems. However, we have arrived at the interim conclusion that the explanation rests with a 'commonality of legal culture', specifically a culture that places the role of the judiciary at the centre of legal development; this, we believe, is different from civil law countries. A further part of this hypothesis is that restructuring is somewhat dependent on judicial responsiveness and that this is more possible in common law countries.[27] These ideas are discussed further in Chapters 4 and 7.

That said we are a bit wary of the common law - civil law divide as providing the only explanation as we suspect this might be too simplistic. As described below, there are also variations among civil law countries, which makes the mostly dualistic approach under the

[26] Many commentators have presented the view that the Member States which are most likely to attract corporate restructuring business are the Netherlands and possibly Ireland. The UK is also regarded as continuing to attract restructuring business in Europe despite Brexit. From a practitioners' perspective this is often presented as a competition for legal business whereas not all of the judiciary are as keen to add to the burden of their court work. For example, a note issued by Dentons Solicitors, 'English Creditors and the new Dutch Scheme of Arrangement - A Two Horse Race?' (June 16 2020) < https://www.dentons.com/en/insights/articles/2020/june/16/whoa-english-creditors-and-the-new-dutch-scheme-of-arrangement-a-two-horse-race>; from Ireland: Deloitte, 'Business Restructuring Solutions: Solutions to help get your business back to growth' < https://www2.deloitte.com/ie/en/pages/finance/solutions/restructuring-services.html>; An international perspective provided from London: Global Restructuring Review, 'International Debt Restructuring: Can other Jurisdictions compete with London and New York? <https://www.shlegal.com/docs/default-source/news-insights-documents/11_16-grr-roundtable.pdf?sfvrsn=b58b165b_0> [All accessed June 17, 2020].

[27] The importance of the English Scheme of Arrangement post the recent financial crisis cannot be denied. The development of Schemes of Arrangement is discussed fully in Jennifer Payne, *Scheme of Arrangment: Theory Structure and Operation* (CUP, 2014). Many European companies were restructured under this process. The following cases are examples: *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch) and *Re Rodenstock GmbH,* [2011] EWHC 1104 (Ch). In addition, English courts are flexible regarding jurisdictional issues. In the first instance English law provides that A scheme can be between 'a company' and its creditors. This includes any company which is liable to be wound up under the Insolvency Act 1986. This can include solvent or insolvent 'foreign' companies. The test of whether an English court accepts jurisdiction rests on the following questions where a positive answer to any question is sufficient. First the presence of assets in the jurisdiction but this is not absolutely necessary. Second whether there are parties who might benefit from a process and finally whether there are one or more persons will receive assets are subject to court's jurisdiction. In *Primacom Holding GmbH & Anor v A Group of the Senior Lenders & Credit Agricole* [2012] EWHC 164 (Ch) and *Re Rodenstock GmbH,* [2011] EWHC 1104 (Ch), the English court found that the fact that English law governed all creditor arrangements was sufficient. See further, Jenifer Payne, 'Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563, 571: 'There is much to be said for the view that where the creditors have chosen English law, allowing a scheme of arrangement to compromise or transfer the creditors' debt is entirely appropriate.'

legal origins theory too simplistic to explain the variety of differences among the EU Member States.[28]

Within the common law countries of the EU, there are also problems associated with the differences between Schemes of Arrangement and Examinerships. The latter is included in the EIR Recast while the former is not as it is a process derived from Company Law and is therefore excluded.[29] This has not been detrimental to its use by a variety of foreign companies seeking to restructure in the UK. Rather, the flexibility of the 'sufficient connection test' as opposed to COMI has made it possible to extend availability of the process far more broadly than might have been possible had the procedure been subject to COMI. It is unclear yet how Brexit will affect the use of the process by European companies as it will not be affected by the disapplication of the EIR Recast. However, the recognition of judgements under the EU Judgements Regulation (Council Regulation (EC) No. 44/2001)[30] had supported the general effectiveness of English Schemes of Arrangement and whilst some doubt has been cast over this approach in recent decisions of both the English courts and the CJEU, this has been relied upon by English practitioners. Of interest is the fact that whilst both Schemes of Arrangement with very similar characteristics to the English model are available in Ireland, the Examinership process has been the preferred approach over many years.

3.3.2 Civil Law countries with pre-existing rescue processes

The French *sauvegarde* procedures include a number of different variations, which have been described in Report 1.[31] These have been in place for some time, in fact since the 1980s. These processes are included in the EIR Recast and plans are afoot to amend the existing legal framework to take account of the PRD. The question remains however, whether any of the existing frameworks in France are fully compliant with the implementation of the Directive. It is interesting that France resists the cross-class cram-down which, although important in terms of a robust restructuring framework, is not a necessary part of implementation.

3.3.3 Civil Law countries responding to the financial crisis

Italy

There are three types of restructuring processes available and all of these, the *concordato preventivo*is covered by the EIR Recast. The concordato preventivo[32] includes an optional stay and a cross-class cram-down and is subject to court confirmation. The other two procedures as described by our contributors, seem to be more administrative in nature. These are different types of accordi di ristrutturazione dei debiti (purely consensual or binding on a

[28] Chapter 4, Section 4.3.1 refers to a number of commentators who have criticised this simple dualistic approach in (n 28).
[29] Irish Companies Act 2014, Part 9 and English and Welsh Companies Act 2006, Part 26.
[30] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.
[31] La Loi n° 2005-845 du 26 juillet 2005 de sauvegarde des entreprises (Law No. 2005-845 of July 26th, 2005 for the Safeguard of Companies).
[32] Codice della crisi d'impresa e dell'insolvenza (CCI), art 84, para 3.

minority of dissenting creditors) that envisage an out-of-court phase consisting of negotiation and reaching an agreement with creditors with a view to rescuing the company. These are subject to court confirmation. To an outsider, the range of options is confusing and therefore problematic The issue of formal co-operation obligations arising is determined by two questions. The first is whether the process is covered by the EIR Recast. But as two out of three of the procedures are not covered by the EIR Recast, the issue of whether a formal obligation to co-operate arises does not apply. A second issue is that two out of the three procedures are out of court procedures. If these processes involve administrative authorities, it should not be assumed that co-operation obligations do not apply; in fact, such obligations could apply, as they have equal relevance to courts and administrative authorities, a point that will be discussed in more detail in section 3.3.6. It is possible that some sort of co-operation would occur in any event. That said, as we discuss in Chapter 4 section 4.3.2, legal certainty and foreseeability are fundamental to judicial co-operation and where individual Member States present a variety of preventive restructuring procedures, some of which are included in the EIR Recast, some of which are not, further uncertainty will arise in relation to both issues of recognition and co-operation. In fact, the variety that we now see emerging raises the question as to whether there should have been more harmonisation in the PRD once it was near finalisation, with less scope of implementation for individual Member States.[33]

Spain

Spain is somewhat similar to Italy with a range of options for restructuring. These provisions include a stay and the possibility of including dissenting creditors where a majority approves the compromise plan in a particular class. However, at present Spain has no procedure that includes a cross-class cram-down as such. Again, as with France, it is not necessary to introduce cross-class cram-down as part of the implementation of the PRD and so we can see that there is a growing lack of harmonisation between the states.

3.3.4 Innovator countries

The Netherlands has introduced the WHOA legislation in anticipation of the passing of the PRD.[34] Interestingly, as the first version of the WHOA was progressing through the Dutch parliament, existing Dutch legislation under which a pre-pack restructuring process is possible was challenged on behalf of employees of Estro. Its business was restructured and sold to a new company, Smallsteps, with all employees being made redundant and some offered new contracts. The Dutch pre-pack is available under what was considered a liquidation procedure (*faillissement)*, which is why it was believed that the rules requiring the transfer of employment contracts would not apply in their case, as such rules apply only in procedures

[33] See further JCOERE Consortium, Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations (JCOERE Project, 2019) < https://www.ucc.ie/en/jcoere/research/report1/>.

[34] *Wet homologatie onderhands akkoord* (Act on the Confirmation of Extrajudicial Restructuring Plans) (WHOA).

that are not with a view to the liquidation of the company. The CJEU found that despite the identifying features of the procedure under which the pre-pack was created being liquidation, because the business would continue to operate, the requirements to transfer employment contracts would also apply. This took away an important characteristic upon which the perceived competitiveness of the Dutch pre-pack relied: avoiding the highly protective Dutch employment regulations by being able to dismiss employees prior to the purchase of the employing company under a pre-pack. As a result, the WHOA went back to the proverbial drawing board, ostensibly to deal with what was viewed as a disadvantage to its competitiveness as a result of the CJEU's finding in *Estro/Smallsteps*, among other things.[35]

3.3.5 Newer accession states

Both Poland and Romania have taken the commitment to corporate rescue on board. There are elements of the Italian experience in the Romanian legislation. Polish legislation is advanced and developed and at present, includes four different possibilities. However, there are plans to further develop the processes in keeping with the option for robust restructuring processes.

3.3.6 The Resisters

Germany

Effectively, there is no *preventive* restructuring framework available in Germany but the description of German insolvency procedures to this effect seems to rely on the dividing line of declared insolvency. In effect, there is no rescue process available before a declared insolvency but post a declaration of insolvency the legislative framework does provide for a restructuring process. Once the debtor files for insolvency under the *Insolvenzverfahren*[36] the restructuring or rescue process is available. The *Insolvenzverfahren* is included in the EIR Recast. German law allows for a restructuring plan to be approved despite the objections of an entire class, so this would indicate that cross-class cram-down is permitted weighed against criteria applied by the court.[37]

This is also influenced by a continued theoretical resistance to pre-insolvency restructuring which is described in Chapter 4 of JCOERE Report 1.[38]

[35]Case C-126/16 *First Steps Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* [2017] ECLI:EU:C:2017:489. The CJEU response supported the envisaged possibilities for rescue in the PRD but also stated that employees must be protected. There is now a specific provision in Article 13 designed to protect workers. The different political response is interesting in contrast to the differing approach to worker welfare in the common law countries.

[36] *Insolvenzverfahren,* the unitary insolvency procedure under *Die Insolvenzordnung* (The Insolvency Statute or InsO).

[37] See further the description of the German process in Section 3.2 of the report by Stefania Bariatti and Robert Van Galen, *Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices* TENDER NO. JUST/2012/JCIV/CT/0194/A4, (INSOL Europe 2014). In this document the German process is described as potentially occurring once the notice of insolvency is published.

[38] JCOERE Report 1, Chapter 4, section 4.4 discusses the theoretical debate around pre-insolvency and preventive restructuring, available here: <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/report1chapter4/>.

Austria

The Austrian URG seems to be a very 'light touch' restructuring process, which seems quite similar to the English (and Irish) Scheme of Arrangement insofar as it is essentially a restructuring process, which can be used for a solvent restructuring or a restructuring where the company is likely to become insolvent. There is also no requirement for court confirmation of the scheme, which is in contrast to the UK Scheme of Arrangement despite some similarities between these systems. There is no cross-class cram-down. In effect this would represent a bare minimum in terms of the requirements of the PRD.

In both countries there seems to be little appetite for a robust restructuring process at policy level. Germany had one before which we are told was not used. There is resistance to wholesale rewriting of existing contracts. Austria has the same response, which is interesting as we have been informed that, as a centre for cross-border insolvency, Austria might experience more of these kinds of cases than others.

3.3.7 Outliers

Denmark

Of key importance in considering the position of Denmark are articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. Denmark is not obliged to comply with further provisions regarding Title 5 of Part 3 of the TFEU. Therefore, the Danish legislative framework as it currently stands is not covered by the EIR Recast per Recital 88. Nevertheless, Denmark intends to follow the provisions of the PRD. Reflecting the German approach, the Danish legislative framework provides for a restructuring plan but only after a formal declaration of insolvency has been made. Thus, a new process will be introduced following the terms of the PRD.

3.4 Harmonisation and Co-operation

As described above, there is general acknowledgement that co-operation is reliant on significant degrees of harmonisation. This is acknowledged by the European Commission and is also evidenced in practise with the most obvious example emanating from our comparison with the United States in Chapter 7 where a federal arrangement of states operates under a federal bankruptcy code. In this latter context, as we show in Chapter 7, issues relating to the choice of forum become muted and less complex. It should be noted that despite this marked difference between the EU and the US in the context of insolvency law, it is not the case that all significant areas of law are harmonised across the US, the most obvious examples being

tax law and employment laws.[39] Corporate law is also an area which is not harmonised across the United States. Nevertheless, in this particular arena the states of Delaware, New York and California represent the majority of cases where choice of forum in corporate law is necessary. Thus, it is not accidental that the choice of forum in corporate bankruptcy follows this line. In the EU, in contrast, all Member States pursue their own corporate law frameworks, with some elements of harmonisation across Europe.[40] In addition, tensions between the real seat doctrine and the place of incorporation make it difficult to replicate the US experience, although corporate mobility is becoming increasingly common in Europe.[41] On the whole however, it is clear that harmonisation of EU corporate insolvency law has a long way to go and this is clearly the case as regards our specific focus on preventive restructuring. Our first Report has described in detail different approaches of EU Member States and these differences become more exaggerated the more one engages in discourse on the subject. The differences were adumbrated as early as 2014[42] in the period leading up to the publication of the Commission's policy document, *A New Approach to Business Failure,* discussed here and elsewhere in our Reports.

3.5 Procedural Obstacles: Findings from JCOERE Project Report 1

In our original questionnaire, which we circulated to a range of chosen Member State jurisdictions, we identified in advance some issues that we characterised as procedural obstacles and which we hypothesised would cause obstacles to co-operation. The EIR Recast itself includes some specific provisions regarding choice of forum and / or choice of law issues and in some senses therefore, the EIR Recast acknowledges that co-operation has its limits. What is interesting is the extent to which the EIR Recast itself embeds obstacles to co-operation in this way. These are discussed in the following section. For the moment however, we are focussing on issues, which arise in a typical preventive restructuring framework or issues which are specifically addressed in the PRD, which may prove to be problematic.

These include but are not exhaustive of the following issues:

Rights in Rem as provided for in article 8 of the EIR Recast. This issue was included in our original questionnaire in anticipation of difficulties arising from it. In addition, we included other issues in our questionnaire, which did not form part of our discussion of the contributor responses in Report 1, namely Constitutional Parameters Delimiting Freedom of Judicial

[39] As regards the latter there is very little harmonised law in relation to individual employment law standards unlike the EU where levels of harmonisation are significant. In contrast laws regulating trade unions and collective bargaining are federalised. See generally Irene Lynch Fannon, *Working Within Two Kinds of Capitalism* (Hart 2003). Similarly, although there is a federal tax base states in the United States vary considerably as regards income tax levels and indeed sales tax.

[40] See *inter alia*, Shareholders' Directive, Council Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending *Directive* 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1.

[41] See for example, Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999] ECR I-01459 and Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (*NCC) [2002] ECR I-09919.

[42] Stefania Bariatti and Robert Van Galen, Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices TENDER NO. JUST/2012/JCIV/CT/0194/A4, (INSOL Europe 2014).

Communication (Qn 12). We also raised questions about Training and Competency for Insolvency Judges (Qn 14), which is addressed in Chapter 4 of this Report (section 4.6).

3.5.1 Rights in Rem

Article 8 of the EIR Recast provides particular protection for creditors with rights *in rem* over assets 'which are situated within the territory of another Member State'. [43] Effectively this means that there is a limitation to the jurisdictional reach of any insolvency proceeding opened in one Member State in relation to assets situate in another Member State. In the context of the PRD, this imposes a limitation on the reach of any restructuring insofar as it affects the rights of a creditor secured with an *in rem* right. Dahl and Kortleben observe[44] that article 8 relates to the right in an asset but not to the asset itself. Thus, where the creditor obtains proceeds from the realisation of the asset, the underlying principle is that the asset belongs to the insolvency estate so that where there is a surplus generated the surplus reverts to the insolvency estate. Where the asset is realised for equivalent value, no further issues arise, but where the asset is realised for less than the value of the debt, the creditor will become a creditor of the company for the remainder. This seems a legitimate approach in the context of traditional insolvency proceedings. In a restructuring however, the question is whether the creditor's right in a particular asset is protected in this way under the European framework. In other words, is the protection in the EIR Recast absolute? It would seem to be so. Therefore, the creditor's right or claim cannot be part of the restructuring proceedings as such, unless the creditor specifically agrees to this. This would therefore seem to be an *ex ante* limit on the operation of cram-down or cross -class cram-down provisions.[45] Furthermore, in the scenario where proceeds of the realised asset are insufficient to meet the debt the question persists as to whether the creditor remains in a different, protected position compared with other creditors which must submit to the restructuring process.[46]

Essentially as observed by Snowden,[47] the opening of a main insolvency proceeding (which if it is included in Annex A, will include a preventive restructuring process) 'has no effects upon the right *in rem'*. This means that 'security rights in other Member States can be asserted and enforced in spite of the opening of insolvency proceedings as if no such proceedings existed.'[48]

---

[43] EIR Recast, Art. 8(1): 'The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, which are situated within the territory of another Member State at the time of the opening proceedings.' Art 8(2) goes on to provide examples of such rights.

[44] See Michael Dahl and Justus Kortleben, 'Chapter 1: General Provisions: Article 8, Third Parties' Rights in Rem in Mortiz Brinkmann (ed) *European Insolvency Regulation: Article by Article Commentary* (Beck and Hart, 2019), 131.

[45] See further *ibid.,* and references therein to Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016).

[46] For our contributors' perspective on rights in rem in relation to their protection under the EIR Recast and the potential conflict created in the PRD, see JCOERE Report 1, Chapter 8, section 8.4, available here: <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/report1chapter8/>

[47] Kristin van Zwieten, Georg Ringe, Richard Snowden, Francisco Javier Garcimartin and Miguel Virgos, 'Chapter 1: General Provisions (Art. 1-18)' in Reinhard Bork and Kirstin Van Zwieten (eds) *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).

[48] *Supra* n. 44, at para 25. See in addition reference to the opinion of the Advocate General Szpunar therein in the CJEU Case C-557/13 *Hermann Lutz v Elke Bäuerle* [2015] ECLI:EU:C:2014:2404.

3.5.2 Constitutional issues – public hearings

As argued by Moss, Fletcher and Isaacs, it would seem to be incompatible with procedural rights and principles if courts were to communicate with each other without the presence of legal parties or their advisors.[49] It seems to us that this might be the view of members of the judiciary (and commentators and practitioners) in a number of Member States, including Ireland, for example, which has a constitutional guarantee that justice would be administered in public insofar as possible. However other commentators take a different view.[50] In our view, the nature of the co-ordination would be determinative of whether a procedural or indeed constitutional principle is breached. It could be that limited co-ordination such as setting a date might be finally decided upon without the parties present, but on the other hand, we would not agree that courts co-ordinating actions regarding the appointment of an insolvency practitioner could be done without informing the parties and ensuring their presence.[51] In addition, the requirement that a court hearing should be heard in public is not, in terms of constitutional jurisprudence, limited to the requirement that only the parties are heard. There is an understanding that the constitutional requirement extends to the interests of the public in general including journalists, reporters, other interested stakeholders, who may not be party to the action, *per se.* In the case of Ireland, this understanding can be said to stem from two articles of the Irish Constitution; first, Article 34.1 and second, Article 40.6.1.

Article 34.1 states that justice shall be administered in public and was considered in detail in *The Irish Times v Ireland*, wherein it was held by the Supreme Court that it was both 'a fundamental right in a democratic state and a fundamental principle of the administration of justice… for people to have access to the courts to hear and see justice being done' save in limited exceptions.[52] The exceptions to this are few and far between as demonstrated by *Doe v Revenue Commissioners*, wherein a potential exception to the requirement was considered.[53] At a preliminary hearing, the plaintiffs sought permission to bring the main proceedings anonymously and in an *in camera* hearing for (part of) those proceedings. The case concerned the identification of the plaintiffs in Iris Oifigiúil (Government Official Gazette), effectively as 'tax defaulters'.[54] The plaintiffs argued for anonymity on two grounds;

---

[49] Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016), at para. 8.695.

[50] Dominik Skauradszun and Andreas Spahlinger, 'Chapter III Secondary Insolvency Proceedings: Article 42. Co-operation and communication between courts in Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019), p. 352 where it is argued that because co-operation is between two representatives of the courts and that the focus is on co-ordination this cannot be 'compared to a hearing or the court's examination of the evidence.' However, the following sentence contemplates courts coordinating about the 'appointment of the same insolvency practitioner' without informing the parties or inviting them to take part in the deliberations.

[51] This appears to be borne out in many of the guidelines considered in Chapter 6.

[52] [1998] 1 IR 359, 361. The court also expressed that the trial judge in this case, who prohibited contemporaneous reporting, could have dealt with the matter under contempt of court rules and by giving adequate directions to the jury, arguably further emphasising that any prohibition on the media from reporting on court cases should be exceptional. This case also considered the right of the media to report in the context of Article 40.6.1. See also *Cullen v Toibín* [1984] I.L.R.M 577 and *In re R* [1989] I.R. 196, in which Walsh J stated: 'The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done' [p.134].

[53] [2008] 3 IR 328

[54] The publication in Iris Oifigiúil would be of the settlement reached between the plaintiffs and the Revenue Commissioners under the 'Disclosure of Undeclared Liabilities by Holders of Off-Shore Assets' scheme. There was a disagreement between the parties as to the legal requirement for such a publication.

first, an entitlement to privacy in taxation matters and second, an entitlement of access to the courts, which would be lost in their case if anonymity was not permitted. The Court rejected both arguments and held that the constitutional rights to privacy or to a good name are insufficient to displace the constitutional imperative to administer justice in public and are distinguishable from the right to a fair trial, which may necessitate some proportionate restriction of that imperative.[55] Article 40.6.1 – protects the right of citizens to express freely their convictions and opinions subject to certain limitations;[56] it acknowledges *inter alia* the 'grave import to the common good' of the education of public opinion. Naturally this right is not absolute and must cede to other constitutionally protected rights, such as the right to a fair trial or 'trial in due course of law'.[57] In *Kelly v O'Neill* the constitutionally guaranteed right to freedom of expression of the press was expressly acknowledged by the Supreme Court;[58] while it viewed this right as 'a value of critical importance in a democratic society', the Court held that it was not an absolute right and could be superseded by other concerns, such as the administration of justice and the right to a fair trial.[59]

Rules of this kind depend and their interaction with obligations to co-operate depend on the domestic legal framework. However, in our questionnaire, all of the jurisdictions had written constitutions other than the UK. The nature of the constitutional guarantee that justice will be administered in public and how it is understood will no doubt affect the willingness of members of the judiciary to communicate with members of the judiciary in other Member States and it will certainly affect the manner in which that communication takes place.

Although it is noted that not all jurisdictions will take the same approach as the Irish example. In contrast to the assumptions made in Ireland, contributors from other countries with written constitutions such as Denmark expressed the view that it is not generally considered that the process of communication raised significant challenges.

3.5.3 Co-operation: Statute, judge-made protocol or guideline?

From country to country, different approaches are taken to the issue of co-operation. In France, for example, the law that implements or adds to the EIR Recast and the co-operation provisions emphasise the need for security and privacy. The law states that communication may take place by any suitable means that enable security, confidentiality and the privacy of

[55] The right to a fair trial was not relevant in *Doe*, as the plaintiffs had 'admitted' wrongdoing by virtue of reaching a settlement with the Revenue Commissioners.
[56] Article 40.6.1 identifies these limitations as 'public order and morality' and 'the authority of the State', however it does not extend to 'criticism of Government policy', which is expressly protected.
[57] Articles 38.1 and 40.3.
[58] [2000] 1 I.L.R.M. 507.
[59] [2000] 1 I.L.R.M. 507, 509. Although this was a criminal matter, critically the Supreme Court drew a distinction between "an article published after the jury have returned a verdict of guilty, but before sentence is imposed, which simply summarises the facts of the case … and includes innocuous background material" and the media having "an unrestricted licence, subject only to the law of defamation, to comment freely and publish material, however untrue and damaging, concerning a trial at a stage when it was still in progress".

the information exchange to be guaranteed.[60] The court may also appoint a judge or authorise the supervising judge and / or the office-holder to carry out any necessary co-operation and communication.[61] The office-holder is also required to submit for the approval of the supervising judge any proposed agreement or protocol agreed by virtue of the same provisions of the Recast EIR in respect of the same debtor or another entity that is a member of the same group as the debtor.[62] In some countries, such as the French example cited here, the manner in which judges might co-operate with other courts is regulated by statute. In other countries, there is no expectation of such regulation and so the matter may be addressed through the operation of protocols, such as those considered in Chapter 6.[63]When questioned, judges often expressed the view that they themselves would adopt and deivse a protocol if necessary and often expressed scepticism about the need for a protocol. Certainly, it became apparent that there was little awareness of developed protocols amongst some judges, which is discussed further in Chapter 8, with the guidelines themselves being explored in Chapter 6.

According to the Polish Constitution everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Similar to Ireland, exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly (article 45 of the Polish Constitution).[64]

The Italian Constitution does not include any express parameter delimiting the freedom of judges to communicate, in general; however, pursuant to art 111 of the Italian Constitution, all proceedings must be conducted on an equal footing in a fair and impartial third-party hearing between the parties. This provision introduces the so-called adversarial principle in the Italian jurisdiction.

In light of the above, direct communications between Courts, although permitted, needs to occur in a way that is compliant with *domestic* constitutional principles provided here simply as examples of issues that might occur in all Member States. In particular, compliance with constitutional provisions prohibits that judicial decisions be taken without protecting the interested parties right to be heard (orally or in writing) on an equal footing.

While there is a focus on the rights of parties to the proceedings in the answers to our questions about constitutional issues, it is important to note that in some jurisdictions the

[60] See JCOERE Consortium, Emilie Ghio and Paul Omar, 'Country Report: France' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionfrance/>. See also Article 2, Ordinance no. 2017-1519 of 2 November 2017, introducing Article L695-4 of the Commercial Code.
[61] *Ibid,* introducing new Article L695-3 of the Commercial Code.
[62] *Ibid*, introducing new Article L695-2-II of the Commercial Code.
[63] See further Chapter 6.
[64] See JCOERE Consortium, Michał Barłowski and Sylwester Zydowicz, 'Country Report: Poland' (JCOERE Website 2020), < https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionpoland/>.

constitutional issues regarding the hearing of judicial proceedings in public (as with Ireland) will extend well beyond the interests of particular parties to the proceedings.

3.5.4 Court or administrative authority?

Other difficulties that may arise have been illustrated by a consideration of case law in Chapter 5. One of these includes the equation of a court with what is described as an 'administrative authority' in the PRD. In this case, even though the Recitals to the PRD and the definition in article 2 refer to 'a court', in subsequent articles, reference is repeatedly made to 'a judicial or administrative authority' as is the case in article 5(2), article 6 relating to the imposition of a stay and so on.[65] A similar approach is taken in the EIR Recast where the definition in article 2(6)(i) states that court means 'the judicial body of a Member State' in relation to specific provisions[66] but goes on to provide in article 2(6)(ii) that, in all other articles, 'court' means 'the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings'. This means that, for the purposes of articles 42-44 and articles 57 and 58, an equivalence is drawn between a judicial body and an administrative authority. Recital 20 of the EIR Recast states:

> Insolvency proceedings do not necessarily involve the intervention of a judicial authority. Therefore, the term 'court' in this Regulation should, in certain provisions, be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened.

Many of the articles in the PRD refer to judicial or administrative authorities exercising power or authority in various ways. However, there can be a significant difference in the characteristics of judicial and administrative authorities, whether within a single jurisdiction or in a cross-border situation.

3.5.5. Court or administrative authority: Case law

From the very beginning the equivalence drawn between a court and an administrative authority was bound to present problems between the common law and civil law systems where the perception of the latter type of arbiter is much more mixed than in civil law countries. However, the difficulties caused by this asserted equivalence between a court and an administrative authority will not be limited to simply a civil-common law divide, as is

[65] The same phraseology is used in Article 10 in relation to confirmation of a restructuring plan and in Article 11 regarding the operation of cram-down provisions.
[66] These specific provisions are listed in PRD, Article 2(6)(i). None are of particular relevance to restructuring other than points (b) and (c) of Article 1(1) which refer to a stay.

evidenced by some of our responses to the JCOERE Questionnaire. As expected, this issue presented problems in the *Eurofood* case.[67] Under article 2(d) of the 2000 EIR it is stated that 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings' and went on in art 2(e) to state that '"judgment"' in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decisions of any court empowered to open such proceedings or to appoint a liquidator'. Article 2(f) provided that the time of opening of proceedings shall mean 'the date of the judgment which renders the commencement effective'. However, Recital 10 of the EIR explicitly stated as follows:

> Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings.

In his opinion in *Eurofood*, Advocate General Jacobs explained that 'in various jurisdictions there are different ways in which insolvency proceedings may be commenced', usually a decision of a court, on the one hand, and the appointment of a liquidator, on the other hand. The EIR 'confers automatic recognition on insolvency proceedings opened in both ways'.[68]

The *Parmalat/Eurofood* case illustrates the potential for enormous difficulty in the application of these principles. Here, the first decision in Italy to commence the insolvency process was made by the Italian Minister for Production Activities on 9 February 2004. It is worth bearing in mind, however, that Parmalat SpA had been admitted to extraordinary administration proceedings and an extraordinary administrator appointed on 24 December 2003. In Ireland, the petition for the winding-up of the company had been presented to the High Court and a provisional liquidator appointed to *Eurofood* on 27 January 2004. Subsequently, the winding-up order was made, and an official liquidator appointed on 23 March 2004. The most important question, namely which proceedings would prevail in relation to *Eurofood IFSC*, turned on which step constituted the 'opening of proceedings'. The ECJ held that it was the appointment of the provisional liquidator by the Irish High Court on 27 January 2004, which constituted the opening of main insolvency proceedings. This issue was vigorously contested on behalf of the Italian authorities who characterised a provisional liquidator as a 'temporary administrator' with 'limited powers' and therefore not a 'liquidator' for the purpose of the EIR. In contrast, it was contended that, as an administrative act, the Italian commencement did not amount to the commencement of proceedings as such. The ECJ concluded that under Irish law a provisional liquidator has 'extensive powers', including to take possession of the assets of a company, and his role is therefore much wider than a 'temporary administrator.

On the continuing question of court-to-court co-operation and staying with the Italian situation, as suggested earlier in this Chapter, various restructuring processes in Italy involve

[67] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813, and *Re Eurofood IFSC Ltd, (*C-341/04) [2006] Ch. 508; [2006] 3 W.L.R. 309 [Hereinafter *Eurofood*].
[68] Case C-341/04 *Eurofood*, para 64.

an administrative authority rather than a court. The *procedimento di composizione assistita della crisi* involves an administrative authority. In other processes, the board (*collegio,* art 17 CCI) is composed of three members chosen among those included in a public register of experts. One of them is designated by the court and the other two by the Chamber of Commerce and by the trade association of the debtors' industry. While it is important to note that in Italy the court, not the board, has the power to grant a stay on enforcement actions, nevertheless, it is clear that in some cases courts could potentially be asked to co-operate with administrative authorities. As with *Parmalat* this may cause difficulties in and of itself.

3.6 Workers

In introducing a restructuring framework under the Preventive Restructuring Directive, article 13 provides:

> Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework.

As indicated in the text, the article then goes on to list some provisions but also notes that all rights of workers available in domestic legislation are protected under the article. The question then arises as to whether a restructuring, which includes a cram-down of workers' claims within a class or includes a cross -class cram-down of an entire class of creditors' claims of which workers form a part, can be achieved under these provisions?

The answer would seem to lie in the practical terms of a restructuring process, in other words the actual restructuring agreement. Usually workers will be kept in employment during a restructuring as preservation of jobs is indeed one of the aims of restructuring. However, some workers may be made redundant or there may be a reorganisation of working roles. In these cases, workers will have a claim against state insurance funds or will benefit from the provisions of Directives 98/59/EC[69], 2001/23/EC[70] and 2008/94/EC[71] (Transfer of Undertakings Regulations) and the Directive seeks to preserve this situation.

However, the Directive goes on to state in article 13(2):

> Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.[72]

[69] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.
[70] Council Directive (EC) 2001/23 of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.
[71] Council Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.
[72] PRD, art 13(2).

This seems to imply that where a domestic restructuring framework allows for workers to be part of a restructuring claim, where workers could in fact waive rights to claims for payment or other rights that might arise, this is permissible under the PRD.

The EIR Recast also includes the proviso that in all cases '[t]he effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.'[73] Effectively, as with the provisions of the EIR Recast in relation to rights *in rem* discussed above, the EIR Recast itself places a limitation on universal recognition of any particular insolvency process, including any rescue framework implementing the PRD, which is covered by the EIR Recast. Where the process is not covered by the EIR Recast, article 13 of the PRD provides that workers are protected by domestic law. However, article 13.2 implies or envisages that Member States may introduce particular restructuring frameworks under the PRD, which may not insist that workers rights are absolute.

3.7 Further Obstacles

3.7.1 Liability for non-co-operation

In the commentary on the EIR Recast edited by Brinkmann[74] and specifically the commentary on article 42, which obliges courts to co-operate, Skauradszun and Spahlinger observe that this obligation was not present in the EIR 2000.[75] The authors note that this obligation stems from article 81 of the TEFU regarding judicial co-operation in civil matters with cross-border implications but note that despite this European aspiration co-operation with foreign courts 'will be an entirely new experience for many judges' noting however, that some jurisdictions already have an obligation embedded in legislation.[76]

The authors continue to address the very important issue that this provision does in fact impose an obligation on the court and raise the issue of what happens when there is non-compliance. The first point is that article 2(6)(ii) of the EIR states that 'court' includes in its definition 'the judicial body or another competent body of a Member State empower to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings'. Most importantly the authors go on to assert that, under German law, this definition comprises judges as well as officers of justice as individuals.[77] This is further considered in Chapter 5.

[73] EIR Recast, art 13.
[74] Mortiz Brinkmann (ed), European Insolvency Regulation: Article by Article Commentary (Beck, Hart, Nomos, 2019).
[75] See also, Chapter 2 of this Report.
[76] The authors quote Renato Mangano, Bob Wessels, Reinhard Dammann, 'Secondary Insolvency Proceedings (Art 34-52), in Reinhard Bork and Kristin van Zwieten (eds) *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016) and also refer to the experience of English courts under the UK Cross-border Insolvency Regulation 2006 which implements the UNCITRAL Model Law in the UK.
[77] See above full reference at 46, para 4. Full reference, Dominik Skauradszun and Andreas Spahlinger, 'Chapter III Secondary Insolvency Proceedings: Article 42. Co-operation and communication between courts in Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019), p. 352, para 4.

3.7.2 Effect of non-co-operation

Perhaps of more significance is the consequence of non-compliance with co-operation obligations for the validity of a procedure and its outcome. So, for example where an insolvency practitioner operating a preventive restructuring process recognised under the EIR Recast (for example the Irish Examinership) notifies a second court that an examiner has been appointed and that a stay is in place, is the second court obliged to recognise this stay? The answer seems to be an unequivocal yes. A further question then arises; if the court decided to ignore the stay to give a creditor a remedy in the second court, would this decision and any consequent orders be invalid? The issues concerning recognition and ongoing assistance or co-operation are considered in detail in light of existing case law in Chapter 5.

3.7.3 Practitioner resistance

An additional obstacle to real co-operation in restructuring processes lies in the dynamics of legal practise. In large restructuring cases involving a range of corporate entities, in groups of companies for example, practitioners will be anxious to protect their own role, or practise interest.[78] This will have two effects:

First, it may be the case that a particular restructuring processes will not be included within the remit of the EIR Recast thus avoiding the COMI issue and allowing the Member State to attract restructuring business from across Europe, much as the English Scheme of Arrangement has done in recent years. Alternatively, some states, but not all, will adopt 'robust restructuring processes' such as those adopted in Ireland and the Netherlands and perhaps attract business from Europe through operation of a COMI shift.

Second, arguments may be made that particular actions are not centrally part of the insolvency process, (in our case a restructuring process created to implement the PRD and included in the EIR Recast which will be subject to jurisdictional rules generated by the determination of COMI) and therefore not part of the overall process and not subject to any terms of the EIR Recast as has occurred in a number of cases which are considered in Chapter 5.[79]

During our attendance at conferences and discussions we have definitely seen this effect where practitioners are actively promoting their jurisdiction as supporting rescue or where practitioners are concerned regarding loss of business. This is discussed further in Chapter 7 in the US context.

[78] See Chapter 2 where a similar point is made in relation opt out of co-ordinated proceedings contained in the EIR Recast.
[79] See, for example Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805, and Case C-535/17 *NK v BNP Paribas Fortis NV* [2019] ECLI:EU:C:2019:96.

3.8 Observations from the European Judiciary

Interestingly further obstacles to co-operation have been identified by members of the European Judiciary themselves at events attended by the JCOERE Project. This section describes observations made by members at the Judicial Wing meeting of INSOL Europe, which took place at the annual conferences held in Athens in 2018 and in Copenhagen in 2019. In Athens, the JCOERE Project made a simple introduction of the Project. Even at that point, there was a great deal of interest and a number of significant points arose, even in those initial stages. The first, there was a concern amongst the judiciary regarding a lack of knowledge of legal systems of different Member States. This was considered to be an obstacle to effective co-operation. Methods for ascertaining knowledge of Member States' legal systems varied from availing of informal networks to a formal request for information from a home ministry of justice or similar government entity.[80] It is clear that the EU can contribute further to judicial training in this regard. Some consistency of approach in terms of the provision of information is important. A second key point that emerged even at that point was the varied methods of appointment of members of the judiciary, who may have to deal with cross-border cases. These differing standards regarding training and experience requirements were identified as a possible obstacle to co-operation; this discussion is furthered in Chapter 4 of this Report where it is analysed in the context of mutual trust. Chapter 4 also explored the judicial education and training requirements of our eleven contributing jurisdictions in the JCOERE Questionnaire, which is also set out in Chapter 4, section 4.6.

In Copenhagen, the members of the Judicial Wing were presented with a case study concerning the application of the co-operation provisions in the context of the opening of restructuring proceedings in Ireland (the examinership process) and the enforcement of a compromise in those proceedings against a debtor of the group located in a second Member State.[81] The outcome of this discussion is described in the following section. The purpose of this case study was to identify potential obstacles to court-to-court co-operation and to discern any differences in understanding held by the judges.

3.8.1 The nature of insolvency

A generally acknowledged view from members of the judiciary at the INSOL Europe Judicial Wing Meeting in Copenhagen was the desirability of one forum, particularly as regards bankruptcy or insolvency proceedings. This is derived from the particular nature of insolvency proceedings, which is based on the fundamental concept of the collective distribution of the insolvent estate to all creditors.

[80] As is described in Chapter 2 in instances of cross-border judicial co-operation in other trading blocs, 'information that courts will want…will often revolve around the governing law of another court.' See further, Jay Lawrence Westbrook 'International Judicial Negotiation' (2003) 38 *Tex Int's L J* 567, 579.

[81] This survey is attached in Annex I of this Report.

3.8.2 Procedures and protocol[82]

Many judges expressed concern regarding the nature of the obligations and their own role in facilitating co-operation. Many senior judges were uncomfortable with the idea that they or their court would engage in a high level of communication. Instead, it was considered preferable that this communication, as part of a formal process, would take place via a court clerk or other individual. As discussed previously, the EIR Recast does envisage the appointment of an independent person or body.[83] The insolvency practitioner was also seen as a possible support in terms of co-operation. There would be considerable resistance to any perception that a judge would or would be perceived as communicating behind the scenes. The following key principles were proposed by the Judicial Panel held at the main conference at INSOL Athens:[84]

i. Open Court is a key idea.[85]
ii. Transnational transparency also important. There must be directions given to notify all parties.
iii. Protection of confidential information of course also important.
iv. Fair Procedures.

These procedural rules relevant to all processes but relevant to preventive restructuring when such a process is court-based. However, the differences in approach in legal systems was noteworthy. Whereas in common law countries, the judges were in a position to exercise discretion as to the type and method of co-operation, other jurisdictions, including Italy as a sample civil law country were subject to more specific rules or guidance. For example, the following rules applied in Italy according to Judge Panzani:

i. Italian laws state that the rules of the Regulation must be applied by the court regarding proceedings opened in the EU, but also elsewhere.
ii. There should be a general approach in all cases of cross-border insolvency.
iii. The language of co-operation will be Italian and if this is not possible, it should be English. The Court is allowed to use English, but provision should be made for translation.
iv. The costs of co-operation will be considered an expense of the courts system and would not be considered to be part of the professional costs of the insolvency practitioner.

[82] Again, these observations from members of the judiciary at INSOL Europe Judicial Wing in Copenhagen, reflect observations described in Chapter 2 of this Report. 'There are also gaps in knowledge of foreign insolvency frameworks that could lead to distrust, inhibiting cooperation as trust requires knowledge of how such a framework functions.' Again this is reflective of observations made by Jay Lawrence Westbrook: 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (1991) 65 *Am Bankr L J* 457.
[83] *Supra,* page 3. See further EIR Recast, Article 42(1) and 57(1).
[84] This was discussed by the Judicial Wing Panel: 'Cooperation and Communication between Judges in Cross-Border Insolvencies under the EIR Recast' (INSOL Europe Annual Congress, Athens, 5th October 2018). The Judicial Wing Panel was composed of Judge Caroline Costello, Judge Luciano Panzani, and Emil Szczepanik, Ministry of Justice, Poland.
[85] Although the judges did acknowledge that there would be limited possibilities for private hearings in the context of insolvency proceedings, for example the hearing of an ex parte application for an injunction or stay. In Ireland the initial appointment of an examiner can be based on an ex parte application of private hearings. For example, Mareva or ex parte hearings.

v. Co-operation would ideally be facilitated by IP for the same sorts of reasons regarding procedural safeguards as applied in Ireland.
vi. Italian judges / courts are not permitted to engage in side bar phone calls. At the very least such calls should be recorded.
vii. The IP appointed in Italy cannot be the same as the IP in second jurisdiction. This also indicates that the IP cannot be from the same firm or practise.

In contrast, in former Eastern bloc countries, the idea of co-operation between courts seemed more 'normal' and acceptable.

In France, the procedure for the recognition of a foreign judgment follows the ordinary rules of civil procedure and involves an application to the court by any interested party, including the foreign office-holder and the debtor, even if the foreign judgment was obtained *ex parte*. The court hearing the application must content itself with an examination of the regularity of the foreign judgment and that the public interest and legal system in France would not be offended by the recognition of the judgment. The elements a court would look at in its examination include whether the foreign court had proper jurisdiction, whether the proper law was applied, compliance with due process and public policy rules, including whether the procedure was adversarial, and the absence of fraud. This examination of compliance conditioned the ability of French judges to extend assistance to foreign proceedings.

It is suggested by the JCOERE Project that the markedly different attitudes and existing legal frameworks may constitute barriers to court-to-court co-operation. A judge or administrator[86] operating in a jurisdiction where it is commonplace to have a telephone conversation as a means of communicating and co-operating may be met with clear resistance to such suggestion in another jurisdiction. As articulated, certain jurisdictions have clear rules on co-operation and information sharing, however, it appears that others do not. If there is an unawareness of the extent to which the obligation to co-operate is permissible within a jurisdiction or procedure, then it may act as a barrier to it. In this context, the importance of the applicability of the obligation to co-operate to administrative authorities cannot be overlooked.

3.9 Conclusion and Transition

The JCOERE Project research revealed certain categories of Member State approaches, which we applied to our contributors in the analysis of their approach to preventive restructuring and the likely divergence that will arise in implementation of the PRD due to certain policy differences, which may well present obstacles to co-operation. We also presented an analysis of our findings in relation to questions relating to procedure queried in the JCOERE Questionnaire along with additional observations around how procedural differences may also inhibit effective co-operation in cross-border preventive restructuring cases. This Chapter

[86] Meaning the relevant person in an administrative authority.

has connected this issue with the broader issue related to EU integration and harmonisation and how this affects mutual trust and, by extension, effective co-operation.

The next chapter will examine additional issues that may challenge mutual trust and co-operation, namely legal and judicial culture. As the characteristics of a jurisdiction's legal culture are deeply imbedded features that underpin the development and application of commonly held legal principles, these are particularly difficult to dislodge or otherwise harmonise. They influence a jurisdiction's approach to fundamental legal principles, such as the rule of law, which underpin many other important characteristics of a legal system, including the role of the courts and judicial independence. The EU has taken a proactive approach to harmonising or Europeanising Member State judiciaries with a view to increasing mutual trust and effective co-operation. The next Chapter will explore issues of harmonisation as they relate to legal and judicial culture and how differences in this area may impact court-to-court co-operation.

IV. Chapter 4 Influences of Judicial and Legal Culture in Europe

4.1 Introduction

Chapters 1 and 3 of this Report described the connections that have been made by the EU between the harmonisation of laws and judicial co-operation, in turn leading to ever closer integration of the European Union. The obstacles to harmonisation of substantive laws on preventive restructuring measures, which have been described in the JCOERE Report 1 and summarised in Chapter 3, are connected to similar if not identical issues that also present obstacles to jurisdictional co-operation between courts and practitioners generally. These include differences in legal culture, and for the purpose of this Chapter, judicial culture. While differences in legal and judicial culture are not the sole reasons why harmonisation and co-operation continue to be challenging within the EU, the differences underpin many of the conflicts that do arise.

Effective cross-border court-to-court co-operation is predicated on the principle of sincere co-operation and mutual trust, as set out in the EIR Recast:

> This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. *The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust*. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise that court's decision.[1]

[1] Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19 (hereinafter referred to as the EIR Recast) recital 65.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

As discussed in Chapter 2, while the EIR Recast increased the duties of co-operation and communication between practitioners and between courts, this is not always easy to achieve in practice, particularly between courts. The objective of this chapter is to explore aspects of legal and judicial culture and how these can impact on harmonisation of substantive laws. Lack of close harmonisation can cause difficulties in achieving mutual trust between jurisdictions and courts, which by extension presents obstacles to effective co-operation and co-ordination of cross-border insolvency and restructuring cases in particular and in relation to other cross-border matters generally. Challenges to harmonisation, mutual trust and co-operation connect closely with the issues surrounding European integration, and an ever-closer union, which were outlined in Chapters 1 to 3.

It must be emphasised that within the European Union there is an agreed backdrop to these differences including a strong European commitment to and acknowledgement of what can be broadly described as rule of law issues. The ever-closer integration of the European Union underpins the issues that are the focus of the JCOERE Project. Of particular relevance are the foundational principles concerning adherence or respect for the rule of law discussed in section 4.2 of this Chapter, under which falls liberal democratic ideals such as judicial independence and impartiality, certainty and predictability, as well as aspects of justice and fairness. One of the issues that seems to be central to preventive restructuring particularly is the role of the courts in what this Report described in Chapter 3 as 'robust restructuring frameworks.' In our discussions at conferences and other forums the recognition of the importance of the role of the court has become problematic amongst some academics and policymakers. A difference has also been detected between common law and civil law systems in this context. This is considered in Section 4.3.

In addition to setting 'ground rules,' as it were, on rule of law issues, the EU has also taken a proactive role in trying to harmonise the functioning of the European judiciary in all Member States, which is described in section 4.4 of this Chapter. Nevertheless differences persist that continue to challenge mutual trust, such as issues, albeit in a small number of Member States, concerning judicial independence, discussed in section 4.5, and differing approaches to training, experience, competence, and specialism or expertise, described in section 4.6 below and Chapter 8 of this Report. Section 4.7 will conclude on the challenge of harmonising legal and judicial cultures in light of the discussion of the preceding sections with some thoughts as to how this may impact co-operation when it comes to coordinating preventive restructuring procedures under the PRD.

4.2 Mutual Trust and the Rule of Law in the EU

The EU has actively adopted and promoted the rule of law principle through the legal orders of its Member States, requiring as it does that any acceding Member State has stable institutions guaranteeing democracy, the rule of law, human rights and respect for and

protection of minorities.[2] The Treaty on European Union states unequivocally that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights, and fundamental freedoms, the rule of law, principles that are common to the Member States.'[3] Along with a number of Communications that have presented frameworks and policy initiatives for protecting and promoting the rule of law among the Member States, which will be discussed below, the Charter of Fundamental Rights of the European Union provides specific protection for human rights and fundamental freedoms, the infringement of which on an institutional level could also lead to sanctions by the EU.[4]

As described in Chapter 1, Article 7 of the TEU provides a formal mechanism to address such matters in relation to Member States.

In addition, it has been noted by the Commission that the rule of law:

> makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.[5]

In 2014 the European Commission issued a Communication on a new framework to strengthen the Rule of Law[6] in the EU. This Communication also acknowledged that the way that the rule of law is implemented among the Member States plays a key role in the foundation of mutual trust upon which the functioning of the EU is built.[7] However, it also acknowledged that the content and even standards associated with the rule of law may vary at a national level, depending on each Member State's constitutional framework, offering some reason, if not justification, for the differences in approach to rule of law issues. The Commission listed a number of key principles defining the core common meaning and perhaps expectation that Member States should strive to protect:

> Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.[8]

The 2014 Communication introduced a mechanism that could be utilised if systems at national level were unable to cope with a threat to the rule of law, which in turn could present a

[2] The EU's minimum standards regarding the principle of the 'rule of law' is derived from the Copenhagen criteria on the accession of new Member States: <https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html> [Last accessed 10 April 2020].
[3] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, [Hereinafter TEU] art 6(1).
[4] Charter of Fundamental Rights of the European Union of 26 October 2012 OJ C 326/02 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 14 September 2020.
[5] European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 0158 final, 4.
[6] European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 0158 final. [hereinafter referred to as the Framework].
[7] Framework, 2.
[8] Framework 4.

potential systemic threat to the EU.[9] The Framework suggested a fairly strong assessment and action protocol[10] that aimed at preventing the need to issue proceedings under article 7(1) TEU.[11] The original strong mechanism recommended in the Framework was watered down by the Council, who claimed that such a strong approach would be unlawful.[12] It was decided instead to have a 'dialogue' on an annual basis to discuss rule of law issues, but these dialogues did little to confront Member States with their rule of law shortcomings. The Framework was used twice between 2014 and 2019: once by the Commission in respect of Poland in December 2017[13] and by the European Parliament in September 2018 in respect of Hungary.[14] It was observed in the first rule of law related Communication in 2019[15] that 'progress by the Council in these two cases could have been more meaningful.'[16]

Another Communication focused on the rule of law was issued on 3rd April 2019. It repeats much of the positioning of the Framework with the added aim of enriching the debate on further strengthening the rule of law in the EU and inviting reflection and comment by stakeholders.[17] In July 2019, another Communication was issued by the Commission that offered a 'blueprint for action' in relation to strengthening the rule of law in the EU.[18] The Communications were based on certain core principles, including Member State accountability to ensure the rule of law; treating Member States equally; and finding solutions rather than imposing sanctions 'with co-operation and mutual support at the core.'[19] The Commission identified three pillars to reinforce its approach: 'promoting the rule of law culture, preventing rule of law problems from emerging and deepening, and how best to mount an effective common response when a significant problem has been identified'.[20] In addition, a consultation on the rule of law and the creation of a mechanism to protect it was

[9] Framework 5-6.
[10] A three-stage process based on four principles were suggested that began with a dialogue and ended with 'swift and concrete actions to address the systemic threat' followed by recommendations by the Commission. See Framework 7.
[11] TEU - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 *OJ C326/1* ('TEU') art 7(1), which can be invoked if there is 'a clear risk of a serious breach by a Member State of the values referred to in Article 2.'
[12] Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54(5) JCMS 1075, 1076.
[13] European Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' (Communication) COM (2017) 835 final.
[14] European Parliament, 'resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded(2017/2131 (INL))' [2019] OJ C 433/66.
[15] European Commission, 'Communication from the Commission to the European Parliament, the European Council, and the Council on Further Strengthening the Rule of Law within the Union – State of play and next possible steps' COM (2019) 163 final (hereinafter referred to as the '2019 Communication 163')
[16] 2019 Communication 163, 3.
[17] 2019 Communication 163, 2.
[18] European Commission, 'Communication from the Commission to the European Parliament, The European Council, The Council, the European Economic and Social Committee, and the Committee of the Regions on Strengthening the Rule of Law within the Union – a Blueprint for Action' COM (2019) 343 final. (Hereinafter '2019 Communication 343').
[19] 2019 Communication 163, 7.
[20] 2019 Communication 343, 5.

issued in March 2020, which will result in the first annual Rule of Law Report, which at the time of writing is still awaited.[21]

There is little doubt that the rule of law is an elementary principle forming the foundation of the European Union as well as the process of integration that can cause difficulties in mutual trust and effective co-operation where differences in its treatment persist among the Member States. The differences in approach to the rule of law can often be influenced by differences in legal or judicial culture, as will be discussed in the following sections. The next section will look at the unique aspects of legal culture from a theoretical perspective to lend context to a discussion surrounding the difficulties of cooperating across-borders when individual jurisdictions may differ on key legal principles, such as those associated with the rule of law.

4.3 The Influence of Legal Culture on Rule of Law Principles: Common Law and Civil Law Traditions

As noted above, co-operation between courts relies on mutual trust and confidence as set out in recital 65 of the EIR Recast. Where there are variances in legal principles underpinning mutual trust, then courts/judges will be less likely to respect decisions of other jurisdictions and to effectively co-operate. For judges, it is important to have at least some kind of consensual idea of the legal culture[22] within which their decision-making takes place so that they are operating within the same regulative ideal, particularly if they are co-operating within a cross-border context.[23]

A legal culture can be characterised by a number of factors, such as the nature of institutions, the way that judges are appointed, the role of lawyers, and even public attitudes as they relate to litigation and incarceration. The legal culture of a jurisdiction also extends to more nebulous concepts, such as ideas, values, aspirations, and mentalities that underpin the respect for legal principles, such as the rule of law.[24] The differences in legal culture are also connected to the influence of a jurisdiction's historical evolution,[25] which go beyond simple design aspects of government and institutions.[26]

[21] European Commission, *2020 Rule of Law Report – targeted stakeholder consultation* (European Commission 23 March 2020) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report_en#2020-rule-of-law-report-targeted-stakeholder-consultation> accessed 12 June 2020.

[22] For a discussion around the concept of legal culture, see Sally Engle Merry, 'What is Legal Culture? An Anthropological Perspective' (2010) 5 J Comp L 40, 41; M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 193-194 as cited in Roger Cotterell, 'The Concept of Legal Culture' in David Nelkin (ed), *Comparing Legal Cultures* (Dartmouth Publishing 1997) 13-31, 15

[23] David Nelkin, 'Thinking about Legal Culture' (2014) 1 Asian J L & Soc'y 255, 257

[24] See David Nelkin, 'Using the Concept of Legal Culture' (2004) 29 Austl J Leg Phil 1; Disclosing/Invoking Legal Culture: An Introduction' (1995) 4 Soc & Leg Stud 435; 'Thinking about Legal Culture' (2014) 1 Asian Journal of Law and Society 255, 255; and Roger Cotterell, 'The Concept of Legal Culture' in David Nelkin (ed), *Comparing Legal Cultures* (Dartmouth Publishing 1997) 13-31. .

[25] For a discussion of the historical underpinnings of European legal culture, see Franz Wieacker and Edgar Bodenheimer, 'Foundations of European Legal Culture' (1990) 38(1) The American Journal of Comparative Law 1.

[26] Lawrence M Friedman, 'Legal Culture and Social Development' (1969) 4(1) Law & Society Review 29, 35.

The key characterises of legal culture in individual Member States tend to be deeply rooted and path dependent in nature.[27] Much of the groundwork for modern legal culture was laid at earlier stages in history prior to the creation of the European Union, with small jurisdiction-specific differences that have been retained and that are sometimes at odds with other jurisdictions. It is these deeply rooted, path dependent characteristics that are particularly difficult to dislodge or change in order to harmonise the nature and function of EU Member State judiciaries. The complexities of even understanding the nature of a jurisdiction's legal culture is one of the reasons why it continues to be so difficult to ensure an equal understanding and approach to legal principles generally among the Member States, which the Commission admits it needs in order to implement its blueprint for enhancing the rule of law.

4.3.1 Judicial culture and legal origins

The legal origins[28] of a jurisdiction can sometimes explain why differences in approach to legal regulation and, in this case, court co-operation, persist despite the influence of globalisation and the relative benefit that more homogenous legal systems could provide in terms of efficient cross-border solutions. The legal origins hypothesis claims that national judicial and regulatory styles are influenced by the origins of that legal system from specific legal families. However, this often appears to focus on the common law / civil law divide which has been criticised as being too limited and dualistic.[29] Although the EU is comprised of legal systems derived from several different legal families, a discussion of general differences between the common and civil law judiciaries is a good place to begin for the purpose of this Report as the comparison does reveal key differences upon which other cultural differences are layered.[30]

The clearest example of the difference between common law and civil law legal systems is the codification of law in civil law countries as opposed to the heavier reliance on judicial interpretation and jurisprudence in common law systems.[31] Under civil law systems, legal codes describe which specific actions are prohibited, restricting the actions of participants in a legal system, making it possible to apply the law strictly, and circumscribing judicial

[27] Path dependence describes the theory that a social or legal system is limited by the decisions made in the past or by the events experienced, even though past circumstances may no longer be relevant. For in-depth discussions of path dependency and the law, see, for example, Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000-2001) 86 Iowa L Rev 601; John Bell, 'Path Dependence and Legal Development' (2012-2013) 87 Tul L Rev 787; and Lucian Arye Bebchuk and Mark J Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 Stan L Rev 127, who provide an application of legal path dependency to corporate law.

[28] For a detailed discussion of the legal origins hypothesis, it originated in Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W Vishny, 'The Legal Determinants of External Finance' (1997) 52(3) The Journal of Finance 1131 and 'Law and Finance' (1998) 106(6) Journal of Finance 1113 and was developed further by Juan C Botero, Simeon Dhankov, Rafael La Porta, Florecio Lopez-de-Silanes, and Andrei Schleifer, 'The Regulation of Labour' (2004) 119(4) Quarterly Journal of Economics 1339.

[29] See John Armour, Simon Deakin, Prabirjit Sarkar, Mathias Siems, and Ajit Singh, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2008) 6(2) Journal of Empirical Legal Studies 343 for criticism of the legal origins hypothesis and John Armour, Simon Deakin, Priya Lele, and Mathias Siems, 'How do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection' (2009) 57 Am J Comp L 579 for a discussion of the literature around legal origins as well as an application of the hypothesis.

[30] Franz Wieacker and Edgar Bodenheimer, 'Foundations of European Legal Culture' (1990) 38(1) The American Journal of Comparative Law 1, 6.

[31] Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117(4) The Quarterly Journal of Economics 1193, 1194.

discretion to at least some extent by the content of legal codes.[32] In contrast, codes in common law countries often serve to summarise previous judicial decisions. In addition, a common law judge has the discretion to disregard the provisions of a code when it conflicts with the basic principles of common law, though this discretion is not used capriciously in any sense. As Glaeser and Shleifer note:

> In civil law countries, in contrast, judges are not even supposed to interpret the codes very much, and in principle must seek not to differentiate a specific situation, but to fit it into the existing provisions of a code. As a restraint on the judge, codes are much more powerful in civil than in common law countries.[33]

The differences associated with legal origins have made harmonisation in the EU difficult due to the diverse characteristics of legal systems among the Member States. In the context of restructuring, particularly where court decisions seem to be central to robust restructuring processes, it is difficult to reconcile the common law perspective of law-making and judging with the perspective of a civil lawyer.[34] A civil law practitioner may consider the common law as being overly traditional, uncertain, and peculiar in the interconnected quality of law and equity, while the same characteristics seem to a common lawyer as practical, flexible, rooted in national culture, and natural and productive.[35]

As will be shown in Chapter 5, the civil law perspective makes it difficult sometimes to fully grasp how common law procedures such as the Irish examinership, English Scheme of Arrangement, and American Chapter 11 operate, given the need for judicial decision making in applying the various tests of fairness throughout the operation of the process and in final approval of the restructuring plan. In civil law jurisdictions, the function of a code or statute is to seen as giving a judge clear instructions on how to come to a clear decision, whereas the ambiguities and vagaries of the common law allow a judge to make a decision that can take into account a wider set of circumstances than might be available to a civil lawyer, although this also opens the door for legal uncertainty. These differences do go some way to explaining why common law and civil law judges often approach co-operation in cross-border cases differently.

4.3.2 Legal culture and the judicial role

Clearly, judiciaries have sometimes starkly different roles between common law jurisdictions and the multitude of civil law states. While this can often be traced to the fundamental difference between institutional structures, there are enough differences between civil law jurisdictions alone to indicate that the underlying conflicts go beyond a simple binary comparison. The EU Member States are influenced by a number of legal systemic

[32] Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117(4) The Quarterly Journal of Economics 1193, 1211.
[33] Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117(4) The Quarterly Journal of Economics 1193, 1212.
[34] Pierre Legrand, *Fragments of Law as Culture* (WEJ Tjeenk Willink, 1999) 11.
[35] R Zimmerman, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (1996) 112(Oct) LQR 576, 587.

characteristics due to the variety of civil law systems present, whether they are based on French or Austro-Germanic civil law, the cooperative Scandinavian/Nordic system, the transitioning Eastern European economies that have been influenced by the Soviet era, and those systems that have adopted a hybrid or mixed approach. There are therefore many factors that might challenge the ease of mutual trust between courts and practitioners among the variety of legal systems present within the EU.

Mangano describes two particular issues that may affect the willingness of practitioners in particular to co-operate: lack of certainty and foreseeability of legal frameworks leading to a reluctance to defer to another jurisdiction despite the practical benefit that such co-operation would create.[36] This may have an impact on court co-operation as it is generally through practitioners that such co-operation takes place, usually in a negotiation phase, according to practitioners who have contributed to this Project through various workshops and events. When faced with a lack of certainty or familiarity due to the differences in law and language, Mangano notes that if given the choice a court or an IP would tend to choose the law with which they are comfortable and familiar rather than accede to another jurisdiction's procedural primacy, despite appearing that it would be in the interests of all parties to co-operate.[37] These potential choices demonstrate an impulse to protect local interests over the benefit of the collective of cross-border creditors. Fundamentally, this means that if legal frameworks lack certainty and foreseeability, then courts and practitioners dealing with the same case in different jurisdictions may not opt to co-operate because regardless of what the other courts and practitioners do, in the short term not cooperating is viewed as being in the bests interests of their local creditors.[38]

The difference between civil law and common law approaches as well as the more nuanced differences between legal families among the civil law systems of Europe (which it must be acknowledged is replicated in the wider common law world) may be a key issue in the willingness and ability to co-operate in cross-border insolvency and restructuring cases. Common law jurisdictions tend to be more at ease with interpreting their obligation to co-operate and making private arrangements to do so, such as bespoke co-operation protocols, which will be described in Chapter 7 section 7.3. Mangano observes, however, that civil law jurisdictions sometimes remain attached to a more public interest approach to insolvency law, which is incompatible with an effective conclusion to such private arrangements or protocols.[39] Although the EIR Recast has set an enhanced obligation to co-operate and

[36] Renato Mangano, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314.
[37] The *Eurofood* case is an example of this dilemma occurring in reality. See Chapter 2 section 2.3.1, Chapter 3 section 3.6.1, and Chapter 5 section 5.2.
[38] Renato Mangano, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314, 319-321.
[39] Renato Mangano, 'Path Dependence and Paradox in Harmonising Out-of-Court Procedures across Europe: The Evidence from Italy' (Lecture at the 7th International Symposiom on Out-of-court Restructuring Proceedings in Europe, Cologne 26 August 2016 as cited in 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314, 329.

communicate in cross-border insolvency cases,[40] it is still not entirely clear how this is intended to occur. There is still scope to interpret the enhanced obligations to co-operate because they leave mode and method up to the cooperating parties themselves. In other words, there is no specified framework or protocol judges can refer to that unequivocally explains how co-operation should materialise. While there are a number of guidelines available for judges to rely upon as will be discussed in Chapter 6 of this Report, it seems that these are rarely used in practice, which became apparent in the analysis of the judicial survey in Chapter 8.

The challenge of ambiguous, open-textured obligations under the EIR Recast in combination with different approaches to the role of the judiciaries and the weight and importance of judicial interpretation in decision-making, within the context of deeply ingrained differences between European legal systems, create a web of potential conceptual conflicts to co-operation in cross-border insolvency cases. Considering the scope of implementation possibilities and the controversial provisions in the PRD, for example, these issues may indeed create conflicts that could be more difficult to surmount in negotiation to achieve co-operation in a cross-border restructuring. Despite the efforts by the EU to Europeanise the judiciaries of the Member States, which will be discussed in the next section, differences in practical judicial independence and aspects of the judicial profession persist, making mutual trust at times an elusive pursuit.

4.4 Creating a European Judicial Culture – Networks and Training

4.4.1 Harmonising judiciaries through training and the European Judicial Training Network

There has been a lot of focus and discussion within the last two decades placed on the need to harmonise the judiciaries of EU Member States through training as a means of ensuring that the rule of law and its associated principles are equally applied throughout the EU,[41] with the goals of ensuring mutual trust and effective co-operation. Training and networking organisations have been key promoters of harmonisation and the development of a European judicial culture, such as the European Judicial Training Network,[42] the European Law

[40] Renato Mangano, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314, 330.

[41] For a discussion about judicial harmonisation, see for example, Wolfgang Heusel (ed), 'The Future of Legal Europe: An emerging judicial culture?' (2008) 9 ERA Forum 109; Simone Benvenuti, 'Building a Common Judicial Culture in the European Union through Judicial Networks' Paper presented at the RC09 2013 Interim Meeting on 'The Changing Nature of Judicial Power in Supranational, Federal, and Domestic Systems' Dublin, Ireland July 22-24 2013; 'The European Judicial Training Network and its Role in the Strategy for the Europeanisation of National Judges' (2015) 7(1) International Journal for Court Administration 59; Dr Herman van Harten, 'Who's Afraid of a True European Judicial Culture' (2012) Working Paper presented at the Second REALaw Research forum 'Pluralism in European Administrative Law' Groningen 3rd February 2012.

[42] EJTN Website: http://www.ejtn.eu/ [Last accessed 26 June 2020].

Academy,[43] the INSOL Europe Judicial Forum,[44] and various other organisations[45] created by the EU institutions. This move commenced as an aim of the EU institutions with the Hague Programme in 2005, which emphasised that:

> Judicial co-operation…could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law.[46]

Since that time, a number of other Communications and Resolutions on this matter have been released, which have further promoted the ideals of networking and training to promote mutual trust and respect for the rule of law.[47] Fundamentally, the aim has been to take a practical approach to judicial training that would be relevant to every day work and include both initial and continuous training and that it should be seen as an investment by Member States in the quality of justice. These goals were set as objectives to be achieved by 2020, but in reliance upon existing training structures in Member States while maintaining respect to their subsidiarity and judicial independence in a Communication in 2011.[48]

The European Judicial Training Network has been instrumental as a hub for the implementation of EU policy with regards to the judicial profession as it connects national and European institutions to help define training policies and standards as well as coordinate judicial academies.[49] The EJTN, funded by the EU, adopts a decentralised approach relying on a strong commitment from Member States as well as their individual training institutions.[50] The EU has absorbed these networks in the framework of EU governance under the EJTN and exerts some influence over their activities and objectives. There are four main areas of activity that these networks are generally engaged in: co-operation in the field of training; cultural exchange and socialisation for a better knowledge of other legal systems or for the sharing of practical experiences; standard setting and exchange of best practices; and lobbying and representation of the interests of network members. The various networks relied upon or set

[43] ERA Website: http://www.era.int/ [Last accessed 26 June 2020].
[44] INSOL Europe 'Judicial Wing Introduction and Members' (INSOL Europe Website) <https://www.insol-europe.org/judicial-wing-introduction-and-members>[Last accessed 26 June 2020].
[45] Other networks include the Association of the Council of State and Supreme Administrative Jurisdictions (ACA-Europe), The Association of European Administrative Judges (AEAJ), The Network of Presidents of the Supreme Courts of the European Union (NSPC), and the EU Forum of Judges for the Environment (EUFJE) (non-exhaustive list).
[46] European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union OJ C 53 (3.3.2005) 11-12.
[47] See for example, European Commission, 'Communication from the Commission to the European Parliament and the Council on judicial training in the European Union' COM(2006) 356 final; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan implementing the Stockholm Programme' COM(2010) 171 final; European Parliament 'Resolution of 17 June 2010 on Judicial Training – Stockholm Programme' (P7_TA(2010)0242); European Parliament 'Resolution of 14 March 2012 on judicial training' (2012/2575(RSP)).
[48] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Building Trust in Eu-Wide Justice – A New Dimension to European Judicial Training' COM(2011) 551 final, 6.
[49] Simone Benvenuti, 'The European Judicial Training Network and its Role in the Strategy for the Europeanization of National Judges' (2015) 7(1) Int'l J for Court Administration 59, 59.
[50] Simone Benvenuti, 'Who Defines Judicial Training Standards in the EU, and for Whom? The Case of the European Judicial Training Network (EJTN)' (2013) Paper presented at the RC12 2013 International Conference on 'Sociology of Law and Political Action' Toulouse France September 3-6 2013, 7.

up by the EU institutions help to facilitate and enhance judicial co-operation, improve the functioning of the EU judicial system, and increasing mutual trust.[51] It is likely that these networks also play an important role in encouraging convergence in national judicial practices, gathering European judiciaries into a closer judicial culture.[52]

4.4.2 Judicial training and mutual trust

In June 2014, the European Commission issued a press release on judicial training and mutual trust.[53] The cornerstone of this press release was the aim again to encourage the fostering of mutual trust among the Member States' judiciaries. Viviane Reding, the EU's Justice Commissioner at the time, stated that:

> Mutual trust is the bedrock upon which EU justice policy is built, and high-quality training of legal practitioners is paramount in fostering this trust. As heads of state and government are meeting today and tomorrow to define the future strategic priorities for Europe's justice area, my call to leaders is to put mutual trust high on the future justice agenda. Trust is not made by decree. It grows with knowledge.

Reding emphasised the importance of training in EU law as the most effective way of ensuring that the single market area can deliver the most for citizens and businesses. Training ensures that legal practitioners are equipped to implement EU law and to foster a sense of a common European judicial culture based on mutual trust. Training does not necessarily fix all of the problems that are associated with mutual trust when considering the obligation to co-operate. The respect a system and its judiciary have for legal principles and norms is also an important aspect that engenders respect as well as trust between judiciaries. Without mutual respect, there can be no mutual trust.

The 2019 Communication 343 also acknowledged the importance of judicial networks as playing an important role in exchanging ideas and best practices and suggested that the existing networks should be supported to further promote the rule of law.[54] It was noted that national judiciaries themselves have an important role to play in promoting the rule of law standards and that participation in councils and national debates on judicial reforms are an important part of national checks and balances.[55]

---

[51] Monica Claes and Maartje de Visser, 'Are you Networked Yet? On Dialogues in European Judicial Networks (2012) 8(2) Utrecht L Rev 100, 107-108

[52] Simone Benvenuti, 'The European Judicial Training Network and its Role in the Strategy for the Europeanization of National Judges' (2015) 7(1) Int'l J for Court Administration 59, 66. See also Dr Herman van Harten, 'Who's Afraid of a True European Judicial Culture' (2012) Working Paper presented at the Second REALaw Research forum 'Pluralism in European Administrative Law' Groningen 3rd February 2012, 15 and Simone Benvenuti, 'Building a Common Judicial Culture in the European Union through Judicial Networks' (2013) Paper presented at the RC09 2013 Interim Meeting on 'The Changing Nature of Judicial Power in Supranational, Federal and Domestic Systems, Dublin, July 22-23 2013, 2.

[53] European Commission, 'Press Release: Getting the priorities for future Justice polices right: European Commission boosts judicial training to foster mutual trust' (European Commission, 26 June 2014) < https://ec.europa.eu/commission/presscorner/detail/en/IP_14_745> [Last accessed 26 June 2020].

[54] 2019 Communication 343, 6.

[55] 2019 Communication 343, 7.

4.4.3 Protecting the Rule of Law through shared knowledge and values

The Commission's Communications on the rule of law in 2019 identified that some of the political developments in several Member States that led to the undermining of the rule of law could be attributed to a lack of information and limited public knowledge about the rule of law and the challenges its government were making to it.[56] This came through clearly in a special Eurobarometer Survey in 2019.[57] In order to rectify this, the Commission has proposed taking action to embed the rule of law in national and European political discourse by:

> …disseminating knowledge about EU law requirements and standards and the importance of the rule of law for citizens and business, and by empowering stakeholders with an interest in in promoting rule of law themes. For citizens and businesses to appreciate the role and importance of justice systems, these need to be modern and accessible. Of key importance is the mutual trust in each other's judicial systems, which is a pre-condition for a truly functioning Single Market.[58]

The activities of the European Commission in this area and the multitude of judicial social and training networks have helped to create a greater understanding of differences in legal and judicial cultures, while also drawing judiciaries closer together. This accompanied by checks such as the Judicial Scorecard, along with the Rule of Law framework and inter-institutional and Member State dialogues around that, have continued to help on the march towards judicial Europeanisation. In addition to these supranational and EU level activities, Member State professional guidelines and efforts to harmonise these have also helped to draw judiciaries closer together, at least in terms of understanding each other.

While on paper there is a set of shared values regarding independence, impartiality, integrity and professionalism, current guidelines and ethical codes developed on the basis of these values are still diverse among the Member States.[59] For example, judges in 'old' Member States tend to be critical towards centralised judicial management and approach the value of individual judicial autonomy differently than do those in 'new' Member States, who, depending on their individual history, are in many cases still adjusting to a greater degree of self-governance.[60] The next section will explore aspects of the challenges in this area, specifically focusing on problems of judicial independence.

---

[56] 2019 Communication 343, 5.
[57] Special Eurobarometer 489 Report on the Rule of Law (European Commission 2019) <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2235>[Last accessed 15 June 2020].
[58] 2019 Communication 343, 5
[59] See Elaine Mak, 'Researching Judicial Ethical Codes, or: How to Eat a Mille-Feuille?' (2018) 9(2) Int'l J for Court Administration 55 for a discussion on judicial ethical codes and guidelines.
[60] Anja Siebert Fohr (ed), *Judicial Independence in Transition* (Springer 2012); see also David Kosar, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016) as cited in Elaine Mak, Niels Graaf, and Erin Jackson, 'The Framework for Judicial Co-operation in the European Union: Unpacking the Ethical, Legal, and Institutional Dimensions of 'Judicial Culture' (2018) 34(1) Utrecht Journal of International and European Law 24, 33.

4.5 Challenges to Judicial Independence in the EU

The Judiciary sits at the heart of the rule of law and judicial independence is a key element to ensuring its protection. Without independence, courts may be influenced by politics and special interest lobbies, potentially leading to systematic bias and the potential for arbitrary decision making.[61] While judicial independence is clearly an important value ascribed to by all EU Member States, the relative independence of Member State judiciaries can still differ along a fairly broad spectrum in reality, ranging from fully independent, to judicial systems less protected by constitutional checks on political and governmental influence. These differences can be attributed at least in part to legal culture and tradition as it influences the judicial function and profession in individual Member States.

Countries wishing to join the EU are required to satisfy the Copenhagen Criteria, as noted in Chapter 1 section 1.3. Of particular importance to this discussion around legal culture and its influence on mutual trust and co-operation is the requirement that institutions are stable enough to guarantee democracy and the rule of law.[62] These two aspects are also some of the most deeply embedded in terms of the way in which a country has developed over time and sometimes difficult to change without deep structural adjustments. Coman notes that while the Western European judiciaries are perceived as having good systems in place to protect judicial independence and impartiality (apart from a few notable exceptions), many newer Member States are still developing in line with EU expected criteria.[63] The challenges faced by newer Member States have been particularly acute, though that is not to say that there are not challenges to judicial independence and the rule of law elsewhere in the EU. Where there has been a long history of a politicised or an otherwise non-independent judiciary, it is difficult to create new habits and protocols to assure judicial independence if constitutional mechanisms are not also in place to protect it.

Judicial reforms were required of most of the newer Member States prior to joining the EU as many of them had to adjust to a post-communism approach to justice and administration in order to meet the EU's requirements on judicial and administrative capacity. Coman observes that these attributes are difficult to change in the short term.[64] In some Member States, existing law still tends to be insufficient to ensure real judicial independence. Batory attributes this in part to the layers of legislation and controls introduced that have often been added to existing rules, indicating a 'knee-jerk' reaction to compliance, which can lead to policy design

[61] For a discussion on the nature and importance of judicial independence, see for example, Pablo Jose Castillo Ortiz, 'Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe' (2017) 9 Hague J Rule Law 315 and John Frerejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 S Cal L Rev 353.

[62] European Council, 'Conclusions of the Presidency, European Council in Copenhagen, 21 and 22 June 1993' (1993) SN180/1/93 < https://www.consilium.europa.eu/media/21225/72921.pdf>, para 7(A)(iii).

[63] Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 892-893.

[64] Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 893.

being out of step with effective implementation.[65] As observed by Fleck, the quick reformative reactions appeared at times to have merely moved power and undue influence from one bureaucratic institution to another with some radical reforms having an opposite effect to increasing mutual trust, introducing lack of efficiency, decline in trust in the judiciary, corruption and ideological bias.[66]

The EU has tried to help in the area of judicial reform in issues of judicial independence, in particular for new Member States. For example, a Co-operation and Verification Mechanism was created as a transitional measure for Romania and Bulgaria to assist them in addressing several judicial reform shortcomings, corruption and organised crime. The Mechanism established a set of criteria for the Commission to assess on an annual basis[67] and has been viewed as efficient, however, recent reports show some setbacks, which has raised the question as to whether the demand for progress is stringent enough and whether changes should be more concrete in the system before the Mechanism is terminated.[68] While Romania and Bulgaria continued to follow these benchmarks, Poland, Hungary, and the Czech Republic saw increased tensions as political parties tested their autonomy against EU judicial governance to empower elected branches of government over the judiciary. It is interesting to note that if some of these governments were exhibiting the same characteristics at the time that they joined the EU, they would not have been permitted to do so. [69]

In conclusion, it is not the intention of this Chapter or this Report to detail the problems that have been encountered since the accession of some of the newer Member States that risks the rule of law and judicial independence. It is sufficient to note that the issues confronting newer Member States are closely connected to cultural trends that have informed their legal systems for decades as are the difficulties that continue to be encountered by older Member States in this area. These paths are hard to break and require more than just legislative changes, rather entire paradigm shifts in the values and principles that underpin a jurisdiction's existential foundation.[70] If judicial harmonisation is to be achieved, these paradigm shifts will continue to require a close working relationship between EU institutions and Member States to ensure developing principles are aligned. A commonly held view and approach to the rule of law and judicial independence are essential to establishing and

[65] Agnes Batory, 'Why do Anti-Corruption Laws Fail in Central Eastern Europe? A Target Compliance Perspective' (2012) 6 Regulation & Governance 66, 67.
[66] J Fleck, 'Judicial Independence in Hungary' in A Sievert-Fohr (ed), *Judicial Independence in Transition* (Springer 2011) as cited in Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 893-894.
[67] EESC Opinion para 4.6.1.
[68] EESC Opinion para 4.6.2.
[69] Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 894.
[70] For a discussion around the issues encountered by newer Member States after joining, see for example: Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892; Agnes Batory, 'Why do Anti-Corruption Laws Fail in Central Eastern Europe? A Target Compliance Perspective' (2012) 6 Regulation & Governance 66; Daniel J Beers, 'Judicial Self-Governance and the Rule of Law: Evidence from Romania and the Czech Republic' (2012) 59(5) Problems of Post-Communism 50; and Martin Mendelski, 'EU-Driven Reforms in Romania: a Success Story?' (2012) 28(1) East European Politics 23.

maintaining mutual trust in order to ensure effective co-operation between the courts of Member States.

4.6 European Judicial Education and Qualification

As noted in section 4.3 of this Chapter, there are fairly significant differences between the common law and civil law judicial role, with the former including an interpretative duty that tends to be avoided in the latter. There are also a number of differences between the education, experience, and training requirements to be appointed as a judge among the Member States generally, with some fairly substantial differences between common and civil law countries due to the difference in the judicial role. Question 14 of the JCOERE Questionnaire targeted this area of interest, as has the Judicial Survey, which will be discussed in Chapter 8 of this Report. This section will draw primarily from the responses to the JCOERE Questionnaire to the following question: 'In your jurisdiction, what are the training and competency requirements for insolvency judges?'

Italy

In Italy, judges may qualify through a number of avenues. Either a candidate must already have a PhD or other post graduate law degree, have attended a stage or training course in Court, worked as an honorary judge for at least six years, attained a lawyers licence, worked as a regular university law professor, occupied certain managerial roles in Public Administration, or been appointed as a judge of administrative and accounting courts. There is also a compulsory initial induction and training period over 18 months along with internships.[71] Training sessions are also required every four years.[72] Judges are selected through a public competitive exam published by the Minister of justice, with some exceptions. For example, university law professors of at least 15 years' standing enrolled in a specific register can also be appointed Counsellors of the Supreme Court of Cassation by the Superior Council of the Judiciary.[73]

France

Commercial court judges, who hear insolvency cases in France, are a special category of unpaid judge, elected by their peers from a constituency formed of persons registered as running a business for at least five years.[74] They are elected for a period of generally two years in the first instance, but can be re-elected for an additional four years.[75] Newly elected judges

[71] Legislative Decree 30 January 2006, art 25 as amended by Law 30 July 2007.
[72] European Commission, 'Judicial Training Structures: Italy' (European Commission 2012) <https://e-justice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> [Last accessed 16 June 2020].
[73] Marco Gubitosi, 'Legal Systems in Italy: Overview' (Reuters 2019) <https://uk.practicallaw.thomsonreuters.com/w-007-7826?transitionType=Default&contextData=(sc.Default)> [Last accessed 16 June 2020].
[74] Code de Commerce, L721-3.
[75] Greffe du Tribunal de Commerce, 'Presentation du Tribunal de Commerce' (Greffe du Tribunal de Commerce CAEN) <http://www.greffe-tc-caen.fr/pres_tribunal.php#:~:text=Les%20juges%20consulaires,ni%20indemnit%C3%A9%20d'aucune%20sorte> [Last accessed 26 June 2020].

are required to undertake training composed of six modules of one or two days each within the first 20 months of their election to the bench.[76] There is now a specific obligation to acquire relevant professional skills and education with a continuing requirement for further professional development. Failure to complete the requisite courses following election will deem the judge to have resigned from office.[77] This differs from judges in the ordinary and civil courts, which require that an individual has completed a bachelor's in law, requiring three years of legal studies, and a master's in law for two years, and completion of a competitive examination generally preceded by preparatory classes. Successful candidates can then be appointed as judges' assistants, at which time they receive the same training given by the École Nationale de la Magistrature,[78] which lasts for 31 months and is comprised of 27 months general training followed by a phase to prepare the judicial candidates for the positions they will undertake.[79]

Spain

Admission to careers in the judiciary is based on the principles of merit and ability. The selection process is objective and transparent, guaranteeing equal opportunity for everyone who meets the criteria and who has the necessary skills, professional competence and qualifications to serve as a judge. [80] There are three ways to become a judge in Spain. First and probably most traditional, upon completion of a law degree, the candidate can pass a free public competitive examination followed by a theoretical and practical selection course at a judiciary school. The average preparation time for the examination tends to be around 3 to 5 years. Then the candidate is required to spend a year at the Spanish Judicial School in Barcelona followed by a one-year internship in the jurisdiction in which that wish to practice. One can also come to judgeship if they are a legal professional with "renowned competence" and 10 years of practice experience. The candidate would still have to complete a training course at the judicial school, after which they can apply for a merit-based appointment. Finally, a candidate can be a renowned legal professional with more than 15 years of legal practice experience and the ask the general counsel of the judiciary for a discretionary appointment. [81]

[76] Ecole Nationale de la Magistrature, 'Judges Consulaires' (ENM Website) <http://www.enm.justice.fr/formation-juges-consulaires> [Last accessed 26 June 2020].

[77] Law no. 2016-1547 of 18 November 2016, rewriting the section in the Commercial Code on the status of commercial court judges, article 95, introducing new Article L722-17 of the Commercial Code.

Thank you as well to Dr Paul Omar of INSOL Europe and Dr Emilie Ghio, lecturer at Birmingham City University, for their contribution of the content of the country report on France. The French Country Report can be found here: JCOERE Consortium, Ghio E and Omar P, 'Country Report: France' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionfrance/>.

[78] Ecole Nationale de la Magistrature (ENM): http://www.enm.justice.fr/.[Last accessed 26 June 2020].

[79] Ecole Nationale de la Magistrature, National School for the Judiciary Information Pamphlet, (ENM) <https://www.enm.justice.fr/sites/default/files/publications/plaquette2017_EN.pdf> [Last accessed 25 June 2020].

[80] 'Legal Professions – Spain' (European e-Justice) <https://e-justice.europa.eu/content_legal_professions-29-es-en.do?member=1> [Last accessed 25 June 2020].

[81] 'Get to Know Another Country's Judiciary: Spain' (The National Judicial College 2018) < https://www.judges.org/news-and-info/get-to-know-another-countrys-judiciary-spain/> [Last accessed 25 June 2020]; see also Antonio Tapia and Amalia del Campo, 'Legal Systems in Spain: Overview' (Thomson Reuters Practical Law 2018) <https://uk.practicallaw.thomsonreuters.com/7-634-0207?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a897703> [Last accessed 25 June 2020].

Austria

Austrian judges are required to complete a degree programme law of at least 4 years in Austrian law, which is followed by practical experience as internships in the courts. This internship, in principle, for four years and can take place in a variety of legal environments, including of course district and regional courts. The practical experience concludes with a judicial office examination. After the exam has been passed, candidate judges can then apply for vacant permanent positions as judges. Appointments as judges are made by the Federal President who, where most positions are concerned, will have delegated this task to the Federal Minister for Justice. Only Austrian nationals can be appointed judges.[82] There are only 35-40 insolvency judges in Austria and these are usually drawn from experienced judges of the higher courts, such as Landesgerichte and Handelsgericht Wien. Once appointed, an insolvency judge usually stays in this position until retirement. There is no specific training for insolvency judges, but there is an annual seminar organised by the informal association of insolvency judges.[83]

Germany

Judges are required to undertake the same general legal education as all other regulated legal professions. The legal qualification, uniform for all legal professions, is acquired by passing two examinations with the first examination taking place after undergraduate university studies and the second exam after a state-organised practical training. The general criteria for judicial appointment is set out in the German Constitution (*Grundgesetz*). Professional competence is assessed with an emphasis on the examination results while personal and social competences are assessed in interviews with appointment commissions or staff managers of the ministries of justice.[84] New judges begin their career on probation, then after three to five years they become officials for life.[85] Insolvency judges are required to have special competences in insolvency, company and trade law and sufficient basic knowledge in labor, social and tax law as well as in accounting.[86] In practice, however, the huge number of about 185 insolvency courts in Germany results in many judges lacking such competences.

[82] 'Legal Professions in Austria' (Federal Ministry of the Republic of Austria 2018) <Justizwww.justiz.gv.at> accessed 25 June 2020, 18; see also 'Legal Professions – Austria' (European e-Justice) <https://e-justice.europa.eu/content_legal_professions-29-at-en.do?member=1> [Last accessed 25 June 2020].

[83] Thanks to Dr Susanne Fruhstorfer, partner at Taylor Wessing, for her contribution of the content of country report on Austria, available here: :JCOERE Consortium and Fruhstorfer S, 'Country Report: Austria' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionaustria/.

[84] Johannes Riedel, 'Training and Recruitment of Judges in Germany' (2013) <https://www.iacajournal.org/articles/abstract/10.18352/ijca.12/> [Last accessed 25 June 2020].

[85] Julia Broder, 'How Judges in Germany Work' (Deutschland.de 2019) <https://www.deutschland.de/en/topic/politics/the-way-judges-work-in-germany-five-facts#:~:text=Requirements%20for%20judges,a%20minimum%20of%208.0%20points> [Last accessed 25 June 2020].

[86] Gerichtsverfassungsgesetz (Law on the Structure of Courts), s 22(6).

There are no specific training rules for insolvency judges. In general, judges are not obliged to prove training.[87]

The Netherlands

To qualify as a judge in the Netherlands, a candidate must have both an undergraduate and master in Dutch law and at least two years of working experience outside the judiciary. In addition, a candidate must be of irreproachable standing, have passed the selection of the National Selection Committee for Judges (*Landelijke Selectiecommissie Rechters*, LSR),[88] and complete the initial training programme for trainee judges.[89] The duration of the initial training program depends on the number of years of working experience of the trainee judge.[90] For trainee judges with at least two up to five years of working experience, the training will take four years. For trainee judges with more working experience, there is a shortened training period of 15 months to three years. Besides the initial training program,[91] also additional optional training is available.[92] This is in particular relevant since – within the Dutch judiciary – judges will usually switch to a different section about every 3-6 years. As such, there are no specialised insolvency judges in the Netherlands.[93] However, with respect to the WHOA, a so-called 'WHOA pool' will be formed with eleven judges and eleven legal supporters (one for each district court) for building up knowhow and expertise on the WHOA within the Dutch judiciary. To this end, these judges and legal supporters will receive specific training. Furthermore, whereas professional standards provide a quality check for several areas of law, there is no such standard yet available for insolvency judges in the Netherlands.[94]

Denmark

In order to qualify to become a judge in Denmark, an LLM in law is a prerequisite, preceded by an undergraduate degree in law. In addition, a three-year internship as an attorney or within the courts is required. Judges must undertake an initial training programme of 11

[87] Thanks to Professor Stephan Madaus of the University of Halle-Wittenburt for his contribution of the content of the country report on German, available here: JCOERE Consortium and Madaus S, 'Country Report: Germany' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiongermany/.

[88] See further: De Rechtspraak, 'LSR' (De Rechtspraak Website) www.werkenbijderechtspraak.nl/de-organisatie/lsr/ [Last accessed 26 June 2020].

[89] See: De Rechtspraak, 'Recht Voor Jou' (De Rechtspraak Website) <www.rechtvoorjou.nl/home/werken-bij-de-rechtbank/hoe-word-je-rechter-> [Last accessed 26 June 2020]. Judicial training is, in particular, provided for by the SSR. See also SSR, 'Initial Training Programmes' (SSR Website) <https://ssr.nl/ssr-excellent-training-for-a-just-society/initial-training-programmes/> [Last accessed 26 June 2020].

[90] See SSR,' Summary of information about the new Dutch initial training programme' (SSR Website) <https://ssr.nl/wp-content/uploads/2020/03/Summary-new-Dutch-initial-training-programme.pdf > [Last accessed 26 June 2020].

[91] Much training for judges is provided by the SSR. See also SSR, 'Initial Training Programmes' (SSR Website) <https://ssr.nl/ssr-excellent-training-for-a-just-society/initial-training-programmes/> [Last accessed 26 June 2020].

[92] See SSR, 'Life Long Education' (SSR website) https://ssr.nl/ssr-excellent-training-for-a-just-society/life-long-education/. [Last accessed 25 June 2020].

[93] At the start of the legislative program providing for a recalibration of the DBA, it was considered that specialised insolvency judges could be facilitated to better enable knowledge building. This was not included in later updates from the Ministry. See *Kamerstukken II* 2012/13, 29911, 74, at. 2.1.

[94] Thanks to Gert-Jan Boon, PhD Researcher and Lecturer at the University of Leiden for his contribution of the content of country report on The Netherlands, available here: JCOERE Consortium and Boon G.J, 'Country Report: The Netherlands' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionthenetherlands/>

courses. Continuous training following appointment is available, but is not required.[95] There are no specific training requirements for insolvency judges but all judges, including insolvency judges, are required to do a training programme,[96] which includes a module on procedural insolvency law.[97]

Romania

In Romania, a judicial candidate must first have completed a legal undergraduate degree along with a legal masters degree. They must undertake a two-year National Institute of Magistracy Course and pass a final examination. It is also possible to apply directly for a judicial position, which is open to lawyers with five years of experience and passing the required exam. It has been observed that the experience qualification tends to be exceptional with most appointments undertaking the 2-year magistracy course. This means that a majority of newly appointed judges do not have practical experience. During the 2-year course, there is also a 2-week internship in first instance courts, the prosecutor's office, probation office, and at the end of the first year they must undertake a 1-month internship at a lawyer's office with additional hands-on experience during the second year in alternation with the modules of the course.[98]

Poland

Judges in Poland must first have been admitted to a legal profession, which can be done in a number of ways. A candidate to the bar must have a master's degree followed by bar training and a bar exam; have a master's degree in law followed by five years professional experience and a bar exam; have a PhD in law followed by either the bar exam or three years of professional experience; or they have to have a high academic qualification in the legal sciences.[99] Judicial training is managed by the National School of Judiciary and Prosecution in Krakow.[100] A three year training course is required to become a judge, which includes the attendance of lectures and working within the courts. After undergoing one year of training, the candidates the proceed to specialised training as a judge or public prosecutor for an additional 30 months. Finally, trainee judges serve internships as law clerks for 12 months. After one-year general training, the candidates proceed to a specialised training (judge/public prosecutor) for another 30 months. Then, trainee judges serve internships as law clerks (12 months) and then for three years as a court assessor. There is also the possibility of switching

[95] European Commission, 'Judicial Training Structures in the EU: Denmark' (European Commission 2012) <https://ejustice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> accessed 26 June 2020.
[96] According to The Administration of Justice Act section 19 the content of the mandatory training program is decided by *Domstolsstyrelsen*.
[97] Thanks to Dr Line Lanjkaer of Arhus University for her contribution to the content of the country report on Denmark, available here: JCOERE Consortium and Lanikaer L, 'Country Report: Denmark' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiondenmark/>.
[98] 'Judicial Training Structures in the EU: Romania (European Commission 2012) <https://e-justice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> [Last accessed 16 June 2020].
[99] Act of 26 May 1982 - Law on Advocates; Act of 6 July 1982 on Legal Advisors.
[100] Act of 23 January 2009 on The National School of Judiciary and Public Prosecution.

from another legal profession, but this possibility is currently strongly limited.[101] There is no additional competency requirements for insolvency judges.[102]

Ireland

In Ireland, which along with Cyprus will be the only common law jurisdiction remaining in the EU post Brexit (with Malta demonstrating a hybrid civil law / common law jurisdiction) judges are appointed to the High Court, the Court of Appeal and the Supreme Court by the President of Ireland on the advice of the Government.[103] A Judicial Appointments Advisory Board[104], established pursuant to the Courts and Court Officers Act 1995 (as amended) and comprised of senior judges, the Attorney General, legal professionals and nominees from the Minister for Justice has the function of identifying "persons and informing the Government of the suitability of those persons for appointment to judicial office." To be appointed to the Circuit and District court benches, a candidate must be a practising barrister or solicitor with at least ten years' experience whereas to be appointed to the High Court, the Court of Appeal, or the Supreme Court, a candidate must have at least 12 years' standing and have been practising continuously 2 years before the appointment.[105] To obtain the practising experience necessary the individual must be a qualified legal practitioner which usually requires an undergraduate law degree and a professional qualification as either a Solicitor qualified with the Incorporated Law Society of Ireland or a Barrister qualified with the Honourable Society of the Kings Inns. In addition the candidate must possess a sufficient 'degree of competence and probity' and must be 'suitable on grounds of character and temperament.'[106]

England and Wales

Judges in the normal courts of England and Wales must be qualified legal practitioners, which requires an undergraduate law degree and qualification with the Law Society of England and Wales or qualification as a barrister. Following training, a candidate must have had at least 5 or 7 years of post-qualification experience to be a judge.[107] In terms of continuing training, the Judicial College is directly responsible for training full (salaried) and part-time (fee-paid)

[101] Thank you to Michał Barłowsk, senior counsel at Wardynski & Partners, and Sylwester Zydowicz of Taylor Wessing for his contribution of the Polish Country Report: JCOERE Consortium, Barłowski Mand Zydowicz S, 'Country Report: Poland' (JCOERE Website 2020), < https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionpoland/> .

[102] Polish Restructuring Law, s 150.

[103] Irish Constitution, article 35.1 and 13.9. Article 35.1 of the Constitution provides that "[t]he judges of the Supreme Court, the Court of Appeal, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by President." While the formal appointment of judges is made by the President through the presentation of warrants of appointment to those appointed, this power is, pursuant to Article 13.9, exercised "only on the advice of the Government."

[104] www.jaab.ie [Last accessed July 07, 2020]

[105] Section 5 of the Courts (Supplemental Provisions) Act 1961, s5(2)(a).as amended by section 4 of the Courts and Court Officers Act 2002, and section 11 of the Court of Appeal Act 2014, provides that:
" a person shall be qualified for appointment as a judge of the Supreme Court or the Court of Appeal or the High Court if the person is for the time being a practising barrister or practising solicitor of not less than 12 years standing who has practised as a barrister or a solicitor for a continuous period of not less than two years immediately before such appointment."

[106] Court of Appeal Act 2014 s12(d)(ii).

[107] https://www.judicialappointments.gov.uk. See also for further information https://www.judiciary.uk/ [Last accessed July 07, 2020] United Kingdom Courts and Tribunals Judiciary, 'Eligibility for legally qualified candidates' (Judicial Appointments Commission) <https://www.judiciary.uk/about-the-judiciary/training-support/judiciary-trained/> [Last accessed 25 June 2020].

judges in the courts in England and Wales, and for training judges and members of tribunals within the scope of the Tribunals, Courts and Enforcement Act 2007. An essential element of the philosophy of the Judicial College is that the training of judges, tribunals members and magistrates is under judicial control and direction.[108]

Conclusion

Out of the examples from our contributing jurisdictions, there appears to be a wide range of requirements for post education training and apprenticeships to qualify as a judge. There is no specific training requirement to gain a judgeship in the Irish or English jurisdictions, however, given the interpretative role of the judiciary and the need for barristers and solicitors to understand, interpret and apply case law in their advisory and advocacy roles, with ten-years-experience Irish practitioners will have been steeped in judicial interpretation and decision-making to a much higher degree than their civil law counterparts, though it is perhaps less satisfying that the English experience requirement is less than the Irish. Interpretation and experience is an important legal cultural aspect of the common law system that does not align with the judicial role in civil law systems.

The differences among the civil law systems also seem significant, though there are a number of parallels. Most of the judgeships require education in law of either undergraduate or master's level, though this depends on the legal education requirements generally in each jurisdiction. The length of training in terms of courses and internships vary from 8 days in France to 4 years court internship in Austria with a variety of course requirements and on the job training in between. French commercial judges are a particular anomaly, drawn from the business community and elected for fairly short periods of time. Though there is some logic in asking businesspeople to hear commercial cases, by comparison the training seems relatively limited. It is interesting to note as well that it is among the newer Member States that some of the most stringent training and education requirements arise.

Apart from France, all of the other civil jurisdictions interrogated provide a much higher level of training on the surface than do either Ireland or the UK. While the difference in training is clearly connected to the differences in civil and common law and the fact that the interpretation and understanding of judicial decision-making is a part of the job of a common lawyer, without an understanding of that key legal culture difference, it would be easy to view the Irish and English judicial training as inadequate. In the team's experience, there is certainly some dissonance between many civil lawyer's understanding of the common law system that has given them pause, particularly with regard to the interpretative obligation that clarifies ambiguities in legislation and creates precedents that can be used habitually to determine things like fairness (see the unfair prejudice test in Ireland, for example.)

[108]United Kingdom Courts and Tribunals Judiciary, 'The Judicial College' (Judiciary UK) <https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/>

4.7 Towards Resolving Challenges to Judicial Co-operation

Political powers shift and, as has been evident over the last several years, this shift can be in a direction away from balancing political power and toward more authoritarian impulses. Where internal structures of a Member State are not developed or strong enough to resist such movements, the EU has tried to provide early warning systems and mechanisms to assist and recalibrate legal structures as noted in section 4.2 of this Chapter. The Commission needs a deep knowledge of Member State legal culture and systemic characteristics to be able to provide oversight on rule of law problems among the Member States and to identify warning signs that a problem is coming. Country-specific knowledge is essential to respond effectively to rule of law risks as these may arise in different guises in different countries due to the inherent differences among the 27 Member State legal cultures. This means a dialogue with Member State authorities and stakeholders is also essential.[109]

A number of mechanisms have been developed to assist the EU in monitoring issues arising from rule of law and judicial independence problems. The Council of Europe has also developed The Rule of Law Checklist, intended to be a tool for assessing the Rule of Law from the viewpoint of its constitutional and legal structure, legislation in force, and existing case law. It aims at enabling objective, thorough, equal, and transparent assessment of the legal safeguards in place to protect the Rule of Law in a given jurisdiction.[110] In addition, the European Judicial Training Network produced a publication in 2019 about perspectives on the rule of law from both practitioners and academics in the EU. Its objective is to increase knowledge and awareness of professional standards within the rule of law framework and strengthen the rule of law culture in the EU.[111]

The European Semester and the Judicial Scoreboard have also been created to help develop country-specific knowledge relating to the rule of law highlighting positive and negative trends in the judiciaries of the EU Member States.[112] The Judicial Scoreboard offers Member States the opportunity to reflect on their own strengths and weaknesses with indicators on efficiency, quality, and independence of judiciaries.[113] It also feeds into the Semester by providing elements for assessing the quality independence and efficiency of national justice systems. The aim of the European Semester is to provide a framework within which economic policies can be coordinated across the EU, also covering the fight against corruption, effective

[109] 2019 Communication 163, 9.
[110] Venice Commission of the Council of Europe, 'Rule of Law Checklist', CDL-AD(2016)007. Retrieved from: <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> [Last accessed 15 June 2020]. 12.
[111] EJTN, 'Rule of Law in Europe: Perspectives from Practitioners and Academics' (EJTN 2019) <http://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/> [Last accessed 15 June 2020].
[112] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf> accessed 15 June 2020.
[113] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020.

justice systems, and reform of public administration.[114] It provides country specific assessments carried out through a bilateral dialogue with national authorities and the stakeholders involved.[115] However, it has been criticised for not being inclusive enough of social partners and that recommendations are not being implemented in a satisfactory manner in the Member States to which they are addressed.[116] These tools could be further developed in order to explore how the challenges to harmonisation in this area can be further resolved.[117]

In 2019 the Judicial Scoreboard assessed a number of qualities of Member State justice systems, including efficiency, quality standards, independence and training. Given the focus on independence and training in the foregoing sections, it is interesting to consider what the 2019 scoreboard showed. In terms of training, the 2019 scoreboard demonstrated that most Member States provide continuous training in EU Law, the law of other Member States, and judgecraft, though most Member States continue to devote less time to judicial ethics overall. Notably, Romania provides continuous training in judicial ethics to 80% of its judges, by far the highest proportion in that area among all of the other Member States.[118] While judgecraft is clearly important as indicated by the high proportion of judges who receive continuous training in this area, for newer Member States that may have suffered from systemic corruption in the past, judicial ethics should likely form a reasonably high proportion of judicial training practices. Other newer Member States with dealing with the challenges of governmental corruption do not devote near as much time to judicial ethics.

A whole section of the Scoreboard is devoted to judicial independence. The findings in 2019 show that the perceived judicial independence among the general public is skewed in the negative toward newer Member States, with two notable exceptions in the bottom five (Spain and Italy). Most of the negative perceptions are based on interference or pressure from governments and politicians.[119] Where perceptions were positive, this was usually noted as being due to the guarantees provided by the status and position of judges. There has been little change in the perception of either businesses or individuals in the independence of the judiciary among the Member States in terms of the ranking, however, there is a trend in a perception that independence has improved among the states that had been experiencing

[114] EESC Opinion para 4.4.1.
[115]European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020, 3.
[116] EESC Opinion para 4.4.2.
[117] 2019 Communication 9
[118] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en>
<https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020], 42 and figure 37.
[119] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020], figure 47 and 48.

challenges over a four year period. Compared with the 2018 Scoreboard, however, the perception of judicial independence has decreased overall.[120]

While the Scoreboard presents only the perceptions of individuals and businesses in relation to the relative success of their own Member States, they do give some indication as to how the main recipients of a justice systems' services feel about the services they are receiving: the public. The fact that there has been a perceived improvement among the Member States who were facing challenges in the last four years, perhaps shows that the EU's efforts to enhance the rule of law principle throughout all of the Member States, the mechanisms it has created, and the frameworks it has put in place have begun to make some impact on improving mutual trust, creating an environment in which co-operation can occur more effectively. However, and as noted in the previous sections of these Reports, legal and judicial culture will be difficult to change without serious structural changes where the differences are far from expectations within the EU legal framework. 'Knee-jerk' legislative reactions often just transfer responsibility and power to a different institution. That said, the goal of judicial Europeanisation as part of the integration project of the EU is essential for its success if true mutual trust is to be established within the framework of the rule of law, allowing for effective co-operation between the courts of different Member States.

4.8 Conclusion and Transition

The EU, its institutions and associated organisations have clearly been busy implementing the 2019 Communications' frameworks and recommendations (discussed in section 4.2) in the latter half of 2019. The efforts to gather knowledge and increase understanding are a step in the right direction in trying to create a true European judicial culture by challenging the deeply rooted presumptions within Member State legal cultures that create differences making mutual trust more difficult to achieve, and thereby pushing effective co-operation in cross-border matters further out of reach.

This chapter has explored the rule of law within the framework of the EU and how it has been a focus of policy discussion and initiatives towards change, particularly in the last decade. These policies have promoted support for existing judicial training networks and for the introduction of training at national levels through organisations such as the European Judicial Training Network. While there has certainly been a move towards a closer relationship between EU judiciaries and a rise in the level of awareness of foundational principles, such as the rule of law, and their associated principles, such as judicial independence, this has not prevented actions by some Member State Governments which have risked the integrity of the

[120] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020], 138.

rule of law in the EU.[121] Legal culture, coupled with political forces, influence diverse approaches to similar problems. This is one important reason why enhancing harmonisation and co-operation is vital to ensure the strength of the EU. The JCOERE Project is focussed on the integration of a particular aspect of market behaviour, namely the rescue of failing businesses and economic recovery in Europe, but nevertheless our findings and observations can be applied in other spheres.

The next Chapter will discuss and analyse cases arising in the context of co-operation in cross-border insolvency and rescue. The cases discussed in Chapter 5 will demonstrate the different approaches taken by practitioners and courts and how these will influence developments within the EU over time as well as some situations in which difficulties in co-operation have arisen.

[121] As noted in section 4.2 of this Chapter, both Poland and Hungary have been subject to notifications under the Rule of Law Framework. In addition, while Romania and Bulgaria have been seen to follow the benchmarks set out in the Cooperation and Verification Mechanisms, Poland, Hungary, and the Czech Republic have seen increased political tensions as political parties tested their autonomy against EU judicial governance to empower elected branches of government over the judiciary. See Opinion of the European Economic and Social Committee on the Communication COM(2019) 163 final from the Commission to the European Parliament, the European Council, and the Council on Further Strengthening the Rule of Law within the Union – State of play and next possible steps (Brussels 3.4.2019) para 4.6.1.

V. Chapter 5: Judicial *Co-Operation* in Restructuring Processes

5.1 Judicial Co-Operation in Cross-Border Restructuring

This Chapter follows on from the discussion in Chapter 3 summarising differences in approach to preventive restructuring in European Member States and on procedural obstacles to co-operation, in addition to the discussion in Chapter 4 on different legal and judicial cultures in Europe. It will focus specifically on case law arising, either domestically in the European Union, or in the CJEU on co-operation in the context of insolvency, and on the emerging context of European corporate restructuring in particular. The starting point, therefore, will be the EIR Recast Regulation,[1] which imposes specific obligations on insolvency practitioners and courts to co-operate as described in section 2 of this Chapter, building on the exposition of the evolution of the EIR Recast in Chapter 2. The Chapter will then move on in section 3 to a consideration of recognition and co-operation in the context of restructuring. Section 4 considers what co-operation might look like as application of these obligations increases together with post implementation of the PRD.[2] Examples are derived from cross-border cases in other contexts, where instances of judicial co-operation and communication occurred, or where such an approach was proposed and where it did not occur. Case law will demonstrate different approaches by practitioners and courts, which will influence developments in the European Union over time. Finally, section 5 will consider some exceptional cases, which may cause difficulties for co-operation.

[1] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19. [Hereinafter EIR Recast].
[2] Council Directive (EU) 2019/1023 of 26 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18. [Hereinafter "PRD"].

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

5.2 Foundation of the European Approach: Recognition of Proceedings under the European Insolvency Regulation 2000 and the EIR Recast 2015

The EIR Recast Regulation on Insolvency and its predecessor - the Insolvency Regulation[3] - set out important rules regarding recognition of insolvency proceedings across the EU Member States and the enforcement of consequent judgements. As outlined in detail in Chapter 2, the duty to co-operate was developed and expanded in more recent times. In the Insolvency Regulation 2000, an obligation was imposed on insolvency practitioners to co-operate with each other,[4] which was repeated in article 41 of the EIR Recast. The obligation to co-operate was expanded by the Recast, which imposed these obligations on courts to co-operate with each other in addition to the obligation to co-operate being imposed between insolvency practitioners and courts. Furthermore, as laid out in Chapter 2, the EIR Recast also specifically extends co-operation obligations to cases that involve groups of companies. For many years following the enactment of the original Insolvency Regulation, the case law focussed on the important question of centre of main interest or COMI. COMI is determinative of the jurisdiction in which the main insolvency proceedings will begin and the litigation surrounding the issue has been well documented. The important point in the context of co-operation, however, is that once COMI and seizure of proceedings is established, the opening of secondary or territorial proceedings, (as local proceedings are described under the Regulation), is constrained.[5] Despite somewhat rocky beginnings in cases such as *Eurofood*,[6] which will be discussed below, the principles on which COMI is determined are fairly well settled in subsequent decisions of the CJEU, in cases such as *Interedil*[7] and followed in other cases such as *Daisytek*[8]. For our purposes, the smooth operation of the recognition process is a cornerstone of further enhanced court and judicial co-operation as anticipated following the passing of the EIR Recast. As described below, there is, however, more to co-operation than simple recognition and the extent of the new co-operation obligations has yet to be explored.

The *Eurofood*[9] *case,* which was discussed in a different context in Chapter 3 is relevant once again, albeit for a different reason. A further question had been referred to the ECJ by the Supreme Court of Ireland which concerned whether there could be recognition for the principle of Irish law that the liquidation commences from the date of presentation of a petition to wind up a company where that petition is successful, as provided for in s. 220 of the Companies Act 1963.[10] This question was considered by Advocate General Jacobs in his opinion, where he expressed the view that under the Regulation it is national law, which

[3] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1.
[4] *Ibid.* Article 31. As discussed in Chapter 2, strictly speaking, this duty applied to 'liquidators' but was understood to mean insolvency practitioners.
[5] Regulation 1346/2000, Recitals 12, 17 and articles 3 and 27. EIR Recast, Recitals 23, 33, 38 and articles 3 and 34 – 40.
[6] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813.
[7] Case C-396/09 Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA. [2011] ECR I-09915.
[8] Re Daisytek-ISA Ltd. [2004] BPIR 30.
[9] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813.
[10] Companies Act 1963, s 220 provides that once a winding-up order is made the liquidation shall be deemed to commence from the date the petition was presented. This concept of 'relation back' was later referred to as 'heresy' by the Italian authorities in the Supreme Court (*Re Eurofood IFSC Ltd (No 2)* [2006] IESC 41, [2006] 4 IR 307).

determines when a 'judgment' becomes effective. This matter was not considered by the ECJ in this case. However, subsequent cases have considered the issue. The lodgement of a request for the opening of insolvency proceedings, such as the presentation of a petition in the Central Office of the High Court, should have some consequence, even if this does not constitute the 'opening of proceedings'. The ECJ has held that the lodging of a request for the opening of proceedings in a Member State has, at least, the effect of restricting the debtor's freedom to move its centre of main interests; thus, the Member State where the request is lodged retains jurisdiction to determine the issue of centre of main interests and whether to open main insolvency proceedings.[11] Applying to a preventive restructuring process such as the Irish examinership this would mean that the commencement of the stay which is linked to the presentation of the petition would receive pan European recognition under the terms of the Regulation and that co-operation obligations would apply.

In fact, the *Eurofood*[12] case is a classic example of non-co-operation. Similarly, in recent times Irish courts have been inclined to support the repatriation of individual insolvent debtors, rather than allow the administration of the bankruptcy to take place in a neighbouring jurisdiction. In an academic context, this is described as a desire on the part of creditors to maintain 'jurisdictional reach' with the debtor.[13] There is anecdotal evidence of informal co-operation between practitioners in the UK and Republic of Ireland and there are provisions in the Companies Act 2014, which allow a government Minister to make an order allowing for particular co-operation between Ireland and another state. There are similar provisions in the UK Insolvency Act 1986. These provisions were activated between Ireland and the UK until both countries' accession to the EU. It is expected that post Brexit these provisions will be re-activated.[14]

5.2.1 Foundations of the European approach: The co-operation obligations

The co-operation obligations contained in the EIR Recast were dealt with in detail in Chapter 2, however, a brief restatement is useful for this Chapter. In short, the more recent iteration of the Regulation in the EIR Recast introduces an enhanced co-operation regime.[15] Articles

[11]See also the decision of the Court of Justice in Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-00701, where it was held that under art 3(1) the court of the Member State in which the centre of the debtor's main interests was situated at the time when the debtor lodged the request to open insolvency proceedings retained jurisdiction to open those proceedings when the debtor moved the centre of his main interests to another Member State after lodging the request but before the proceedings were opened. See also, in the context of the presentation of a bankruptcy petition, *Stojevic v Komercni Banka AS* [2006] EWHC 3447 (Ch) [2007] BPIR 141 and *Official Receiver v Eichler* [2007] BPIR 1636. See also Case C-396/*09 Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-09915, where the court stated that 'it is the location of the debtor's main centre of interests *at the date on which the request to open insolvency proceedings was lodged* that is relevant for the purpose of determining the court having jurisdiction' (para 55) (emphasis added). In that case, it was held that a debtor could change the place of its registered office *before* a request to open insolvency proceedings was lodged, and the presumption in art 3(1) would apply, but may not be determinative on the question of the location of the debtor's centre of main interests.

[12] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813.

[13] *ACC v McCann and Griffin* [2012] IEHC 236; *Irish Bank Resolution Corp Ltd v Quinn* [2012] NICh. 1, [2012] B.C.C. 608; *O'Donnell and Anor. v Bank of Ireland* [2012] EWHC 3749. See Irene Lynch Fannon, ''Bankruptcy Tourism in the UK: Why and How?' (2013) 26(6) *Insolvency Intelligence* 85 for a discussion of these cases.

[14] Chris Umfreville, Paul Omar, Heike Lücke, Irene Lynch Fannon, Michael Veder and Laura Carballo Piñeiro, 'Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario'', (2018) 27 *International Insolvency Review* 422.

[15] See generally, Moritz Brinkmann (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019).

41-44 address co-operation obligations imposed on insolvency practitioners and courts respectively regarding a single insolvency proceeding concerning one company and articles 56-59 address similar co-operation obligations in the context of groups. It is worth pointing out that the emphasis in the JCOERE Project is on the role of courts and the co-operation obligations imposed on them, rather than the obligations imposed on insolvency practitioners. For clarity though, it must be emphasised that article 41 imposes the obligation on insolvency practitioners to co-operate with each other in a single company situation and article 57 imposes a similar obligation in the context of group proceedings. [16]

The language of the relevant articles is important to note from the outset. The obligation to co-operate is addressed to the court and not to the judiciary, as such.[17] The JCOERE Project, which reflects the policy of the EU Commission Justice Directorate General,[18] focuses on the question of judicial co-operation. It remains to be seen whether the different language employed is significant. In other words, is the fact that the obligation is addressed to the court rather than to the judiciary potentially important? It would seem that it may be of considerable importance in relation to the legal consequences for non-compliance. As described in Chapter 3, questions of liability, for example, will pivot on the precise nature of the obligation.[19]

Article 42 makes it clear that the explicit co-operation provisions are linked to the question of recognition of proceedings where it states that the co-operation obligation is imposed '[i]n order to facilitate the co-ordination of main, territorial and secondary insolvency proceedings concerning the same debtor…' The article goes on to provide that any court dealing with a request to open proceedings or that has opened such proceedings, 'shall co-operate with any other court', which is similarly dealing with a request to open proceedings or which has opened proceedings. The article envisages that the co-operation obligation is subject to the compatibility with the 'rules applicable to each of the proceedings.' [20]

As we have stated, we expect that in the new European era of restructuring some rules may be problematic for different courts and this is discussed in Chapter 3. In some commentary, a wider view is taken of what is meant by 'rules applicable to each of the proceedings.' The proposition is that 'applicable rules' will include a range of laws, including for example, the General Data Protection Regulation (EU) 2016/679 or the Data Protection Directive 95/46/EC.[21] It seems surprising that these two specific legal frameworks would be singled out,

[16] For a general commentary on these obligations see Dominik Skauradszun and Andreas Spahlinger in Moritz Brinkmann((ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019), at Chapter III and Chapter V.
[17] PRD, article 42(1): 'In order to facilitate the co-ordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings'
[18] The JCOERE Project is funded under a call from DG Justice for projects concerning Judicial Co-Operation. It is not envisaged that the use of the term court as distinct from judge is significant but nevertheless the difference should be noted.
[19] See *infra* in this Chapter.
[20] See below for a discussion of what this might mean.
[21] Both of these provisions are specifically mentioned by Skauradszun & Spahlinger (n 16) 342.

as naturally, there will be other relevant legal rules that are applicable. It is our view, of course, that the general legal framework will be applicable, but nevertheless our interpretation of the specific provision is that it is intended to apply to rules applicable to each of the insolvency proceedings covered by the Regulation. On the face of it, the obligation to co-operate is most likely to be interpreted with reference to specific rules applying to particular proceedings covered by the Regulation.[22]

Article 42 goes on to provide some guidance as to how such co-operation might take place, including a provision that 'an independent person or body' acting on the court's instructions may be appointed, who may 'communicate directly with, or request information or assistance directly' from their counterpart in the second Member State.[23] As outlined in Chapter 2, article 42(3) instances particular examples of co-operation that might occur.[24] Article 43 then goes on to impose an obligation on insolvency practitioners to co-operate with courts. Interestingly, however, the language of article 43 focuses on the practitioners' obligation in this regard and does not impose a correlated obligation on the court

Article 57 imposes a similarly worded obligation on courts to co-operate with each other in situations where 'insolvency proceedings relate to two or more members of a group of companies'. Article 58 imposes an obligation, which is similarly worded to that in article 43, on insolvency practitioners to co-operate with courts in the same group context. In both contexts, articles 44 and 59 address costs but interestingly, somewhat different statements are made. Article 44[25] states that costs will not be charged by courts against each other for such co-operation whereas in the group context, article 59[26] states that costs of co-operation will apply to the respective proceedings. In short, the co-operation obligations are imposed on courts and practitioners insofar as such obligations to co-operate are not incompatible with substantive or procedural rules. The key questions posed by the JCOERE Project is how such co-operation obligations will operate in practise, particularly in the context of restructuring and to what extent substantive rules considered in Report 1 and procedural rules considered in Chapter 3 of this Report will prevent co-operation.

5.2.2 Foundations of the European approach: Some issues surrounding co-operation

There are additional questions of interest. We already know that there is more to co-operation than simple recognition of judgements. As the JCOERE Project progressed, a question has been raised in relation to the *borderline* between simple recognition issues,

[22] These specific proceedings are listed for each jurisdiction in Annex A of the EIR Recast.
[23] EIR Recast, article 42(2). This communication must respect the procedural rights of the parties to the proceedings and the confidentiality of information. The reference to 'an independent body or person' reflects the UNCITRAL Model Law provisions described in Chapter 6.
[24] These are: (a) co-ordination in the appointment of the insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) co-ordination of the administration and supervision of the debtor's assets and affairs; (d) co-ordination of the conduct of hearings; (e) co-ordination in the approval of protocols.
[25] EIR Recast, article 44: 'The requirements laid down in Articles 42 and 43 shall not result in courts charging costs to each other for cooperation and communication.'
[26] EIR Recast, article 59: 'The costs of the cooperation and communication provided for in Articles 56 to 60 incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective proceedings.'

which have been played out in many cases, and the broader obligation now imposed under the EIR Recast regarding co-operation, both in relation to single debtor cases and group cases. This question is returned to in Section 5.4 of this Chapter.

As described, the co-operation obligations are actually addressed to courts in the Member States. Therefore, the question arises as to whether judges are personally obliged under the terms of the articles. According to Skauradszun, Spahinger and other commentators under German law 'a prompt rejection or non-response to a request of another court for cooperation…is now a breach of duty.'[27] These authors conclude that the imposition of liability for breach of this obligation will rely on the terms of national laws. However, the idea that an obligation imposed on a court could result in personal liability for a judge or other officer certainly would raise some complex issues in some domestic legal frameworks. It is clear that one cannot presume that the reference to a court explicitly refers to a particular judge, or other officer of the court. Even more it cannot be presumed that an obligation imposed on a body such as a court imposes a specific obligation giving rise to liability on a judge or officer.

A second interesting question in terms of legal consequences, as identified in Chapter 3, is whether an alleged failure to co-operate can affect the validity of any claim, proceeding or other outcome in relation to insolvency proceedings generally. In other words what are the consequences if a party to an insolvency proceeding claims that either a court or an insolvency practitioner failed to comply with the co-operation obligations imposed in the Regulation? Is it even possible for a party to allege a failure to co-operate?

Finally, as described, it is contemplated in the EIR Recast that a court may decide that particular rules, substantive or procedural, render the co-operation required or requested '…incompatible with the rules applicable to them'; or, indeed, the court may find that co-operation may lead to a 'conflict of interest.' The question here is whether this decision by a court can be contested by a party to the proceedings. In other words, are the co-operation articles justiciable and if so, what is the proposed outcome?

5.3 The European Approach: Developing an Obligation to Co-operate in Restructuring

As described here and in Chapter 2, the specific obligations imposed on courts to co-operate are newly introduced in articles 42 and article 57 (in a group context). Therefore, the fact that there are few cases arising in relation to these obligations may not be as significant as we thought it to be at the outset. Instead, it may be simply a matter of time before issues come

[27] *Supra* n 17 at p. 353. Reference is also made to Zipperer in *Festscrhift fur Vallendar* to support this view. However, it is not entirely clear to whom this duty is owed and by whom. It is clear that one cannot presume that the reference to a court explicitly implies reference to a particular judge, or other officer of the court. Even more so one cannot presume that an obligation imposed on a body such as a court imposes a specific obligation giving rise to liability on a judge or officer.

to the fore. Furthermore, restructuring is an even more recent concept in many European states following the passing of the PRD in June 2019.

That said, we have some examples of a broader duty to co-operate being considered by courts in a European context *prior* to the enactment of the EIR Recast. The idea of an obligation imposed on *courts* to co-operate, as being inherent in the obligations already imposed on *practitioners* to co-operate in the original 2000 EIR, was mooted by some commentators and certainly raised in case law.[28]

In *Nortel Networks SA*,[29] for example, the court had been asked to send letters to courts in other EU jurisdictions seeking assistance for the Joint Administrators of various companies in the Nortel group. Patten J. observed that even though the obligation in the 2000 EIR was addressed to practitioners only, 'the duty has been treated by the courts of Member States as incorporating or reflecting a wider obligation *which extends to the courts* which exercise control of insolvency procedures in their respective jurisdictions.'[30] In so finding, he referred to *Re Stojevic*[31] and cited the following passage from that decision, which states:

> Although the wording of Art 31 of the EU Insolvency Regulation only obliges the trustees in bankruptcy to cooperate, this also applies to the court according to the prevailing opinion and under the UNCITRAL model law.[32]

Nevertheless, the obligation to co-operate was not as clearly described as it is now.

5.3.1 Combining the Regulation and the new focus on restructuring

In June 2019, the Preventive Restructuring Directive was passed. The terms of the PRD, insofar as it describes rules which are potentially problematic to co-operation are described in detail in the first JCOERE Report. Chapters 6-8 of JCOERE Report 1 also describe plans for its implementation by a number of Member States. The responses by various Member States to the issues we have raised in relation to the PRD and restructuring generally is summarised in Chapter 3 of this Report. Zorzi and Stanghellini have made some observations regarding the interface, or indeed lack of complementarity, between the PRD and the EIR Recast.[33] A key question that arises is whether the new restructuring processes adopted by Member States will be included in Annex A of the EIR Recast. The PRD provides Member States with the option of registering the processes under Annex A or not. This possibility is mentioned in Recital 13[34]

---

[28] Gabriel Moss, Ian Fletcher and Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016), para 8.402.
[29] Re Nortel Networks SA & Ors [2009] EWHC 206 (Ch).
[30] *Ibid.,* at para 11.
[31] *Stojevic v Komercni Banka AS* [2006] EWHC 3447 (Ch) [2007] BPIR 141, quoting a decision of the Vienna Higher Regional Court (9 November 2004, 28 R 225/04w).
[32] Patten J. also referred in Para 13 of his judgement to a similar observation made in the decision of the court in Graz in *Re Collins & Aikman,* Higher Regional Court of Graz, 20 October 2005, 3 R 149/05, reported in NZI 2006 vol 11 p.660.
[33] Lorenzo Stanghellini and Andrea Zorzi, 'Coordinating the Prevent Restructuring Directive and the Recast European Insolvency Regulation' (2019) Autumn Eurofenix 22.
[34] PRD, Recital 13: 'This Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with

and in article 6, which concerns the imposition of a stay of enforcement proceedings.[35] For example, statements in the final paragraph of article 6 are designed to limit the available stay under the PRD to 4 months where the rescue process is not notifiable under Annex A and where there has been a COMI shift in the preceding 3 months. If a Member State chooses to implement the PRD by introducing a rescue or restructuring process, which is not registered under Annex A of the Regulation, the obligations to co-operate quite simply do not arise. If, on the other hand the process is listed in Annex A, the obligations apply and then, and only then, do the questions around compatibility raised by the JCOERE Project arise.

The significance of the fact that the PRD gives this choice to Member States can be illustrated by comparing an existing restructuring process, which has been already implemented by Ireland as a Member State, namely the examinership procedure, with a second restructuring process used effectively in the UK both before and after the financial crisis and which was particularly popular during the great recession, namely the Scheme of Arrangement procedure. The former is listed in Annex A[36] and therefore once an examinership proceeding is opened in an Irish court, the recognition obligations, and the co-operation obligations under the EIR Recast will arise. In the gathering of the Judicial Wing at Copenhagen, some members of the group regarded these facts as leading to an open and shut case[37] of recognition. This would unquestionably guide the court in the second Member State when considering a request from another party to open secondary proceedings in that Member State. Such a party could be a local creditor wishing to commence an enforcement proceeding in a local court, which would be contrary to the stay that accompanies the opening of an examinership in all cases under Irish law. These rules effectively give the Irish stay a pan-European effect. In addition, requests for co-operation will be similarly governed by the EIR Recast.

A precursor to this situation is exemplified in the decision of the CJEU in *MG Probud Gydnia*[38] in which main insolvency proceedings had been opened in Poland. The company had a branch in Germany, carried on construction activities there and had assets situated there. On the application of the German customs office, a German court ordered the attachment of the company's assets. Even though the attachment had been ordered under German law, under Polish law it was not possible to order attachment of assets in this way. The ECJ confirmed that the main proceedings opened in Poland had universal effect and encompassed all of the

certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures **which do not fulfil the condition of publicity for notification under Annex A** to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments.

[35] PRD, article 6: 'Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.'

[36] As is the French sauvegarde procedure, the Italian procedure and the Spanish procedure which feature in our Reports. See JCOERE Consortium, *Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations* (JCOERE Project, 2019) <https://www.ucc.ie/en/jcoere/research/report1/>.

[37] Discussion at the INSOL Judicial Wing, INSOL European Annual Congress, held in Copenhagen, September 26th, 2019.

[38] Case C-444/07 *MG Probud Gdynia sp. z o.o.* [2010] ECR I-00417.

company's assets including those situated in Germany. As a result, Polish law governed the treatment of assets, even though they were situated in another Member State. Thus, the German courts were precluded from ordering enforcement measures against the company's assets situated in Germany, subject to the exceptions to Art 4 provided for in the Regulation, which did not apply in this case. On the other hand, if secondary proceedings had been opened in Germany, then German law would have applied and there would have been no difficulty in ordering attachment in respect of the assets situated in Germany.[39]

In contrast, if the same situation arose under a UK Scheme of Arrangement, the EIR Recast would not apply and so debtors in a second Member State could proceed to open a second set of proceedings to counteract or disrupt the rescue being proposed under the Scheme of Arrangement. It is also worth noting that rescue processes like the UK Scheme of Arrangement, which are based in company law, are specifically excluded from the application of the EIR Recast under Recital 16,[40] which states:

> This Regulation should apply to proceedings which are based on *laws relating to insolvency*. However, proceedings that are based on *general company law not designed exclusively for insolvency situations* should not be considered to be based on laws relating to insolvency. [emphasis added]

This statement raises an interesting question as to whether restructuring processes designed by Member States, which comply with the terms of the PRD, may in fact be excluded from being registered in Annex A, regardless of the views of the Member State. The lack of clarity or complementarity between the EIR Recast and the PRD presents difficulties of classification of restructuring processes with consequent advantages and disadvantages, which will take some time to work out once the PRD has been implemented. For our purposes, the most important consequence would be that the court (or judicial) co-operation obligations to be found in the EIR Recast would not apply to these restructuring processes at all.

Strangely, the EIR Recast itself addresses the question of restructuring in the provisions that are addressed to insolvency practitioners. Thus, article 41(2)(b) states that in implementing the co-operation described in the first paragraph of the article insolvency practitioners should 'explore the possibility of restructuring of the debtor and, where such a probability exists, coordinate the elaboration and implementation of a restructuring plan'. A similar obligation

[39] Note that article 46 of the EIR Recast provides that the court which opens secondary proceedings may itself order a stay on the process of realisation of assets in whole or in part 'on receipt of a request from the insolvency practitioner in the main insolvency proceedings' but the Regulation goes on to provide that the court may require the insolvency practitioner in the main proceedings to take 'suitable measures to guarantee the interests of the creditors in the secondary insolvency proceedings'. This does not smoothly interface with existing domestic law implementing the Directive such as the Irish Examinership process which allows for a general stay of realisation of all claims, without any guarantee or other protective obligations. This contradiction is part of the Regulation because it recognises the Examinership as a procedure in Annex A.

[40] EIR Recast, recital 16: 'This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors.'

is repeated in relation to the obligation imposed on insolvency practitioners in article 56 in the context of groups.[41]

In contrast, restructuring is not mentioned in relation to the obligation to co-operate imposed on courts in either article 42 or 57.

5.3.2 The classification of rescue as an insolvency proceeding

As we know, the EIR Recast applies to *insolvency* proceedings. However, the PRD, which refers to preventive restructuring processes, implies that the procedures must be processes where there has been no adjudication of insolvency. Nevertheless, the PRD does envisage that a company may be technically insolvent, simply not adjudicated to be insolvent. As discussed in the previous section, we are aware of preventive restructuring mechanisms, such as the Irish examinership process and the French *sauvegarde* processes, which are already covered by the EIR Recast.[42] We also know that certain kinds of restructuring proceedings, such as Schemes of Arrangement, are not included in Annex A of the EIR Recast. As discussed, such proceedings cannot, in fact, be included under the EIR Recast because they derive from company law per Recital 16. It is also possible that that some Member States may decide not to include restructuring processes implementing the PRD in Annex A. This means that the recognition and co-operation obligations included in the EIR Recast may or may not apply to restructuring processes introduced by Member States to implement the PRD. What is interesting and somewhat surprising is that this issue is left to the discretion of the Member States.[43]

5.3.3 Rescue proceedings which are not included in the EIR Recast

In the same vein, similar considerations apply to particular kinds of actions, which may be utilised in domestic insolvency practise, but that do not fit neatly into the categorisation provided by the EIR Recast or the PRD. As described above, Schemes of Arrangement, which are found in English and Irish law, are examples of rescue processes based in company law, which cannot be included under the EIR Recast. Common law receiverships and similar enforcement actions arising from the enforcement of rights *in rem* are another. In some jurisdictions – but not in all – that possess receivership type arrangements, whether these are limited to rights derived from securities on real property or otherwise,[44] are viewed by practitioners as being part of the insolvency turnaround tool kit. This is the case in Ireland.[45] However, a common law receivership occurs without a *formal adjudication* of bankruptcy. All

[41] EIR Recast, article 56(2)(c).
[42] EIR Recast, Annex A, France.
[43] At some point during the last financial crisis the issue of whether UK Schemes of Arrangement ought to be included in the EIR Recast was considered as a debatable point by some academics in the UK See ILA Conference, London, 2015. However, the provisions of the EIR Recast 2015 renders this debate a moot point as Schemes of Arrangement are considered to be derived from Company Law provisions.
[44] English Insolvency Act 1986 Part III (though the use of this procedure has been significantly limited since the passage of the Enterprise Act 2002). See also, Irish Companies Act 2014, Part 8.
[45] See Irene Lynch Fannon, Jane Marshall and Rory O'Ferrall, *Corporate Insolvency and Rescue* (Butterworths, 1996).

that happens is that the debtor decides a security or loan is in jeopardy and the receiver is appointed to protect the security or loan. The question arose in *Re Stanford International Bank Ltd* [46] as to the nature of a receivership in a similar context to the situations that pertain under the EIR Recast. (In this case the issue arose in the context of the UNICTRAL Model Law).

In that case it was held that 'the powers and duties conferred or imposed on the Receiver' did not amount to a 'foreign proceeding' for the purposes of the Cross-Border Insolvency Regulations.[47] Receiverships are not covered in these Regulation and will not be. In that sense there will be types of turnaround mechanisms, which will not come within the remit of the EIR Recast or indeed be mechanisms implementing the PRD as such and will thus, be outside the European framework entirely.

Again, these provisions underline the lack of complementarity between the PRD and the EIR Recast and indeed some inherent lack of coherence in the provisions of the Recast itself.

5.4 Beyond Recognition to a Broader Understanding of Co-operation [48]

As described in the introduction to this Chapter, one of the distinctions at which the JCOERE Project has already arrived, is between recognition *simpliciter* of a decision to open proceedings or recognition of judgement at the close of proceedings, on the one hand, and co-operation, which is ongoing throughout a process, in our case a restructuring process. Bearing in mind the difficult caveat generated by the lack of complementarity between the PRD and the EIR Recast, we will assume for these purposes that a number of restructuring processes will be included in the scope of the EIR Recast so that questions not only of recognition, but of ongoing further co-operation will arise. Commentators[49] have referred to examples of cases involving non-EU cross-border matters as exemplars of court-to-court co-operation relevant to the new provisions in EIR Recast. However, on closer consideration of these cases, not all deal with questions of co-operation as distinct from questions regarding recognition. Our focus on co-operation in the EIR Recast goes further than mere recognition in reflection of the intended goals of the EIR Recast.

To illustrate this distinction, the Irish Supreme Court decision in Re *Flightlease*[50] concerns the question of whether a proceeding in a Swiss court will be *recognised in the sense of*

[46] [2010] EWCA Civ 137.
[47] The Cross-Border Insolvency Regulations 2006 no 1030 (UK).
[48] Bob Wessels, 'A Glimpse into the Future: Cross-Border Judicial Co-Operation in Insolvency Cases in the European Union' (2015) 24(1) IIR 97; Ian Fletcher, 'Spreading the Gospel: The Mission of Insolvency Law and Insolvency Practitioners in the Early 21st Century' in Stefania Barriati and Paul J Omar (eds), *The Grand Project: Reform of the European Insolvency Regulation* (INSOL Europe 2014) 193; Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016).
[49] Paul J Omar 'The Limits of Co-Operation at Common Law: *Rubin v Eurofinance* in the Supreme Court' (2013) 10(2) ICR 106; 'An Irish Perspective on Insolvency Co-Operation: the *RE Flightlease* Case' (2013) 10(3) ICR 158; 'Apres *Rubin*: le Deluge? Thoughts on the future of Common Law Insolvency Co-Operation' (2013) 10(6) ICR 356; 'The Resurgence of Cross-Border Recognition and Enforcement of Insolvency Judgments: the *Re Phoenix* Case' (2013) 9 ICCLR 329; 'The "Empire" Strikes Back: Lessons for the Mother Country in Insolvency Co-Operation' (2013) 11 ICCLR 411; 'A Singular Tide in Insolvency Co-Operation in Bermuda' (2014) 11(3) ICR 159; 'The Universe of Insolvency Co-Operation and the Primeo Directive' (2014) 12(1) ICR 1.
[50] *Re Flightlease (Ireland) Ltd* (in Voluntary Liquidation) [2012] IESC 12. [Hereinafter *Flightlease*].

enforcement of the decision in an Irish court. In answering this question, the court focussed on the nature of the proceedings and the question of whether this concerned the enforcement of a right *in rem* or a right *in personam*. This followed arguments made based on a decision of the English courts in in *Cambridge Gas*,[51] which raised similar facts and where the court held that the particular action was an action *in personam.*

In addition, the common law conflict of law principles recognising such judgements were also considered, as were the statements of the Privy Council in *Cambridge Gas*, which concerned further and additional observations regarding co-operation. In *Flightlease,* a resolution of this final discussion regarding the development of common law principles was not necessary for the court to decide, rather it confined itself to the more limited question of recognition, which it was decided was not required in relation to the Swiss decision.[52]

The English Privy Council decision in *Cambridge Gas* covered similar but broader territory with the decision addressing questions *of recognition*, but also questions *of assistance*, which for our purposes can be equated to the new European obligations to co-operate. As Lord Hoffman observed in his judgement, the entire circumstances in which Cambridge Gas sought to dispute the implementation of certain aspects of the Chapter 11 restructuring plan of the principle company Navigator Holdings plc ("Navigator") were peculiar, in that no particular financial consequences arose for Cambridge Gas. Nevertheless, the Privy Council took the opportunity to deliver an important judgement regarding the common law and the principles, that might be relevant to the courts of England and Wales in deciding whether to provide assistance to foreign bankruptcy proceedings. The focus is, therefore, on the provision of assistance to the ongoing conduct of an overseas insolvency proceeding (again similar to an obligation to co-operate in the European framework). Citing Fletcher,[53] Lord Hoffman agreed with the point made by Professor Fletcher regarding the fact that the common law on cross-border insolvency has for some time been 'in a state of arrested development', referring to both Regulation 1346/2000 and the fact that the UK gave effect to the UNCITRAL Model Law through a statutory instrument.[54] Consequently, the principles at common law could be further developed.

The court recognised that there was and is a distinction between questions of recognition by courts and the decisions of those courts, on the one hand, and on the other hand, the exercise by the Court of its 'discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property'. The latter question of assistance seems to be a more fluid concept.

[51] Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26 [Hereinafter 'Cambridge Gas'].
[52] *Supra* n. 50
[53] Ian Fletcher, *Insolvency in Private International Law* (Oxford, Clarendon Press, 1999) at p. 93. See also the observation of Jay Westbrook in 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (1991) 65 *Am Bankr L J* 457, at p 457, that US courts and academic theorists have 'failed utterly' in addressing the needs of cross-border corporations facing insolvency and cross-border defaults.
[54] Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030).

In describing these distinctions, the Privy Council then went on to discuss the effect of existing common law principles in the following terms:

> the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of Re African Farms 1906 TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, **"recognition carries with it the active assistance of the court".** [55]

Following further consideration of the current principles at common law, the Privy Council concluded in *Cambridge Gas* that the relevant court in the Isle of Man, which had originally been asked for assistance in implementing some aspects of a previously agreed restructuring plan under a Chapter 11 proceedings, had the discretion to assist the trustee in the Chapter 11 proceedings in New York. This obligation was separate from the issue of recognition *per se*.

In the decision of the Privy Council in the *Singularis*[56] litigation, the common law powers to *assist* the operation of a foreign court were further considered in the context of a liquidation, which occurred in the Cayman Islands. The appointed liquidators had made a request to the court in the Cayman Islands ordering the auditors of the company (PwC) to disclose information and in the course of this litigation sought similar orders from the court in Bermuda, again with a view to assisting the liquidators in tracing assets that they felt at the time existed. The order was eventually denied by the Bermuda Supreme Court and this was appealed to the Privy Council, which summarised the questions to be considered as follows:

> The first is whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form), in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.[57]

The Privy Council had this to say in relation to the earlier decision in *Cambridge Gas*:

> It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply **by virtue of its power to assist**, [emphasis added] it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance* SA [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing

[55] *Cambridge Gas* [20] (Hoffman LJ).
[56] Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda) [2015] AC 1675, [2014] UKPC 36 [Hereinafter *Singularis*].
[57] *idem,* para [8].

> whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board.[58]

In making these distinctions, which lead to the conclusion that the **question of assistance** in a particular proceeding is separate from the question of recognition and enforcement of an actual judgement, the question then becomes one of whether recognition is a precondition to assistance. In European terms, can the co-operation obligations (analogous to assistance) be treated separately from recognition issues? Is it possible that assistance may be given to a particular process without involving the question of recognition of a final judgement?

If this is the case, it might lead us to suppose that in relation to restructuring in particular, assistance in the ongoing process of preventive restructuring might allow for a court to assist in the imposition of a stay imposed at the outset of a process, without the question of recognition of the process in the fullest sense of the word being assumed, particularly if the second Member State has implemented the PRD in an entirely different manner from that in the first Member State. If this second Member State implements the PRD through the adoption of a process that varies considerably from the process in the first Member State, would the enforcement of a stay across Member States of the EU simply amount to co-operation (assistance at common law), without obliging the second Member State to enforce a court order or judgement arising from the restructuring, which included cram-down on the interests of creditors in the second Member State?

5.4.1 The nature of the action: Enforcing rights or a collective bankruptcy proceeding?

In *Cambridge Gas*, as with *Flightlease*, the significance of whether the creditors' claim was a right *in rem* or a right *in personam* were also at issue. In the former decision, the distinction was considered important in terms of recognition of the creditors' claim against the insolvent estate. Key points regarding this development are that both corporate and personal insolvency proceedings involve a set of legal principles, which are not encompassed by the question of whether a particular action involves the enforcement of rights *in rem* or rights *in personam*. The distinction rests on the fact that:

> Judgments *in rem* and *in personam* are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment *in rem* or *in personam* is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry

[58] *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2015] AC 1675, [2014] UKPC 36 [18-20]; *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, and by Lord Collins (with whom Lord Walker and Lord Sumption agreed) in *Rubin v Eurofinance SA and others* [2012] UKSC 46.

into the grounds upon which it did so. The judgment itself is treated as the source of the right.

The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details.[59]

This distinction is important; recognition of a court order in a bankruptcy proceeding relates to the proceeding itself. In contrast, recognition of other claims, whether these are claims *in rem* or *in personam*, involves a recognition of a right. The court in *Cambridge Gas* emphasises that there is a difference in the effect of recognition from the second court. This distinction is expressed further in case law such as *Feniks* and *BNP Paribas* referred to below, which also distinguishes particular causes of action arising in national laws from an insolvency proceeding, even where these causes of action were pursued in the context of insolvency proceedings.

Finally, the Privy Council refers constantly to the provision of information as a form of assistance, which can be correlated to the statements in 42(3) described above. Noting that the obligation to assist may be more fluid in some ways, but stops short of recognition of a court order, the question remains as to whether this power of assistance is actually limited to the provision of information? It is also noteworthy that the Privy Council did not think the court was under a common law duty to assist in this particular case.

In this vein of distinguishing a particular cause of action from the recognition of and assistance with an insolvency proceeding as such, in another decision made at around the same time, the court in *Re Phoenix*[60] considered issues surrounding the enforcement of applications in the UK by office holders in a second jurisdiction. In this case a German administrator was recognised in the UK as having the capacity to act with the same powers of an insolvency office holder under the Insolvency Act 1986[61] in the UK. The German administrator then applied under the Insolvency Act 1986 to have certain transactions set aside as being fraudulent against creditors and to claw back sums invested and fictitious profits under what had been deemed a Ponzi Scheme. The facts rested upon the common law principles used to determine whether the court had an inherent jurisdiction to permit the statutory power under s423 to allow a foreign administrator to use those powers.[62] This decision rests upon the issue of assistance rather than the recognition of a particular process.

[59] *Cambridge Gas* [13-14] (Hoffman LJ).
[60] *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann* [2012] EWHC 62 (Ch), [2013] Ch 61. [Hereinafter 'Re Phoenix'].
[61] Insolvency Act 1986, s 423.
[62] Re Phoenix supra n. 60

The elements of what might be involved are nicely summarised in the judgement of the Privy Council in *Singularis* by Lord Collins with reference to previous case law in this area. The elements are as follows: [63]

> First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings.
>
> Second, that power is primarily exercised through the existing powers of the court.
>
> Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law.
>
> Fourth, the very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. [64]
>
> Fifth, in consequence, those powers do not extend to the application, by analogy 'as if' the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case.[65]

5.4.2 Specific actions, rules and exceptions to co-operation in an insolvency and restructuring context

In the case law of the European Union and decisions of the CJEU, the issue of what amounts to a proceeding for the purposes of recognition and the purposes of the co-operation obligations has been litigated recently. In the following two cases the CJEU held that the relevant proceedings, although connected to the main insolvency proceedings in terms of settlement of certain issues, were separate from the insolvency as such and therefore could proceed without incurring the recognition obligations under the regulation. *A fortiori* these sorts of proceedings would also not therefore attract the obligations to co-operate under the Regulation.

In *NK (liquidator) v BNP Paribas Fortis NV*,[66] money had been transferred to Fortis bank prior to insolvency proceedings concerning Gerechtsdeurwaarderskantoor BV ('PI.BV'), a company governed by Netherlands law, of which a particular PI was the sole shareholder and administrator, who had subsequently been declared bankrupt. It was found that this particular transfer amounted to an act of embezzlement, which had resulted in the

[63] Singularis Holdings Limited (Appellant) v PricewaterhouseCoopers [2014] UKPC 36 Para. 38 Collins LJ.
[64] This is a particularly important observation for common law countries in terms of how the EIR Recast is applied. Similar principles may apply in civil law systems. It is important to note that in France and Italy as examples, the implementation of the EIR Recast also includes rules regarding the conduct of recognition and co-operation obligations.
[65] This would mean that where there are differences in domestic legislation between the common law jurisdiction in which the application for assistance is made and the primary jurisdiction, the existence of an ongoing process in the primary jurisdiction would not in and of itself allow for the application of principles existing in that legal framework in the secondary common law court. In this case the transactional avoidance provisions are a case in point.
[66] Case C-535/17 *NK v BNP Paribas Fortis NV* [2019] ECLI:EU:C:2019:96.

imprisonment of the individual involved. During the insolvency proceedings conducted in the Netherlands, proceedings were brought against the bank. Under Dutch law the liquidator can bring an action in tort against a bank to repay money where the money has been paid at a disadvantage to other creditors: - 'Peeters- Gatzen-vordering (PGV).[67] In Dutch law, this is an action in tort, which can be brought by an individual creditor, liquidator, and/or anyone affected. The defendant bank, Paribas Fortis, said it was a tort claim and therefore should be brought in Belgium against the defendant. In contrast, the Dutch liquidator argued that this was a claim normally brought by a liquidator and therefore the Dutch court had jurisdiction over all of the insolvency related matters. CJEU found to the contrary. It decided that just because the liquidator brings the claim, it does not mean it is an insolvency procedure. It is still a tort and because individual creditors can bring the claim, the Belgian court could have jurisdiction. The PGV is covered by the concept of 'civil and commercial matters' within the meaning of article 1(1) Judgement Regulation:

> The Court has held that only actions which derive directly from insolvency proceedings or which are closely connected with them are excluded from the scope of the Brussels Convention and, subsequently, Regulation No 44/2001…[68]

The court went on to state that:

> the same criterion, as stated in the Court's case-law on the interpretation of the Brussels Convention, was set out in recital 6 of Regulation No 1346/2000 in order to delimit the subject matter of that regulation, and was confirmed by Regulation (EU) 2015/848 on insolvency proceedings…[69]

An important statement in the judgement is that:

> [the decisive criterion adopted by the Court to identify the area within which an action falls is not the *procedural context* [author's emphasis] of which that action is part, but *the legal basis* of the action. According to that approach, it must be determined whether the right or obligation which forms …the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings.[70]

More significantly, the decision in *Feniks sp. z o.o. v Azteca Products & Services SL*[71] also addresses this issue in relation to an important transactional avoidance action. In this case

---

[67] This is similar to a claim arising out of mistaken payments.

[68] The court referred to the following judgments at paragraph 26: Case C-133/78 *Henri Gourdain v Franz Nadler* [1979] ECLI:EU:C:1979:49, paragraph 4, and Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'* [2012] ECLI:EU:C:2012:215, paragraphs 22 and 24, and Case C-641/16 *Tünkers France and Tünkers Maschinenbau GmbH v Expert France* [2017] ECLI:EU:C:2017:847, paragraph 19 and the case-law cited therein.

[69] *NK v BNP Paribas Fortis NV* [2019] ECLI:EU:C:2019:96, para 27.

[70] Case C-157/13 *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB* [2014] ECLI:EU:C:2014:2145, Paragraph 27 and 28; Case C-641/16 *Tünkers France and Tünkers Maschinenbau GmbH v Expert France* [2017] ECLI:EU:C:2017:847, paragraph 22; Case C-649/16 *Peter Valach and Others v Waldviertler Sparkasse Bank AG and Others* [2017] ECLI:EU:C:2017:986, paragraph 29.

[71] Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805. I wish to acknowledge the lecture provided by Lucas Kortmann RESOR at the EIRC Conference, hosted by hosted by German Arbeitsgemeinschaft Insolvenzrecht und Sanierung with INSOL Europe and the Law Society, Brussels 29 June 2017 which provided references and explanations for these cases amongst others. Kortmann L, 'Update on ECJ and other landmark decisions on European Insolvency Law' (EIRC Conference, hosted by German Arbeitsgemeinschaft Insolvenzrecht und Sanierung with INSOL Europe and the Law Society, Brussels 29 June 2017.)

Feniks, was a creditor of Coliseum, which was a general contractor with whom Feniks had an investment agreement regarding a construction project in Poland. Coliseum was technically insolvent, in that it was unable to pay subcontractors, but proceedings had not yet been opened. Coliseum sold property in Poland to Azteca (Spain) in partial fulfilment of prior claims by Azteca. This transaction would normally be subject to some sort of clawback action. Under Polish law any creditor – not just an insolvency practitioner or appointed liquidator – can bring a claw back action. Feniks, as a creditor of Coliseum, brought a claw back action against Azteca before the Polish court to clawback the value of the transaction on the basis of article 7(1) (a) of the Judgments Regulation. Azteca argued that the correct forum was the Spanish court.

The question for the CJEU was whether an *actio pauliana* is covered by the rule of international jurisdiction provided for in article 7(1)(a) Judgments Regulation. [Such an action is where a person entitled to a debt repayment (ie a creditor) requests that an act, whereby his debtor has transferred an asset to a third party, which is detrimental to his rights, be declared ineffective].

The response from the CJEU was that an *actio pauliana*, which is based on the creditor's rights created upon the conclusion of a contract, falls within 'matters relating to a contract' of article 7(1)(a) Judgments Regulation. Therefore the action is separate from the insolvency per se and is not subject to the recognition or co-operation obligations in the Regulation. In terms of the interface between the EIR Recast and these provisions of the Judgements Regulation, there is a lack of certainty and clarity as to the borderline between insolvency matters and other causes of actions.[72]

5.4.3 The invocation of exceptional rules

Some interesting cases have illustrated that it might be possible for particular rules to be invoked to prevent full co-operation. The rule in *Gibbs* seems to be one such example; this states that a debt governed by English law cannot be discharged or compromised by a 'foreign' insolvency proceeding.[73] The rule has been heavily criticised, with many commentators considering that it is not relevant in modern day cross-border insolvency proceedings following the continuing trend towards recognition of foreign insolvency proceedings (and their effects). However, in a recent English decision[74] the court considered an application by a foreign representative to the English court on behalf of a debtor, International Bank of Azerbaijan, for a permanent stay on a creditors' enforcement of claims in England under a contract governed by English law, contrary to the terms of the foreign insolvency proceeding. The foreign proceedings were conducted in Azerbaijan and had been recognised in England under the Cross-Border Insolvency Regulations 2006 (the "CBIR") (implementing UNCITRAL Model Law). The English High Court found that the rule in Gibbs did apply to prevent the court

[72] Case C-337/17 Feniks Sp. z o.o. v Azteca Products & Services SL [2018] ECLI:EU:C:2018:805 [44].
[73] Antony Gibbs and sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399. [Hereinafter Gibbs].
[74] Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch) [Hereinafter Bakishiyeva].

granting a permanent (or indefinite) stay on the enforcement of creditors' English law governed contractual claims. Any stay granted by the court would be more than simply procedural and would go to the substance of creditors' claims. The court would, in effect, be ordering the discharge of the creditor's claim and was prohibited from doing this, following the rule in *Gibbs*.

In a European context, by analogy – leaving aside the issue of the UK specifically – the question would quite simply be whether the rule in *Gibbs*, or a rule of this kind, was a rule incompatible with the recognition of, and co-operation with, a restructuring process introduced in another Member State, where this process is registered in Annex A. Following the decision in *Bakishiyeva* there was a view that the recognition and co-operation obligations under the EIR Recast would trump the invocation of a rule such as the rule in *Gibbs* and in fact in *Bank of Baroda v Maniar*[75] it has been held by the English courts (in a case concerning an Irish Examinership) that the EIR effectively by passes the Gibbs rule in cases where there is recognition of insolvency proceedings under the EIR. However, it is not entirely clear how different treatment of different proceedings in different jurisdictions could justifiably lead to different outcomes. The relatively recently created Model Law on Insolvency Related Judgments (2018) not as yet implemented in the UK would similarly trump the Gibbs rule.

5.4.4 The public policy exception in the EIR Recast

The EIR Recast does provide for the court to decide that an insolvency process in another jurisdiction may not be recognised for public policy reasons, specifically if recognition of such proceedings are contrary to public policy. In the European context, a decision of this kind was made by the Irish High Court, Dunne J. in a set of proceedings brought by the ACC Bank against Sean McCann in *ACC Bank plc v McCann.* Mr McCann had also been involved in property development in Ireland. The case in hand concerned his application for a personal bankruptcy order in Northern Ireland and the efforts of his main creditor to have that order annulled. In a decision in the Irish High Court, Dunne J. upheld the creditor's argument based on article 26 of the EIR Recast, which provides for the annulment of proceedings on public policy grounds. In upholding the creditor's challenge, which focussed on the fact that the nature and timing of the application to Northern Ireland had negated the creditor's right to be heard and could potentially prejudice the particular creditor's rights in significant ways regarding priority of payment, the proposed recognition of the bankruptcy adjudication in Northern Ireland was declined as being contrary to public policy within the terms of article 26. In the circumstances of the case and in granting the order not to recognise the personal bankruptcy proceedings in Northern Ireland, Dunne J. stated:

> Suffice it to say I think that this is one of the exceptional and rare cases in which the court should, for the reason I have already outlined, namely the fact that ACC did not

[75] Bank of Baroda v Maniar [2019] EWHC 2463.

have an opportunity to be heard in Northern Ireland on the question of COMI bearing in mind that they will be significantly prejudiced by that fact it is my view appropriate in this case to make an adjudication. [76]

This case was on appeal to the Supreme Court, but the appeal has been withdrawn.[77]

5.5 Conclusion and Transition

The foregoing Chapter has focused on cases that have centred on an issue of cross-border *cooperation* within the EU in the area of cross-border restructuring and insolvency. Although the EIR Recast has only been applicable for the last three years at the time of writing, the cases discussed in this Chapter have shown what could occur in the EU when restructuring procedures falling under the EIR Recast begin to come before Member State courts and the CJEU and how these issues may develop in the EU over time, including where difficulties may arise. The discussion in this Chapter provides an insight as well into the eventuality that there may be competing procedures under the PRD and what this could mean for court-to-court co-operation generally or under the EIR Recast.

The next Chapter will present a thematic discussion of the various guidelines and recommendations that provide direction in relation to cooperation and coordination of cross-border insolvency and restructuring cases. Chapter 6 will discuss 8 different sets of guidelines and recommendations, focusing on their approaches to the sharing or obtaining of information; disclosure requirements; asset co-ordination; the mechanism of co-operation and communication methodology; and the notification and service of official documents. Chapter 6 will therefore extract issues that are relevant to court-to-court co-operation focusing on how these issues may arise in the context of restructuring (preventive or otherwise).

[76] Please note these statements are from the transcript of the proceedings in the High Court. There is no approved judgement to date. See further reports at RTE Business, 'Judge puts stay on Sean McCann bankruptcy case' *RTE News* (Dublin, 21 August 2012) < https://www.rte.ie/news/business/2012/0821/334442-judge-puts-stay-on-sean-mccann-bankruptcy-case/> [Accessed July 11, 2013].

[77] See also *Re Zetta Jet Pte Ltd* [2018] SGHC 16. Under article 6 of the Singapore Model Law, to which article 17 is subject, a Singapore court may refuse recognition if such recognition would be "contrary" to the public policy of Singapore. Article 6 of the Model Law on the other hand requires recognition to be "manifestly contrary" to public policy for it to be refused.

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. These include formal frameworks such as the UNCITRAL Model Law on Cross-border Insolvency and less formal guidelines covering both substantive and procedural matters, including aspects of cooperation between courts and insolvency professionals. Some of these initiatives have been led by the World Bank and the International Monetary Fund and have the aim of improving the effectiveness of insolvency regimes, in order to enhance the performance of economic and financial systems. Other examples have emerged from the American Institute; its 2000 publication 'General Principles of Cooperation' has since been superseded and improved in a 2012 version.

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 report.[1] The purpose of this Chapter is to extract the issues identified in these reports and projects that are relevant to court-to-court cooperation in cases of cross-border preventive restructuring. Accordingly, these documents are being assessed to discern what guidance they give along the following themes as they relate to communication and cooperation between courts and between courts and practitioners. This Chapter will be divided into four macro-areas addressing the following aspects of judicial cooperation in the cross-border insolvency context: a) the sharing or obtaining of information and disclosure requirements (s 6.2); b) asset coordination (s 6.3); c) cooperation and communication methodology (s 6.4) and, finally, d) the mechanism of notification or service of official documents (s 6.5).

[1] Thanks to Paul Omar, Technical Research Officer of INSOL Europe for preliminary work on collating these documents.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

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 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 Contractualised distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings ('CODIRE')[7];
- Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement ('ACURIA')[8];
- The European Law Institute Project on the Rescue of Business in Insolvency Law ('ELI Report')[9].

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 very important 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 representatives and creditors to effectively interact with each other and with

[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').
[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) (herineafter referred to as the 'CoCo Guidelines').
[7] Lorenzo Stanghellini, Riz Mokal, Christoph G Paulus, and Ignacio Tirado, *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018) (hereinafter referred to as 'CODIRE').
[8] Catarina Frade, et al, 'Assessing Courts' Undertaking of Restructuring and Insolvency Actions: Best Practices, Blockages, and Ways of Improvement' (European Commission 2019) (hereinafter referred to as 'ACURIA').
[9] 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').

the courts of the main and secondary proceedings.[10] To this end, various international institutions have developed principles and good practices that should guide 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.

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.[11] 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' in order to ensure:

> (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.[12]

In other terms, the UNCITRAL Model Law can be understood as an instrument of harmonisation of national insolvency legislation with the purpose of enhancing cooperation between the courts involved in cases of cross-border insolvency.[13] 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 States, which are 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.[14] 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 Regulation would be the relevant instrument. In reality, the main relevance of the Model Law is to a situation where one of the parties is based outside

[10] Antonio Leandro 'Amending the European insolvency regulation to strengthen main proceedings' (2014) 2 *Rivista di diritto internazionale privato e processuale* 317, 317.
[11] Alberto Mazzoni 'Procedure concorsuali e standards internazionali: norme e principi di fonte Uncitral e Banca Mondiale', (2018) 45(1) *Giur. Comm*., I, p. 43.
[12] See UNCITRAL Model Law, Preamble, p. 3.
[13] See Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP, 2016), p. 10. see also United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (UN, 2014), p. 9-13.
[14] 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].

the EU and both are signatories. With that said, the Model Law may inform European developments as many of the concepts are similar.

Amongst other aims, the UNCITRAL Model Law aims to address 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 a reorganisation.[15]

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

a) The right to direct access to the courts of an enacting State, granted to foreign representatives, pursuant to art 9 of the Model Law: this feature reduces, by a considerable amount, the time and costs necessary to communicate between foreign jurisdictions.

b) The establishment of simplified procedures to recognise foreign proceedings, pursuant to art 15 of the Model Law, and the presumption that the documents submitted for recognition are authentic (see art 16):

c) Required cooperation and direct communication between courts insolvency practitioners, pursuant to art 25 of the Model Law. This feature - above all - aims to reduce the obstacles to judicial 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, due to the fact that cooperation is not linked to recognition of the foreign proceeding, it can occur at an early stage and before the recognition takes place.[16]

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.[17] 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.[18]

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

[15] See UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, p. 10.
[16] 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.
[17] 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'].
[18]UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, Introduction, p. 1.

- the absence of a relevant legislative framework, and
- uncertainty with regard to the scope of the legislative authorisation to pursue cooperation with foreign judges.[19]

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* that cooperation and communication can be achieved.

The most relevant point of UNCITRAL Model Law in this regard is article 18, which regulates the 'subsequent' information that must be provided after the filing of the application for recognition of the foreign proceeding. Art 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'.

While the purpose of the obligation set in the first part of art 18 is to allow the court to terminate the consequences of the recognition of the foreign proceeding if it ceases to meet the requirements set by art 2 of the UNCITRAL Model Law, the second part of art 18 aims to facilitate the coordination of potential, multiple proceedings opened after the recognition of the first foreign proceeding. It is worth noting that the duties regarding the sharing of information described above start after 'the time of filing the application for recognition' and, therefore, it is not necessary to wait for the recognition in order to start sharing information between courts and representatives (and obtaining it).

The sharing of information becomes relevant in the UNCITRAL Model Law when court-to-court cooperation is taken into consideration. In fact, the second part of art 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.[20]

***In summary**:*

◊ *The representative of the foreign proceeding must inform the court about any substantial change regarding such proceeding.*

[19] UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, p. 15.
[20] 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* p. 16

◊ *Courts are entitled to communicate and exchange information directly and are subject to an intense cooperation duty.*

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) and includes some relevant principles that should drive the cooperation and sharing of information between courts and insolvency practitioners (administrators). Principle 9, Point 1, of the Global Principles requires full disclosure in cross-border insolvency matters, by providing that the cooperation between such subjects 'should include prompt and full disclosure regarding all relevant information, including assets and claims'. Such disclosure should also help, pursuant to Principle 9, promoting transparency and reducing fraud.

The following point of Principle 9 also refers to the 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, as can be noted, 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,[21] to the other insolvency practitioners, while respecting the applicable law and potential confidentiality arrangements.

Principle 33 of the Global Principles further explores the information exchange duties amongst insolvency practitioners, by providing 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 the specification about their ranking and status.

***In summary**:*

◊ *Courts and insolvency practitioners are required to disclose promptly any relevant information.*

◊ *Insolvency practitioners are also required to share non-public information, provided that confidentiality is respected.*

[21] This understanding of non-public information has been derived from Guideline 7.5 of the CoCo guidelines available on p.51.

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 the information concerning insolvency proceedings and, for this reason, provides - under Point D4 - 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'.[22] The World Bank Principles do not include non-public information in the list of suggested data to be shared, in contrast to ALI-III Global Principles.

In addition, is also worth mentioning that 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.[23] Such a provision should contribute to reducing the delays and costs when acquiring information from other proceedings opened in different countries.

***In summary**:*

◊ *All relevant information about the debtor should be available and accessible*

◊ *Direct communication between foreign courts and their representatives is recommended*

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 of 2014, produced by the Leiden Law School and the Nottingham Law School, refers to the exchange of information (mainly by electronic means, see below) between actors in different jurisdictions as the basis for coordination and cooperation amongst 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.

[22] 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.
[23] See World Bank Principles for Effective Creditor/Debtor Regimes, Revised 20 January 2011, p. 21.

Additionally, JudgeCo Guideline n. 4 allows the courts involved to communicate, for the same purpose, with the insolvency practitioners of another jurisdiction provided that, as specified in Guideline n. 3, the court obtained the consent of the parties involved in advance.

As can be seen from the above-mentioned 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 associated costs) required to disclose information and, more generally, to communicate, while protecting the rights of those participating to the insolvency proceeding.[24]

***In summary**:*

◊ *Direct communication between foreign courts is recommended with a view to harmonise the proceedings, provided that the consent of all parties affected is obtained in advance.*

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

Another fundamental source of guidance in this regard are the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines) of 2007. In the words of one of its authors: 'the drafters' aim was to 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'.[25] Strictly speaking, it is not overtly addressed to courts.

Indeed, 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 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

[24] See below, section 6.4.3.
[25] 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].

should be shared by the other insolvency practitioners 'subject to appropriate confidentiality arrangements to the extent that this is commercially and practically sensible'.[26] The key concept seems to be that commercially sensitive information is not shared unnecessarily.

***In summary**:*

◊ *Insolvency practitioners involved in a cross-border insolvency case should disclose all the relevant information about the proceedings, subject to appropriate confidentiality arrangements.*

◊ *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.*

6.2.6 CODIRE: The need for adequate and updated information

The "Contractualised distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings' project (hereinafter 'CODIRE') is a research project carried out by Università degli Studi di Firenze (Project Co-ordinator), Humboldt-Universität zu Berlin and Universidad Autónoma de Madrid.

Two main objectives drove the project action:

a) the formulation of harmonised guidelines for effective judicial review of and oversight of fair and efficient insolvency and pre-insolvency proceedings;

b) the development of policy recommendations addressed to policymakers at European and national level.

The project also aimed to cast light on other key issues, highlighted both in the Recommendation on a new approach to business failure and insolvency (2014/135/EU) and in the Preventive Restructuring Directive (2019/1023/EU), henceforth PRD.[27]

More specifically, in order to remove or, at least, reduce obstacles to an effective cooperation between foreign courts, such provisions consider possible incentives for the creation of a common ground in the European insolvency context by providing shared, core principles to the actors involved in the restructuring process.[28]

---

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

[27] Lorenzo Stanghellini, Riz Mokal, Christoph G. Paulus and Ignacio Tirado, *Best practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer, 2018), Introduction, p. XVIII. The full report is available at <https://www.codire.eu/publications/>. Many CODIRE guidelines and policy recommendations are relevant in the context of the analysis of substantive and procedural obstacles to judicial cooperation (and coordination) in cross-border insolvency cases. In fact, as already noted in Report 1 of JCOERE Project, the PRD envisages provisions that - both directly and indirectly - impact the framework set by the Regulation 848/2015 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. 10. The full report is available at < https://www.ucc.ie/en/jcoere/research/report1/

[28] In this regard, it is worth remembering that Recital 12 of the PRD, once explained the scope of Regulation 848/2015 and its limits ('that Regulation does not tackle the disparities between national laws regulating those procedures'), stresses the 'need to go beyond matters of

The CODIRE project, suggests a set of guidelines and policy recommendations that focus on:

a) The importance of identifying (and addressing) the crisis in a timely fashion;

b) The role of fairness during the proceedings, both under a procedural and substantive point of view;

c) The development of a common basis with respect to the content and structure of restructuring plans and the role of the professionals involved;

d) The development of best practices with regard to the confirmation and implementation of restructuring plans.

It is hoped that the adoption and implementation by the various Member States of the best practices outlined in the CODIRE may, therefore, achieve the goal contained in both the PRD and in the Recast, namely the creation of common basic rules in order to remove obstacles to an effective cooperation between foreign courts.[29]

With specific regard to the sharing of information and disclosure requirements, it is worth noting that Policy Recommendation n. 2.5 of CODIRE requires adequate information to be provided to stakeholders. Further recommendations refer to additional information requirements benefitting the actors involved in a restructuring process. Whilst these principles will feed into the quality of restructuring practises in Europe and are reflected in the PRD they only indirectly affect the ability of courts to cooperate as envisaged by the EIR Recast.

***In summary**:*

◊ *Actors involved in a restructuring process should be provided with an adequate and updated set of information.*

6.2.7 ACURIA: Disclosure and transparency

The 'Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement' (hereinafter 'ACURIA') is a research project carried out by the Centre for Social Studies of Portugal (Project Co-ordinator), Università degli Studi di Firenze, Uniwersytet Gdanski and Maastricht University.

judicial co-operation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs'.
That said, Recital 13 of the PRD is coherent with the premises laid down by Recital 12. Pursuant to it, the PRD 'aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness' see Appendix to the Exposition of the terms of the PRD.

[29] With regard to this specific issue see the Note on 'Harmonisation of Insolvency Law at Eu Level', 2010, requested by the European Parliament's Committee on Legal Affairs and Rolef J de Weijs, 'Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and *Anticommons*' (2012) 21(2) *International Insolvency Review* 67.

This project was aimed at identifying best practices and legal and procedural strategies in the field of business insolvency and restructuring law that are suitable for replication in different jurisdictions. This, in turn, was in order to enable courts to provide a better response in those cases.

In addition, ACURIA planned to:

a) support the development of stronger legislation and policies at domestic and EU levels, with special regard to insolvency and cross-border insolvency;

b) promote the cooperation between the academic world, practitioners and economic actors.

ACURIA takes into consideration the substantial and procedural rules that become relevant during an insolvency proceeding (intended to also include restructuring proceedings) and conducted a comparative analysis between various European jurisdictions, namely Italy, the Netherlands, Poland and Portugal.

The findings of the research show that these jurisdictions have some common features, for example, their favour for 'rescue-solutions over liquidation outcomes' and 'the absence of specialised courts to trial insolvency and restructuring cases'.[30]

Resonating with our discussion in Chapter 4, ACURIA also highlights a deep heterogeneity amongst the relevant jurisdictions, regarding some procedural and substantial aspects of their insolvency laws, such as the existence of precautionary measures in order to prevent further damage to the insolvent's estate and the appointment of the insolvency practitioner.

Furthermore, the project focuses on some possible ways to enhance the response of the courts when facing insolvency cases and, in this regard, it stresses the importance of:

a) timelines of the proceeding, by creating and developing early warning devices;

b) predictability and legal certainty, by providing specialised training - to judges and insolvency practitioners - in insolvency law, economic sciences and accounting;[31]

c) haste and efficiency, by means of new information technologies, in order to streamline the communication between the parties involved, included judges and insolvency practitioners;

d) participation, by simplifying the interaction of all the relevant parties of the proceeding and by implementing technological devices to allow meetings to be held at a distance;

[30] See ACURIA *Comparative perspective of four EU countries*, p. 1-2, available at https://acuria.eu/index.php?id=16486&id_lingua=2&pag=16491. See also articles in a special edition of the International Insolvency Review on the ACURIA project (2020) 29(3).

[31] This issue is considered in Chapters 4 and 8 of this Report.

e) transparency, by means of clear communication with the stakeholders and requiring appropriate disclosure.[32]

With a particular focus on the sharing of information and disclosure, ACURIA stresses the importance of transparency in the context of corporate restructuring and insolvency procedures and, for this reason, it requires the relevant actors to disclose 'information at the decisive stages of the process, such as the sale of assets, through transparent methods' pursuant to Guideline e) of the 'Ways of improvement'.

Guideline e) accounts for both the 'procedural' and 'substantive' aspects of the disclosure duties in this context, by also suggesting the use of 'publicised virtual auctions' in order to effectively share the relevant information.

***In summary**:*

◊ *The disclosure of all the relevant information and the adoption of transparent methods during the decisive stages of the proceeding are recommended.*

6.3 Asset Coordination

In order to ensure an effective coordination in a cross-border insolvency case, it is necessary to regulate the treatment of the debtor's assets in all jurisdictions involved, so that the actions of one creditor or a 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.[33]

Coordination in this respect 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 proceedings.[34] For this reason, the international institutions mentioned above address this issue and, consequently, provide guidelines and best practices that deal with the rules concerning the treatment of debtor's assets in situations that involve foreign, parallel proceedings.

6.3.1 The Model Law: Stay on individual actions and relief

Article 29 of the UNCITRAL Model Law on Cross-border Insolvency of 1997 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 coordination

[32] ACURIA, *Building trust: enhancing courts' performance in corporate restructuring and insolvency*, p. 16, available at https://acuria.eu/index.php?id=16486&id_lingua=2&pag=16491.
[33] 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.
[34] 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.

duty on the involved courts contained in the UNCITRAL Model Law is primarily aimed at protecting the debtor's assets during the proceeding.

In fact, pursuant to art 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 art 20, points a) and b), the enforcement against the debtor's assets must be stayed while the right to dispose of the assets of the debtor must be suspended. This is of particular relevance to restructuring proceedings in view of the importance of the stay to their success.

Article 21 of the UNCITRAL Model Law provides that the Court can grant relief, with regard to the above-mentioned measures, 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'.

On the one hand, this last provision responds to the need for flexibility of the rules regarding the treatment of debtor's assets; on the other hand, 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/liquidation of the debtor's business.

***In summary**:*

◊ *A stay on individual actions should be provided after the recognition of the main proceeding.*

◊ *A relief from such stay should be available in order to protect the interest of the creditors.*

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 the 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 a (too) wide discretion in this regard that, as said above, might frustrate the reorganisation/liquidation efforts and, therefore, requires that the exceptions to the stay must be limited and clearly defined.

Principle 17 pertains to the stay and moratorium in a successive stage of the cross-border insolvency scenario, which is to say when the recognition of the parallel proceeding has already taken place. This last principle provides that, when a court recognises a foreign insolvency proceeding as main proceeding, then it should 'promptly grant a stay or moratorium prohibiting the unauthorised disposition of the debtor's assets and restraining actions by creditors'. With regard to reorganisation cases, Principle 17 provides that the stay should allow the continuation of the debtor's business. It is worth noting that from this provision emerges a strong awareness regarding the need for preservation of the going concern of the 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.

With a view to maximising the value for all the parties involved, 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, 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. The remaining questions will concern cooperation on administration of assets against the backdrop of a stay on enforcement actions.

The Global Principles also consider coordination between insolvency practitioners (administrators); 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'. Moreover, 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.

***In summary**:*

◊ *A stay on individual actions should be available at the earliest possible time, in each country where the debtor has assets, and also a relief from such when necessary.*

◊ *In case of parallel proceedings, cooperation between courts and insolvency practitioners is required to achieve the maximum value from the assets of the debtor.*

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

The World Bank Principles also seem broadly aligned with the international standards and best practices on this matter. 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 the 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.[35]

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 (restructuring and non-restructuring) proceeding. It is worth noting that, as seen above, 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 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.[36]

[35] See Annex III to this Report.

[36] 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/>

***In summary**:*

◊ *A stay of actions should be provided (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.*

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, in line with the provisions mentioned above, 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. This last principle 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 result in the requirement being unreasonable.

The combined reading of the aforementioned 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.[37]

***In summary**:*

◊ *In an insolvency cooperation scenario, a stay or moratorium is needed at the earliest possible time in each country where the debtor has assets.*

◊ *Prior agreement from any other insolvency practitioner is required with regard to matters concerning proceedings or assets involving that jurisdiction.*

[37] 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.

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 subject to realisation' if a 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 of 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 the courts involved, if required to act, approve such value maximising sales.

***In summary**:*

◊ *Insolvency practitioners should minimise the conflicts between the different procedures.*

◊ *Insolvency practitioners should seek cooperation when selling the debtor's assets, in order to maximise their value.*

6.3.6 CODIRE: The role of professionals to maximise the value of the assets

CODIRE's Policy Recommendation 7.2 concerns the sale of debtor's assets and the best practices to maximise their value. In this regard, this Recommendation provides that, if the plan is completely or prevalently based on the realisation of the debtor's assets, 'the law should provide for the appointment of a professional entrusted with the task of implementing the plan concerning the sale of the debtor's assets in the best interest of creditors'.

Similarly, regarding restructuring plans, Guideline 7.2 recommends the appointment of a professional to realise assets should the restructuring plan envisage the sale of assets 'having a relevant economic value'. These two provisions, read together, stress the importance of the appointment of a professional that is invested with the necessary power to maximise the value of debtor's assets in the best interest of all the parties involved. With a view to harmonising the insolvency law of the countries involved in cross-border insolvency proceedings, it might be useful to incorporate, at a domestic level, the best practices mentioned above and, therefore, develop a common ground for the coordination of the actors involved.

***In summary**:*

◊ *The appointment of a professional invested with the necessary power to maximise the value of the debtor's assets is recommended.*

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

The European Law Institute Business Rescue Report of 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 phenomenon of the insolvency of a group of companies, Recommendation 9.02 of the ELI Report provides that courts, when deciding on the opening of an insolvency proceedings regarding 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 the presence of a coordination strategy between different proceedings and requires the court to verify such requirement when deciding on the request of opening of an insolvency proceeding.[38]

***In summary**:*

◊ *Courts are required to consider whether a coordinated strategy is adopted in a corporate group insolvency proceeding.*

6.4 The Mechanism of Cooperation and Communication

Most of the best practices and guidelines that we have 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 and reorganisation or liquidation.[39] It is also the best way to ensure 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 Recast in the previous chapters, cooperation and communication are intrinsically connected.[40] Consequently, the various guidelines and principles, when regulating the

[38] 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.

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

[40] 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.

mechanism of cooperation, also deal with methods of communication that the 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 the courts to cooperate to the maximum extent possible, both with foreign courts and with foreign representatives. The cooperation required by art 25 can occur either directly or through an intermediary. That said, in order to simplify the duty imposed on the courts, art 25 provides that the court are 'entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representative'. Similarly, art 26 requires that the insolvency practitioners involved in a cross-border insolvency proceeding cooperate to the maximum extent possible, both with foreign courts and foreign representatives.

Art 27 of the UNCITRAL Model Law lists some possible means that can be used by courts and insolvency practitioners to implement the aforementioned cooperation requirements (articles 25 and 26). Under art 27, cooperation can predominantly be reached 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 discussed in Chapter 5.

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.[41] At least the added cost is addressed in the European Regulation.[42]

[41] 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.
[42] See Chapters 2 and 5 of this Report.

***In summary**:*

◊ *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 concerning the coordination of two or more proceedings.*

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.

The major issues in this last regard seem to involve the (fundamental) right of the parties to 'equality of arms' set forth by Principle 6 and the requirements, 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 to be violating the above-mentioned right, as the requirement of publicity might not be respected. This might happen especially in those situations where the insolvency's actors might discuss urgent matters informally.[43]

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, when communicating with each other,[44] to 'provid(e) advance notice to counsel for affected parties', 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, which satisfies both courts, be set.

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 - as already underlined above - may represent the major obstacle to a full and integrated cooperation between courts of different Member States.[45] However, as we note in Chapter 3, 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.

[43] See also Chapter 3 of this report.
[44] By sending, for example, 'formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings' see Guideline 7.
[45] 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.

***In summary**:*

◊ *Advance notice to counsel for affected parties is required when communicating with each other.*

◊ *In the event of communications between courts by electronic means, it is necessary to allow the counsel for parties to participate in the sharing of such information.*

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

The Global Principles address cooperation by underlying the potential and increasing role of protocols and agreements in enhancing effective cooperation between courts and insolvency practitioners.[46]

Indeed, having provided that the insolvency practitioners involved in a cross-border insolvency case 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 points out the 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 communications 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, in this regard, 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 proceeding to communicate, exchange information and cooperate. This hypothetical framework can become relevant especially if we consider the fact that, pursuant to the ELI guidelines examined below (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, point 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 the 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

[46] 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.

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 an additional method consisting 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 participate in person at such 'e-meetings' and that the communication between the courts should be recorded.[47] 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.

***In summary**:*

◊ *It is recommended that, in order to make communication and cooperation among courts, faster and formalized protocols should be used.*

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

As already said above at § 6.3.6, Guideline 12 of the CoCo Guidelines addresses 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 to the duty of cooperation relevant 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 (co-liquidator) in the secondary proceedings 'would better ensure coordination'.

Guideline 6 applies to the communication duties imposed on the 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.

[47] 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.

***In summary**:*

◊ *Direct communication at an early stage amongst insolvency practitioners is recommended.*

◊ *The insolvency practitioner in the main proceeding should take the initiative.*

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, after requesting the domestic legislators to ensure that insolvency practitioners and courts follow the principles and guidelines set out in the CoCo and JudgeCo Guidelines and Principles, specifies that communications and cooperation can take 'any form, including the conclusion of protocols'.

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 to 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 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.[48]

***In summary**:*

◊ *International guidelines and best practices regarding cross-border insolvency should be included in a specific clause of the protocol between courts*

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. 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 in order to reduce costs and delays. The best practice and rules in this regard 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.

[48] 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.

In this regard, an important impulse comes from the use of new technologies, which can now have a primary role during all the stages of the proceedings.[49]

6.5.1. The Model Law: Notification to foreign creditors

The UNCITRAL Model Law considers the regulation of notification to foreign creditors. Under art 14, it provides that, whenever notification is to be given to creditors 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'.[50]

Art 14 also requires that such notification is made individually, with the exception 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, art 14 pertains to the content of the notification of the commencement of the proceeding 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 required by court order.

***In summary**:*

◊ *It is recommended that appropriate steps are taken by courts to notify also foreign creditors. Such notification is to be made individually, except when the circumstances require to do otherwise.*

◊ *Appropriate steps should also be made to notify creditors whose address is unknown.*

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'.

[49] 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.
[50] See UNCITRAL Model Law, Part I, p. 7.

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 (to foreign parties) 'electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier'. This provision should help in reducing the delays in favour of foreign insolvency actors and add transparency to the proceedings.[51]

With regard to 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 languages that the recipients are expected to understand. Principle 28 pertains to the notices among the insolvency practitioners involved in a cross-border insolvency case, providing that the insolvency practitioners 'should receive prompt and prior notice of a court hearing or the issuance of a court order'. This provision, in line with what has already been said above, aims to ensure the availability of information to and the participation of all the relevant parties involved in a cross-border insolvency case.

***In summary**:*

◊ *All the notices should be made electronically and the relevant materials should be made available electronically in a publicly accessible system.*

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 notice requirements to 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 proposes a criterion for the recognition of foreign creditors for the purposes of the notification, providing that 'known foreign creditors' are those expressly mentioned 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

[51] 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

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.

***In summary**:*

◊ *Courts are required to give sufficient notice in order to permit them to have a full and fair opportunity to file their claims.*

◊ *Publication of such notices in the Official Gazette or, in any case, in an online registry is recommended.*

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

The CoCo Guidelines address a fundamental aspect regarding 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'. This method, pursuant to Guideline 9, should develop a common basis that should allow the acceptance of the relevant documents by all the parties involved.

In addition, the CoCo Guidelines aim, in line with the JudgeCo principles and guidelines, to ensure that *all* of the insolvency practitioners involved in a cross-border insolvency case are given notice in a timely manner. For this reason, 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. Guideline 17 also provides that, if the insolvency practitioner is unable to attend the hearing, the court should invite the insolvency practitioner to communicate her/his observations to the court before the decision of the court is taken.

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.

***In summary**:*

◊ *Notice of court hearings and court orders should be given to each of the insolvency practitioners as soon as possible.*

6.6 Conclusion

This Chapter has described the guidelines, principles and best practices developed by various international institutions. This study of the relevant provisions 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 importance of removing obstacles to direct cooperation and communication between the main actors of the insolvency proceedings, namely judges and insolvency practitioners, is recognised. 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, connected to the first one, is the acknowledged need for participation among the actors involved and the need for appropriate safeguards. The increasingly informal nature of the exchange of information – between the representative and judges of the different proceedings – reveals the importance of protecting the rights of the parties to be informed in a timely fashion of any pertinent communication and given the opportunity to participate, if possible.

Finally, 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. 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 – set out in almost every international report collecting guidelines and best practices in the last decade. This fundamental point, highlighted by the latest European and domestic legislations and by 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.

VII. Chapter 7: Comparative Analysis of Co-operation in Other Federalised Systems: The United States

7.1 Introduction

The purpose of this Chapter is to compare the approach of the EU to matters of cross-border insolvency with the approach in the United States as a comparator federal jurisdiction. Given the uncertainty of how the EU preventive restructuring procedures will be dealt with in terms of implementation of the PRD in member states, coupled with issues surrounding co-operation and coordination under the EIR Recast , considering how another federalised jurisdiction deals with multi-state cases is a useful exercise to benchmark actions related to the JCOERE Project going forward. Accordingly, this enquiry extends to both forum determination and coordination of multiple proceedings.

While there are arguments that will challenge the validity of comparing the EU with the United States, for example whether the EU is truly federal in nature, we would hypothesise that there are enough practical parallels and connections to the problems of forum shopping and the coordination of cross-border cases to draw helpful comparisons to how the same issues are handled in the United States.[1]

The following discussion will also refer to how the US courts have developed protocols and addressed instances of co-ordination of cross-border insolvency proceedings to draw examples of how this might occur within the EU in relation to cross-border restructuring procedures. While other federal jurisdictions were considered as additional possible comparators, such as Australia and Canada, the case law and literature are far more developed in the United States, which will therefore be the focus of the following discussion.

[1] For a discussion on federalism generally and in the EU in particular, see for example Andrew Glencross, 'Federalism, Confederalism, and Sovereignty Claims: Understanding the Democracy Game in the EU' (2007) SGIR Conference Turin, 12-14 September 2007 European University Institute 5; Armin Cuyvers, 'The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World' (2013) 19(6) Eur L J 711; Jose Gomes Andre, 'American Lessons: Legitimacy, Federalism, and the Construction of a European Compound Polity' (2017) 18(3) European Politics and Society 333; John Kincaid, 'Confederal Federalism and Citizen Representation in the European Union' (1999) 22(2) West European Politics 34; and John Erik Fossum, 'European Federalism: Pitfalls and Possibilities' (2017) 23 Eur L J 361.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

This Chapter will proceed as follows: section 2 addresses forum determination and forum shopping. Section 3 addresses coordination, which includes not only recognition and enforcement mechanisms, but also for cross-border restructuring and insolvency, the coordination of assets, parties, and the implementation of plans. Section 7.4 will explore the concept of forum competition as compared to interstate competition in the USA and the potential for similar competition among EU Member States. Section 7.5 will then offer a comparative reflection upon the EU's co-operation mechanisms and the other cooperative frameworks or mechanisms discussed below.

7.2 Forum Shopping and Court Cooperation in the United States

7.2.1 The idiosyncrasies of the United States bankruptcy regime

Bankruptcy is set within the competence of the federal government by the US Constitution under the Bankruptcy Clause,[2] which confers the federal government with the power to enact 'uniform laws on the subject of bankruptcies throughout the United States.'[3] Interestingly, prior to the introduction of a federal bankruptcy procedure, the American states mirrored to some extent the current picture of EU Member States, with each state having its own perspective on how to deal with financially distressed companies, sometimes with different objectives and outcomes. This caused a number of constitutional challenges with little clarification from the Supreme Court[4] until a Bankruptcy Act was passed in 1898.[5] In that sense the period before 1898 represents a movement from states operating their own bankruptcy/ insolvency codes to a more federalised structure. In terms of timing the much shorter period of European integration from the 1950s to the present allows us to perhaps view the current European situation in an historical frame. Even after the 1898 Bankruptcy Act further steps were taken towards a fully Federalised bankruptcy code including the enactment of the Chandler Act during the New Deal in 1938.[6]

The borderline between bankruptcy cases and other areas of law presents interesting questions where many of these areas of law are matters for regulation by the states. This will include laws relating to tort, contract, property, and trusts and estates.[7] It will also include company law or the law relating to corporations which is a matter of state law. Contract law

[2] US Constitution, art 1, s 8, cl4. See MH Redish, 'Doing it with Mirrors: *New York v United States* and Constitutional Limitations of Federal Power to Require State Legislation' (1993-1994) 21 Hastings Const LQ 593, 594-596.

[3] United States Constitution, article 1 paragraph 8 clause 4; For a detailed history on the evolution of the federal bankruptcy competence under the Constitutions Bankruptcy Clause, see SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review 319, 341-342; Charles Jordan Tabb, 'The History of the Bankruptcy Laws in the United States' (1995) 3(1) Am Bankr Inst L Rev 5, 12-15; and R Sylla, RE Wright and DJ Cowen, 'Alexander Hamilton, Central Banker: Crisis Management during the US Financial Panic of 1792' (2009) 83 *Business History Review* 61, 62-63..

[4] See *Sturges v Crownshield* 17 US (4 Wheat) 122 (1819); see also SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review *319*, 352-353.

[5] Act of July 1, 1898, Ch 541 30 Stat 544 (repealed 1978); see also SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review 319, 388-389.

[6] The full development of a federal bankruptcy framework is described in SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review 319, 341-342.

[7] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 515.

was originally particularly problematic in multi-state (cross-border) bankruptcies and bankruptcy discharges as such procedures by their nature impair the obligations arising under contract.[8] State bankruptcy laws were therefore challenged as being unconstitutional in interstate bankruptcies because of their potential impairment of contracts in another state. This mirrors to some extent the difficulties in aligning insolvency procedures among the Member States of the EU due to different legal principles on how to deal with issues such as secured debt, the order of priorities, and rights *in rem*.

Today, bankruptcy and restructuring laws are contained in the US Federal Civil Code[9] within the Bankruptcy Statute under Title 11. It is a hybrid system that relies on both federal and state law,[10] built on a foundation of state law, which establishes the substantive entitlements of debtors and creditors which intersects with state competence in areas of corporate law, tort, contract, property, and trusts and estates.[11] Arguments begin in state District courts and it must be shown that the jurisdiction of bankruptcy has been earned before a case will be transferred into the bankruptcy court system, and then only if some bankruptcy policy is being furthered.[12]

The division lines between bankruptcy laws and processes and other related areas of law is also reflected in how the judiciary are appointed in the US. US bankruptcy judges derive their authority under article I section 8 of the US Constitution, which details the powers of Congress including the power to enact a bankruptcy statute, whereas other judges derive their authority under article III, which creates the judicial branch of the United States Government.[13] The individual rights and effective administration of justice protecting judicial independence and competence is embedded within article III; whereas, it has been argued that article I judges lack the same level of constitutional protections.[14] Bankruptcy judges also differ from article III judges because they are not appointed by the President, but by the United State Court of Appeal for the Circuit in which they sit and for a term of only fourteen years.[15] For this reason, their position is not as secure as article III judges, and there is the

[8] See *Ogden vs Saunders* 25 US (12 Wheat) 213 (1827); see also SJ Lubben, 'A New Understanding of the Bankruptcy Clause ' (2013) 64(2) Case Western Reserve Law Review 319, 349-350 and Charles Jordan Tabb, 'The History of the Bankruptcy Laws in the United States' (1995) 3(1) *Am Bankr Inst L Rev* 5, 16-18.

[9] The US Civil Code codifies general and permanent statutory law at the federal level of the United States legal system. Federal law pre-empts state and territorial law if there is a conflict so long as the federal law is also in accordance with the United States Constitution.

[10] See for example, 11 USC §362(a) which enjoins all entities from taking almost any action outside of the bankruptcy process that would affect a debtor's property; §541, which designates all legal and equitable interests as property of the estate; and §544 which creates rights in the bankruptcy trustee based on the powers allowed to certain lien creditors under relevant state law.

[11] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 515.

[12] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 529-530.

[13] Article 1 details the powers of Congress, while clause 8 lists those powers, including the power to establish 'uniform laws on the subject of bankruptcies throughout the United States.' US Constitution art 1 §8 cl 4.

[14] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 533.

[15] 28 USC §152(a)(1) (2006); for a discussion about judicial appointment see David A Skeel, 'Bankruptcy Judges and Bankruptcy Venue' (1998) 1(1) Delaware L Rev 1, 32-33.

perceived danger of being subject to external influence.[16] Because of the protections in place for article III judges, they are better protected from being influenced by external factors that could influence their decision-making. In order to ensure that judicial independence is maintained, a norm was adopted in the *Marathon*[17] case and later incorporated into the Bankruptcy Code requiring that all bankruptcy cases be filed in an article III District Court,[18] which could then choose to refer the matter to a bankruptcy judge 'operating as a type of special master to the District Court.'[19]

The key difference between article I and article III judges in relation to bankruptcy revolve around whether a matter is considered 'core' or 'non-core'. Core proceedings are essentially those actions that arise from public rights created by the enactment of the Bankruptcy Code.[20] Whereas, non-core proceedings are predicated on rights that are usually decided outside of bankruptcy, whether under state or federal law, such as contractual or tortious matters.[21] Bankruptcy judges can hear both types of proceedings, but are only empowered to exercise their full competence over core proceedings, with only limited competence over the non-core matters[22] in which he or she can only submit 'proposed findings of fact and conclusions of law to the district court, subject to de novo review.'[23] There have been arguments justifying this approach[24] but what is interesting is the overall recognition of the difference between insolvency or bankruptcy law and proceedings and other actions in contract or tort or other related areas. These distinctions are also reflected in the EU approach to enforcement of insolvency processes and determinations under the specialised European Insolvency Regulation (original and Recast) as distinct from the more generally applied Brussels Judgement Regulation.

These distinctions have further implications regarding do-operation in insolvency matters as adumbrated in the discussion of cases on assistance of foreign courts in insolvency at common law in chapter 5.

7.2.2 Forum determination in the USA

Forum shopping between states in the United States is common for a variety of matters and most importantly in the current context for corporate law matters. While it is allowed and

[16] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 538.
[17] *N Pipeline Construction Co v Marathon Pipe Line Co* 458 US 50, 87 (1982).
[18] 28 USC §157 (2006).
[19] Model Emergency Bankruptcy Rule (a) (1982) reprinted in Bankruptcy Code, Rules and Forms, xv (West 1983); see also G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 530.
[20] See *N Pipeline Construction Co v Marathon Pipe Line Co* 458 US 50, 71 (1982).
[21] See *Broyles v US Gypsum Co* 266 BR 788, 783 (ED Tex 2001).
[22] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 518-519.
[23] *Wood v Wood (In re Wood)* 825 F2d 90, 95 (5th Cir 1987).
[24] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 539.

facilitated by the legal system, Congress and the courts have often disparaged the practice.[25] In corporate law cases forum shopping also implies choice of law issues whereas because the substantive law of bankruptcy in the United States is federal in nature, it would seem to follow that this should exclude forum shopping driven by choice of law. However, there remain a number of 'jurisdictional hooks' to shop among the bankruptcy courts.[26]

As we know Chapter 11 proceedings are the most similar type of proceeding to the new EU PRD ans so our discussion will focus on this issue. Forum shopping occurs frequently in Chapter 11 reorganisation cases[27] by filing a petition in a court other than in the location of the company's head office.[28] In the Chapter 11 petition, the debtor or its representative simply states its preferred venue and if it satisfies the requirements for forum determination as set out in the Bankruptcy Venue Statute,[29] it tends to be accepted without question. The Statute ostensibly provides two methods of determining venue: domicile or residence[30] and affiliation.[31] These two criteria have been interpreted as giving rise to 5 different options to establish forum:

1. place of incorporation;
2. location of the debtors' principle assets;
3. the debtor's principle place of business;
4. a case concerning an affiliate of the debtor is pending in the jurisdiction; or
5. objections to the venue have been waived expressly or through conduct.[32]

The Bankruptcy Venue Statute therefore provides for a virtually unlimited choice for large debtors with extensive operations.[33] There is a presumption associated with the debtor's choice of venue that must be rebutted should a party which to transfer the venue elsewhere by demonstrating with a preponderance of evidence that a different venue is better. This allows debtors to file, with little or no interference, in a jurisdiction where they believe they will receive the most favourable judgement.[34]

This has led to a focus on two main courts for bankruptcy filing: the District of Delaware and the Southern District of New York (SDNY). The 'jurisdictional hooks' mentioned above do not derive from differences in state laws but derive from a number of less identifiable factors.

[25] Mary Garvey Alegro, 'In Defense of Forum Shopping: A Realistic Look at Selecting a Venue' (1999) 78 *Neb L Rev* 79, 87.
[26] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169, 169; see also Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) *Connecticut L Rev* 159 for an empirical analysis and discussion of instances of forum shopping in the United States.
[27] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169.
[28] T Eisenberg and L LoPucki, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 *Cornell L Rev* 967, 975.
[29] 28 U.S. Code § 1408 - Venue of cases under title 11.
[30] 28 USC §1408 (1).
[31] 28 USC §1408 (2).
[32] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 16.
[33] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 23.
[34] Mary Garvey Alegro, 'In Defense of Forum Shopping: A Realistic Look at Selecting a Venue' (1999) 78 Neb L Rev 79, 99.

Both jurisdictions are considered debtor friendly and have judges with extensive expertise and experience. Both states provide rules that make it fairly easy to file, including Delaware's rule on incorporation which allows any of the many companies incorporated in Delaware with little or no business activities in the state to file for insolvency in Delaware. In the case of New York, its affiliate rule, which allows companies to file if they have some affiliate in the state already filing for bankruptcy there offers a jurisdiction, with flexible rules for parties to claim a connection with that jurisdiction.[35]

As Delaware grew in popularity, the bankruptcy industry grew up around it. Delaware's popularity in the bankruptcy arena is of course linked to the underlying popularity of Delaware as a state of incorporation and as a forum of choice for corporate litigation generally. Because of the experience and significant body of specialised jurisprudence in the state system, Delaware judges are viewed as more predictable with certainty of outcomes. While certainty may be beneficial, John Coffee notes that it can sometimes be 'manipulated by management in those areas where its interests' conflict with those of the shareholders.' [36] While there are arguments that challenge the morality and appropriateness of shopping for what is sometimes perceived as judicial favour, few real efforts have been made to change this status quo.[37] In addition, it has been suggested by Coffee and others that the role of markets will actually provide an incentive for states to ensure efficient legal systems, which will be of benefit to any party involved in a corporate law or bankruptcy case. The argument goes that if a company were to choose a jurisdiction with inefficient laws, it would suffer in the product and capital markets and its stock price would also fall, making the firm an attractive takeover target. Thus, the availability of forum shopping may actually facilitate a race to the top for states providing efficient laws.[38] Nevertheless and despite arguments regarding the merits or demerits of forum shopping and a lack of consensus about the correct interpretation of the Bankruptcy Venue Statute on forum determination most Chapter 11 cases are heard in one of these two jurisdictions.[39]

Objecting to a venue selection in the United States after it has already been filed is also difficult. In fact, most cases proceed with little discussion over the choice of venue at all as

[35] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 388-389; see also Samir D Parikh, 'Modern Forum Shopping in Bankrupcty' (2013) 46(1) Connecticut L Rev 159, 181-192.
[36] John C Coffee, 'The Future of Corporate Federalism: State Competition and the New Trend toward De Facto Federal Minimum Standards' (1987) 8 Cardozo L Rev 759, 766; see also Leslie R Masterton, 'Forum Shopping in Business Bankrupcty: An Examination of Chapter 11 Cases' (1999) 16(1) Bankr Dev J 65, 67 .
[37] For a discussion of competing arguments about the pros and cons of Delaware's popularity, see L LoPucki, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 Cornell L Rev 967, 1002; T Eisenberg and L LoPucki, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 Cornell L Rev 967, 971; and see also Lynn M LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (Ann Arbor 2005), which offers an in-depth critique of forum shopping in the United States.
[38] John C Coffee, 'The Future of Corporate Federalism: State Competition and the New Trend toward De Facto Federal Minimum Standards' (1987) 8 Cardozo L Rev 759, 766; see also Leslie R Masterton, 'Forum Shopping in Business Bankrupcty: An Examination of Chapter 11 Cases' (1999) 16(1) Bankr Dev J 65, 67; David A Skeel, 'Bankruptcy Judges and Bankruptcy Venue' (1998) 1(1) Delaware L Rev 1, 22; for a discussion around the relevance of either racing to the top or to the bottom in the United States federal system, see Anne Anderson, Jill Brown, and Parveen P Gupta, 'Jurisdictional Competition for Corporate Charters and Firm Value: a Re-examination of the Delaware Effect' (2017) 14 Int J Discl Gov 341.
[39] See Marcel Kahan and Ehud Kamar, 'The Myth of State Competition in Corporate Law' (2002) 55(3) Stanford L Rev 679, 725-726, 730-731.

the alternative is costly, timely, and challenging. Courts view debtors as being in the best position to know their operations and the extent of their problems better than any other party, so tend to defer to the better information the debtor is perceived to have to make this choice. There is also a concentration of professionals and experts in New York and Delaware, so there is a strong 'club atmosphere' that tends to influence the maintenance of the status quo.[40] As noted by LoPucki and Whitford:

> Although the benefits of venue transfer may well exceed the costs for all claimants as a group, the benefits to any one claimant are likely to be far less than the costs of a successful challenge to the initial venue choice. These costs are high, in part because much of the information needed to assess what venues are possible…tend to be under the exclusive control of the debtor during the crucial period from the filing of the case until momentum renders the case unmoveable.[41]

Finally, judges, while empowered to transfer venue themselves, will rarely do so.[42]

Despite the fact that bankruptcy law is a federal competence in the US, there still exist significant variances on case-defining issues from circuit to circuit, such as the treatment of key non-assignable contracts[43] and third party releases under reorganisation plans.[44] Thus while the bankruptcy law remains the same, decisions relying on judicial interpretation that may be taken in relation to a plan may find different results under different circuits.[45] The exercise of discretion makes debtors and decision-makers quite sensitive to the perceived experience, knowledge, and personality of judges in a given district.[46] It is not surprising then that debtors and decision-makers in a Chapter 11 case will take time to examine the characteristics of available potential venues and judges for a bankruptcy case to determine the greatest chance of success.[47]

7.2.3 European parallels

The first point to make is that the development of an integrated market is of much more recent vintage in the EU and consequently the development of a European insolvency legal framework is in a comparatively early phase. At this point of its development, the application of the COMI test in cross-border insolvencies and restructurings in the European Union under the original Regulation 1346/2000 and the Recast 848/2015 renders the idea of forum

[40] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 394-396.
[41] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 42.
[42] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 42 and Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 394-396.
[43] 11 USC §365(c); See *In re Catapult Entm't* 165 F3d 747, 754-755 (9th Cir 1999) and *In re W Elecs Inc* 852 F2d 79 (3d Cir 1988).
[44] See *In re Lowenschuss* 67 F3d 1394, 1401-02 (9th Cir 1995); *In re Zale Corp* 62 F3d 746, 760-01 (5th Cir 1995); and *In re W Real Estate Fund Inc* 922 F2d 592, 601-02 (10th Cir 1990); Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 193.
[45] Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 193.
[46] Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 194.
[47] Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 195.

shopping less possible. However, over time, the idea of orchestrating a "COMI shift"[48] prior to a proceeding has gained more familiarity and become more common. The emergence of case law and litigation on COMI[49] is related to the operation of more traditional insolvency processes, rather than more recent developments in restructuring law. The development of a newer European approach to business failure represented in the PRD raises a number of possibilities that have been considered in Chapters 2, 3 and 5 of this Report. Essentially, where some restructuring processes do not come within the EIR Recast, the block to forum shopping created by decades of COMI case law quite simply does not exist.

The second point then comes into play, which is that unlike the US, restructuring laws are quite different across the EU and given our analysis in both the first JCOERE Report and the summary of different approaches in Chapter 3, forum shopping driven by choice of law is a real possibility. We have already seen this in relation to UK Schemes of Arrangement.[50] However it will now be possible, given the range of choices built into the PRD, to have a process that both implements the PRD but that is more dynamic and 'robust' than other implementing processes.

7.2.4 American cases on forum determination or transfer

The following sample of cases demonstrate a habitual tendency for a state such as Delaware or New York to accept jurisdiction or refuse to transfer it, despite the thin association a venue has to the actual operations of the company and evidence that participation by the more vulnerable stakeholders would be stymied due to the costs of attendance. There are further interesting points raised in the discussion below.

Polaroid 2001[51]

The Polaroid case is demonstrative of some of the issues around objecting to the filing of a case in a venue distant from a company's main activities.

In 2001, after years of financial difficulty, Polaroid filed for protection under Chapter 11 of the US Bankruptcy code. A sale of substantially all of its assets under section 363(b) of the US Bankruptcy Code was approved by the Bankruptcy Court of Delaware,[52] although the company's nerve-centre was in Massachusetts where it had thousands of employees.[53] There was considerable controversy around the s 363 sale, which the financial press criticised for

[48] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169, 180 and (n 41).
[49] See generally Chapters 2 and 5 of this Report.
[50] Jennifer Payne, 'Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14 European Business Organization Law Review 563-589.
[51] *In re Polaroid Corp*, No 01-10864 (Bankr D Del July 3, 2002).
[52] *In re Polaroid Corp*, No 01-10864 (Bankr D Del July 3, 2002).
[53] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass).

being undervalued by around a third of the actual value.[54] Judge Walsh of the Bankruptcy Court of the District of Delaware declined to take the creditor committee's evidence that the company would be worth more in a reorganisation into account, relying instead on a market approach in which a transaction appropriately conducted is viewed as the best test of value.[55]

It was noted by Chief Bankruptcy Judge of for the United States Bankruptcy Court for the District of Massachusetts, the Honourable Frank J Bailey, in his testimony during a hearing on the Chapter 11 Bankruptcy Venue Reform Act of 2011, that filing in certain magnet courts, such as Delaware, has an adverse effect on 'the rights of small creditors, vendors, employees and pensioners' because 'efforts to overrule the filer's choice have proven to be much too expensive for all but the most well-heeled creditors.'[56] Polaroid's filing of Chapter 11 in Delaware far from its assets and investments, meant that anyone interested in pursuing their rights would have to either travel to Delaware or hire a lawyer to appear in court on their behalf.[57] As noted by Judge Bailey in his testimony to Congress on the matter of reforming the Bankruptcy Venue Statute:

> […]the stakeholders, large and small, would have had an opportunity to participate in the proceeding. At a minimum, stakeholders would have received notices that told them that they could participate in the proceeding at courthouses near where they live and work before a judge that lives in the same community as they do. This is to say there would have been the perception that their opportunity was real and accessible. And perception is often paramount.[58]

It is suggested by Coordes[59] that the Polaroid case 'demonstrates the difficulties that can arise when a company files far from its primary operating region.' While there are ways to challenge the venue filing under section 1412 of the Bankruptcy Venue Statute, Judge Bailey notes that litigating a motion to change venue is very expensive and often out of the reach of small vendors and former employees. The strong presumption in favour of the debtor's chosen forum also makes it difficult to persuade a Court to change the venue of the case.[60] In a European context these issues are aggravated by legal and cultural differences.

---

[54] Kris Frieswick, 'What's Wrong with this Picture?' (CFO 2003) <https://www.cfo.com/banking-capital-markets/2003/01/whats-wrong-with-this-picture/> accessed 22 June 2020; see also Tom Becker and Lingling Wei, 'Questions Mount in Chapter 11 Case of Former Polaroid' (WSJ Online 2003) as cited in Lynn M LoPucki and Joseph Doherty, 'Bankruptcy Fire Sales' (2007) 106 Mich L Rev 1, 13.

[55] *In re Polaroid Corp*, No 01-10864 (Bankr D Del July 3, 2002), Transcript of Sale Hearing before Honourable Peter J Walsk United States Chief Bankrupcty Judge, 172-173, 177 as cited by Lynn M LoPucki and Joseph Doherty, 'Bankruptcy Fire Sales' (2007) 106 Mich L Rev 1, 14.

[56] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 35-36.

[57] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 39.

[58] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 42.

[59] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 381.

[60] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 50.

Enron (2002)[61]

The Enron Case is well-known for many reasons. According to C William Thomas, it is an example of failure due to 'individual and collective greed born in an atmosphere of market euphoria and corporate arrogance.'[62] Unusually, there was actually a request to transfer its venue to the Southern District of Texas instead of being heard in the Southern District of New York. There were multiple litigant companies and groups involved in the Enron case along with a class-action lawsuit on behalf of pension beneficiaries. In short it was a complex, multi-faceted case that garnered much media attention at the time due to the scandals associated with it.

Enron's business activities took place mainly in Portland, Oregon and Houston, Texas, with no real property owned in New York. The debtor companies were organised under the laws of Oregon, California, and Delaware with only one organised under the law of Texas and one under Pennsylvania law. None of the debtor companies were organised under the law of New York and the principle place of business was almost unanimously identified as Houston.[63] Around 25,000 employees worked for Enron worldwide, with 7500 employees in Houston Texas and only 63 employees in New York, where it decided to file for bankruptcy. At the time of filing the motion to change venue, almost all of the dismissed employees in the United States were employed in Houston.[64] In addition, much of the debtor's real property was also located in Houston.[65] The only connection Enron had to New York was Enron Metals & Commodity Corp, a Delaware corporation with its principle place of business in New York with assets consisting of furniture and fixtures at a rental office; deposit accounts at Citibank; contracts, accounts receivable, prepaid transactions, and trades in progress, comprising less than 0.5% of the assets of the debtor as a whole.[66]

A group of creditors and state officials moved to transfer the venue to the Southern District of Texas to make it easier for small stakeholders to participate. Because the venue was found to be properly filed, it was the burden of the movant to 'show by a preponderance of the evidence that the transfer of venue is warranted.'[67] The judgment in the motion to transfer also noted accessibility of both potential venues, observing that while New York is one of the most accessible locations in the world, it is 1,600 miles from Enron's headquarters, which is blocks from the Texas District Bankruptcy Courts. It also noted the challenges of plane ticket costs and the limitations of arrival times in terms of travel from Texas to New York,[68] which

[61] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002).
[62] C William Thomas, 'The Rise and Fall of Enron' (2002) Journal of Accountancy <https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html> accessed 22 June 2020.
[63] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [334].
[64] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [337].
[65] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [338].
[66] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [338].
[67] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [342].
[68] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [339].

indicates that the Court was considering the convenience of the most affected stakeholders in their decision making.

Judge Arthur Gonzalez of the Bankruptcy Court of the Southern District of New York refused to move the venue, despite the overwhelming amount of business operations conducted in Texas. Key considerations included the number of creditors and the relative amount of their claims, placing an importance on the value of the debt owed, which placed the banks and financing creditors in a high position of preference. It was also noted that given the worldwide nature of the Enron bankruptcy, New York was more accessible overall than Texas.[69] Further, both the creditors' committee and the banks, Enron's largest creditor, opposed the transfer. Primarily, support of the venue transfer came mainly from Texas state and local authorities with an economic interest in the case. While clearly employees may not have been able to attend in person, the Judge considered that the issues most pertinent to employees would not likely be heard by the bankruptcy court in the first place.[70] That said, the issue of greatest concern to those employees in Texas was the fate of their 401k pension plans, which were heavily affected by the failure of the company due to the high percentage of Enron stocks in which the plan had invested.[71]

Fundamentally, Judge Gonzalez deemed that there was not really a necessity for those arguing for the venue change to attend court, and that court management protocols would make it possible for interested parties to follow the case from a distance.[72]

The court found that:

> New York is the more economic and convenient forum for those whose participation will be required to administer the cases. Accordingly, New York is the location which would best serve the Debtors' reorganization efforts – the creation and preservation of value.[73]

Jurisdiction was retained in the Southern District of New York, which was arguably the exactly correct decision based on wealth maximisation principles. That said, little consideration was given in the case to what Judge Bailey considered in his testimony to Congress in relation to Polaroid was also important: the perception of an opportunity to participate, which employees and smaller local stakeholders will not have had due to the costs of travel and their lack of income due to lay-offs. Again in a European context the issue of what has been termed 'jurisdictional reach' will be even more pertinent and it is one which European judges may be more sensitive to.

---

[69] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [345].
[70] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [346].
[71] Patrick J Purcell, 'The Enron Bankruptcy and Employer Stock in Retirement Plans' (CRS Report for Congress 2002) <https://www.everycrsreport.com/files/20020122_RS21115_077711a5e71ecdbbbb7715846f05d7e498f691c0.pdf> accessed 23 June 2020.
[72] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [347].
[73] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [349].

General Motors (GM) Case (2009)[74]

The General Motors' bankruptcy is another example of filing in a place that is clearly not a company's headquarters and the relative ease with which this can be done in the United States. A Chevrolet-Saturn dealership in Harlem filed under Chapter 11, making it possible for GM to utilise the affiliate rule under the Bankruptcy Venue Statute, which allows a filing to be made in a place 'in which there is pending a case under Title 11 concerning such person's affiliate, general partner, or partnership.'[75] GM was headquartered in Detroit, Michigan and incorporated in Delaware with its only affiliation in New York a single subsidiary dealership in Harlem. GM lawyers centred on the Harlem affiliate so that it could find a way to bring the whole case to the Southern District of New York, which as noted by Reuters, is 'known for its expertise and speed in handling huge bankruptcies such as Enron and WorldCom.'[76]

Out of the 26 representative groups appearing in the case, 18 were at least partially based in New York, including GM's representatives, the representatives of the creditors' committee, and the various Unions representing the workers. These are clearly some of the largest groups of stakeholders in the case, while those based elsewhere comprise individual tort victims, other US States, single creditors, a retirees' association, and a public citizen litigation group,[77] groups that on the face of it have relatively minor financial interests than those represented by New York legal professionals. In 2011, after the GM Bankruptcy, reforms were being mooted for the Bankruptcy Venue Statute to reduce forum shopping. It was noted by a congressman of the House Judiciary Committee sponsoring the Bill that venue shopping for sympathetic courts '…significantly disadvantages displaced employees, creditors and shareholder who should be able to participate in the reorganisation negotiations.'[78]

In line with this statement by Congressman Lamar Smith (R-TX), it has been observed by Coordes that 'running the bankruptcy from New York could make it more difficult for GM's Detroit-based employees, trade creditors, and other stakeholders to interfere in the case' noting further that 'filing close to home might have fuelled local tensions, invited more voices into the courtroom, and slowed down the case – all risks GM probably preferred to avoid.'[79] While no written evidence to this intention has been unearthed, filing in New York will certainly have been easier for the many party representatives and professionals in the case based there. There was no objection or request for change of venue filed in the GM

[74] *In Re General Motors Corp* 407 BR 463 (Bankr SDNY 2009).
[75] 28 US Code § 1408(2).
[76] Tom Hals and Martha Graybow, 'GM Bankruptcy Forever Linked to Harlem Dealership' (Reuters 2009) <https://www.reuters.com/article/us-gm-harlemdealership/gm-bankruptcy-forever-linked-to-harlem-dealership-idUSTRE55050V20090601#:~:text=NEW%20YORK%20(Reuters)%20%2D%20General,quirks%20of%20U.S.%20bankruptcy%20law.&text=Before%20GM%20filed%20its%20historic,its%20own%20Chapter%2011%20filing.> accessed 23 June 2020.
[77] *In Re General Motors Corp* 407 BR 463 (Bankr SDNY 2009) [471] list of Appearances.
[78] Jacob Barron, 'Bill Introduced to Combat Bankruptcy "Venue Shopping"' (NCAM 2011) <http://www.nacm-e.com/credittrends/articles/Aug_11/Bill%20Introduced%20to%20Combat%20Bankruptcy%20Venue%20Shopping.htm> accessed 23 June 2020.
[79] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 382-384.

bankruptcy, which proceeded on the basis of a s363 sale[80] to the US Treasury and the governments of Canada and Ontario through Export Development Canada (EDC) as a Chapter 11 reorganisation would have been too lengthy to ensure the company would not end up in liquidation.[81] The only objections listed in the case relate to the fairness of the sale to the various parties and it was approved by SDNY Bankruptcy Judge Robert E Gerber.

While the filing in New York was legal the media,[82] interest groups,[83] and even Congress[84] questioned the appropriateness of choosing New York over Delaware (incorporation) or Michigan (headquarters), not only in relation to GM but generally in similar cases. As noted by the Honourable John Conyers Jr:

> By choosing to file for Chapter 11 in a distant venue such as New York, a business—with its principal assets and most of its creditors and employees located in Michigan or California for example—makes it much more difficult for these creditors, particularly smaller creditors and workers, to participate in the case and defend their claims.
>
> These creditors are forced to retain counsel in the distant venue and, if they want to physically appear, incur travel costs. In effect, they have to pay more to collect on their claims.
>
> As a result, the ability of these small creditors and workers to influence the bankruptcy proceedings is greatly diminished. And, by choosing a distant forum, a company can reduce local press coverage of the case.[85]

While the reform of the Bankruptcy Venue Statute failed to change the venue determination rules around Chapter 11 filings, in part due to resistance from a powerful Delaware Congressman at the time, Joe Biden, the discussions within Congress, the media, and interest groups illuminated how easy it is to file in a state with little connection to the business of the company and how difficult it is to challenge that filing once made in practical and financial terms. Those who benefit from filing in New York, for example, often tend to have the greatest financial strength while those who are most adversely affected by a distant filing tend to have far less financial stake in the case, in terms of the proportion of debt owed to them.

---

[80] 11 US Code § 363 Use, sale, or lease of property.
[81] *In Re General Motors Corp* 407 BR 463 (Bankr SDNY 2009) [479-480] & [484].
[82] Barbara Kiviat, 'GM's Potential Bankruptcy: Shopping for Venue '(Time 2009)
< http://content.time.com/time/business/article/0,8599,1890171,00.html> accessed 23 June 2020.
[83] See for example a statement from the National Association of Credit Management: Jacob Barron, 'Bill Introduced to Combat Bankruptcy "Venue Shopping"' (NCAM 2011)
<http://www.nacm-e.com/credittrends/articles/Aug_11/Bill%20Introduced%20to%20Combat%20Bankruptcy%20Venue%20Shopping.htm>
accessed 23 June 2020
[84] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 112th Congress (prepared statement of Honorable John Conyers, Jr, Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary) 76.
[85] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 112th Congress (prepared statement of Honorable John Conyers, Jr, Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary) 76.

Conclusion

The forgoing cases show a range of forum issues. The common thread between all of these cases is that a forum that might not have been the most appropriate under the Bankruptcy Venue Statute or convenient to a large number of creditors (even if those creditors did not command a commensurate value of the debt owed) has been confirmed or accepted by the courts. The tendency of courts as well as the strong presence of insolvency professionals in New York and Delaware and the powerful lobby they also control make changing venue that much more difficult, particularly when the larger creditors that usually command more of the value of the debt and the apparent tendency of bankruptcy judges to look at convenience of creditors from a proportion of value perspective. Finally, the presumption that appears to follow forum selection by the debtor that it will know best where it should file adds a further burden onto stakeholders who may be left out-of-court. As surmised by Coordes, these 'judicial considerations suggest that small creditors must fight an uphill battle when they object to venue in large cases.'[86] Other commentators have described the 'harm' of forum shopping[87] but there are others who do not regard the fact that specialist courts and jurisdictions have emerged in the US to be a problem. This debate is expected to resonate in the EU.

In an emerging European context, the key difference is the strength of the jurisdictional tie created by COMI jurisprudence in the EIR Recast coupled with normative resistance to forum shopping (possibly derived from elements of legal culture described in Chapter 4). However, the phenomenon of emerging patterns in recent significant European corporate insolvency cases, particularly relating to corporate restructuring that are run out of the courts in London under the Scheme of Arrangement framework[88] raises questions regarding the alleged difference between Europe and the US. It is possible that as the European Union becomes more integrated that patterns of forum shopping may begin to reflect patterns that have emerged in the United States over a long period of 100 years. More integration implies a greater knowledge of the characteristics of particular jurisdiction, reflected in the taxonomic characterisation presented in Chapter 3. Thus, certain jurisdictions appear more attractive as forums.

However, there is another consideration. It has always been assumed that one of the key differences between the US and the EU is that unlike the US, there is very little by way of harmonisation of insolvency law as between state frameworks in the EU compared with the federalised approach of the US. As we progress incrementally towards harmonisation in Europe and as we discover through our work in preventive restructuring and in relation to cross-border practise generally that in fact there is a commonality of concepts (eg. *actio pauliana* and variants thereof) across European jurisdictions, it is likely that greater

[86] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 397.
[87] Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut L Rev 159, 193 *ff*
[88] Jennifer Payne, Schemes of Arrangement: Theory Structure and Operation (CUP 2014).

convergence will occur. Against that background deliberate forum shopping driven by a search for issues like efficient and expert courts, a concentration of legal and financial expertise in a particular jurisdiction and a willingness or openness to accept jurisdiction over cases may be a feature of future European practise.

7.3 Coordinating Proceedings in other Cooperative Paradigms

This Chapter has illustrated that the issue of interstate court-to-court recognition and co-ordination is not a hotly contested legal issue in bankruptcy proceedings in the United States, although it is controversial in other respects. Comparisons with the EU system are therefore not entirely fluid because even though harmonisation is acknowledged as a goal and an important element in court co-operation (see Chapters 3, 4, 6 and 8 of this Report) this is not near the EU reality.

There is the separate but related issue of co-ordination in cases which in US jurisprudence typically involve jurisdictions outside the US. And indeed, in terms of the EU there are states such as the UK that have been identified as possessing similarly attractive forums for international restructuring particularly, as distinct from more traditional insolvency processes. (Post Brexit the interesting question is whether one of the remaining states will take up this role and it is generally acknowledged that Ireland and the Netherlands are the main contenders). In this context US courts are considered exemplars of the conduct of co-ordination of proceedings in an international context. New York in particular is considered to be a centre point for restructuring and therefore the study would not be complete without a consideration of how the co-ordination of proceedings is actually achieved. This Report has considered what the EIR Recast itself describes as co-ordination in Chapters 2 and 3, and in Chapter 5 has considered some case law within European jurisdictions, mostly from England and Wales, on co-ordination in international insolvency and restructuring proceedings. Hence a consideration of how US courts co-ordinate proceedings is pertinent to the extent that it might provide some useful examples for cross-border insolvency co-ordination either within the EU or in cases involving one European jurisdiction operating externally to the EU. Comparisons are therefore not entirely straightforward; nevertheless, European insolvency practitioners, lawyers and policy makers may assess the likelihood of successful co-ordination within Europe against this comparative context Alternatively with the new interest in preventive restructuring the real focus might be on external cases even in a European construct where Ireland, the Netherlands and Luxembourg already look to the attraction of legal and financial services business into their jurisdictions and the EU.[89] This discussion is continued in 7.4 below.

[89] Reinout Vriesendorp, Ferdinand Hengst, Wies van Kesteren, Irene Lynch Fannon, Michel Nichels and Benoit Nerriec, INSOL International Special Report on Restructuring Cross Border Groups: Key Considerations Around Foreign Tax and Finance Driven SPVs (INSOL International, June 2020).

There are a number of examples of how the US has coordinated complex multinational bankruptcies in the US courts under Chapter 15 which demonstrate that coordination is often achieved through the use of bespoke protocols,[90] in addition to or instead of following guidelines such as those discussed in Chapter 6, some of which also refer to the use of protocols in aid of co-ordination. The following examples of protocols used in international cases may indicate what could be expected in future cross-border restructuring cases within and external to the EU.

7.3.1 Maxwell[91]

The *Maxwell* case is one of the first recorded uses of a coordinating protocol in a cross-border insolvency case. The parties created a bespoke protocol to coordinate what were effectively two primary insolvency proceedings in the UK and the USA. An examiner was appointed under the Chapter 11 proceedings to work towards harmonizing the two proceedings. The protocol's two primary goals were to maximise the value of the estate and to harmonise the proceedings to minimize expense, waste, and jurisdictional conflict.[92] Under the protocol framework, UK administrators were tasked with the corporate governance of the Maxwell estate, while major decisions concerning the estate would require the approval of the US examiner or approval by the US Court. While much of the decision making in the case was left open, the protocol provided direction regarding the conduct of certain matters to be determined in the case, in particular that the parties should develop a coordinated plan of reorganisation and Scheme of Arrangement. The UK administrators and US examiner were able to consensually accomplish all matters of coordination and co-operation, with only one material conflict regarding US preference law.[93]

7.3.2 Nortel[94]

Nortel was a multinational group of high-tech companies with the parent company in Canada and much of its business occurring in the United States. Insolvency proceedings were filed in Canada, the USA and the UK. The results of this case indicate both the best of co-operation and the worst. Although reorganisation failed, the parties were able to co-operate to sell the debtor's global assets in large pieces spanning many different countries. Cooperating with the disposition of the assets produced more value than would have happened if individual

[90] Protocols are case-specific, private international contracts between the parties of an insolvency case that strive to promote efficiency in the coordination of cross-border cases and their resolution, including worldwide asset identification, collection, and distribution for the benefit of all creditors: Anthony V Sexton, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation' (2011-2012) 12 Chi J Int'l L 811; Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587

[91] *In re Maxwell Communications Corp* Case No 91-B-15741 (TLB) (Bankr SDNY Jan 15 1992).

[92] Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re Maxwell Communication Corp,* Case No 91-B-14741 (TLB) (Bankr SDNY Jan 15 1992).

[93] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 592.

[94] *In re Nortel Networks Inc* 669 F3d 128 (3d Cir 2011).

jurisdictions had dealt only with their domestic assets. However, the parties could not then agree on how to allocate the proceeds of sale without resolution through the courts, which heavily dissipated the benefits gained from the initial cooperative efforts.[95]

7.3.3 Blackwell

The Blackwell case[96] concerned Inverworld, which collapsed in a scandal after defrauding investors in the United States and several Latin American countries. Insolvency proceedings were brought in the United States, Cayman Islands, and England. A protocol was agreed that led to the dismissal of the English insolvency proceedings if certain conditions to protect claimants were met between the other two courts. The US Court was tasked with resolving the outstanding legal and factual issues, while the Cayman court oversaw the creation and operation of the mechanism formulated to distribute the claimants' proceeds, with full recognition and enforceability agreed between the courts. It is generally considered that this led to a successful worldwide settlement at a much lower cost that would have occurred if the three courts struggled for power over the case.[97] The key factor that is attributable to the success of this case and its protocol is the substantial amount of communication aimed at resolving the global case. The judges involved:

> actively encouraged the professionals to engage in cross-border negotiations with an emphasis on non-litigious solutions despite plausible conflicting claims for several groups of claimants under each of the seven arguably applicable laws...Judicial activism combined with a first-rate performance by the professionals produced spectacularly fast, fair, and efficient results.[98]

7.3.4 Nakash[99]

The Nakash protocol is an example of a protocol agreed with a civil law country, Israel, and the United States. The fact that it was agreed with a civil law country is significant because of the strict adherence to statutory law required of a civil law judiciary, which often inhibits effective co-operation in such cases due to a lack of legislative standing to do so. This potential obstacle arising from legal origin differences was noted in Chapter 4 section 4.3.2 and discussed in some detail by Magnano.[100] Express statutory permission to enter into the protocol was required, which was perhaps surprisingly found by the Israeli court. It also

[95] Jay L Westbrook, 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 Tex L Rev 1473, 1490-1491.
[96] San Antonio Express News v Blackwell (In re Blackwell) 263 BR 505.
[97] Jay L Westbrook. 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of A Central Court' (2018) 96 Tex L Rev 1473, 1493.
[98] Jay L Westbrook. 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of A Central Court' (2018) 96 Tex L Rev 1473, 1493.
[99] Order Approving Cross-Border Protocol, Granting Comity to Jerusalem District Court Letter of Request, Setting Damages for Initial Stay Violation and Granting *Nunc Pro Tunc* Stay Relief in Respect of Alleged Further Stay Violations, *In re Nakash* Ch 11 Case no 94-B-44840 (NRL) (Bankr SDNY May 23 1996)
[100] Renato Magnano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 317.

focused on enhanced coordination of court proceedings between the civilian judiciary of Israel and the American court along with coordinating the actions of the parties. This enhanced coordination was needed because of the increased level of involvement in the civilian court setting required to harmonise the international proceedings.[101] Flaschen and Silverman's view is that the success of this protocol can largely be attributed to the willingness of the two courts to work together along with the extraordinary agreements made to harmonise and respect the actions of each other. [102] The particulars of the case are less important in this context than the nature of the two systems and the fact that they were able to conduct proceedings in a coordinated fashion despite the fundamental differences between the legal systems, that might otherwise have inhibited effective co-operation to the extent reached between the parties and the court.

Finally, the Lehman bankruptcy is a particularly complicated example of an international cross-border insolvency case.[103] The Lehman Brothers insolvency resulted in 75 separate insolvency proceedings[104] subject to the laws of nine different countries all of which had competing and sometimes conflicting policy and social influences.[105] The Protocol[106] itself was agreed as a response to a lack of applicable law that would bind all of the parties in the Lehman bankruptcy and was broadly similar to the UNCITRAL Model Law containing references to the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases by the American Law Institute.[107] We would consider it exceptional in this discussion.

7.3.5 Limitations of the United States' approach to cross-border co-ordination

Protocols have been powerful tools in cross-border insolvency cases heard in the United States but are also flawed. In a protocol, it is still possible for a party to 'hold-out' for a better deal to the detriment of the collective and they do not resolve territorial disputes about substantive law.[108] There have been a variety of cross-border cases resolved through the use of protocols, but with a broad range of success and efficiency. That said, many judges as will

[101] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 593.
[102] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 594.
[103] For a detailed account of the Lehman Brothers bankruptcy, see Stephen J Lubben and Sarah Pei Woo, 'Reconceptualising Lehman' (2014) 49 Texas Int'l L Rev 297 and more recently, for a detailed discussion and analysis of the Lehman insolvency, see Paula Moffat, 'In a Digital Age and Where Significant Assets May Consist of Dematerialised Instruments, are our Existing Rules Sufficient to Provide a Fair and Effective Regime Governing the Location of Assets?' (PhD Thesis, Nottingham Trent University 2016).
[104] Sheryl Jackson and Rosalind Mason, 'Developments in Court-to-Court Communications in International Insolvency Cases' (2014) 37(2) UNSW L J 507, 507.
[105] Jamie Altman, 'A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency' (2011) 12 San Diego Int'l L J 463, 466-467.
[106] Lehman Bros Holdings Inc, Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies (May 12, 2009).
[107] 'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases' (The American Law Institute and the International Insolvency Institute 2001).
[108] Anthony V Sexton, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation' (2011-2012) 12 Chi J Int'l L 811, 823.

be shown in Chapter 8 in the responses to the judicial survey, would still prefer to draft their own bespoke protocols on a case by case basis.

As with provisions in the EIR Recast, (Article 26) the US courts have the discretion to refuse to recognise a plan that contains some action that would be manifestly contrary to public policy under the rules of Chapter 15 in cross-border insolvency cases.[109] This exception provides flexibility to avoid recognising foreign insolvency proceedings, as public policy is a decision based in national law, which was discussed in some detail in relation to the EIR Recast in Chapter 5 section 5.5.3.

Protocols also often contain a similar public policy exceptions. The exception can have a broad range of interpretations from differences in substantive law, to conflicts with fundamental constitutional principles.[110] This is particularly acute when a protocol attempts to bring together both civil and common law jurisdictions.[111] As observed by Sexton:

> Courts in civil law jurisdictions meticulously scour their civil codes for authorisation to engage in any practice, but because protocols frequently interact with rules limiting ex parte communications and communications between courts, civil law courts have found their authority to endorse protocols lacking.[112]

It is not entirely clear to us in our JCOERE research that despite the fact that some civil law jurisdictions such as France and Italy have standardised rules relation to co-ordination and co-operation as discussed in Chapters 2 ,3 and 5 that all civil law countries have the same approach. Nor is it clear that all common law jurisdictions, would approach the adoption of co-ordination protocols without considerable and careful consideration of the constitutional and administrative law principles mentioned in Chapters 3 and 5. Otherwise the information on what co-ordination looks like or indeed might look like in the EU in reality is sparse, and this would be equally applicable both within the EU and in relation to any one jurisdiction within the EU co-operating externally. Although some of the guidelines referred to in Chapter 6 (section 6.4.3 and 6.4.5), notably the European JudgeCo Principles and Guidelines[113] along with the ELI Report[114] as well as the well-known ALI-III Principles, [115] do refer to the usefulness of creating protocols to co-ordinate cross-border proceedings, evidence of their use by courts in EU countries in strictly EU cross-border cases is not prevalent. Nor is there significant evidence of use by courts in EU of such protocols in external cases, other than in relation to

[109] 11 US Code § 1506 - Public policy exception.
[110] Anthony V Sexton, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation' (2011-2012) 12 Chi J Int'l L 811, 824.
[111] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 593-94
[112] Anthony V Sexton, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation' (2011-2012) 12 Chi J Int'l L 811, 824.
[113] 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').
[114] 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').
[115] 'ALI-III Global Principles for Cooperation in International Insolvency Cases' (International Insolvency Institute 2017) (hereinafter referred to as the ALI-III Global Principles)

cases deliberated upon in England and Ireland, a sample of which are mentioned in Chapter 5.

7.4 Competition in the International Restructuring Forum Context

The United States provides an interesting example of how competing for forum in international cross-border corporate insolvency cases may (or may not) arise. As the restructuring frameworks implemented as a result of the PRD may not be covered by either the EIR Recast or the Judgments Regulation, it has already been noted that there may be opportunities for competition between European jurisdictions for restructuring business. The Netherlands has already been clear that they would like to become the next restructuring destination post-Brexit, as was discussed in Chapter 3 section 3.5.4, and also currently have plans to create a non-EIR Recast procedure similar to the English Scheme of Arrangement. Ireland already has an English Scheme of Arrangement process in place used effectively recently in *re Ballantyne plc.*[116]

Competition for international (or European) forum also brings to mind the "race to the bottom" debate. McCormack has refuted the "race to the bottom" argument in the realm of European cross-border insolvency, suggesting that in a European context, involuntary or poorly adjusting creditors can also be protected by secondary proceedings, 'which truncates the possibility for a 'race to the bottom' leaving only opportunities for a 'race to the top.''[117] This protection is not available from state to state in the USA as all creditors who are party to a bankruptcy will be governed by the same federal bankruptcy regime. Co-ordination procedures and co-operation obligations contained in the EIR Recast add further assurance in this vein. [118]

7.5 Comparing Co-operation in the US with the EIR Recast

7.5.1 Comparing procedural co-ordination

Without a recognised procedural framework such as the EIR Recast, coordination tends to be either subject to soft law or at the discretion of the parties. This can lead to a delay in acting quickly to seek recognition and coordination, as happened in the *Nortel* case, which resulted in two or more independent insolvency proceedings with little or no co-operation and a subsequent loss of value. The *Lehman* case is also an example where a delay caused serious

[116] Ruairi Rynne, 'Landmark Scheme of Arrangement in Ireland' (2019) Autumn Eurofenix 30. See also Irene Lynch Fannon and Gerard Murphy, *Corporate Insolvency and Rescue* (Bloomsbury, 2012*). Ballantyne RE Plc & Companies Act 2014* [2019] IEHC 407. From the William Fry Solicitor's note: 'This case demonstrates the effectiveness of an Irish law scheme of arrangement (which has been on the statute books for over 50 years) as a tool to implement complex international debt restructurings. Together with the extensive use of the examinership process to restructure insolvent Irish businesses it highlights the effectiveness and robustness of Ireland as a jurisdiction in which to pursue such restructurings.'

[117] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169, 181.

[118] See further, Chapter 3 of JCOERE Report 1.

problems as recognition and coordination were not sought for months. Whereas early co-operation facilitated perhaps by a regulation such as the EIR Recast promotes earlier contact.

> Early co-operation permits the establishment of protocols and lines of authority in a cooperative direction from the start. It also has the benefit of being put in place before tactical considerations have become so apparent as to make it difficult for the parties to agree.[119]

The presence of an overarching regulation applicable to all jurisdictions helps to create certainty in the procedural aspects of a cross-border insolvency cases. Our engagement with the European judiciary gave a clear indication that judges bound by the EIR Recast would not argue with a request for recognition of foreign main proceedings because the wording of the provisions is obligatory. While co-operation and recognition between courts in the USA in relation to inter-state insolvency and restructuring proceedings is not a problem due to the federal nature of bankruptcy, it does arise in cross-border cases occurring within the US Bankruptcy Court when there are multiple international proceedings occurring within the same case. That said, the use of 'sufficient connection' rather than the COMI test seems to continue to be the rule, even when a case falls under Chapter 15, which provides for a COMI test. This flexibility of interpretation is in part due to the ability of common law courts such as the US, Ireland, and the UK to interpret the test of COMI in a way that is more likely to make jurisdiction possible in more spurious situations.

The examples of coordination of international cross-border procedures in the USA may also serve as useful instruments of reference for coordination efforts between EU Member States when having to deal with potentially competing restructuring procedures.[120] However, bespoke protocols can also be problematic for civil law jurisdictions due to the nature of the judicial role as the applier of statutory law, rather than the interpreter. As aforementioned, a judge would most of the time need some kind of legislative permission to involve him or herself in a protocol that dictated its role in a case. The *Nakash* protocol was a significant exception to this characteristic conflict but is likely due to the relationship between the two relevant jurisdictions (the USA and Israel). Protocols can be created to suit the particulars of a case and provide a flexible and party-specific resolution to cross-border conflicts. However, protocols are also potentially subject to holdouts and will also differ on a case by case basis, though there is also an argument that case specific protocols may be more beneficial than a one-size-fits-all approach.

7.6 Conclusion and Transition

This Chapter has focused on the methods and means used by the United States in both its cross-border interstate bankruptcies as well as in the international restructuring arena. Co-

[119] Jay L Westbrook. 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of A Central Court' (2018) 96 Tex L Rev 1473, 1491.
[120] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 599.

operation in this context has focused on how certain conflicts of laws issues are resolved in a place not covered by the EIR Recast, namely forum determination and the coordination of procedures. These comparisons are useful as the EU is itself both a species of federal organisation somewhat similar to the United States but is also a confederation of states that exhibit international relationships, similar to the United States' relationships with other countries. Thus, looking at the US from an interstate and international bankruptcy perspective offers some insight into the mechanisms that exist for co-operation both within and outside of the EU that may be instructive in both insolvency generally and restructuring particularly. Drawing parallels to the current paradigm of co-operation under the EIR Recast, the inevitable conclusion is that the EIR Recast provides certainty and a harmonised approach that will be lacking should there be a proliferation of restructuring procedures that Member States choose to keep out of the EIR Recast.

The next Chapter will present the results of the JCOERE Judicial Survey. It is organised along several key themes: experience with cross-border co-operation; awareness of co-operation guidelines; demand for resources among the judiciaries of the EU; and interpretative observations in relation to judicial training.

VIII. Chapter 8: JCOERE Focus Group Survey on Judicial Cooperation Guidelines Awareness, Use, and Recommendations

8.1 Introduction JCOERE Survey of Judicial Practice

As noted in the first Chapter of this Report, the JCOERE Project is focused on the obligation imposed on courts by the EIR Recast[1] to co-operate in cross-border insolvency and restructuring matters. Chapter 2 of this Report outlines the provisions. Chapter 3 describes procedural and other obstacles to such co-operation which are added to the substantive obstacles also summarised in Chapter 3 (and discussed in detail in the JCOERE 1 Report). Chapter 5 outlined case law illustrating some real examples of non co-operation. On the positive side, Chapter 4 described the many policy initiatives followed by the EU and its institutions, as well as related organisations such as the European Judicial Training Network (EJTN) and the European Law Academy (ERA), to assist in raising the level of cooperation by addressing the issues that might prevent it, such as challenges to the rule of law, a lack of understanding of other legal systems, and mutual trust between jurisdictions. In addition, a number of guidelines have been introduced with the aim of providing frameworks or advice to judges faced with cross-border cases, insolvency/restructuring or otherwise. These were described in a thematic manner in Chapter 6 of this Report.

One of the aims of the JCOERE Project has been to explore awareness of the guidelines described in Chapter 6, their use, and their potential to support cooperation amongst members of the European judiciary. The purpose of this Chapter is to discuss a survey that was disseminated to three separate focus groups of judges within the EU to determine their experience with cross-border cooperation, as well as their awareness of the guidelines applicable to the area of court-to-court cooperation. Some aspects of the survey also reflect themes and observations outlined in Chapter 4 of this report.

[1] Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) *OJ L141/19* (hereinafter referred to as the "EIR Recast").

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

At the planning stage, it was intended to disseminate an English language survey among networks of judges throughout the EU. On the recommendations of our partners at Università degli Studi di Firenze and Universitatea Titu Maiorescu in Bucharest, the team undertook to create the survey in both Italian and Romanian to avoid any reticence to take the survey based on a preference for doing so in their own language. The survey was therefore produced in three different languages (English, Italian, and Romanian) and disseminated to three different focus groups: INSOL Europe Judicial Forum and a selection of additional Irish judges contacted through the members of the JCOERE advisory board;[2] networks of Italian Judges;[3] and the Romanian Magistracy networks.[4] There was a window of approximately one month within which the surveys could be completed, resulting in 17 responses to the English Language Survey, 14 responses from the Romanian Language Survey, and 19 responses to the Italian Language Survey.

The survey was divided into three main sections; the first section contained preliminary questions pertaining to the role, specialism, jurisdiction and, requirements for training, both to become a judge and in relation to hearing insolvency cases. This section was designed to highlight commonalities and differences between the participants and to assist in the categorisation of responses to questions asked later in the survey. The second section focussed on the participants' experience with cooperation and communication in cross-border insolvency cases. The final section then assessed the awareness and use of a list of guidelines, both European and international, that provide advice on how to cooperate and communicate in cross-border cases. Some of these guidelines focus on cross-border insolvency, whereas others are less specialised in nature. The questions in this survey are intended to satisfy one of the tasks under Workpackage 3 of the JCOERE Project, specifically to gauge awareness of cooperation guidelines amongst members of the judiciary and to enhance such awareness.

The responses to the judicial survey give a reasonable indication of the general experience among the three focus groups with cross-border cooperation, as well as the awareness and use of some of the cooperation and communication guidelines. Utilising their responses, it has been possible to find certain correlations among the responses to specific questions and to make certain general observations that will be useful in the context of the JCOERE project. The next section will therefore focus on the judicial experience with cross-border cooperation and the awareness and use of cooperation and communication guidelines. There will also be a short comment on judicial training requirements, as answered by the three focus groups;

[2] The JCOERE Project Team would like to express its gratitude in particular to the Honourable Judge Michael Quinn of the Irish High Courts and Lorna Reid for facilitating the contact with both the INSOL Europe Judicial Forum and the group of Irish judges hearing commercial cases in Ireland. This group of judges will be referred to throughout the rest of this Report as the English Language Focus Group or "ELFG".
[3] The JCOERE Project Team would like to express its gratitude in particular to Professor Lorenzo Stanghellini of Universita degli Studi di Firenze for facilitating the contact with the network of Italian Judges.
[4] The JCOERE Project Team would like to express its gratitude in particular to Judge Nicoleta Mirela Nastasie of the Bucharest Tribunal for facilitating the contact with the network of judges among the Romanian Magistracy.

this discussion will mainly focus on some interpretative issues arising from the survey in this area.

8.2 Observations from the Judicial Survey

In terms of some preliminary data, the survey was answered by 50 judges from 11 different jurisdictions in total. Of these judges, a total of 13 indicated that they only hear insolvency related cases, while 16 hear cases of a commercial or corporate nature, with the last 12 hearing a variety of civil cases.

8.2.1 Judicial experience with co-operation

As identified in the introduction, a key theme to be explored by the survey was the experience that members of the focus group had with cross-border cooperation. It is interesting to note initially that out of the 50 judges responding to this survey, only 16 have had specific training on how to deal with cooperation in cross-border cases (6 in the English Language Focus Group; 4 in Italy; and 6 in Romania). In terms of the experience indicated in relation to cooperation, there were some interesting results, as set out in the table below:

	ELFG	**Italian Judges**	**Romanian Judges**
Insolvency cooperation experience in the EU	**4/17**	**2/19**	**6/14**
Of those, also trained in cooperation	**2/4**	**1/2**	**4/6**
Cooperating on EU insolvency cases only	**3/4**	**1/2**	**2/6**
Cooperating in international insolvency cases	**1/4**	**1/2**	**4/6**
Non-insolvency cooperation experience in the EU	**5/17**	**4/19**	**8/14**
Of those, also trained in cooperation	**4/5**	**2/4**	**3/8**
Cooperation in international non-insolvency cases	**3/17**	**2/19**	**4/14**
Of those, also trained in cooperation	**2/3**	**0/2**	**3/4**

The focus group responses indicate a diverse experience with both cooperation itself and with training in cooperation. Interestingly, it does not actually indicate a strong correlation between the two. Some judges appear to have had to cooperate without any training in the area, while others have had training that they have not yet had to use. In the responses to the English Language Survey, there does seem to be a correlation between the length of service

and experience cooperating in cross-border matters; however, no such correlation exists in the Italian or Romanian responses.

It can be observed from the responses that the reach of current cooperation training seems to be patchy. It is unclear from the survey why this is, but it is something that the Commission may want to consider in coordination with national training initiatives. (See below in the following section).

The responses also indicate that cooperation may not be as widespread as initially surmised within the JCOERE hypothesis. While some of the judges have cooperated both inside and outside of the EU and in both insolvency and other matters, the numbers who have engaged in cross-border cooperation are still less than half of the total number of responding judges.[5] Interestingly, it seems the Romanian magistracy has experienced requests for cooperation more frequently than the judges who responded to the English Language or Italian surveys. Our survey did not collect information that could be specifically useful in identifying why this may be the case, however, it is certainly an area worth exploring. The general response reflected the experience of practitioners as reported at INSOL events, namely that cross border insolvency *issues, as distinct from transactions,* were not that common within the EU, nor were issues requiring the formal need to raise or address court to court cooperation. In contrast the relative frequency in Romania could indicate an interesting characteristic of Romania and the Romanian judiciary, or perhaps be reflective of patterns of trading in newer Member States to the EU, or of those states, which are located centrally within Europe, or which are close to a number of non-EU countries.

It should be noted that because the EIR Recast has only been in effect for a relatively short period of time (26th June 2017), there has been little generation of case law under it. This could be a factor in the low numbers of judges with cooperation experience, as it may be that the issue of cross-border cooperation – as it pertains to the enhanced obligation to cooperate in the Recast – has not yet arisen for the judges within these groups. That said, as the obligation becomes more known and companies become even more global, training in this area should certainly be more targeted to ensure those who may be asked to co-operate, have had the training to do so effectively. Given the COVID 19 crisis current at the time of writing and the likely impact to the economy, which will in turn almost certainly result in an increase in insolvencies internationally over the next number of years, cross-border cooperation may become even more important to ensure that the benefits of cooperation, such as effective restructuring and the preservation of the maximum value of an insolvency are achieved. This, in turn it is argued, highlights the need for increased awareness of the EIR Recast and its effects and the importance of preventive restructuring processes.

[5] Also less than half of those who responded to the survey in each focus group.

8.2.2 Awareness and use of co-operation and communication guidelines

The second key theme of the survey is the awareness and utilisation of various cooperation guidelines that have been developed either internationally or at a European level, in connection with the original EIR.[6] As the EIR Recast only came into force in 2017, it is perhaps unsurprising that a new specific cooperation and communication guideline has not yet been fully developed to reflect the enhanced obligation to co-operate within the EU, though a project to update the CoCo guidelines[7] is ongoing with an expectation that a revised set of guidelines will be released in late 2020. This project is discussed further at the end of this section.

While the CODIRE Project[8] was completed following the period in which the EIR Recast came into force, its reference to cooperation and communication are not as direct as some of the more targeted guidelines listed below. The same applies to the ACURIA Best Practices.[9]

The JCOERE Judicial Survey noted 14 different cooperation and cross-border insolvency guidelines and recommendations, 9 of which were discussed in detail in Chapter 6 of this report in terms of shared themes that arise in cross-border insolvency cases requiring cooperation.[10] The resources were chosen on the basis that they had some connection with both cross-border insolvency law and advice or guidelines about dealing with such cases from a cooperative perspective, or because they touched on the benefits of cooperation in some way. Such guidelines range from bespoke communication and coordination guidelines, to recommendations on how to deal with certain issues arising in cross-border insolvency and restructuring. The level of awareness of each of these guidelines in each focus group is set out in the table below:

[6] Council Regulation (EC) no 1346/2000 of 29 May 2000 on insolvency proceedings *OJ L160/1* (hereinafter referred to as the "EIR").
[7] Bob Wessels and Miguel Virgos, 'European Communication and Cooperation Guidelines for Cross-Border Insolvency' (INSOL Europe Academic Wing 2007) (herineafter referred to as the "CoCo Guidelines").
[8] Lorenzo Stanghellini, Riz Mokal, Christoph G Paulus, and Ignacio Tirado, *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018) (hereinafter referred to as "CODIRE").
[9] Catarina Frade, et al, 'Assessing Courts' Undertaking of Restructuring and Insolvency Actions: Best Practices, Blockages, and Ways of Improvement' (European Commission 2019) (hereinafter referred to as "ACURIA").
[10] Chapter 6 focuses on the Model Law, the ALI-III Global Principles, the World Bank Principles, JudgeCo Principles and Guidelines, CoCo Guidelines, CODIRE, ACURIA, and the ELI Report. The ADB Standards are considered in the annexe to Chapter 6.

	ELFG Out of 17	Italian Judges Out of 19	Romanian Judges Out of 14
Coco Guidelines	**12**	**1**	**1**
JudgeCo Principles and Guidelines[11]	**11**	**3**	**0**
The UNCITRAL Model Law[12]	**15**	**4**	**2**
EBRD Core Principles[13]	**3**	**0**	**0**
INSOL Europe Judicial Wing Book[14]	**9**	**2**	**1**
The ELI Report[15]	**7**	**2**	**0**
CERIL Statement[16]	**5**	**2**	**0**
CODIRE	**5**	**2**	**0**
ACURIA	**3**	**1**	**0**
ALI/UNIDROIT Principles[17]	**5**	**6**	**1**
World Bank Principles[18]	**7**	**0**	**0**
ALI-III Global Principles[19]	**4**	**0**	**0**
ALI General Principles	**4**	**0**	**0**
The ALI-III Guidelines[20]	**5**	**0**	**0**

It is interesting to note that the vast majority of those responding to the English Language Survey were aware of at least one of these guidelines (15/17). This is perhaps unsurprising for

[11] '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").
[12] 'UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation' (United Nations 2014) (hereinafter referred to as the "Model Law").
[13] 'Core Principles for an Insolvency Law Regime' (European Bank for Reconstruction and Development 2004) (hereinafter referred to as the "EBRD Principles).
[14] *The Role of the Judge in the Restructuring of Companies within Insolvency* (Judicial Wing of INSOL Europe 2013) (hereinafter referred to as the "INSOL Europe Judicial Wing Book").
[15] 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").
[16] Conference on European Restructuring and Insolvency Law (CERIL) Statement 2018/01 in Insolvency Regulation (Recast) and National Procedural Rules
[17] 'ALI-UNIDROIT Principles of Transnational Civil Procedure' (American Law Institute and UNIDROUT 2004).
[18] 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (World Bank 2011) (hereinafter referred to as the "World Bank Principles").
[19] 'ALI-III Global Principles for Cooperation in International Insolvency Cases' (International Insolvency Institute 2017) (hereinafter referred to as the ALI-III Global Principles).
[20] 'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases' (The American Law Institute and the International Insolvency Institute 2001).

two reasons; first, the majority of the judges within this group were derived from the INSOL Judicial Forum. Secondly, the majority of the respondents (16/17) indicated that they attended international judicial events, predominantly INSOL Europe Judicial Forum meetings, wherein it is common to discuss European level guidelines and reports. Among the Italian and the Romanian groups, there was comparatively less awareness of the guidelines, with 8 of the 19 respondents for Italy and 4 of the 14 respondents for Romania indicating awareness of one or more of the 14 resources listed in the survey.

There appears to also be an interesting connection between the attendance at international events and knowledge of at least one of the guidelines. Of the 7 Italian respondents who had attended international events, 4 were aware of at least one of the guidelines. 1 of the 4 Romanian respondents who were involved in international events were also aware of at least one of the guidelines. The same filter when applied to the English Language Survey Group revealed that 14 of the 16 who attended international events also expressed awareness of at least one guideline. It is perhaps an obvious connection, but it does support the Commission's training policy as described in Chapter 4 to involve judges in networks and events to encourage Europeanisation of the judiciary. Extending this analogy here, it is recommended to encourage a greater proportion of judges (and practitioners) in the Member States, who may be involved in cross-border cases, to attend networking and training events hosted by organisations such as the EJTN or the Judicial Forum. It is argued that this will help increase awareness of the resources available to them to aid in meeting the enhanced obligation to co-operate under the EIR Recast.

Regarding the use of cooperation guidelines, 4 of the total number of judges surveyed (50) have referred to such guidelines to aid them in communication and cooperation in cross-border insolvency cases. These 4 judges were split between the English and Italian Language Surveys. On a related point, almost half of the judges surveyed had a preference for creating a protocol on a case-by-case basis; this may be indicative of a number of things, for example, a desire amongst some of the judges to consider things flexibly and perhaps a preference not to be constrained by a specific set of guidelines, which may be perceived as not being appropriate in every cross-border circumstance. The view that protocols created on a case-by-case basis may be preferable was also expressed by some members of the judiciary at INSOL Europe events.[21] This could indicate that members of the judiciary are aware of the possibility raised by the JCOERE project that substantive and procedural issues may arise that will need to be addressed on a case-by-case basis rather than with set guidelines, which may not accommodate them.

It is interesting to note, however, that while only 4 judges overall said that they had ever actually referred to the guidelines when dealing with a cross-border case requiring

[21] This was discussed by the Judicial Wing Panel: 'Cooperation and Communication between Judges in Cross-Border Insolvencies under the EIR Recast' (INSOL Europe Annual Congress, Athens, 5th October 2018). The Judicial Wing Panel was composed of Judge Caroline Costello, Judge Luciano Panzani, and Emil Szczepanik, Ministry of Justice, Poland.

cooperation, it seems that those who did refer to guidelines referred to several of them, with different guidelines being referred to in the different cohorts. The English and Italian language groups both referred to the CoCo Guidelines, the Model LAW, and the ALI/UNIDROIT Principles, with the English Language respondents also referring to the JudgeCo Principles, the EBRD Guidelines, the Judicial Wing, the ELI Project, and the ALI Transnational Insolvency Principles. Again, it is possible that membership in the INSOL Europe Judicial Wing has led to a wider awareness of resource among its members. Given the broad awareness of the Model Law, it is unsurprising that all three groups referred to it. The Romanian group was more familiar with international principles, such as the EBRD and the World Bank principles and did not refer to any of the more European guidelines, such as JudgeCo and CoCo. As suggested in relation to other aspects of the survey, perhaps this is a reflection of its proximity to non-EU countries.

8.2.3 Desired access to information

Amongst the respondent judges, there seemed to be a real interest in having access to information either in relation to substantive rules on preventive restructuring (43/50), or case studies demonstrating instances of cooperation (44/50), or both. That said, even accessing information is not a clear-cut issue for members of the judiciary. Approximately half of the respondents across the three groups indicated that there were rules applicable to the way in which judges could access information external to a case; approximately half indicated that there were not. One possible explanation for the contradicting responses, particularly within the same jurisdiction, was that some respondents answered the question as though a proceeding had already commenced before their court, whereas others were answering more generally; in certain jurisdictions, a judge can only formally rely on sources that are opened to them by the parties during the proceedings. In some countries, it appears there are specific rules as to permitted sources of information. Thus what may have seemed quite a simple question at the outset has turned out to be more multifaceted that we had imagined and a question still remains as to what kind of information judges would be able to access from outside sources and the methods by which they could go about doing so.

As noted at the beginning of this section, a set of guidelines specific to communication and coordination of cross-border insolvency and restructuring cases that includes the enhanced obligations set out in the EIR Recast is not yet available. As mentioned previously, a project to revise the CoCo Guidelines in line with the EIR Recast has been ongoing since the end of 2017;and a working group comprised of academics, judges, and practitioners belonging to both INSOL Europe and the Conference of European Restructuring and Insolvency Law (CERIL) have been involved in this considerable task.).[22] A survey carried out by the working group resulted in recommendations including, naturally, updating the text to reflect the language of the EIR Recast and the Directive on Preventive Restructuring. There is also a suggestion to

[22] Under the stewardship of Tomáš Richter Of Counsel at Clifford Chance and Charles University Prague and Paul Omar, INSOL Europe.

examine the case for specific provisions addressing the position of groups and to consider the relationship between insolvency office-holders and the group coordinator. Also, forthcoming will be proposals to enhance communication requirements in the case of foreign creditors, where the current rules might need further elaboration on the duty of practitioners to communicate outside their jurisdiction. The possibility of a communications template (minimum information to be supplied) and whether undertakings should take any particular form have also been mooted. Work on a draft is still continuing and is expected to see light in late 2020.[23]

8.2.4 Judicial training requirements

Within each focus group, discrepancies have been observed in the responses pertaining to the questions on required training. Respondents were asked: "Before you qualified as a judge or administrative decision-maker, were you required to take specific training?" This was an open question in that respondents were then invited to write, if applicable, what the relevant training requirements were in their jurisdiction to become a judge in a comment box. The question did not specify "formal" training or educational prerequisites, so it is unsurprising that there was a variety of interpretations of this question, leading to conflicting responses in some instances.

As covered in the JCOERE Questionnaire and discussed in Chapter 4 of this Report, training and qualification requirements to become a judge differ among the Member States of the EU. However, the variety of answers to this question, particularly from participants in the same jurisdiction, points more towards a non-uniform interpretation of the question. In light of this, it is difficult to draw any reliable trends from this particular questions, however, there were a number of similarities that arose in relation to most, or at least some, of the jurisdictions: a university (law) degree with some requiring post-graduate degrees; practice experience as a lawyer; a period of formal judge training; internships with courts or firms; exams; and certain character requirements.

The preliminary questions of the survey also queried whether judges in the three focus groups were required to undertake training to hear insolvency related cases. The overwhelming response was that such specialist training is generally not required, apart from 4/19 of the Italian focus group and 1/17 in the English Language group. Of the 13 total respondents across the three focus groups who hear only insolvency cases, only 1 from the Italian group indicated that they were also required to undertake any specialist training. As 7 of the Italian respondents also indicated that they hear only insolvency cases, it must be queried whether the training indicated by that one respondent is actually a requirement, or if it is optional but perhaps undertaken as a matter of practice. It is also possible that respondents who answered

[23] The team would like to express its gratitude to Dr Paul Omar for this useful update on the progress of the revision of the CoCo guidelines in line with the EIR Recast.

in the affirmative were doing so in light of insolvency-related training that they had undertaken in the past as part of their role.

A further question asked whether there were requirements for Continuing Professional Development (CPD) if a judge specialised in insolvency law, which could be answered by providing some commentary on what was required. While over half of the respondents indicated some requirement for CPD, the answers do not correlate within the same jurisdictions in many cases. In addition, this question received responses that do not align with those who had to take training to decide insolvency cases in the first place or with the numbers who hear only insolvency cases. As was the case with the previous question, it is possible that respondents interpreted *requirement* along the same lines as custom and practice; thus, while it may not be a requirement that CPD is undertaken, it may be that it is generally accepted practice that a judge would do so.

With regards to the content of judicial training in the EU, section 4.6 of Chapter 4 of this Report gives a much clearer picture of what is required among the 11 European jurisdictions that contributed to the JCOERE Questionnaire.

8.3 Analysis of and Reflection on the Results

The main purpose of the survey of the three judicial focus groups was to assess the awareness of current existing guidelines pertaining to communication and cooperation and to gauge experience with cooperation among the respondents. The EU's promotion of judicial involvement in networks and training to encourage the development of a European judicial culture coincides with the importance of such networks for the dissemination of knowledge about resources to assist with the EU derived obligations to cooperate between the courts of different jurisdictions. While the correlations are not equal across the three focus groups, there is certainly a correlation between attendance at events such as the Judicial Forum and awareness of such guidelines among the English Language survey participants. While knowledge of guidelines will obviously not impact judicial experience with cooperation on a case-by-case basis, it does point to the effectiveness of networks and training in raising awareness of the resources available to judges in cooperation and communication. In addition, it also seems clear that there is not a broad experience of cooperation in cross-border insolvency cases, which could potentially be attributed to the newness of the enhanced obligation to cooperate under the EIR Recast. That said, given the crisis looming for national economies at the time of writing due to the COVID-19 pandemic and associated lock-downs and limitations on business and industry, the potential for a growth in cross-border cases is significant over the next few years.

At the time of writing, the judiciary has also been forced to make a lot of serious changes in the way that they deal with hearings and cases as a result of the inability to hold such hearings in person due to the COVID-19 crisis of 2020. INSOL International conducted a webinar hosted by Judge Nicoleta Mirela Nastasie of the Bucharest Tribunal with Judge Martin Glenn of the

Southern District of New York Bankruptcy Court and Judge Aedit Abdullah of the Singapore Bankruptcy Courts, during which the impact on the judiciary of the COVID-19 crisis, as well as the changes made to accommodate the need for social distancing, were discussed. While these reactions are not directly pertinent to cooperation, it is true that the experience has been eye-opening in particular for traditionalist judges who may have been resistant to virtual options prior to these being necessitated by the crisis. Virtual tools not only make it easier for parties to access courts and each other, but may well enhance the possibility of cooperating in cross-border cases. Judge Aedit Abdullah acknowledged that the Singapore judiciary may have had to order equipment and even laptops to accommodate the needs of virtual courtrooms, but the fact is that judges have been able to do so despite a common reticence towards the adoption of new technology. As noted by Judge Martin Glenn, "Financial distress does not know geographical boundaries" and as companies continue to expand into global enterprises, the administration of justice must find a way to keep up, including the facilitation of cooperation between courts.

While it was also recognised that there are differences in the level of discretion that judges have in common law jurisdictions like the United States and Singapore to adopt new methods of administering justice, Judge Nastasie was absolutely clear that she did not believe that the civil law jurisdictions were especially different, particularly given the obligation to cooperate under the EIR Recast and the fact that some Member States have also adopted the UNCITRAL Model Law. While judges may not have the same discretion to choose how to run their courts, there is no reason why new methods cannot be mooted and passed as new procedural legislation that could lend an air of harmonisation to cooperation and communication in cross-border insolvency.

Given the likely increase in cross-border insolvency and restructuring cases, there is also likely an increased need for cooperation so that EU judges can meet the enhanced obligations set out in the EIR Recast effectively. The current prevalence of virtual training and interactivity due to the inability to meet in person as a result of travel restrictions presents an opportunity to increase the reach of training in cooperation and the awareness of guidelines. Almost global acceptance among legal academics and judges of this "new normal" of online hearings and information delivery should make reaching a greater number of the judges, who may need training in cross-border court cooperation, far less difficult than requiring travel away from home. The crisis has already made the world much smaller and increased the flexibility of working environments. It could also make a positive change in terms of the acceptance of more extensive virtual training initiatives that could reach a far greater number of judges.

IX. Chapter 9: Reflections, Conclusions, and Recommendations of the JCOERE Project

9.1 Introduction: The JCOERE Research Project

This chapter will provide some reflections based on the two Reports, which have been presented by the JCOERE Project. The Project began with the obligations imposed on courts to co-operate with courts in other jurisdictions and with insolvency practitioners in the European Union, which were introduced in the EIR Recast 848/2015. The obligations were newly introduced in the Recast Insolvency Regulation and as the Regulation itself did not come into force until June 2017, it is very early on in its application, and quite early to assess the overall impact of these enhanced obligations. As the European Commission had published an intention to address corporate failure and rescue in its policy document entitled *'A New Approach to Business Failure'*[1], it was appropriate to consider preventive restructuring processes in light of the operation of the EIR Recast and in particular, in light of the co-operation obligations contained therein. Thus, the JCOERE Project hypothesis was that the co-operation obligations would be particularly problematic in the context of preventive restructuring because of the nature of the substantive rules involved in restructuring, which would be coupled with existing challenges to co-operation described as procedural in nature. In short, the question was whether the co-operation obligations would meet particular obstacles, both substantive and procedural, in the context of preventive restructuring.

9.2 The Preventive Restructuring Directive

Just as the JCOERE project got underway, progress in relation to the final passing of the preventive restructuring directive advanced significantly. As outlined in Chapter 5 of Report 1, the PRD 1023/2019 was passed in June 2019. Accordingly, against a backdrop of lively academic commentary and considerable policy engagement from the EU Commission, the JCOERE project began an interrogation into the key substantive rules, which were both core

[1] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee "A new European approach to business failure and insolvency" Strasbourg, 12.12.2012, COM (2012) 742 final.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

to a preventive restructuring process and likely to be problematic in terms of the type of recognition and co-operation envisaged by the EIR Recast. Based on experience with the Irish preventive restructuring process – the Examinership process – and familiarity with English Schemes of Arrangement, the JCOERE project identified the following rules as being particularly challenging to co-operation across jurisdictions:

- Provision for **a stay** of individual enforcement actions.
- Focus on a **debtor in possession** model.
- **Cram down** of **dissenting creditors**, including intra class cram down and more importantly **cross class cram down.**
- Protection of new and interim financing of a restructuring.
- The role of a court or administrative authority in approving a restructuring plan.

9.2.1 Methodology

In addition to a doctrinal approach to existing preventive restructuring processes with which we had familiarity, namely the Irish examinership and Scheme of Arrangement process and the similar Scheme of Arrangement process in the UK we also adopted a comparative approach in relation to jurisdictions within the EU.

The project conducted a survey of 11 Member States to gauge both existing preventive restructuring frameworks and likely attitudes to implementation of the Directive within these Member States. We enlisted the help of additional contributors beyond the consortium across the EU to complete this survey which is described in detail in Report 1. In addition as described below we also conducted a survey of members of the European judiciary for the purposes of this second Report.

9.2.2 Different approaches to preventive restructuring in the EU

Pertinent to the issues of both recognition and future co-operation between courts and between courts and insolvency practitioners, was the discovery of considerable differences amongst Member States both in relation to existing laws and in relation to proposed implementation of the Directive. These differences were underpinned by a lively and contested academic debate on the merits of preventive restructuring, which was also reflected in the approach of lawmakers within the European Union. While Report 1 of the JCOERE Project provides detail on different approaches within the surveyed states, Report 2 summarises, in Chapter 3, these different approaches through the utilisation of a taxonomy broadly categorising the approaches along a spectrum representing those interested in what is termed ‘robust restructuring processes’ and those Member States, which are resistant to preventive restructuring.

The fact that there are these differences is underpinned by the broad range of choice provided in the Directive. Even though aiming to harmonise an approach to business failure and preventive restructuring, there are so many options provided for in the Directive that it is a

fairly weak harmonising instrument. This will obviously present challenges in terms of recognition and in terms of co-ordination as envisaged by the Regulation.

The Directive is also somewhat unusual in its characteristics in that it does not envisage a harmonising 'floor of rights' which one might see in the area of employment law for example or set of 'minimum standards' which one might see in environmental law. Instead Member States must comply with the Directive and implement a preventive restructuring process, but this does not mean that they cannot have additional restructuring processes, which do not exactly mirror the principles of the Directive.

Not only that but, as is pointed out in both of our Reports, there is some mismatch or a lack of complementarity between the terms of the Directive and the EIR Recast. This means that a restructuring process may or may not be included in the EIR Recast. As discussed during the course of this Report, a process outside of the Regulation is not covered by both the recognition provisions or the co-ordination provisions. This is not unusual amongst a number of Member States; examples of this set of affairs are available in France, where some of the restructuring procedures are covered by the Regulation and others are not. In Ireland, for example, the Examinership process is covered by the Regulation and the Scheme of Arrangement process is not. The same applies to the new Dutch WHOA legislation, where one procedure is envisaged to be included in Annex A and the other is not. Furthermore, as identified in this Report, a conscious choice may be made by the Member State to create a procedure, which would sit outside of the Regulation.

9.3 The EIR Recast 848/2015

As described, the JCOERE Project was focussed at the outset on the interesting co-operation obligations imposed on courts in relation to both individual debtor proceedings and groups. These obligations, in addition to the impetus for their creation, were discussed in detail in Chapter 2. However, co-operation is also linked to the concept of recognition in the EIR and so the co-operation obligations will only apply to insolvency proceedings to which the Regulation applies. As we see from the discussion in the previous section, recognition of various restructuring processes may not even arise as the processes may be excluded from the EIR Recast.

Furthermore, even if a process is included in the Regulation, there is the possibility that main proceedings will be accompanied by secondary or territorial proceedings. Given the nature of the creditors' interests and the challenge to those interests, which is inherent in preventive restructuring, it may be very likely that this eventuality will transpire following implementation of the PRD by Member States. Therefore, co-operation will be important as it is a real issue where a number of different proceedings are being run.

However, the focus of our work was not on the original set of problems raised by the Regulation, which stem from the COMI concept and move through when secondary or territorial proceedings might be opened. Rather, our focus was on the co-operation

obligations; the first part of our hypothesis that substantive rules, which are inherent in preventive restructuring, might be particularly problematic is borne out, we would argue, by the significant levels of theoretical disagreement and policy debate, which we discovered in the course of our research. While the PRD does set out essential basic principles in the form of minimum standards for restructuring frameworks, the scope and permitted derogations have made such disagreements possible, creating a fertile ground for further debate and the potential for not insignificant diversity among the Member State frameworks created under the PRD. These debates and disagreements will be aggravated by the heightened possibility of secondary proceedings being a more likely eventuality because of the very nature of restructuring.

The variety of preventive restructuring processes allowed for, both under the PRD and outside of it, will aggravate this issue. Most importantly, the PRD will not be implemented across the EU until 2021 and so it is early days to predict how all of these variations will play out.

9.4 Co-operation as a Separate Concept from Recognition

Because it is early days in terms of describing how co-operation obligations may be treated in national courts, our discussion in Chapter 5 of some conceptual analysis of the obligation courts might have to assist a foreign court is pertinent to the nature of the co-operation obligations. In these common law decisions the courts regard the obligation to assist a foreign court or officer of that court as standing separately from the issue of recognition of a proceeding or a court order arising from such a proceeding. It is possible that over time obligations to co-operate will emerge as a separately justiciable concept, not necessarily linked to recognition per se.

9.5 Co-operation and the European Judiciary

We demonstrated in Report 1 both how complex the Preventive Restructuring Directive itself was and the complexity generated around its design and implementation. However, when we turned to procedural obstacles and focussed on the courts and the nature of the obligation per se, we discovered a multilevel range of complexity.

The first issue concerned, of course, when and how the obligation to co-operate would apply. Many questions that arose are generated by the applicability of the Regulation itself. However, additional questions were generated by the terms of the co-operation obligations. These are considered in Chapter 3 and include unanswered questions of liability and consequences in the event of non-compliance with the obligation.

In our applied research, which included considerable engagement with members of the judicial wing of INSOL Europe, we also discovered a considerable diversity of views amongst European judiciary regarding co-operation in live cases. Some judges expressed particular concern regarding questions of propriety in terms of constitutional and administrative law in the context of co-operating with another court, with others regarding this matter in purely

pragmatic terms. We began to understand the variety of cultures, which persist within the European Union. These differences are clear in areas such as judicial training, required qualifications and judicial appointments but do not end with these practical differences but continue on to areas of judicial reasoning and function. Chapter 4 of this report considers these issues in depth with Chapter 8 complimenting this analysis, by exploring the responses of members of the European judiciary to the survey questions on some of these very issues. There was considerable divergence of experience, outlook and approach to matters of co-operation, particularly when these have been couched in terms of a positive obligation.

Furthermore, even when a generally positive approach was taken to the concept of European integration and co-operation in a broader context, (underpinned in rule of law concepts described in Chapters 1 and 4) we also identified considerable concern regarding the mechanics of co-operation. Even though some mention of specific issues is made in the Regulation, there is little to assist regarding the actual practise of co-operation. In this context, we considered both the experience of the judiciary by engaging positively with them in workshops and through the survey, which is discussed in Chapter 8. We also considered the relevance and applicability of existing guidelines, which are described in Chapter 6. Overall, we found that many judges favoured creating their own protocols, something that is reflective of the US experience, (considered in chapter 7).

9.6 UNCITRAL Model Law and Guidelines

In this context it is not entirely clear that the aspirational, optimistic tone of the guideline documents discussed in Chapter 6 have engaged proactively with legal principles, both substantive and procedural, which will serve to block such co-operation. Of course, principles are not designed ab initio to block such co-operation but there is no reason why they cannot be invoked by parties to yield this effect. The motivation parties may have to do this, including the pragmatic commercial issues, such as costs, loss of business by practitioners and the issue of cases moving beyond jurisdictional reach, are also left unaddressed.

From the responses to the judicial survey analysed in Chapter 8, it can be observed that the reach of current co-operation training seems to be patchy. It is unclear from the survey why this is the case, but it is something that the Commission may want to consider in coordination with national training initiatives, particularly given the emphasis that the Commission has given to judicial networking and training in the last decade, as discussed in Chapter 4.

9.7 Cross Border Insolvency?

Overall one of our most interesting, if not somewhat puzzling discoveries, was the fact that despite companies operating across borders in the EU, when it came to insolvency the cross-border nature of the trading patterns did not seem to result in significant cross-border insolvency issues. This phenomenon was first highlighted to us by practitioners in the field, who constantly expressed reservations regarding the frequency of any of these issues arising in practise, let alone in litigation. There seems to be a pattern of matters, which might have a

cross-border element to them, being resolved informally. Indeed, it may be recalled that a contention in Chapter 2 was that a tendency towards co-operating prior to the introduction of the Recast, in the sense of concluding (in)formal agreements and protocols, was not particularly unusual amongst those practitioners in common law jurisdictions. Furthermore, the prevalence of informal resolutions possibly stems from the fairly rigid conception of the COMI rules, which has now become embedded in EU law given that the first Regulation was passed in 2000.

Though they clearly anticipated that such cases might arise, the judges that we surveyed also had generally low levels of experience with cross-border insolvency cases; this was despite the fact that the vast majority of these judges either specialised in insolvency law, habitually attended international conferences, such as those held by INSOL Europe, or both.

Within this unusual and surprising reality, we discovered some disquiet based on lack of knowledge of other Member States approaches and some level of disquiet regarding the lack of availability of official sources of information regarding the processes of other Member States. This is particularly aggravated in the context of preventive restructuring given the range of approaches and considerable concern about the prospective operation of the obligations in the Regulation. As discussed in Chapter 8, even the matter of receipt of information is far from clear-cut. Co-operation should also be considered in light of the adversarial nature of proceedings in certain jurisdictions, but not others. In other words, in certain jurisdictions, judges must generally rely only on sources that are opened to them by one side or the other during the course of a proceeding. Such a dynamic being present in only some EU jurisdictions may create a situation where some judges can freely attain necessary information, whereas are confined by rules embedded in their legal system.

We also discovered that there was some resistance to a pan European approach from practitioners based on what has been described as jurisdictional reach. This is discussed in Chapter 5 and can be seen in evidence in some of the cases discussed therein where arguments are made that particular actions are not covered by the Regulation and do not require ceding of jurisdiction or do not require compliance with co-operation obligations. These kinds of issues, concerning practitioner and court interest in keeping the litigation within state is also reflected in the more sophisticated US approach.

9.8 Some Future Trends

In Chapter 7 we considered a different federalised group of States, namely the United States, to provide additional understanding to what might emerge in Europe as we continue to focus on integration of Member State insolvency cases, ranging from recognition of forums by second Member States, the possibility of co-ordination between courts of different jurisdictions and how that might be accomplished and ultimately harmonisation of state laws. It is possible that as the European Union becomes more integrated that patterns of recognition, co-operation and forum shopping may begin to reflect patterns which have

emerged in the United States over a longer period of 100 years. More integration implies a greater knowledge of the characteristics of particular jurisdiction, reflected in the taxonomic characterisation which we presented in Chapter 3. Thus certain jurisdictions may appear more attractive as forums for insolvency litigation and this may become an acceptable feature of the European Union.

As we progress incrementally towards harmonisation in Europe and as we discover through our work in preventive restructuring and in relation to cross border practise generally that in fact there is a commonality of concepts (eg. *actio pauliana* and variants thereof) across European jurisdictions it is likely that greater convergence will occur. Against that background deliberate forum shopping driven by a search for efficient and expert courts, a concentration of legal and financial expertise in a particular jurisdiction and a willingness or openness to accept jurisdiction over cases may be a feature of future European practise. It is arguable that this has already developed in relation to the recognition of the jurisdiction of England and Wales as a restructuring centre in the last recession and the recognition of certain states, Ireland, the Netherlands and Luxembourg as the location for the FinCos of inward investing multinational companies.

9.9 Conclusion

In conclusion, it is not entirely clear that there will be an integrated European approach to preventive restructuring. This is for a variety of reasons. First, this is because of scepticism regarding the potential harmonising effect of the PRD. A second complication is the interface between the PRD and the EIR, which we have mentioned in various contexts throughout this report. Thirdly, while in some ways recognition determined by a COMI test under the Regulation may be fairly straightforward in the context of traditional insolvency processes, we do not expect that this will be the case in preventive restructuring; first, because not all of the processes will be covered by the Regulation but secondly even where they are, we expect to see secondary proceedings arising to protect the interests of the parties in the face of such radical rules as an ongoing stay, cram down and cross class cram down. In this context, it is also worth bearing in mind that coordinated group proceedings are optional in nature under the EIR Recast – in that there is an opt out for the insolvency practitioner without the necessity to justify the decision – thus, we anticipate that this may yield a similar result, namely multiple uncoordinated proceedings in order to protect the interests of local parties and perhaps, even as a commercial decision. Fourthly, even if a process implemented under the PRD is covered by the Regulation we remain puzzled by the empirical evidence surrounding a lack of cross border insolvency issues. We consider the role of the practitioner in retaining jurisdiction for whatever reason is important here. Fifthly even where the issues arise we also detected considerable concern from the judiciary regarding the mechanics of co-operation and the interface between co-operation and concern for procedural transparency and consequent issues of administrative and constitutional propriety.

As a way forward, we intend to continue our focus on the procedural and substantive issues that judges in particular may experience in the future, when dealing with obligations to co-operate. In keeping with the aims and deliverables of the Project, we will consider these issues through the creation of case studies, which will consider hypothetical scenarios based on the rescue processes envisaged in the PRD and potential obstacles to co-operation that may arise. In addition, we will also further consider the guidelines analysed in this Report and how they could pertain to these issues, by providing information to judiciary and other relevant parties on how to address situations where co-operation is not possible and how the obligations imposed under the Regulation could be addressed. It is hoped that this solution driven research in the coming months will help to ameliorate some of the difficulties that judges might experience in the future.

In terms of future research questions that might be pertinent to consider, it is anticipated that further research will be required to consider how the PRD is transposed by different Member States, and whether an integrated and harmonised approach materialises. In addition, as the Recast Regulation becomes properly embedded into EU law in time, it is anticipated that further research will be required to consider how recognition relates to co-operation in light of different approaches in case law to *assistance* (which we would consider to be an equivalent concept to co-ordination) as distinct from recognition or enforcement of court orders. Furthermore, additional research is called for as to how co-operation will practically be carried out by the judiciary across the variety of jurisdictions in the European union which at present display different characteristics in terms of judicial culture.

Annex I: Documents presented at Judicial Wing Meeting at INSOL Europe Annual Congress in Copenhagen.

Judicial Co- Operation Supporting Economic Recovery in Europe

Case Study for consideration by the Judicial Wing and by the Turnaround Wing at INSOl Europe Annual Conference, Copenhagen September 2019.

© Professor Irene Lynch Fannon[i]

This project (no. 800807) is funded by the EU Justice Programme (2014-2020).

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

StylishHotelGroup is a hotel group with its COMI in Ireland. It has a range of corporate entities in a group structure. Some of these companies are property ownership companies, some are operational. Typically the property ownership companies have 1-5 employees, whereas the operational companies in the group have on average 100 employees (operating the hotels).

In the period 2005-2010 the Group engaged in considerable expansion and borrowed over €500 million euro from its main banker. This loan eventually became a non-performing loan which was temporarily taken over by the Irish state agency (NAMA) but was then sold on to GermanBank AG

In 2017 StylishHotelGroup and GermanBank AG entered into a contractual debt settlement agreement which wrote down the total amount owed on the loan and provided for a longer repayment plan. Although concluded in Ireland the contract contained a choice of German law clause. ['the 2017 agreement']

In 2018, finding itself unable to comply with the terms of the 'the 2017 agreement' StylishHotelGroup decided to avail of the Irish preventive restructuring process- and petitioned the Irish High Court to have an Examiner appointed.[ii] Most of the trade creditors were supportive of the application to have an Examiner appointed but GermanBank AG objected strongly.

The High Court refused to appoint an Examiner on the grounds that there was no reasonable prospect of all of the companies in the group receiving the required investment to survive. However, the parent company appealed to the Irish Court of Appeal and an Examiner was appointed to all the relevant companies in the StylishHotelGroup despite the objections of GermanBank AG and despite the presence of the existing '2017 agreement' whereby this bank had already agreed to a write down of its debt.

The Examinership process is very similar to the process envisaged by the European Directive on Preventive Restructuring 2019/1023 in its most robust form. It involves the imposition of a stay or moratorium on all actions against the company and any related company (i.e. member of the group) for a pre-determined period of 3 months, which can be extended by the court. It also provides for intra and cross class cram- down on approval by the court.

The Examinership has commenced. Unhappy with the prospects of further write down, GermanBank AG seeks to bring an action on foot of 'the 2017 agreement' to enforce this prior agreement in the court in Germany. The Irish companies argue that the Examinership proceeding in Ireland takes precedence.

GermanBank AG argues that 'the 2017 agreement' must exclude the possibility of the companies applying for the Examinership process as GermanBank AG have already taken a discounted debt repayment proposal under this '2017 agreement'. There is no specific statement to this effect in the agreement. The Irish court had rejected this argument in its initial decision to appoint an Examiner.

For information the Irish Examinership process, although pre-dating the new EU Directive 2019/1023 by thirty years, was modelled on the US Chapter 11 and contains many features of the Directive in its most radical form. In particular it is possible that as the Examinership or rescue progresses, the GermanBank AG debt (which represents 98% of the companies' debts) will be written down a second time and the debt repayment agreement could be substantially altered by the process. This is of immediate concern to GermanBank AG and consequently they wish to enforce the 2017 agreement in the German court. In contrast the Irish companies argue that the possibility of rescuing the entire group as a viable entity is reliant on the company availing of the preventive restructuring process (the Irish Examinership process) and re-arranging its debt structure with the agreement of its creditors:-

It might be of interest to note the following statement regarding the Irish preventive restructuring process known as Examinership from the Irish Court of Appeal in the case on which this case study is based:-

"78. Measured, therefore, against the statutory objectives of Part 10 of the 2014 Act, …[the Examinership process]… I can accordingly see no real difference in principle between the two types of contractual agreements so far as the appointment of an examiner is concerned. Of course, it may be said that such an application for examinership is inconsistent with prior contractual agreements and commitments on the part of the petitioning company or companies, but, as I have already sought to explain, this is true almost by definition of every application for examinership.

79. Putting this another way, I cannot find anything in the 2014 Act which enables a court considering an application for examinership to distinguish between the inevitable breach of a loan agreement (with, for example, a promise to repay a loan by a given date) on the one hand and a breach of the obligations contained in a debt settlement agreement regarding the orderly disposal of assets for debt reduction purposes on the other. One cannot really beautify by fancy words or nice phrases that which for some - and for secured lenders in particular - must be an unpalatable feature of the examinership process, namely, that it involves the judicial variation and dishonouring of all types of commercial contracts.

80. The fact, therefore, that an application for examinership would be inconsistent with the performance of the obligations imposed on a company under the terms of a settlement agreement cannot in itself - and I stress these words - be a dispositive consideration for a court determining whether to appoint an examiner under s. 509(1) of the 2014 Act, precisely because the entire examinership system is premised on the assumption that pre-existing commercial contracts (of whatever kind) will be overridden, varied, negated and dishonoured in the wider public interest of rescuing an otherwise potentially viable company."

Issue 1

In light of Articles 19 and 20 and Articles 42-44 of the EIR-Recast 848/2015 is the German court obliged to recognise the Irish rescue proceedings and co-operate with the Irish court thus allowing main proceedings with a stay to continue even though

a. **this affects other proceedings being opened elsewhere and**
b. **would operate quite drastically on the rights of the German creditor?**

If yes, how would an obligation to co-operate work in this context?

In your experience, if relevant what sort of issues would typically arise which would require co-operation?

The first issue is the applicability of **Article 19 of the EIR-R (European Insolvency Regulation- Recast)** which imposes the obligation to recognise "any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3…. from the moment that it becomes effective."

The second issue relates to the obligations imposed on courts and insolvency practitioners to co-operate in insolvency proceedings under **Articles 42- 44 and Articles 57-59 of the Recast Regulation 2015/848.** These relate in the first instance to the facilitation of "the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor", and in the second instance to the facilitation of "the effective administration of the proceedings" where the proceedings relate to "two or members of the same group".

Issue 2

If the German court recognises the Examinership process which it most likely will, this will mean that the stay operated under the Irish Examinership process will operate against GermanBank AG.

Then the question is if the GermanBank proceeds in the German court what will the approach of the German court be?

Is it possible to open secondary or territorial proceedings which might allow for enforcement of the 2017 agreement against the principle of the stay?

Do the co-operation obligations affect the decision to open/not to open secondary proceedings…will they make a difference?

Does the obligation to co-operate add an additional constraint on the German court?

Alternatively is the obligation to co-operate something less significant than the initial question of recognition?

For example does the obligation to co-operate simply mean that if the German court sought clarity on how the Examinership process would proceed, the Irish court might be obliged to co-operate with this request?

Would this involve an obligation to provide information on the process in general and/or on the specific process?

Issue 3

GermanBank AG seeks to enforce the debt settlement agreement- 'the 2017 agreement' as a **contract subject to German law**. GermanBank AG intends to argue before the German court that this action in the German court relates to a specific contract and is not primarily related to insolvency and so the Recast Regulation does not apply and that the German court is free to hear this action and enforce 'the 2017 agreement', despite the Examinership process proceeding in Ireland. Similar arguments have been made in some recent cases which have been considered by the CJEU.[iii]

Does this argument sideline the Regulation? [iv]

Bear in mind the Irish proceedings are opened and the Irish stay affects all actions.

Should the German court co-operate to make the stay effective thus facilitating the rescue regardless of the argument?

Attached are copies of both the Preventive Restructuring Directive 2019/1023 and the EIR-Recast 848/20.

Endnotes

[i] I would like to thank particularly, The Honourable Judge Michael Quinn, The High Court of Ireland and Judge Nicoleta Nastase, Romania for their assistance in clarifying this case study. The case study itself is derived from an Irish case *Re Kitty Hall Ltd*. [2017] IEHC and [2017] ICEA 247. Some adjustments to the facts have been made including the insertion of the German choice of law clause and the move on the part of the German Bank seeking to enforce the '2017 Agreement' in a German court. In reality the compromise or scheme proceeded and was approved by the Irish High Court in December 2017, Baker J.

[ii] First introduced under the Companies (Amendment) Act 1990 and now contained in Part X of the Companies Act 2014.

[iii] The following cases are relevant to the final **Issue 3**

Case 535/17 NK (liquidator) v BNP Paribas Fortis NV, 6 February 2019.

NK v BNP Paribas

Prior to insolvency proceedings money transferred to Fortis bank- this amounted to an act of embezzlement. During the insolvency proceedings conducted in the NL proceedings were brought against the bank. Under Dutch law the liquidator can bring an action in tort against a bank to repay money where the money has been paid at a disadvantage to other creditors: - 'Peeters- Gatzen-vordering (PGV). (This is similar to a claim arising out of mistaken payments).

In Dutch law, this is an action in tort, which can be brought by individual creditor / liquidator and/ or anyone affected. The defendant bank, NK Fortis, said it was a tort claim and therefore should be brought in Belgium. In contrast the Dutch liquidator argued that this was a claim normally brought by a liquidator and therefore the Dutch court had jurisdiction.

ECJ disagreed. It decided that just because the liquidator brings the claim it does not mean it is an insolvency procedure. It is still a tort and because individual creditors can bring the claim the Belgian court could have jurisdiction. The PGV is covered by the concept of 'civil and commercial matters' within the meaning of Article 1(1) Judgement Regulation:-

"26 The Court has held that only actions which derive directly from insolvency proceedings or which are closely connected with them are excluded from the scope of the Brussels Convention and, subsequently, Regulation No 44/2001 (see, to that effect, judgments of 22 February 1979, Gourdain, 133/78, EU:C:1979:49, paragraph 4, and of 19 April 2012, F-Tex, C‑213/10, EU:C:2012:215, paragraphs 22 and 24). Consequently, only those actions, as described, fall within the scope of Regulation No 1346/2000 (see, to that effect, judgment of 9 November 2017, Tünkers France and Tünkers Maschinenbau, C‑641/16, EU: C: 2017:847, paragraph 19 and the case-law cited).

27 Moreover, that same criterion, as stated in the Court's case-law on the interpretation of the Brussels Convention, was set out in recital 6 of Regulation No 1346/2000 in order to delimit the subject matter of that regulation, and was confirmed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19), not applicable ratione temporis to the present case, which provides in Article 6 that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them.

28 The decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis of the action. According to that approach, it must be determined whether the right or obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings (judgments of 4 September 2014, Nickel & Goeldner Spedition, C‑157/13, EU:C:2014:2145, paragraph 27; of 9 November 2017, Tünkers France and Tünkers Maschinenbau, C‑641/16, EU:C:2017:847, paragraph 22; and of 20 December 2017, Valach and Others, C‑649/16, EU:C:2017:986, paragraph 29)."

…

"33 Also, according to the case-file submitted to the Court, the action brought by the liquidator against Fortis is an action for liability for a wrongful act. The purpose of such an action is therefore for Fortis to be found liable on the basis of an alleged failure to fulfil its monitoring obligations, under which it ought to have refused the cash withdrawals made by PI amounting to EUR 550 000, because, according to the liquidator, the withdrawals gave rise to the loss suffered by the creditors.

34 Therefore, having regard to these factors, such an action is based on the ordinary rules of civil and commercial law and not on the derogating rules specific to insolvency proceedings…"

Case 337/17 Feniks sp. z o.o. v Azteca Products & Services SL 4 October 2018

Feniks/Azteca

Feniks was a creditor of Coliseum (a general contractor with whom Feniks had an investment agreement regarding a construction project in Poland). Coliseum was technically insolvent in that it was unable to pay subcontractors, but proceedings had not yet been opened. Coliseum sold property (in Poland!) to Azteca (Spain) in partial fulfilment of prior claims by Azteca. This transaction would normally be subject to some sort of clawback action. Under Polish law any creditor (and not just an insolvency practitioner or appointed liquidator) can bring a claw back action. Feniks as a creditor of Coloseum brought a claw back action against Azteca to clawback money before Polish court on the basis of Article 7(1) (a) Judgment Regulation. Azteca argued that the correct forum was the Spanish court

The question for the CJEU was whether an *actio pauliana* is covered by the rule of international jurisdiction provided for in Article 7(1)(a) Judgment Regulation? Such an action is where a person entitled to a debt repayment requests that an act, whereby his debtor has transferred an asset to a third party which is allegedly detrimental to his rights, be declared ineffective in relation to the creditor,

And the response from the CJEU was that an *actio pauliana* which is based on the creditor's rights created upon the conclusion of a contract, falls within 'matters relating to a contract' of Article 7(1) (a) Judgment Regulation. In terms of the interface between the Recast Regulation and these provisions of the judgement regulation there is a lack of certainty and clarity as to the borderline between insolvency matters and other causes of actions.

[iv] I wish to acknowledge the lecture provided by Lucas Kortmann RESOR at the EIRC Conference, hosted by hosted by German Arbeitsgemeinschaft Insolvenzrecht und Sanierung with INSOL Europe and the Law Society, Brussels 27 June 2019 which provided references and explanations for these cases amongst others.

[v] This publication was funded by the European Union's Justice Programme (2014-2020). The content of this document represents the views of the authors only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Annex II(a): Survey of Judicial Practice in Cross-Border Restructuring Cases - Co-Operation and Communication

Introduction

The Judicial Co-Operation for Economic Recovery in Europe (JCOERE) Project (No. 800807) is a research action project funded by the EU Commission DG Justice. The project has a number of research goals:-

- The most important part of the project focuses on the obligation imposed on courts in the Recast Regulation 848/2015, which provides a procedural framework for resolving cross-border insolvency cases, to co-operate in cross-border insolvency matters. To this end, the project undertook to engage proactively with the European judiciary to document their perception of the obligation to co-operate in practice, including possible obstacles and proposed resolutions.
- The obligation to co-operate in insolvency matters does not of course occur in a vacuum. Accordingly, the project focuses on restructuring and rescue frameworks to determine if there are substantive or procedural obstacles to court-to-court co-operation. This is particularly important given the new EU Preventive Restructuring Directive.
- The first part of the project interrogated the following jurisdictions: Ireland, Italy, Romania, France, The Netherlands, Germany, Denmark, Austria, Poland, Spain, and the UK with a view to identifying different substantive rules which might raise problems regarding co-operation. We are now in the second phase of the project. Identifying procedural aspects of these and other European jurisdictions which might raise obstacles to co-operation. For this reason we are conducting this survey and we are particularly interested in hearing from members of the judiciary in the sample of Member States listed above. However, if you are a member of the judiciary of another EU Member State, we welcome your participation as well.
- It might be timely to let you know that at this point in the research project, our impression is that while court to court co-operation is in no way resisted, it does not really express itself in a formal way, nor does it seem to arise as much as might have been expected given policy investment in this issue and academic commentary. We

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

have received this impression from engagements with the Judicial Wing and the relevant practitioner forums through the INSOL Europe network. The research has in effect become more open ended. For this reason, we are very interested in your opinions and your experience or lack of experience in these issues.

The purpose of this short survey is to engage with the European judiciary along with civil servants and administrators who deal with cross-border insolvency and restructuring cases to gather data on your experience with court to court co-operation. **Please note that the survey should take you about 15 minutes, unless you choose to offer additional commentary.**

We would be grateful for your response by **24th May 2020**.

You have two choices as to how you wish to complete this short questionnaire:

1. Access our online survey here.
2. Fill out this form and send it to jennifer.gant@ucc.ie. The boxes below can be "ticked" by simply clicking in them.

Responses via the survey link are fully anonymous and any surveys returned by email will be treated anonymously as well. The data gathered with this survey will form a part of Report that will be submitted to the European Commission and processed according to EU and University College Cork ethical rules.

We thank you in advance for taking the time to participate in our project. Should you have any questions at all, please do not hesitate to contact Professor Irene Lynch Fannon, Principal Investigator (i.lynchfannon@ucc.ie) or Dr Jennifer L. L. Gant, Post-Doctoral Researcher on the project (jennifer.gant@ucc.ie).

The JCOERE Team

Preliminary Survey Questions

This first set of questions are general questions about your role as a person who may decide insolvency or restructuring cases in your jurisdiction. Their purpose is mainly to help us to categorise the information we obtain. Thank you in advance for engaging in this survey. Your time and participation is greatly appreciated.

1. What is your current role?

Judge ☐

Mediator or Arbitrator ☐

Other Administrative Authority ☐

Civil Servant ☐

Other ☐

If other, please explain:

2. Which of the following choices best describes what you do in your role?

I hear insolvency and/or restructuring cases only: ☐

I also hear commercial and/or corporate law cases: ☐

I hear all kinds of civil cases: ☐

3. Common law and civil law jurisdictions differ in the way that the members of the judiciary are trained generally. Before you qualified as a judge or administrative decision-maker, were you required to take specific training? If so, please describe the nature of the training required in your jurisdiction.

4. Were you required to take specialist training in order to decide on insolvency and/or restructuring cases in your jurisdiction?

Yes ☐

No ☐

a. If so, what training were you required to take? (describe in a few words, if possible)

b. If you specialise in insolvency cases, what requirements does your jurisdiction have for continuing professional development (CPD) in this area?

c. Have you received any specialist training in insolvency and restructuring related cases in the last 5 years? If so, how many days approximately does this training amount to?

0 ☐

1-5 ☐

6-10 ☐

More than 10 ☐

5. Have you taken any training about judicial co-operation and/or communication with the courts of other Member States?

Yes ☐

No ☐

a. Have you co-operated directly with courts of another state on insolvency and restructuring matters at all in your career?

Yes ☐

No ☐

b. If you have co-operated directly with courts of another state in insolvency and restructuring matters, has it been:

Only on cases within the EU ☐

Only on cases with jurisdictions outside of the EU ☐

On international cases including both EU and non-EU jurisdictions ☐

c. Have you co-operated directly with courts of another state in non-insolvency matters within the EU?

Yes ☐

No ☐

d. Have you co-operated directly with courts of another state in non-insolvency matters outside of the EU?

Yes ☐

No ☐

e. If you have co-operated on other matters directly with courts of another state, which matters have you co-operated on and with which jurisdictions? Please note them in the comment box.

6. How long have you been deciding on insolvency and/or restructuring cases?

0-3 years: ☐

3-7 years: ☐

7-10 years: ☐

10-15 years: ☐

More than 15 years: ☐

7. In which jurisdiction do you work?

Austria	☐	Italy	☐
Belgium	☐	Latvia	☐

Bulgaria	☐	Lithuania	☐
Croatia	☐	Luxembourg	☐
Cyprus	☐	Malta	☐
Czech Republic	☐	The Netherlands	☐
Denmark	☐	Poland	☐
Estonia	☐	Portugal	☐
Finland	☐	Romania	☐
France	☐	Slovakia	☐
Germany	☐	Slovenia	☐
Greece	☐	Spain	☐
Hungary	☐	Sweden	☐
Ireland	☐	United Kingdom	☐

Survey of Judicial Practice in Co-operation and Communication

Questions 8 and 9 refer to co-operation generally, while questions 10, 11 and 12 relate to insolvency and/or restructuring specifically.

8. Have you ever needed to co-operate or communicate with a court in another European jurisdiction in a cross-border matter generally?

Yes ☐

No ☐

9. How many cases have you heard in your career that have required you to communicate and/or co-operate with a court in another jurisdiction, generally?

0 ☐

2-10 ☐

11-25 ☐

More than 25 ☐

NA ☐

10. Have you had to co-operate with a court in another European jurisdiction in an insolvency or restructuring case?

Yes ☐ No ☐

11. How many insolvency related cases per year do you have to decide that require cross-border co-operation or communication with court in another EU Member State?

0 ☐

1-5 ☐

More than 5 ☐

12. How many insolvency related cases have you decided on in your career that have required you to communicate and/or co-operate with a court in another EU Member State?

1 ☐

2-10 ☐

11-25 ☐

More than 25 ☐

Survey of Awareness of Co-Operation and Communication Guidelines

13. One observation made on the JCOERE Project so far is that cooperation between courts is not as big an issue as we initially believed. As such, the following questions are academic in nature to test the general awareness among the EU judiciary of the guidelines and projects that have been done in this area to date. In your career have you ever heard of any of the following guidelines and projects relevant to court-to-court co-operation?

Yes ☐

No ☐

14. If you have heard of any of the guidelines relevant to court-to-court cooperation, please indicate which ones below:

1	European Communication and Co-Operation Guidelines for Cross-border Insolvency (Coco Guidelines) 2007	☐
2	The EU Cross-Border Insolvency Court-to-Court Co-operation Principles (JudgeCo) [2014]	☐
3	The UNCITRAL Model Law	☐
4	European Bank for Reconstruction and Development (EBRD) Core Principles for an Insolvency Law Regime (2004)	☐
5	The Role of the Judge in Restructuring of Companies within Insolvency (INSOL Europe Judicial Wing) [2013]	☐
6	European Legal Institute (ELI) Project on the Rescue of Business in Insolvency Law [2017]	☐

7	Conference on European Restructuring and Insolvency Law (CERIL) Statement 2018/01 in Insolvency Regulation (Recast) and National Procedural Rules	☐
8	Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law (CODIRE) [2018]	☐
9	Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages, and ways of improvement in the EU (ACURIA) [2019]	☐
10	ALI/UNIDROIT Principles of Transnational Insolvency Procedure (2005)	☐
11	World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes [2011]	☐
12	ALI Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases [2012]	☐
13	The American Law Institute (ALI) General Principles (2000)	☐
14	The ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-border Cases (2000)	☐

15. Have you ever referred to any of the guidelines listed in the question above in order to assist you in protocols for communication or co-operation in cross-border insolvency or restructuring cases?

Yes ☐

No ☐

16. Would you prefer to create a protocol for communication and co-operation on a case by case basis?

Yes ☐

No ☐

17. If you have referred to any of the listed guidelines or project publications, please indicate which (if any) that you have referred to in the past by reference to the guidelines and projects listed in question 13:

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐10 ☐ 11 ☐ 12 ☐13 ☐ 14 ☐

If the guidance or documentation you referred to was not listed above, please note it here:

18. Have you ever attended international or European judicial events? (For example, the European Judicial Training Network (EJTN) or the INSOL Europe Judicial Forum):

Yes ☐

No ☐

What events do you attend (or plan to attend)?

19. Would it be helpful for you to have access to information about substantive rules in other jurisdictions, such as the mechanisms of preventive restructuring?

Yes ☐

No ☐

Unsure ☐

20. Are there rules in your legal system about how you can obtain information external to the cases you hear, such as information about substantive rules in other jurisdictions?

Yes ☐

No ☐

21. If there are rules restricting your freedom to access to information about substantive rules in other jurisdictions, please specify here if possible.

22. How would you prefer to access information about substantive insolvency rules in other jurisdictions?

Information provided by the state or courts ☐

A practitioner's textbook ☐

An academic text or report ☐

Downloadable PDFs of country reports and other information ☐

A simple website presenting information ☐

An interactive website ☐

A combination of the above or something else entirely (please specify below):

23. Would it be helpful to have access to information and case-studies that provide different experiences with court-to-court co-operation in cross-border insolvency or restructuring cases?

Yes ☐

No ☐

Unsure ☐

24. In what format would you prefer to access this information:

A book or set of documents ☐

An e-book or documents sent by email ☐

Downloadable PDFs of country reports and case studies ☐

A simple website presenting the information ☐

An interactive website ☐

A combination of the above or something else entirely (please specify below):

Case Studies of Court-to-Court Co-Operation in Insolvency and Restructuring (Optional)

25. The JCOERE Project is also tasked with developing case studies exemplifying situations in which court-to-court co-operation has occurred. These will be included in a database accessible by all European judges who may find it useful to see how similar problems have been dealt with in different jurisdictions. If possible, please provide an example from your experience where you have had to co-operate or communicate with a court in a different jurisdiction with a brief summary of the case facts, the issue that required co-operation or communication, and how you resolved or otherwise dealt with the co-operation and communication. You can either set it out below or email jennifer.gant@ucc.ie or i.lynchfannon@ucc.ie at your convenience with your case study example.

26. Thank you for your kind participation in this project. If you would like to receive updates or be informed when our databases have been completed, please provide your email here or send a separate e-mail to jennifer.gant@ucc.ie or i.lynchfannon@ucc.ie.

Annex II(b): Sondaj privind practicile judiciare în cazurile de restructurare transfrontalieră - Cooperare și comunicare

Introducere

Proiectul de Cooperare Judiciară pentru Redresare Economică în Europa (JCOERE) (nr. 800807) este un proiect de cercetare finanțat de Comisia Europeană Direcția Generală Justiție și Consumatori. Proiectul are o serie de obiective de cercetare:

- Cea mai importantă parte a proiectului se concentrează pe obligațiile impuse instanțelor de Regulamentul (UE) 848/2015, care oferă un cadru de reglementări procedurale pentru soluționarea cazurilor de insolvență transfrontalieră, pentru cooperarea în problemele de insolvență transfrontalieră. În acest scop, proiectul s-a angajat să colaboreze în mod activ cu sistemul judiciar european pentru a documenta percepția acestuia asupra obligației de cooperare în practică, inclusiv obstacole posibile și soluții propuse.
- Obligația de a coopera în materie de insolvență nu apare desigur fără rost. În consecință, proiectul se concentrează pe reglementările referitoare la restructurare și redresare pentru a determina dacă există obstacole de fond sau de procedură pentru cooperarea între instanțe. Acest lucru este deosebit de important având în vedere noua Directivă a UE privind restructurarea preventivă.

- Prima parte a proiectului a analizat următoarele jurisdicții: Irlanda, Italia, România, Franța, Olanda, Germania, Danemarca, Austria, Polonia, Spania și Marea Britanie, în vederea identificării unor reguli de fond care ar putea ridica probleme în ceea ce privește cooperarea. Acum suntem în a doua fază a proiectului: identificarea aspectelor procedurale din aceste jurisdicții și din alte jurisdicții europene care ar putea ridica obstacole în calea cooperării. Din acest motiv, efectuăm acest sondaj și suntem interesați în special de punctul de vedere al membrilor sistemului judiciar din eșantionul de state membre enumerate mai sus. Cu toate acestea, dacă sunteți membru al sistemului judiciar al altui stat membru al UE, sunteți bineveniți să participați.

- Ar putea fi oportun să vă anunțăm că în acest moment al cercetării în cadrul proiectului, impresia noastră este că, deși cooperarea între instanțe nu este împiedicată, ea nu se exprimă cu adevărat într-un mod formal și nici nu pare să se ridice la nivelul așteptat, având în vedere investiția politică în această problemă și comentariile academice. Am primit acest punct de vedere prin parteneriatul cu Aripa

The content of this document represents the views of the author only and is his/her sole responsibility.
The European Commission does not accept any responsibility for use that may be made of the information it contains.
This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

Judiciară (*Judicial Wing*) și prin intermediul forumurilor practicienilor prin rețeaua INSOL Europe. Cercetarea a devenit, în realitate, mai deschisă. Din acest motiv, suntem foarte interesați de părerile dvs. și de experiența dvs. sau lipsa de experiență în aceste probleme.

Scopul acestui scurt sondaj este de a colabora cu sistemul judiciar european, împreună cu funcționarii publici și administratorii care se ocupă de cazurile transfrontaliere de insolvență și restructurare pentru a colecta date despre experiența dvs. privind cooperarea între instanțe. **Vă rugăm să rețineți că sondajul ar trebui să dureze aproximativ 15 minute, cu excepția cazului în care alegeți să oferiți comentarii suplimentare.**

V-am fi recunoscători dacă ne-ați transmite chestionarul completat pana cel târziu la data de .....2020.

Aveți două opțiuni cu privire la de completare al acestui scurt chestionar:

3. Accesați chestionarul online aici.
4. Completați acest chestionar și trimiteți-l pe adresa nicoletamirelanastasie@gmail.com sau cristidrg@yahoo.com. Căsuțele de mai jos pot fi "bifate" printr-un singur click.

Răspunsurile prin link-ul sondajului sunt pe deplin anonime și orice sondaje transmise prin e-mail vor fi de asemenea prezentate ca fiind anonime. Datele colectate cu ocazia acestui sondaj vor face parte dintr-un raport care va fi transmis Comisiei Europene și prelucrat în conformitate cu normele etice ale UE și Universitatea Colegiul Cork.

Vă mulțumim anticipat că ne-ați acordat timpul necesar pentru a participa la proiectul nostru. Daca aveți orice fel de întrebări, va rugam sa contactați fără ezitare pe Professor Irene Lynch Fannon, Principal Investigator (i.lynchfannon@ucc.ie) sau Dr Jennifer L. L. Gant, cercetător post-doctoral in cadrul proiectului (jennifer.gant@ucc.ie).

Echipa JCOERE

Întrebări preliminare ale sondajului

Acest prim set de întrebări reprezintă întrebări generale despre rolul dvs. de persoană care poate soluționa cazurile de insolvență sau de restructurare din jurisdicția dvs. Obiectivul lor este în principal să ne ajute în structurarea informațiilor pe care le obținem. Vă mulțumim anticipat pentru implicarea în acest sondaj. Timpul și participarea dvs. sunt în mod deosebit de apreciate.

1. Ce funcție îndepliniți in prezent?

Judecător ☐

Mediator sau Arbitru ☐

Altă autoritate administrativă ☐

Funcționar public ☐

Alte funcții ☐

În cazul in care îndepliniți un alt rol, vă rugăm să explicați:

2. Care dintre următoarele alternative descrie cel mai bine ce faceți în virtutea funcției pe care o dețineți??

Sunt specializat doar în cazuri de insolvență și / sau restructurare: ☐

Soluționez și cauze de drept comercial și / sau corporatist: ☐

Soluționez toate tipurile de cauze civile: ☐

3. Competența în sistemele de tip *common-law* și cele de drept civil diferă în funcție de modul în care membrii sistemului judiciar sunt instruiți în general. Înainte de a vă califica ca judecător sau factor de decizie administrativă, a trebuit să urmați o pregătire specifică? Dacă da, descrieți natura formării necesare în sistemul dvs. judiciar.

4. A trebuit să urmați o pregătire de specialitate pentru a putea soluționa cauzele de insolvență și / sau de restructurare ce vă revin spre competentă soluționare?

Da ☐

Nu ☐

d. Dacă da, ce pregătire a trebuit să urmați? (descrieți în câteva cuvinte, dacă este posibil)

e. Dacă sunteți specializat în cauze de insolvență, ce forme de pregătire sunt prevăzute de legislația dvs. pentru dezvoltarea profesională continuă în acest domeniu??

f. Ați participat la cursuri de specialitate în materia insolvenței și restructurării în ultimii 5 ani? Dacă da, cate zile a durat aproximativ această pregătire?

0 ☐

1-5 ☐

6-10 ☐

Mai mult de 10 ☐

5. Ați participat la cursuri de instruire cu privire la cooperarea judiciară și / sau comunicarea cu instanțele din alte State Membre?

Da ☐

Nu ☐

f. In cariera dvs, v-ați întâlnit cu situații în care a fost nevoie de cooperare judiciară în materie de insolvență și restructurare?

Da ☐

Nu ☐

g. Dacă v-ați confruntat cu situații de acest gen, au fost*:*

Doar cazuri în interiorul Uniunii Europene ☐

Doar cazuri ce vizează jurisdicții din afara Uniunii Europene ☐

În cazuri internaționale ce includ atât Uniunea Europeană,

cât și jurisdicții jurisdicția din afara UE ☐

h. Ați cooperat în alte domenii decât cel al insolvenței în interiorul Uniunii Europene?

Da ☐

Nu ☐

i. Ați cooperat în alte domenii decât cel al insolvenței ce vizează jurisdicții din afara Uniunii Europene?

Da ☐

Nu ☐

j. Dacă ați cooperat în alte probleme cu alte jurisdicții, care sunt problemele în care ați cooperat și cu ce jurisdicții? Vă rugăm să le notați în caseta de comentarii.

6. De cat timp soluționați cauze în materie de insolvență/restructurare?

0-3 ani: ☐

3-7 ani: ☐

7-10 ani: ☐

10-15 ani: ☐

Mai mult de 15 ani: ☐

Sondaj în materia practicilor judiciare în cooperare și comunicare

Întrebările 7 și 8 se referă la cooperare în general, în timp ce întrebările 9, 10, și 11 se referă în special la insolvență și / sau restructurare

7. Ați avut vreodată nevoie de cooperare sau comunicare cu o instanță dintr-o altă jurisdicție europeană într-o chestiune transfrontalieră, în general?

Da ☐

Nu ☐

8. Câte cazuri ați soluționat în cariera dvs. care v-au solicitat să comunicați și / sau să cooperați cu o instanță din altă jurisdicție, în general?

2 ☐

1-10 ☐

11-25 ☐

Mai mult de 25 ☐

Nu este cazul ☐

9. A fost necesar să cooperați cu o instanță din altă jurisdicție europeană într-un caz de insolvență sau de restructurare?

Da ☐ Nu ☐

10. Câte cauze legate de insolvență în care este necesară cooperare transfrontalieră sau comunicare cu instanța de judecată dintr-un alt stat membru al UE, trebuie să soluționați pe an?

0 ☐

1-5 ☐

Mai mult de 5 ☐

11. Câte cauze legate de insolvență ați soluționat în cariera dvs., care v-au solicitat să comunicați și / sau să cooperați cu o instanță dintr-un alt stat membru al UE?

3 ☐

2-10 ☐

11-25 ☐

Mai mult de 25 ☐

Sondaj privind cunoașterea ghidurilor de îndrumare în materie de cooperare și comunicare

12. O observație făcută până acum în proiectul JCOERE este aceea că cooperarea dintre instanțe nu este o problemă atât de mare cum am considerat inițial. Ca atare, următoarele întrebări sunt de natură academică pentru a testa în ce măsură sistemul judiciar din UE are cunoștință de ghidurile de îndrumare și proiectele realizate până în prezent. În cariera dvs., ați auzit vreodată de oricare dintre următoarele ghiduri și proiecte relevante pentru cooperarea între instanțe?

Da ☐

Nu ☐

13. Dacă ați aflat despre oricare dintre îndrumările relevante pentru cooperarea judiciară, vă rugăm să indicați care din cele de mai jos:

1	European Communication and Co-Operation Guidelines for Cross-border Insolvency (Coco Guidelines) 2007	☐
2	The EU Cross-Border Insolvency Court-to-Court Co-operation Principles (JudgeCo) [2014]	☐
3	The UNCITRAL Model Law	☐
4	European Bank for Reconstruction and Development (EBRD) Core Principles for an Insolvency Law Regime (2004)	☐
5	The Role of the Judge in Restructuring of Companies within Insolvency (INSOL Europe Judicial Wing) [2013]	☐
6	European Legal Institute (ELI) Project on the Rescue of Business in Insolvency Law [2017]	☐
7	Conference on European Restructuring and Insolvency Law (CERIL) Statement 2018/01 in Insolvency Regulation (Recast) and National Procedural Rules	☐

8	Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law (CODIRE) [2018]	☐
9	Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages, and ways of improvement in the EU (ACURIA) [2019]	☐
10	ALI/UNIDROIT Principles of Transnational Insolvency Procedure (2005)	☐
11	World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes [2011]	☐
12	ALI Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases [2012]	☐
13	The American Law Institute (ALI) General Principles (2000)	☐
14	The ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-border Cases (2000)	☐

14. V-ați referit vreodată la oricare dintre materialele enumerate în întrebarea de mai sus, pentru a vă ajuta în protocoalele de comunicare sau cooperare în cazurile transfrontaliere de insolvență sau de restructurare?

Da ☐

Nu ☐

15. Ați prefera să creați un protocol pentru comunicare și cooperare de la caz la caz?

Da ☐

Nu ☐

16. Dacă v-ați referit la oricare dintre ghidurile enumerate sau publicațiile de proiect, vă rugăm să indicați (dacă este cazul) la care v-ați referit în trecut, cu referire la ghidurile de îndrumare și proiectele enumerate la întrebarea 12:

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐10 ☐ 11 ☐ 12 ☐13 ☐ 14 ☐

Dacă ghidul sau documentația la care faceți referire nu a fost enumerat mai sus, vă rugăm să notați aici:

17. Ați participat vreodată la evenimente judiciare internaționale sau europene? (De exemplu, cele organizate de Rețeaua Europeană de Formare Judiciară (EJTN) sau Forumul judiciar INSOL Europa):

Da ☐

Nu ☐

La ce evenimente ați participat (sau aveți de gând sa participați)?

18. Ar fi util să aveți acces la informații despre regulile de baza din alte jurisdicții, cum ar fi mecanismele de restructurare preventivă?

Da ☐

Nu ☐

Nu sunt sigur ☐

19. Există reguli în sistemul dvs. judiciar despre cum puteți obține informații ce exced cauzelor pe care le soluționați, cum ar fi informații despre regulile de fond din alte jurisdicții?

Da ☐

Nu ☐

20. Dacă există reguli care restricționează accesul dvs. la informații despre regulile de fond din alte jurisdicții, vă rugăm să specificați aici.

21. Cum preferați să accesați informații despre regulile de insolvență din alte jurisdicții?

Informații furnizate de stat sau instanțe ☐

Un manual al practicianului ☐

Un text sau raport academic ☐

Fișiere PDF descărcabile ale rapoartelor altei țări și alte informații ☐

Un site web simplu care prezintă informații ☐

Un site web interactiv ☐

O combinație între cele de mai sus sau cu totul altă variantă (vă rugăm să specificați mai jos):

22. Ar fi util să aveți acces la informații și studii de caz care oferă jurisprudență diferită cu privire la cooperarea judiciară internațională în cazurile de insolvență transfrontalieră sau de restructurare?

Da ☐

Nu ☐

Nu sunt sigur ☐

23. În ce format preferați să accesați aceste informații:

O carte sau un set de documente ☐

Un e-book sau documente transmise prin e-mail ☐

Fișiere PDF descărcabile ale rapoartelor de țară și studii de caz ☐

Un website simplu care furnizează informații ☐

Un website interactiv ☐

O combinație între cele de mai sus sau cu totul altă variantă (vă rugăm să specificați mai jos):

Studii de caz privind cooperarea între instanțele de judecata în materie de insolvență și restructurare (opțional)

24. Proiectul JCOERE are, de asemenea, sarcina de a dezvolta studii de caz care ilustrează situații în care a avut loc cooperarea între instanțele de judecată. Acestea vor fi incluse într-o bază de date accesibilă tuturor judecătorilor europeni, cărora le-ar putea fi de folos să vadă cum au fost rezolvate probleme similare în diferite jurisdicții. Dacă este posibil, vă rugăm să furnizați un exemplu din experiența dvs. în care ați fost nevoit să cooperați sau să comunicați cu o instanță dintr-o jurisdicție diferită, cu un scurt rezumat al datelor din speța respectivă, problema care a necesitat cooperare sau comunicare și modul în care ați rezolvat sau v-ați descurcat cu problemele de cooperare și comunicare. Puteți să o descrieți mai jos sau prin e-mail la nicoletamirela.nastasie@gmail.com sau cristidrg@yahoo.com , după cum doriți, cu exemplul dvs. de studiu de caz.

25. Vă mulțumim pentru amabilitatea de a participarea la acest proiect. Dacă doriți să primiți actualizări sau să fiți informați când baza noastră de date este completă, vă rugăm să ne furnizați e-mailul aici sau să trimiteți un e-mail separat la nicoletamirela.nastasie@gmail.com sau cristidrg@yahoo.com.

Annex II(c): Questionario sulle prassi giudiziarie in tema di insolvenza transfrontaliera - Cooperazione e comunicazione

Introduzione

Il progetto The Judicial Co-Operation for Economic Recovery in Europe (JCOERE, n. 800807) è un progetto di ricerca finanziato dalla Direzione Generale Giustizia della Commissione europea. Il progetto ha una serie di obiettivi:

- La parte più importante del progetto si concentra sull'obbligo di cooperazione in materia di insolvenza transfrontaliera imposto ai tribunali dal Regolamento n. 848/2015, che fornisce un quadro procedurale per la risoluzione dei casi di insolvenza transfrontalieri. A tal riguardo, il progetto si interfaccerà in modo proattivo con la magistratura europea per documentare la percezione di quest'ultima riguardo all'obbligo di cooperazione nella pratica, compresi i possibili ostacoli e le proposte di risoluzione di questi ultimi.
- Ovviamente, l'obbligo di cooperare in materia fallimentare si inserisce in un contesto normativo. Pertanto, il progetto si concentra sui quadri di ristrutturazione e salvataggio al fine di determinare se vi siano ostacoli sostanziali o procedurali alla cooperazione giudiziaria. Ciò è particolarmente importante in considerazione della nuova Direttiva UE sulla ristrutturazione preventiva.
- La prima parte del progetto ha coinvolto i seguenti ordinamenti: Irlanda, Italia, Romania, Francia, Paesi Bassi, Germania, Danimarca, Austria, Polonia, Spagna e Regno Unito, al fine di individuare le diverse norme sostanziali che potrebbero sollevare problemi in materia di cooperazione. Siamo ora nella seconda fase del progetto che consiste nell'identificare gli aspetti procedurali dei diversi ordinamenti europei che potrebbero creare ostacoli alla cooperazione. Per tale motivo abbiamo elaborato il presente questionario e siamo particolarmente interessati a ricevere un feedback dalla magistratura degli Stati membri sopra elencati. In ogni caso, se appartiene alla magistratura di un altro Stato membro dell'UE, accogliamo con favore anche la Sua partecipazione.
- Appare opportuno comunicarLe che, giunti a questo punto del progetto di ricerca, la nostra impressione è che la cooperazione giudiziaria, pur non essendo in alcun modo osteggiata, non abbia trovato alcuna veste formale, né sembra aver luogo nella misura che ci si sarebbe potuto aspettare, in considerazione dell'investimento in termini di regolamentazione e dell'analisi dottrinale compiuta. Abbiamo ricevuto tale

The content of this document represents the views of the author only and is his/her sole responsibility.
The European Commission does not accept any responsibility for use that may be made of the information it contains.
This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

impressione dall'interazione con la componente giudiziaria e i relativi forum di professionisti della rete INSOL Europe. La ricerca si è, dunque, allargata. Per questo motivo siamo molto interessati alle Sue opinioni e alla Sua esperienza o inesperienza rispetto a tali temi.

Lo scopo di questa breve indagine è di coinvolgere la magistratura europea, insieme ai funzionari e agli amministratori di procedure di insolvenza che si occupano di casi transfrontalieri in materia fallimentare, al fine di raccogliere i dati relativi alla Sua esperienza nella cooperazione con altri tribunali. **Si prega di notare che l'indagine dovrebbe durare circa 15 minuti, a meno che non si scelga di fornire un commento aggiuntivo.**

Le saremmo grati se volesse farci pervenire la Sua risposta entro il giorno _____.

Ha a disposizione due opzioni per la compilazione di questo breve questionario:

5. Compilare il presente modulo ed inviarlo all'indirizzo mail nuovodirittofallimentare@dipp.unifi.it
   Le caselle sottostanti possono essere "spuntate" semplicemente cliccandoci sopra.
6. Accedere al nostro sondaggio online, qui.

Le risposte al sondaggio fornite tramite il link sopra indicato sono completamente anonime ed anche i moduli restituiti via e-mail saranno trattati in modo anonimo.

La ringraziamo in anticipo per il tempo dedicato alla partecipazione al nostro progetto. Per qualsiasi domanda, non esitate a contattare il Prof. Lorenzo Stanghellini all'indirizzo e-mail stanghellini@unifi.it.

Il Team JCOERE

Domande preliminari

Questa prima serie di domande generali riguardano la posizione da Lei ricoperta. Lo scopo di queste ultime è, principalmente, quello di aiutarci a classificare le informazioni che otteniamo. La ringraziamo in anticipo per la Sua partecipazione a questo questionario. Il Suo tempo e la Sua partecipazione sono molto apprezzati.

27. Quale delle seguenti opzioni descrive meglio l'attività da Lei svolta?

Tratto solamente casi riguardanti la materia fallimentare: ☐

Tratto anche casi in materia di diritto commerciale e/o societario: ☐

Tratto ogni tipologia di casi in materia civile: ☐

28. Gli ordinamenti di common law e di civil law differiscono nel modo in cui i membri della magistratura sono formati. Prima di ottenere la qualifica di giudice, le è stato richiesto di seguire una formazione specifica? In caso affermativo, descriva la natura della formazione richiesta nel suo ordinamento.

29. Le è stato richiesto di seguire un corso di formazione specialistica per decidere casi in materia di diritto fallimentare nel suo ordinamento?

Sì ☐ No ☐

g. In caso affermativo, quale tipologia di corsi Le è stato richiesto di seguire? (breve descrizione)

h. Se è specializzata in materia fallimentare, quali sono i requisiti previsti nel Suo ordinamento per l'aggiornamento professionale in tale materia (opzionale)

i. Ha frequentato un corso di formazione specialistica in materia fallimentare negli ultimi 5 anni? In caso affermativo, in quanti giorni è consistito approssimativamente?

0 ☐

1-5 ☐

6-10 ☐

Più di 10 ☐

30. Ha seguito un corso di formazione sulla cooperazione giudiziaria e/o sulla comunicazione con le corti di altri Stati membri?

Sì ☐

No ☐

a. Ha mai cooperato in materia fallimentare?

Sì ☐

No ☐

b. Se ha cooperato in materia fallimentare, è stato*:*

Solo all'interno dell'UE ☐

Solo al di fuori dell'UE ☐

In casi internazionali riguardanti ordinamenti UE e non UE ☐

c. Ha cooperato con riferimento a questioni attinenti ad una materia diversa, all'interno dell'UE?

Sì ☐

No ☐

d. Ha cooperato con riferimento a questioni attinenti ad una materia diversa, al di fuori dell'UE?

Sì ☐

No ☐

e. Se ha cooperato con riferimento a questioni attinenti ad una materia diversa, di quale materia si tratta? Si prega di riportarle nella casella dei commenti.

31. Da quanto tempo si occupa di casi in materia fallimentare?

0-3 anni: ☐

3-7 anni: ☐

7-10 anni: ☐

10-15 anni: ☐

Più di 15 anni: ☐

Questionario sulle prassi giudiziarie in materia di cooperazione e comunicazione

Le domande 8 e 9 si riferiscono alla cooperazione in generale, mentre le domande 10, 11 e 12 riguardano specificamente il diritto fallimentare.

32. Avete mai avuto la necessità di cooperare o comunicare con il tribunale di un'altro ordinamento europeo riguardo ad una questione transnazionale, in generale?

Sì ☐ No ☐

33. Quanti casi ha conosciuto, nel corso della sua carriera, che le hanno richiesto di comunicare e/o di collaborare con un tribunale di un altro ordinamento, in generale?

4 ☐

2-10 ☐

11-25 ☐

Più di 25 ☐

NA ☐

34. Ha dovuto collaborare con il tribunale di un altro ordinamento europeo nell'ambito di un caso in materia di diritto fallimentare?

Sì ☐ No ☐

35. Quanti casi in materia fallimentare deve decidere, in un anno, che richiedono una cooperazione transfrontaliera o di comunicare con il tribunale di un altro Stato membro dell'UE?

0 ☐

1-5 ☐

Più di 5 ☐

36. Quanti casi in materia fallimentare ha deciso, nella sua carriera, che le hanno richiesto di comunicare e/o di collaborare con un tribunale di un altro Stato membro dell'UE?

5 ☐

2-10 ☐

11-25 ☐

Più di 25 ☐

Si prega di inserire nella casella sottostante qualsiasi ulteriore informazione ritenga rilevante:

Questionario sulla conoscenza delle linee guida aventi ad oggetto la cooperazione e la comunicazione

37. Nel corso del Progetto JCOERE è emerso che la cooperazione tra tribunali è una questione che presenta un rilievo inferiore rispetto a quanto previsto all'inizio dei lavori. Per tale motivo, le seguenti domande sono di natura accademica, al fine di testare la consapevolezza generale della magistratura dell'UE in merito alle linee guida e ai progetti realizzati in questo settore fino ad oggi.

Nel corso della Sua carriera è venuto a conoscenza dell'esistenza delle seguenti linee guida e progetti riguardanti la cooperazione giudiziaria?

Sì ☐

No ☐

38. In caso affermativo, si prega di indicare quali:

Linee guida e progetti in materia di cooperazione giudiziaria

1	European Communication and Co-Operation Guidelines for Cross-border Insolvency (Coco Guidelines) 2007	☐
2	The EU Cross-Border Insolvency Court-to-Court Co-operation Principles (JudgeCo) [2014]	☐
3	The UNCITRAL Model Law	☐
4	European Bank for Reconstruction and Development (EBRD) Core Principles for an Insolvency Law Regime (2004)	☐
5	The Role of the Judge in Restructuring of Companies within Insolvency (INSOL Europe Judicial Wing) [2013]	☐

6	European Legal Institute (ELI) Project on the Rescue of Business in Insolvency Law [2017]	☐
7	Conference on European Restructuring and Insolvency Law (CERIL) Statement 2018/01 in Insolvency Regulation (Recast) and National Procedural Rules	☐
8	Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law (CODIRE) [2018]	☐
9	Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages, and ways of improvement in the EU (ACURIA) [2019]	☐
10	ALI/UNIDROIT Principles of Transnational Insolvency Procedure (2005)	☐
11	World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes [2011]	☐
12	ALI Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases [2012]	☐
13	The American Law Institute (ALI) General Principles (2000)	☐
14	The ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-border Cases (2000)	☐

39. Ha mai fatto riferimento ad una delle linee guida sopra elencate al fine di trovare supporto nell'ambito di protocolli, aventi ad oggetto la comunicazione o cooperazione in casi transfrontalieri di diritto fallimentare?

Sì ☐

No ☐

40. Preferirebbe fare ricorso ad un protocollo per la comunicazione e la cooperazione, creato *ad hoc* per ogni singolo caso?

Sì ☐

No ☐

41. Se ha fatto riferimento ad una qualsiasi delle linee guida o dei report elencati, La preghiamo di indicare a quale ha fatto riferimento in passato tra le linee guida e i progetti elencati nella domanda 12:

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐10 ☐ 11 ☐ 12 ☐13 ☐ 14 ☐

Se la linea guida o il documento a cui si fa riferimento non risulta elencato sopra, si prega di indicarlo di seguito:

42. Ha mai partecipato ad eventi internazionali o europei riservati alla magistratura? (Ad esempio, l'European Judicial Training Network (EJTN) o l'INSOL Europe Judicial Forum):

Sì ☐

No ☐

A quali eventi ha partecipato (o intende partecipare)?

43. Riterrebbe utile avere accesso alle informazioni sulle norme sostanziali di altri ordinamenti, come i meccanismi che regolano la ristrutturazione preventiva?

Sì ☐

No ☐

Non so ☐

44. Sono presenti nel Suo ordinamento regole per l'ottenimento di informazioni esterne al giudizio, come ad esempio informazioni sulle norme sostanziali vigenti in altri ordinamenti?

Sì ☐

No ☐

45. Se vi sono regole che limitano l'accesso alle informazioni sulle norme sostanziali in vigore in altri ordinamenti, si prega di specificarle di seguito, se possibile.

46. Come preferirebbe accedere alle informazioni sulle norme sostanziali in materia fallimentare di altri ordinamenti?

Informazioni fornite dallo stato o dai tribunali ☐

Un libro di testo scritto da un professionista ☐

Un testo o un report accademico ☐

Un PDF scaricabile contenente un report e altre informazioni ☐

Un semplice sito web contenente le informazioni ☐

Un sito web interattivo ☐

Una combinazione di quanto sopra o qualcosa di completamente diverso (specificare di seguito):

47. Sarebbe utile avere accesso a informazioni e a casi di studio che forniscano esperienze diverse di cooperazione giudiziaria transfrontaliera in materia fallimentare?

Sì ☐

No ☐

Non so ☐

48. Quale formato ritiene migliore per ottenere tali informazioni:

Un libro o un insieme di documenti ☐

Un e-book o documenti inviati via e-mail ☐

Un PDF scaricabile contenente un report e casi di studio ☐

Un semplice sito web contenente le informazioni ☐

Un sito web interattivo ☐

Una combinazione di quanto sopra o qualcosa di completamente diverso (specificare di seguito):

Casi di cooperazione giudiziaria in materia fallimentare (facoltativo)

Il progetto JCOERE ha anche il compito di sviluppare casi di studio che esemplifichino situazioni in cui si è verificata una cooperazione tra corti. Questi ultimi saranno inclusi in una banca dati accessibile a tutti i giudici europei che ritengano utile venire a conoscenza di come problemi simili sono stati affrontati in ordinamenti diversi. Se possibile, si prega di fornire un esempio tratto dalla Sua esperienza in cui ha dovuto cooperare o comunicare con un tribunale di un diverso ordinamento con una breve sintesi dei fatti del caso, la questione che ha richiesto la cooperazione o la comunicazione e come ha risolto o altrimenti trattato le questioni riguardanti la cooperazione e la comunicazione. Può indicarlo, a Sua discrezione, qui di seguito o inviare una e-mail a nuovodirittofallimentare@dipp.unifi.it con l'esempio del caso di studio.

La ringraziamo per la gentile disponibilità a partecipazione a questo progetto. Se desidera ricevere aggiornamenti o essere informata quando i nostri database saranno stati completati, La preghiamo di fornirci la Sua e-mail nella casella sottostante o di inviare una e-mail a nuovodirittofallimentare@dipp.unifi.it.

Annex III: Chapter 6 - Additional Guidelines

As indicated in the course of Chapter 6, there is an additional set of guidelines that covers some of the four areas addressed; namely the sharing or obtaining of information and disclosure requirements and asset co-ordination. As the JCOERE project focuses on cooperation within the EU, it was felt that the - The Asian Development Bank Good Practice Standards for Insolvency Law ("ADB Standards") may be less relevant than the European and International guidelines contained in the chapter. Below is the analysis of these standard under the two relevant headings.

The ADB Standards: The sharing of information about the debtor

The Asian Development Bank, in its Good Practice Standards for Insolvency Law of 2000, takes into consideration the sharing of information. Good Practice Standards 8.1 and 8.2 provide that "the law should prescribe, as fully as possible, for the provision of relevant information concerning the debtor" and that, in addition, also an independent comment and analysis on such information should be provided.

This provision is particularly relevant if we consider the principal aims of the Good Practice Standards elaborated by the Asian Development Bank, which include the creation of a common basis for the insolvency laws of the Asian countries and the enhancement of a dialogue between their courts and representatives.

The availability of proper information and the consequent transparency that derives from it is understood by the Asian Development Bank studies as a fundamental element of an effective co-operation and, more in general, of shared insolvency law standards. This point is particularly highlighted with regard to the rescue process of a business.

***In summary**:*

◊ *All relevant information about the debtors must be provided, along with an analysis of such data.*

The content of this document represents the views of the author only and is his/her sole responsibility.
The European Commission does not accept any responsibility for use that may be made of the information it contains.
This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

The ADB Standards: Stay in the context of a reorganisation

The Asian Development Bank deals with the present issue with its Good Practice Standards n. 5.4 and 5.5.

Good Practice Standard 5.4 provides that, in the context of a reorganisation, "the automatic stay or suspension of actions should be as wide and all-embracing as possible" and that it should apply to all creditors and persons bearing an interest in the property of the debtor. Instead, Good Practice 5.5. provides that the stay should be of "limited specific duration" and that relief from the stay should be granted on the application of affected creditors or other persons.

The above-mentioned provisions of the Asian Development Bank seem to be aligned with the other guidelines and best practices proposed by other international institutions and, also in this case, the value of a reorganisation efforts that preserve the assets and going concern of the debtor seems to be fully recognised.

***In summary**:*

◊ *In a reorganisation scenario, an automatic stay, as wide as possible, is recommended.*

◊ *A relief from such stay should be granted on application of the creditors or other actors.*

Annex IV: Bibliography

1. Legislation

European Union (Regulations, Directives & Proposals, Communications, and Recommendations)

Consolidated Version of the Treaty on European Union [2012] OJ C326/13.

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Council Directive (EC) 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.

Council Directive (EC) 2001/23 of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.

Council Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.

Council Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1.

Council Directive (EU) 2019/1023 of 26 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18.

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19.

Council Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

Council Treaty of Maastricht on European Union [1992] OJ C 191/1.

European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 0158 final.

European Commission, 'Communication from the Commission to the European Parliament and the Council on judicial training in the European Union' COM(2006) 356 final.

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan implementing the Stockholm Programme' COM(2010) 171 final.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Building Trust in Eu-Wide Justice – A New Dimension to European Judicial Training' COM (2011) 551 final.

European Commission, 'Communication from the Commission to the European Parliament, the European Council, and the Council on Further Strengthening the Rule of Law within the Union – State of play and next possible steps' COM (2019) 163 final.

European Commission, 'Communication from the Commission to the European Parliament, The European Council, The Council, the European Economic and Social Committee, and the Committee of the Regions on Strengthening the Rule of Law within the Union – a Blueprint for Action' COM (2019) 343 final.

European Commission, 'Compendium of European Union legislation on judicial cooperation in civil and commercial matters (2018 Edition)', (European Commission, 19 July 2019).

European Commission, 'Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency' (Staff Working Document) SWD (2014) 61 final 1.

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' (Communication) COM (2012) 744 final.

European Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' (Communication) COM (2017) 835 final.

European Commission, 'Recommendation of 12 March 2014 on a new approach to business failure and insolvency' [2014] OJ L 74/65, COM (2014) 1500 final.

European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en>. [Last accessed 13 June 2020].

European Council, 'Conclusions of the Presidency, European Council in Copenhagen, 21 and 22 June 1993' (1993) SN180/1/93 < https://www.consilium.europa.eu/media/21225/72921.pdf>

European Council, 'Conclusions of the Presidency, European Council in Tampere 15 and 16 October 1999,' (1999) <https://www.europarl.europa.eu/summits/tam_en.htm#c?textMode=on>.

European Parliament Committee on Legal Affairs 'Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' [2013] (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)).

European Parliament, 'Motion for a Resolution on the Political Situation in Austria' (2 February 2000) B5-0101/2000.

European Parliament 'Resolution of 17 June 2010 on Judicial Training – Stockholm Programme' (P7_TA(2010)0242.

European Parliament 'Resolution of 14 March 2012 on judicial training' (2012/2575(RSP)).

European Parliament, 'resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded(2017/2131 (INL))' [2019] OJ C 433/66.

Venice Commission of the Council of Europe, 'Rule of Law Checklist', CDL-AD (2016)007. Retrieved from: <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> [Last accessed 15 June 2020].

Virgós, M and Schmit, E 'Report on the Convention of Insolvency Proceedings of 3 May 1996', EC Council Document 6500/96.

Denmark

The Administration of Justice Act.

The Constitutional Act of the Kingdom of Denmark.

Kamerstukken II 2012/13, 29911, 74.

England and Wales

Companies Act 2006.

Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

Insolvency Act 1986.

France

Le Code de commerce ("Commercial Code").

La Loi n° 2005-845 du 26 juillet 2005 de sauvegarde des entreprises ("Law No. 2005-845 of July 26th, 2005 for the Safeguard of Companies").

La Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle (Law no. 2016-1547 of 18 November 2016, rewriting the section in the Commercial Code on the status of commercial court judges, article 95, introducing new Article L722-17 of the Commercial Code).

Ordonnance n° 2017-1519 du 2 novembre 2017 portant adaptation du droit français au règlement (UE) n° 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité (Ordinance no. 2017-1519 of November 2nd, 2017, adapting French law to Regulation (EU) No. 2015/848 of the European Parliament and of the European Council of May 20, 2015 relating to insolvency proceedings).

Germany

Die Insolvenzordnung ("The Insolvency Statute").

Gerichtsverfassungsgesetz ("Law on the Structure of Courts").

Grundgesetz für die Bundesrepublik Deutschland (German Constitution).

Ireland

The Irish Constitution.

Companies Act 2014.

Companies Act 1963.

Court of Appeal Act 2014.

Italy

Codice della crisi d'impresa e dell'insolvenze ("Decree No 14 of 12th January 2019 - CCI").

Constitution of the Italian Republic (*Costituzione della Repubblica Italiana*).

Legislative Decree 30 January 2006, art 25 as amended by Law 30 July 2007.

Poland

Act of 26 May 1982 - Law on Advocates.

Act of 6 July 1982 on Legal Advisors.

Act of 23 January 2009 on The National School of Judiciary and Public Prosecution.

Act of 15 May 2015 on Restructuring Law (*Prawo restrukturyzacyjne*).

Constitution of the Republic of Poland.

Singapore

Singapore Companies (Amendment) Act 2017, Model Law.

The Netherlands

Wet homologatie onderhands akkoord (Act on the Confirmation of Extrajudicial Restructuring Plans) (WHOA).

United States of America

Bankruptcy Act of July 1, 1898, Ch 541 30 Stat 544 (repealed 1978).

Title 11, Chapter 3, United States Code.

Title 11, Chapter 5, United States Code.

Title 11, Chapter 11, United States Code.

Title 28, Chapter 6, United States Code.

Title 28, Chapter 87, United States Code.

United States Constitution.

Other Congressional Documentation

Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass)

Model Emergency Bankruptcy Rule (a) (1982) reprinted in Bankruptcy Code, Rules and Forms, xv (West 1983)

2. Cases

European Court of Human Rights

Schüssel v Austria, Ap no. 42409/98 (ECHR 21 February 2002).

European Union

Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v. Christianapol sp. z o.o.* [2012] ECLI:EU:C:2012:739.

Case C-535/17 *NK v BNP Paribas Fortis NV* [2019] ECLI:EU:C:2019:96.

Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459.

Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813.

Case C-126/16 *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* [2017] ECLI:EU:C:2017:489.

Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805.

Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'* [2012] ECLI:EU:C:2012:215.

Case C-133/78 *Henri Gourdain v Franz Nadler* [1979] ECLI:EU:C:1979:49.

Case C-557/13 *Hermann Lutz v Elke Bäuerle* [2015] ECLI:EU:C:2014:2404, Opinion of Advocate General Szpunar.

Case C-396/*09 Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA.* [2011] ECR I-09915.

Case C-444/07 *MG Probud Gdynia sp. z o.o.* [2010] ECR I-00417.

Case C-157/13 *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB* [2014] ECLI:EU:C:2014:2145.

Case C-649/16 *Peter Valach and Others v Waldviertler Sparkasse Bank AG and Others* [2017] ECLI:EU:C:2017:986.

Case C-191/10 *Rastelli Davide* [2011] ECR I – 13209.

Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-00701.

Case C-641/16 *Tünkers France and Tünkers Maschinenbau GmbH v Expert France* [2017] ECLI:EU:C:2017:847.

Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-09919.

Austria

Collins & Aikman, *Re* (Higher Regional Court of Graz, 20 October 2005, 3 R 149/05.

England, Wales and Northern Ireland

Antony Gibbs and sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399.

Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch).

Bank of Baroda v Maniar [2019] EWHC 2463.

Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26.

Daisytek-ISA Ltd., Re [2004] BPIR 30

Drax Holdings Ltd, Re [2003] EWHC 2743 (Ch).

Eurofood IFSC Ltd, Re (C-341/04) [2006] Ch. 508; [2006] 3 W.L.R. 309.

HIH Casualty and General Insurance Ltd, Re [2008] UKHL 21.

Irish Bank Resolution Corp Ltd v Quinn [2012] NICh. 1, [2012] B.C.C. 608.

Nortel Networks SA & Ors, Re [2009] EWHC 206 (Ch).

O'Donnell and Anor. v Bank of Ireland [2012] EWHC 3749.

Official Receiver v Eichler [2007] BPIR 1636.

Phoenix Kapitaldienst GmbH, Schmitt v Deichmann, Re [2012] EWHC 62 (Ch), [2013] Ch 61.

Rodenstock GmbH, Re [2011] EWHC 1104 (Ch).

Rubin v Eurofinance SA and others [2012] UKSC 46.

Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda) [2015] AC 1675, [2014] UKPC 36.

Stanford International Bank Ltd., Re [2010] EWCA Civ 137.

Stojevic v Komercni Banka AS [2006] EWHC 3447 (Ch) [2007] BPIR 141.

Primacom Holding GmbH & Anor v A Group of the Senior Lenders & Credit Agricole [2012] EWHC 164 (Ch).

France

MPOTEC Gmbh, Re [2006] BCC 681.

Ireland

ACC v McCann and Griffin [2012] IEHC 236.

Ballantyne RE Plc & Companies Act 2014 [2019] IEHC 407.

Cullen v Toibín [1984] I.L.R.M 577.

Doe v Revenue Commissioners [2008] 3 IR 328.

Eurofood IFSC Ltd (No 2), Re [2006] IESC 41, [2006] 4 IR 307.

Flightlease (Ireland) Ltd., Re (in Voluntary Liquidation) [2012] IESC 12.

Kelly v O'Neill [2000] 1 I.L.R.M. 507.

The Irish Times v Ireland [1998] 1 IR 359, 361.

R, In re [1989] I.R. 196.

Italy

Decision of the Supreme Court, 12/04/2018, n 9087.

Singapore

Zetta Jet Pte Ltd and Others, Re [2018] SGHC.

United States

Broyles v US Gypsum Co 266 BR 788, 783 (ED Tex 2001).

Catapult Entm't, In re 165 F3d 747, 754-755 (9th Cir 1999).

Del & Hudson Ry Co, In re 96 BR 467 (Bankr D Del 1988).

Enron Corp, In re 274 BR 327 (Bankr. S.D.N.Y. 2002).

General Motors Corp, In re 407 BR 463 (Bankr SDNY 2009).

Houghton Mifflen Harcourt Publishing Co, In re 474 BR 122 (Bankr SDNY 2012).

Houghton Mifflen Harcourt Publishing Co, In re 474 BR 122 (Bankr SDNY 2012) – 56 Bankr Ct Dec 179 (22 June 2012): Decision on US Trustee Motion to Transfer Venue.

Lehman Bros Holdings Inc, Cross Border Insolvency Protocol for the Lehman Brothers Group of Companies (May 12, 2009).

Lowenschuss, In re 67 F3d 1394, 1401-02 (9th Cir 1995).

Maxwell Communications Corp, In re Case No 91-B-15741 (TLB) (Bankr SDNY Jan 15 1992).

Maxwell Communication Corp, In re Case No 91-B-14741 (TLB) (Bankr SDNY Jan 15 1992): Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators.

Nakash, In re Ch 11 Case no 94-B-44840 (NRL) (Bankr SDNY May 23 1996): Order Approving Cross-Border Protocol, Granting Comity to Jerusalem District Court Letter of Request, Setting Damages for Initial Stay Violation and Granting *Nunc Pro Tunc* Stay Relief in Respect of Alleged Further Stay Violations.

Nortel Networks Inc, In re 669 F3d 128 (3d Cir 2011).

Northern Pipeline Construction Co v Marathon Pipe Line Co 458 US 50, 87 (1982).

Ocean Properties of Del Inc, In re 95 BR 305 (Bankr D Del 1988).

Ogden vs Saunders 25 US (12 Wheat) 213 (1827).

Polaroid Corp, *In re* No 01-10864 (Bankr D Del 2002).

Polaroid Corp, *In re* No 01-10864 (Bankr D Del July 3, 2002), Transcript of Sale Hearing before Honourable Peter J Walsk United States Chief Bankrupcty Judge, 172-173.

Sturges v Crownshield 17 US (4 Wheat) 122 (1819).

West Electrics Inc, In re 852 F2d 79 (3d Cir 1988).

W Real Estate Fund Inc, In re 922 F2d 592, 601-02 (10th Cir 1990).

Wood v Wood (In re Wood) 825 F2d 90, 95 (5th Cir 1987).

Zale Corp, In re 62 F3d 746, 760-01 (5th Cir 1995).

3. Guidelines on Judicial Cooperation

'ALI-III Global Principles for Cooperation in International Insolvency Cases' (International Insolvency Institute 2017).

'ALI-UNIDROIT Principles of Transnational Civil Procedure' (American Law Institute and UNIDROUT 2004).

Conference on European Restructuring and Insolvency Law (CERIL) Statement 2018/01 in Insolvency Regulation (Recast) and National Procedural Rules.

'Core Principles for an Insolvency Law Regime' (European Bank for Reconstruction and Development 2004).

'EU Cross-Border Insolvency Court-to-Court Cooperation Principles' (Tri Leiden, University of Leiden, and Nottingham Law School 2014).

Frade C, et al, 'Assessing Courts' Undertaking of Restructuring and Insolvency Actions: Best Practices, Blockages, and Ways of Improvement' (European Commission 2019).

'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases' (The American Law Institute and the International Insolvency Institute 2001).

'Principles for Effective Insolvency and Creditor/Debtor Regimes' (World Bank 2011).

Stanghellini L, Mokal R, Paulus C.G, and Tirado I, *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018).

Wessels B and Virgos M, 'European Communication and Cooperation Guidelines for Cross-Border Insolvency' (INSOL Europe Academic Wing 2007).

---, Madaus S, and Boon G.J, *Rescue of Business in Insolvency Law* (European Law Institute 2017).

The Role of the Judge in the Restructuring of Companies within Insolvency (Judicial Wing of INSOL Europe 2013).

United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (UN, 2014).

United Nations Commission on International Trade Law, *Practice Guide on Cross-Border Insolvency Cooperation* (UN, 2009).

4. Books

Brinkmann M (ed), *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019).

Bork R and Mangano R, *European Cross-Border Insolvency Law* (OUP, 2016).

Friedman M, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975).

Fletcher I, *Insolvency in Private International Law* (Oxford, Clarendon Press, 1999).

Kosar D, *Perils of Judicial Self-Government in Transitional Societies* (CUP, 2016).

Legrand P, *Fragments of Law as Culture* (WEJ Tjeenk Willink, 1999)

LoPucki L.M, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (Ann Arbor, 2005).

Lynch Fannon I, Marshall J and O'Ferrall R, *Corporate Insolvency and Rescue* (Butterworths, 1996).

--- *Working Within Two Kinds of Capitalism* (Hart, 2003).

--- and Murphy G, *Corporate Insolvency and Rescue* (Bloomsbury, 2012).

Moss G, Fletcher I and Isaacs S, *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016).

Payne J, *Scheme of Arrangement: Theory Structure and Operation* (CUP, 2014).

Siebert Fohr A (ed), *Judicial Independence in Transition* (Springer 2012);

Stanghellini L, Mokal R, Paulus C.G, Tirado I, *Best practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer, 2018).

Vellani C, *L'approccio giurisdizionale all'insolvenza transfrontaliera* (Milano, Dott A Giuffre' Editore, 2006).

5. Book Chapters

Akintola K and Ellina S, 'The Use and Abuse of Corporate Insolvency Rescue Procedures: A Contextual Evaluation of the United Kingdom and Cyprus' in Jennifer L. L. Gant (ed), *Party Autonomy and Third Party Protection in Insolvency Law* (INSOL Europe 2019).

Cotterell R, 'The Concept of Legal Culture' in David Nelkin (ed), *Comparing Legal Cultures* (Dartmouth Publishing 1997).

Dahl M and Kortleben J, 'Chapter 1: General Provisions: Article 8, Third Parties' Rights in Rem in Brinkmann (ed) *European Insolvency Regulation: Article by Article Commentary (*Beck, Hart, Nomos, 2019).

Fleck J, 'Judicial Independence in Hungary' in A Sievert-Fohr (ed), *Judicial Independence in Transition* (Springer 2011).

Fletcher I, 'Spreading the Gospel: The Mission of Insolvency Law and Insolvency Practitioners in the Early 21st Century' in Stefania Barriati and Paul J Omar (eds), *The Grand Project: Reform of the European Insolvency Regulation* (INSOL Europe 2014).

Mangano R, Wessels B, Dammann R, 'Secondary Insolvency Proceedings (Art 34-52), in Bork R and van Zwieten K (eds) *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).

Skauradszun D and Spahlinger A, 'Chapter III Secondary Insolvency Proceedings, Articles 40 – 44', in Brinkmann M (ed) *European Insolvency Regulation: Article by Article Commentary* (Beck, Hart, Nomos, 2019).

Van Zwieten K, Ringe G, Snowden R, Garcimartin F.J and Virgos M, 'Chapter 1: General Provisions (Art. 1-18)' in Bork R and Van Zwieten K (eds) *Commentary on the European Insolvency Regulation* (Oxford University Press, 2016).

Zipperer H, 'Ist der Grundsatz der par conditio creditorum gerecht?' in Marie Luise Graf-Schlicker, Hanns Prütting, Wilhelm Uhlenbruck (eds), *Festschrift für Heinz Vallender* (RWS Vlg Kommunikationsforum, 2015).

6. Articles

Alegro M.G, 'In Defense of Forum Shopping: A Realistic Look at Selecting a Venue' (1999) 78 *Neb L Rev* 79.

Altman J, 'A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency' (2011) 12 *San Diego Int'l L J* 463.

Anderson A, Brown J, and Gupta P.P, 'Jurisdictional Competition for Corporate Charters and Firm Value: a Reexamination of the Delaware Effect' (2017) 14 *Int J Discl Gov* 341.

Armour J, Deakin S, Sarkar P, Siems M, and Singh A, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2008) 6(2) *Journal of Empirical Legal Studies* 343.

---, Deken S, Lele P, and Siems M, 'How do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection' (2009) 57 *Am J Comp L* 579.

Arye Bebchuk L and Roe M.J, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stan L Rev* 127.

--- and Guzman A.T, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 *J. L. & ECON*. 775.

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

Batory A, 'Why do Anti-Corruption Laws Fail in Central Eastern Europe? A Target Compliance Perspective' (2012) 6 *Regulation & Governance* 66.

Becker T and Wei L, 'Questions Mount in Chapter 11 Case of Former Polaroid' (WSJ Online 2003).

Beers D.J, 'Judicial Self-Governance and the Rule of Law: Evidence from Romania and the Czech Republic' (2012) 59(5) *Problems of Post-Communism* 50.

Bell J, 'Path Dependence and Legal Development' (2012-2013) 87 *Tul L Rev* 787.

Benvenuti S, 'The European Judicial Training Network and its Role in the Strategy for the Europeanisation of National Judges' (2015) 7(1) *International Journal for Court Administration* 59.

Bernardo P.J, '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.

Bork R, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 *Int. Insolv. Rev.* 246

Botero J.C, Dhankov S, La Porta R, Lopez-de-Silanes F, and Schleifer A, 'The Regulation of Labour' (2004) 119(4) *Quarterly Journal of Economics* 1339.

Castillo Ortiz P.J, 'Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe' (2017) 9 *Hague J Rule Law* 315.

Claes M and De Visser M, 'Are you Networked Yet? On Dialogues in European Judicial Networks (2012) 8(2) *Utrecht L Rev* 100.

Coffee J.C, 'The Future of Corporate Federalism: State Competition and the New Trend toward De Facto Federal Minimum Standards' (1987) 8 *Cardozo L Rev* 759.

Cole M. G, and Zywicki T.J, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) *Utah L Rev* 511.

Coman R, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) *Europe-Asia Studies* 892.

Coordes L.N, 'The Geography of Bankruptcy' (2015) 68 *Vand L Rev* 382.

Cuyvers A, 'The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World' (2013) 19(6) *Eur L J* 711.

Deane F and Mason R, 'The UNCITRAL model law on cross-border insolvency and the rule of law' (2016) 25(2) *International Insolvency Review* 138.

De Weijs R. J, 'Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and *Anticommons*' (2012) 21(2) *International Insolvency Review* 67.

Dominelli S and Ilaria Queirolo I, '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.

Eidenmuller, H 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' (2013) 20 *Maastricht J Eur & Comp L* 133

Eisenberg T and LoPucki L.M, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 *Cornell L Rev* 967.

Flaschen E.D, and Silverman R.J, 'Cross-border Insolvency Cooperation Protocols' (1998) 33(3) *Texas International Law Journal* 587

Fossum J.E, 'European Federalism: Pitfalls and Possibilities' (2017) 23 *Eur L J* 361.

Frerejohn J, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *S Cal L Rev* 353.

Friedman L.M, 'Legal Culture and Social Development' (1969) 4(1) *Law & Society Review* 29.

Geva E.Z, 'National Policy Objectives from an EU Perspective: UK Corporate Rescue and the European Insolvency Regulation: A Note on *Hans Brochier Holdings Ltd* v. *Exner* and *Re Collins & Aikman Europe SA*' (2007) 8 *EBOR* 605**.**

Ghei N and Parisi F, 'Adverse Selection and Moral Hazard in Forum Shopping: Conflicts of Law as Spontaneous Order' (2004) 25(4) *Cardozo L Rev* 1367, 1368.

Ghio E, 'Cross-border Insolvency and Rescue Law Theory: Moving Away from the Traditional Debate on Universalism and Territorialism' (2018) 29(12) *ICCLR* 713.

Glaeser E.L and Shleifer A, 'Legal Origins' (2002) 117(4) *The Quarterly Journal of Economics* 1193.

Gomes Andre J, 'American Lessons: Legitimacy, Federalism, and the Construction of a European Compound Polity' (2017) 18(3) *European Politics and Society* 333.

Hathaway O.A, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000-2001) 86 *Iowa L Rev* 601.

Jackson S and Mason R, 'Developments in Court-to-Court Communications in International Insolvency Cases' (2014) 37(2) *UNSW L J* 507.

Kincaid J, 'Confederal Federalism and Citizen Representation in the European Union' (1999) 22(2) *West European Politics* 34.

Kahan M and Kamar E, 'The Myth of State Competition in Corporate Law' (2002) 55(3) *Stanford L Rev* 679.

Kamalnath A, 'Cross-Border Insolvency Protocols: A Success Story?' (2013) 2 *International Journal of Legal Studies and Research* 172.

La Porta R, Lopez-de-Silanes F, Shleifer A, and Vishny R.W, 'The Legal Determinants of External Finance' (1997) 52(3) *The Journal of Finance* 1131.

---, ---, ---, ---, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113.

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

LoPucki L.M, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 *Cornell L Rev* 967.

--- 'Universalism Unravels' (2005) 70 *Am Bankr L J* 143.

--- and Doherty J, 'Bankruptcy Fire Sales' (2007) 106 *Mich L Rev* 1.

--- and Whitford W.C, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991(1) *Wis L Rev* 11.

Lubben S.J, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) *Case Western Reserve Law Review* 319.

--- and Woo S.P, 'Reconceptualising Lehman' (2014) 49 *Texas Int'l L Rev* 29

Lynch Fannon I, 'Bankruptcy Tourism in the UK: Why and How?' (2013) 26(6) *Insolvency Intelligence* 85.

--- 'An Irish Perspective on the Cram down provisions in the Preventive Restructuring Directive 1023/2019 EU: Guest Editorial' (2019) 27(3) *International Insolvency Review* 1.

Madaus S, 'Leaving the Shadows of US Insolvency Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 *Eur Bus Org L Rev* 615.

--- 'Insolvency Proceedings for Corporate Groups under the New Insolvency Regulation' (2015) 6 *International Insolvency Law Review* 235.

Mak E, 'Researching Judicial Ethical Codes, or: How to Eat a Mille-Feuille?' (2018) 9(2) *Int'l J for Court Administration* 55.

--- Graaf N, and Jackson E, 'The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal, and Institutional Dimensions of 'Judicial Culture' (2018) 34(1) *Utrecht Journal of International and European Law* 24.

Maltese M, 'Court-to-court protocols in crossborder bankruptcy proceedings: differing approaches between civil law and common law legal systems' (2013) *International Insolvency Institute.*

Mangano R, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 *IIR* 314.

Masterton L.R, 'Forum Shopping in Business Bankruptcy: An Examination of Chapter 11 Cases' (1999) 16(1) *Bankr Dev J* 65.

Mazzoni A, 'Procedure concorsuali e standards internazionali: norme e principi di fonte Uncitral e Banca Mondiale', (2018) 45(1) *Giur. Comm*., I, 43.

McCormack G, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) *Cambridge L J* 169.

'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) *J Legal Studies* 325.

--- 'Reforming The European Insolvency Regulation: A Legal And Policy Perspective' (2014) 10 *Journal of Private International Law* 41.

--- 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 *ICLQ* 815.

--- 'US Exceptionalism and UK Localism? Cross-Border Insolvency Law in Comparative Perspective' (2016) 36(1) *Legal Studies* 136.

Mendelski M, 'EU-Driven Reforms in Romania: a Success Story?' (2012) 28(1) *East European Politics* 23.

Merry S.E, 'What is Legal Culture? An Anthropological Perspective' (2010) 5 J Comp L 40.

Mohan S.C, 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21(3) *International Insolvency Review* 199.

Moore K.A and Parisi F., 'Rethinking Forum Shopping in Cyberspace' (2002) 77 *Chi Kent L Rev* 1325.

O'Hara E.A and Ribstein L.E, 'From Politics to Efficiency in Choice of Law' (2000) 6 U Chi L Rev 1151.

Oliver P and Stefanelli J, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54(5) *JCMS* 1075.

Omar P, 'Genesis of the European Initiative in Insolvency Law' (2003) 12 *Int. Insolv. Rev.* 147.

---'The Limits of Co-Operation at Common Law: *Rubin v Eurofinance* in the Supreme Court' (2013) 10(2) *ICR* 106.

---'An Irish Perspective on Insolvency Co-Operation: the *RE Flightlease* Case' (2013) 10(3) *ICR* 158.

---'Apres *Rubin*: le Deluge? Thoughts on the future of Common Law Insolvency Co-Operation' (2013) 10(6) *ICR* 356.

---'The Resurgence of Cross-Border Recognition and Enforcement of Insolvency Judgments: the *Re Phoenix* Case' (2013) 9 *ICCLR* 329.

---'The "Empire" Strikes Back: Lessons for the Mother Country in Insolvency Co-Operation' (2013) 11 *ICCLR* 411.

---'A Singular Tide in Insolvency Co-Operation in Bermuda' (2014) 11(3) ICR 159; 'The Universe of Insolvency Co-Operation and the Primeo Directive' (2014) 12(1) *ICR* 1.

Nelkin D, 'Using the Concept of Legal Culture' (2004) 29 *Austl J Leg Phil* 1.

--- 'Thinking about Legal Culture' (2014) 1 *Asian J L & Soc'y* 255.

---Disclosing/Invoking Legal Culture: An Introduction' (1995) 4 *Soc & Leg Stud* 435.

Panzani L, '*La disciplina della crisi di gruppo tra proposte di riforma e modelli internazionali*' (2016) 38(10) *Il fallimento e le altre procedure concorsuali* 1153.

Parikh S.D, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) *Connecticut L Rev* 159.

Payne J, ' Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563, 589.

Pottow J, 'Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45(4) *Va J Int'l L* 935.

--- 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency' (2007) 32 *Brook J Int'l L* 785.

Rasmussen R and Thomas R, 'Chapter 11 Reorganization Cases and the Delaware Myth' (2002) 55 *Vanderbilt L Rev* 1987.

Redish MH, 'Doing it with Mirrors: *New York v United States* and Constitutional Limitations of Federal Power to Require State Legislation' (1993-1994) 21 *Hastings Const LQ* 593.

Roe M.J, 'Delaware's Competition' (2003) 117 *Harvard L Rev* 588.

Rynne R, 'Landmark Scheme of Arrangement in Ireland' (2019) Autumn *Eurofenix* 30.

Santen B, 'Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 *ERA Forum* 229.

Sexton A.V, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation' (2011-2012) 12 *Chi J Int'l L* 811.

Skeel D.A, 'Bankruptcy Judges and Bankruptcy Venue' (1998) 1(1) *Delaware L Rev* 1.

Skeel D.A, 'What's So Bad About Delaware' (2001) 54 *Vanderbilt L Rev* 309.

Slaughter A.M, 'International Law in a World of Liberal States' (1995) 6 *Eur J Int'l L* 503.

Spigelman J, 'Cross-Border Insolvency: Co-operation or Conflict?' (2009) 83(1) *Australian Law Journal* 44.

Stanghellini L and Zorzi A, 'Coordinating the Prevent Restructuring Directive and the Recast European Insolvency Regulation' (2019) *Autumn Eurofenix* 22.

Sylla R, Wright R.E, and Cowen D.J, 'Alexander Hamilton, Central Banker: Crisis Management during the US Financial Panic of 1792' (2009) 83 *Business History Review* 61.

Tabb C.J, 'The History of the Bankruptcy Laws in the United States' (1995) 3(1) *Am Bankr Inst L Rev* 5.

Umfreville C, Omar P, Lücke H, Lynch Fannon I, Veder M and Piñeiro L.C, 'Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario'', (2018) 27 *International Insolvency Review* 422.

Unt L, 'International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue (1997) 28 *Law & Pol'y Int'l Bus* 1037.

Warner G.R, 'Conflicting Norms: Impact of the Model Law on Chapter 11's Global Restructuring Role' (2019) 28(2) *IIR* 273.

Wieacker F and Bodenheimer E, 'Foundations of European Legal Culture' (1990) 38(1) *The American Journal of Comparative Law* 1.

Wessels B, 'A Glimpse into the Future: Cross-Border Judicial Co-Operation in Insolvency Cases in the European Union' (2015) 24(1) *IIR* 97.

--- 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.

Westbrook J.L, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (1991) 65 *Am Bankr L J* 457.

--- 'International Judicial Negotiation' (2003) 38 *Tex Int's L J* 567.

--- 'Chapter 15 at Last' (2005) 79 *Am Bankr LJ* 713.

--- 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 *Tex L Rev* 1473.

Zimmerman R, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (1996) 112(Oct) *LQR* 576.

Zumbro P.H, 'Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool' (2010) 11 *Business Law International* 157.

7. Online Journals

Bariatti S and Conso G, '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.* Available at: < http://ilfallimentarista.it/articoli/focus/il-regolamento-ue-2015848-del-parlamento-europeo-e-del-consiglio-del-20-maggio-2015>

Hals T and Graybow M, 'GM Bankruptcy Forever Linked to Harlem Dealership' (2009) *Reuters* <https://www.reuters.com/article/us-gm-harlemdealership/gm-bankruptcy-forever-linked-to-harlem-dealership idUSTRE55050V20090601#:~:text=NEW%20YORK%20(Reuters)%20%2D%20General quirks%20of%20U.S.%20bankruptcy%20law.&text=Before%20GM%20filed%20its%20historic,its%20own%20Chapter%2011%20filing.> [accessed 23 June 2020.]

Stephen Lubben, "The Overstated Absolute Priority Rule" (20 March 2015), available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581639> [Last accessed 23 June 2020].

Thomas C.W, 'The Rise and Fall of Enron' (2002) *Journal of Accountancy* < https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html> [accessed 22 June 2020.]

8. Reports

Bariatti S and Van Galen R, *Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices TENDER NO. JUST/2012/JCIV/CT/0194/A4*, (INSOL Europe 2014).

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].

Council of Europe, *Anti-money Laundering and Counter-terrorist Financing Measures in Cyprus, Fifth Round Mutual Evaluation Report December 2019 Moneyval* (2019) 27.

European Commission, *2020 Rule of Law Report – targeted stakeholder consultation* (European Commission 23 March 2020) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report_en#2020-rule-of-law-report-targeted-stakeholder-consultation> [accessed 12 June 2020.]

European Commission, *Special Eurobarometer 489 Report on the Rule of Law* (European Commission 2019)<https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2235> [accessed 15 June 2020.]

JCOERE Consortium, *Report 1: Identifying substantive and procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations* (JCOERE Project, 2019) < https://www.ucc.ie/en/jcoere/research/report1/>.

Patrick J Purcell, *The Enron Bankruptcy and Employer Stock in Retirement Plans* (CRS Report for Congress 2002) <https://www.everycrsreport.com/files/20020122_RS21115_077711a5e71ecdbbbb7715846f05d7e498f691c0.pdf> [accessed 23 June 2020].

Vriesendorp R, Hengst F, van Kesteren W, Lynch Fannon I, Nichels M, Nerriec B, *INSOL International Special Report on Restructuring Cross Border Groups: Key Considerations Around Foreign Tax and Finance Driven SPVs* (INSOL International, June 2020).

9. Websites

Barron J, 'Bill Introduced to Combat Bankruptcy "Venue Shopping"' (*NCAM* 2011) http://www.nacme.com/credittrends/articles/Aug_11/Bill%20Introduced%20to%20Combat%20Bankruptcy%20Venue%20Shopping.htm [Last accessed 23 June 2020.]

Broder J, 'How Judges in Germany Work' (Deutschland.de 2019) <https://www.deutschland.de/en/topic/politics/the-way-judges-work-in-germany-five-facts#:~:text=Requirements%20for%20judges,a%20minimum%20of%208.0%20points> [last accessed 25 June 2020].

De Rechtspraak, 'LSR' (De Rechtspraak Website) www.werkenbijderechtspraak.nl/de-organisatie/lsr/ [Last accessed 26 June 2020].

De Rechtspraak, 'Recht Voor Jou' (De Rechtspraak Website) <www.rechtvoorjou.nl/home/werken-bij-de-rechtbank/hoe-word-je-rechter-> [Last accessed 26 June 2020].

Deloitte, 'Business Restructuring Solutions: Solutions to help get your business back to growth' < https://www2.deloitte.com/ie/en/pages/finance/solutions/restructuring-services.html> [Last accessed 17 June 2020].

Dentons Solicitors, 'English Creditors and the new Dutch Scheme of Arrangement - A two Horse Race?' (June 16 2020) < https://www.dentons.com/en/insights/articles/2020/june/16/whoa-english-creditors-and-the-new-dutch-scheme-of-arrangement-a-two-horse-race> [Last accessed 17 June 2020].

Ecole Nationale de la Magistrature (ENM): http://www.enm.justice.fr/ [Last accessed 26 June 2020].

EJTN Website <http://www.ejtn.eu/> [Last accessed 26 June 2020].

EJTN, 'Rule of Law in Europe: Perspectives from Practitioners and Academics' (EJTN 2019) <http://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/> [Last accessed 15 June 2020].

Ecole Nationale de la Magistrature, 'Judges Consulaires' (ENM) <http://www.enm.justice.fr/formation-juges-consulaires> [Last accessed 26 June 2020].

Ecole Nationale de la Magistrature, 'National School for the Judiciary Information Pamphlet' (ENM) <https://www.enm.justice.fr/sites/default/files/publications/plaquette2017_EN.pdf > [Last accessed 25 June 2020].

ERA Website: <http://www.era.int/> [Last accessed 26 June 2020].

European Commission, 'Conditions for Membership' (06 December 2016) < https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en> [Last accessed 27 April 2020].

European Commission, 'Judicial Training Structures in the EU: Denmark' (European Commission 2012) <https://ejustice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> accessed 26 June 2020.

European Commission, 'Judicial Training Structures: Italy' (European Commission 2012) <https://ejustice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> [Last accessed 16 June 2020].

European Commission, 'Judicial Training Structures in the EU: Romania' (European Commission 2012) <https://e-justice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> accessed 16 June 2020.

European Commission, 'Press Release: European Commission acts to preserve the rule of law in Poland' (European Commission, 26 July 2017) < https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2161> [Last accessed 27 April 2020].

European Commission, 'Press Release: Getting the priorities for future Justice polices right: European Commission boosts judicial training to foster mutual trust' (European Commission, 26 June 2014) < https://ec.europa.eu/commission/presscorner/detail/en/IP_14_745> [Last accessed 26 June 2020].

European E-Justice, 'Legal Professions – Austria' (European e-Justice) <https://e-justice.europa.eu/content_legal_professions-29-at-en.do?member=1> [Last accessed 25 June 2020].

European E-Justice, 'Legal Professions – Netherlands' (European e-Justice) <https://e-justice.europa.eu/content_legal_professions-29-nl-en.do?member=1#:~:text=Anyone%20wishing%20to%20become%20a,system%20provides%20the%20necessary%20training> [Last accessed 25 June 2020].

European E-Justice, 'Legal Professions – Spain' (European e-Justice) <https://e-justice.europa.eu/content_legal_professions-29-es-en.do?member=1> accessed 25 June 2020.

Federal Ministry of Republic of Austria, 'Legal Professions in Austria' (Federal Ministry of the Republic of Austria 2018) <Justizwww.justiz.gv.at> [Last accessed 25 June 2020].

Frieswick K, 'What's Wrong with this Picture?' (*CFO* 2003) <https://www.cfo.com/banking-capital-markets/2003/01/whats-wrong-with-this-picture/> [accessed 22 June 2020].

Garcimartín F 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' available at http://www.ejtn.eu/PageFiles/6333/Rules_on_jurisdiction.pdf.> [Last accessed 23 June 2020].

Greffe du Tribunal de Commerce, 'Presentation du Tribunal de Commerce' (Greffe du Tribunal de Commerce CAEN) < http://www.greffe-tc-caen.fr/pres_tribunal.php#:~:text=Les%20juges%20consulaires,ni%20indemnit%C3%A9%20d'aucune%20sorte> [Last accessed 26 June 2020].

Gubitosi M, 'Legal Systems in Italy: Overview' (Reuters 2019) <https://uk.practicallaw.thomsonreuters.com/w-007-7826?transitionType=Default&contextData=(sc.Default)> accessed 16 June 2020.

Global Restructuring Review, 'International Debt Restructuring: Can other Jurisdictions compete with London and New York? <https://www.shlegal.com/docs/default-source/news-insights-documents/11_16-grr-roundtable.pdf?sfvrsn=b58b165b_0> [Last accessed June 17, 2020].

IBA, 'How to Qualify as a Lawyer in the Netherlands' (International Bar Association) <https://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Netherlands.aspx> accessed 25 June 2020.

INSOL Europe 'Judicial Wing Introduction and Members' (INSOL Europe Website) <https://www.insol-europe.org/judicial-wing-introduction-and-members>[Last accessed 26 June 2020].

INSOL Europe, 'Past Events: INSOL Europe Annual Congress 2018: Athens, Greece' (*INSOL Europe* 2018) < https://www.insol-europe.org/events/past_events/0/start_date/asc/2018> [Last Accessed 23 June 2020].

JCOERE Consortium, Barłowski Mand Zydowicz S, 'Country Report: Poland' (JCOERE Website 2020), <

https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionpoland/> [Last accessed 23 June 2020].

JCOERE Consortium and Boon G.J, 'Country Report: The Netherlands' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionthenetherlands/.

JCOERE Consortium and Fruhstorfer S, 'Country Report: Austria' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionaustria/. [Last accessed 23 June 2020].

JCOERE Consortium, Ghio E and Omar P, 'Country Report: France' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionfrance/> [Last accessed 23 June 2020].

JCOERE Consortium and Langkjaer L.H, 'Country Report: Denmark' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiondenmark/> [Last accessed 23 June 2020].

JCOERE Consortium and Madaus S, 'Country Report: Germany' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiongermany/. [Last accessed 23 June 2020].

JCOERE Consortium, Sotillo Marti A and Vercher-Moll J, 'Country Report: Spain' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionspain/> [Last accessed 23 June 2020].

Kiviat B, 'GM's Potential Bankruptcy: Shopping for Venue" (Time 2009) <http://content.time.com/time/business/article/0,8599,1890171,00.html> [Last accessed 23 June 2020].

National Judicial College, 'Get to Know Another Country's Judiciary: Spain' (The National Judicial College 2018) < https://www.judges.org/news-and-info/get-to-know-another-countrys-judiciary-spain/> [Last accessed 25 June 2020].

Publications Office of the European Union, 'Accession Criteria: Copenhagen Criteria' (Eur-Lex website), <https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html> [Last accessed 26 June 2020].

Riedel J, 'Training and Recruitment of Judges in Germany' (2013) <https://www.iacajournal.org/articles/abstract/10.18352/ijca.12/> [Last accessed 25 June 2020].

SSR, 'Initial Training Programmes' (SSR Website) https://ssr.nl/ssr-excellent-training-for-a-just-society/initial-training-programmes/. [Last accessed 25 June 2020].

SSR, 'Life Long Education' (SSR website) https://ssr.nl/ssr-excellent-training-for-a-just-society/life-long-education/. [Last accessed 25 June 2020].

SSR,' Summary of information about the new Dutch initial training programme' (SSR Website) <https://ssr.nl/wp-content/uploads/2020/03/Summary-new-Dutch-initial-training-programme.pdf > [Last accessed 26 June 2020].

Tapia A and Del Campo A, 'Legal Systems in Spain: Overview' (Thomson Reuters Practical Law 2018) <https://uk.practicallaw.thomsonreuters.com/7-634-0207?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a897703> accessed 25 June 2020.

United Kingdom Courts and Tribunals Judiciary, 'Eligibility for legally qualified candidates' (Judicial Appointments Commission) <https://www.judiciary.uk/about-the-judiciary/training-support/judiciary-trained/> accessed 25 June 2020.

United Kingdom Courts and Tribunals Judiciary, 'The Judicial College' (Judiciary UK) <https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/> [Last accessed 30 June 2020].

US Courts, 'Chapter 11 – Bankruptcy Basics' (*United States Courts)* <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [Accessed April 1st, 2020].

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

10. Newspaper Articles

Khalaf R, 'Transcript, Emmanuel Macron: 'We are at a moment of truth' (English)', *Financial Times* (Paris, April 14th, 2020) <https://www.ft.com/content/317b4f61-672e-4c4b-b816-71e0ff63cab2> (Last accessed April 30th, 2020).

Peel M, 'Moscow on the Med: Cyprus and its Russians' *Financial Times* (Limassol and Nicosia, May 15th, 2020) < https://www.ft.com/content/67918012-9403-11ea-abcd-371e24b679ed> [Last accessed June 26th 2020].

RTE Business, 'Judge puts stay on Sean McCann bankruptcy case' *RTE News* (Dublin, 21 August 2012) < https://www.rte.ie/news/business/2012/0821/334442-judge-puts-stay-on-sean-mccann-bankruptcy-case/> [Last accessed 30 June 2020].

11. Conference Papers/Conference Presentations

Benvenuti S, 'Building a Common Judicial Culture in the European Union through Judicial Networks' (Paper presented at the RC09 2013 Interim Meeting on "The Changing Nature of Judicial Power in Supranational, Federal, and Domestic Systems" Dublin, 22-24 July 2013).

Simone Benvenuti, 'Who Defines Judicial Training Standards in the EU, and for Whom? The Case of the European Judicial Training Network (EJTN)' (Paper presented at the RC12 2013 International Conference on "Sociology of Law and Political Action" Toulouse, 3-6 September 2013).

Costello C, Luciano Panzani L, Szczepanik E, 'The Judicial Wing Panel: 'Cooperation and Communication between Judges in Cross-Border Insolvencies under the EIR Recast' (INSOL Europe Annual Congress, Athens, 5 October 2018).

Finnerty A, 'Preventive Restructuring – Is Ireland a Leader in the EU?' (YANIL Conference, Copenhagen, 24 September 2019).

Glencross A, 'Federalism, Confederalism, and Sovereignty Claims: Understanding the Democracy Game in the EU' (SGIR Conference Turin, 12-14 September 2007 European University Institute 5).

Heusel W, 'The Future of Legal Europe: An emerging judicial culture?' (2008) 9 *ERA Forum* 109.

Kortmann L, 'Update on ECJ and other landmark decisions on European Insolvency Law' (EIRC Conference, hosted by German Arbeitsgemeinschaft Insolvenzrecht und Sanierung with INSOL Europe and the Law Society, Brussels 29 June 2017.)

Magnano R, 'Path Dependence and Paradox in Harmonising Out-of-Court Procedures across Europe: The Evidence from Italy' (Lecture at the 7th International Symposiom on Out of Court Restructuring Proceedings in Europe, Cologne, 26 August 2016).

Mokal R, "The New Relative Priority Rule" (paper presented at the International Insolvency Institute, 17 June 2019).

Richter T, 'Negotiating a restructuring plan: confirmation, cross-class cram-down and valuation' (ERA Conference, Trier, 7 November 2019).

Tollenaar N, 'The concept of a restructuring – the underlying economic and legal principles' (ERA Conference, Trier, 7 November 2019).

Van Harten H, 'Who's Afraid of a True European Judicial Culture' (Working Paper presented at the Second REALaw Research forum "Pluralism in European Administrative Law" Groningen, 3 February 2012.)

12. PhD Theses

Moffat P, 'In a Digital Age and Where Significant Assets May Consist of Dematerialised Instruments, are our Existing Rules Sufficient to Provide a Fair and Effective Regime Governing the Location of Assets?' (PhD Thesis, Nottingham Trent University 2016).