

# CROSS-BORDER INSOLVENCY'S GOOD PRACTICES: SOME ASPECTS AND ONE PROJECT

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## 1. The importance of the issue

Cross-border insolvency good practices in cooperation and communication are of the utmost importance for citizens' lives because they are crucial to saving businesses and jobs and to maximizing value for creditors, especially when dealing with main and secondary insolvency proceedings in different jurisdictions.

The importance of having a legal environment with tools that may help in avoiding value destruction in insolvency proceedings is clear. A business-friendly context allows enterprises to overcome economic and financial difficulties.

Achieving those goals in cross-border insolvency procedures depends on cooperation and communication between courts, between insolvency practitioners and between courts and insolvency practitioners<sup>1</sup>. The task becomes even more daunting in group member

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<sup>1</sup> Problems related with cooperation exist in many jurisdictions. For an analysis focused on East Asia, see Angus FRANCIS, "Cross-border Insolvency in East Asia: Formal and Informal Mechanisms and UNCITRAL's Model Law", in Roman TOMASIC, ed., *Insolvency Law in East Asia*, London-New York: Routledge, 2006, 535-551 (at p. 550, the author writes: "national insolvency regimes that encourage cooperation in the resolution of these cases are needed").

insolvencies. Tools are available, but it is necessary to know if and how they are being used<sup>2</sup>.

## 2. EU Insolvency Regulation 2015/848.

EU Insolvency Regulation 2015/848 (Recast EIR) replaced Regulation (CE) 1342/2000<sup>3</sup> (EIR), and applies to all EU member states except to Denmark. Recast EIR may apply not only to liquidation proceedings, but also to pre-insolvency and hybrid proceedings (see Annex A).

Recast EIR contains several provisions on cooperation and communication duties. Recital 48 of the Recast EIR reads that cooperation should take into account best practices, as set out in the principles and guidelines adopted by European and international organisations: “Main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor’s insolvency estate or to the effective realization of the total assets if there is proper cooperation between actors [...]. Proper cooperation implies the various insolvency practitioners and the courts involved cooperating closely”<sup>4</sup>.

Cooperation duties were present in the 2000 EIR, but only addressed insolvency practitioners<sup>5</sup>, and there were “no prescriptions

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<sup>2</sup> A discussion about “whether and what sorts of measures may foster or at least not harm cooperation” may be found” in Irit MEVORACH, *The Future of Cross-Border Insolvency*, New York: Oxford University Press, 2018, 169 ff.

<sup>3</sup> See, on the pretexts for the Recast EIR, the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) N.º 1346/2000 on insolvency proceedings COM(2012) 744 Final.

<sup>4</sup> As Reinhard BORK, “The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency”, *Int’l Insolvency Rev* 26 (2017) 246-269, at p. 259, access in 25.9.2021, available at <<https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>>, wrote, the principle of cooperation “has its foundations in the European Law principle of EU member states assisting one another”. The author also emphasizes that “UNCITRAL has not published any guidelines on this topic; what could have been meant by this was the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation from 2009”. See also, on the principle of (sincere) cooperation, CJEU, *Bank Handlowy w Warszawie SA and PPHU “ADAX”/Ryszard Adamiak v. Christianapol sp. Z o.o.*, Case C-116/11.

<sup>5</sup> See Alexandre de Soveral MARTINS, “O Regulamento (EU) 2015/848 relativo aos processos de insolvência”, in *Estudos de Direito da Insolvência*, 2.<sup>a</sup> ed., Coimbra: Almedina, 2018, 76.

allowing liquidators to conclude agreements and protocols”<sup>6</sup>. Therefore, opinions were divided about their legality<sup>7</sup>.

Good practices are well known alternatives to the political unanimity under Article 81 TFEU regarding the development of judicial cooperation in civil matters and they also eliminate obstacles to the proper functioning of civil proceedings<sup>8</sup>. Those issues are still related with the Stockholm Programme in the Area of Freedom, Security and Justice, and with post-Lisbon Treaty concerns.

Some Guidelines and Principles are already available. I would mention here the *Uncitral Practice Guide* (on cross-border insolvency cooperation), the Prospective Principles for Coordination of Multinational Corporate Group Insolvencies, the EU JudgeCo Cross-Border Insolvency Court-to-Court Cooperation Principles, the EU JudgeCo Cross-Border Insolvency Court-to-Court Communications Guidelines, the *Global Principles for Cooperation in International Insolvency Cases*, including *Global Guidelines for Court-to-Court Communications in International Insolvency Cases* (drafted by Ian Fletcher and Bob Wessels), the The American Law Institute's Principles of Cooperation among Nafta Members (ALI/Nafta Principles) and *Guidelines*, and the *European Communication and Cooperation Guidelines for Cross-Border Insolvency* (CoCo Guidelines), developed under the aegis of *Insol Europe* by Bob Wessels and Miguel Virgós. The Judicial Insolvency Network conceived the *Modalities of Court-to-Court Communication*, already adopted by the Bankruptcy Court for the District of Delaware, the Bankruptcy Court for the Southern District of New York, the Su-

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<sup>6</sup> See Renato MANGANO, “From ‘Prisoner’s Dilemma to Reluctance to Use Judicial Discretion: the Enemies of Cooperation in European Cross-Border Cases”, *Int’l Insolvency Rev.* 26 (2017) 314-331, at p. 317, access in 25.9.2021, available at <<https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>>. Ilya KOKORIN / Bob WESSELS, *Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups*, Cheltenham/Northampton: Elgar, 2021, 30, wrote that the Recast EIR uses agreement and protocol “interchangeably”.

<sup>7</sup> See, on the different opinions, Ellen DELZANT, “Article 41”, in Eberhard BRAUN, her., *Insolvenzordnung*, 8. Aufl., München: Beck / Beck-online, 2020, Rn. 10, access in 25.9.2021, available at <[https://beck-online.beck.de/Dokument?vpath=bibdata%2FKomm%2FBraunKoInsO\\_8%2Fcont%2FBraunKoInsO.Inhaltsverzeichnis.htm&anchor=Y-400-W-BRAUNKOINSO&opustitle=BraunInsO](https://beck-online.beck.de/Dokument?vpath=bibdata%2FKomm%2FBraunKoInsO_8%2Fcont%2FBraunKoInsO.Inhaltsverzeichnis.htm&anchor=Y-400-W-BRAUNKOINSO&opustitle=BraunInsO)>.

<sup>8</sup> Bob WESSELS, EU *Cross-Border Insolvency Court-to-Court Cooperation Principles*, The Hague: Eleven, 2015, 38.

preme Court of Singapore and the Seoul Bankruptcy Court.

Last year, the French *École Nationale de Magistrature*, in partnership with institutions from Belgian, Spain and Poland, published *Best Practices Guidelines for Judicial Cooperation in EU cross-border insolvency proceedings*.

Protocols mentioned in art. 41 of the Recast EIR<sup>9</sup> are useful to try to avoid opportunistic behaviours<sup>10</sup>. Recital (49) reads that insolvency practitioners and courts should be able to enter protocols, as well as agreements, “for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies”.

Agreements on coordination are also accepted by UNCITRAL *Model Law on Enterprise Group Insolvency*. However, Art. 43 of the Recast EIR does not mention cooperation and communication of courts with insolvency practitioners<sup>11</sup>, nor does it pay special attention to cooperation and communication with registry offices.

### 3. The Project

Circumstances will determine how easy cooperation may be. Many issues will depend on a creditor’s attitude, as well as on the type of proceedings. Cooperation will probably be easier if all proceedings are liquidation proceedings<sup>12</sup>. But cooperation, protocols and other

<sup>9</sup> See also arts. 42, 3, 43, 56, 1, 57.

<sup>10</sup> Alexandre de Soveral MARTINS, “O Regulamento (EU) 2015/848 relativo aos processos de insolvência”, *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*, vol. III, Coimbra: Universidade de Coimbra/Instituto Jurídico, (Studia Iuridica 119) 267-299, p. 287; see also Peter MANKOWSKI / Michael MÜLLER / Jessica SCHMIDT, *EuInsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar, 2016*, München: Beck / Beck-online, art. 41, Rn. 63, access in 25.9.2021, available at <[https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo\\_1/EWG\\_VO\\_2015\\_848/cont/MankowskiKoEuInsvo.EWG\\_VO\\_2015\\_848%2Ehtm](https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo_1/EWG_VO_2015_848/cont/MankowskiKoEuInsvo.EWG_VO_2015_848%2Ehtm)>.

<sup>11</sup> “O Regulamento (EU) 2015/848 relativo aos processos de insolvência”, *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*, vol. III, Coimbra: Universidade de Coimbra/Instituto Jurídico, (Studia Iuridica 119), 267-299, at p. 288. See also *EuInsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar, 2016*, München: Beck, Beck-online, Art. 43, Rn. 2, access in 25.9.2021, available at <[https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo\\_1/EWG\\_VO\\_2015\\_848/cont/MankowskiKoEuInsvo.EWG\\_VO\\_2015\\_848%2Ehtm](https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo_1/EWG_VO_2015_848/cont/MankowskiKoEuInsvo.EWG_VO_2015_848%2Ehtm)>.

<sup>12</sup> See *EuInsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar, 2016*,

agreements also depend on the ability to communicate, and, therefore, on establishing common ground. Insolvency practitioners and judges will have to choose the languages that allow them to understand each other, and they will have to learn how to trust<sup>13</sup>. In fact, mutual trust “is considered one of the key principles of the EU cross-border insolvency regime”<sup>14</sup>. The appointment of an insolvency practitioner may also have to take into account if those chosen are knowledgeable of different languages and foreign laws<sup>15</sup>. However, as Renato Mangano wrote<sup>16</sup>, if “courts and insolvency practitioners belong to a jurisdiction that has a restricted culture of judicial discretion, they tend to minimise efforts in cooperation”.

It has also been said that “the genuine problem lies with the lack of awareness and knowledge of the available soft law instruments and/or their content”<sup>17</sup>. That is why Professors at the Law Faculty of the University of Coimbra<sup>18</sup>, together with Professors from the University of Salamanca<sup>19</sup>, from the Polytechnic Institute of Leiria<sup>20</sup> and from the Faculty of Economics<sup>21</sup>, are developing a research project on good practices in cooperation and communication in cross-border insolven-

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München: Beck / Beck-online, Art. 41, Rn. 46, access in 25.9.2021, available at <[https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo\\_i/EWG\\_VO\\_2015\\_848/cont/MankowskiKoEuInsvo.EWG\\_VO\\_2015\\_848%2Ehtm](https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo_i/EWG_VO_2015_848/cont/MankowskiKoEuInsvo.EWG_VO_2015_848%2Ehtm)>.

<sup>13</sup> “From ‘Prisoner’s Dilemma to Reluctance to Use Judicial Discretion: the Enemies of Cooperation in European Cross-Border Cases”, *Int’l Insolvency Rev.* 26 (2017) 314-331, at p. 316, access in 25.9.2021, <available at <https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>>, asks why cooperation faces so many difficulties: “Are they due to a lack of trust or difficulties in communicating in a foreign language? Probably they are, at least partially”.

<sup>14</sup> *The Future of Cross-Border Insolvency*, New York: Oxford University Press, 2018, p.

<sup>15</sup> Helmut ZIPPERER, “Artikel 41”, in Heinz VALLENDER, *her., EuInsVO. Kommentar zur Verordnung (EU) 2015/848 über Insolvenzverfahren*, Köln: RWS, 2020, Rn. 63.

<sup>16</sup> “From ‘Prisoner’s Dilemma to Reluctance to Use Judicial Discretion: the Enemies of Cooperation in European Cross-Border Cases”, *Int’l Insolvency Rev.* 26 (2017) 314-331, at p. 323, access in 25.9.2021, available at <<https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>>.

<sup>17</sup> See Burkard HESS *et al.*, *The implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, Baden-Baden: Hart/Nomos, 2017, 142.

<sup>18</sup> Professors Alexandre de Soveral Martins (PI), Carolina Cunha (co-PI), Maria José Capelo Resende, Mónica Jardim and Rui Dias.

<sup>19</sup> Professors Fernando Carbajo Cascón and Martín Charro.

<sup>20</sup> Professor Ana Filipa da Conceição.

<sup>21</sup> Professor Catarina Frade.

cy procedures<sup>22</sup>.

It is crucial to collect data about judges' and insolvency practitioners' familiarity with those tools and methods. In cases where good practices guides and principles have been applied, the advantages for the administration of proceedings, if any, should be identified.

It has been stated that protocols and other tools to improve cooperation are scarcely used<sup>23</sup>. However, they have been known of, at least since the Maxwell case<sup>24</sup>. Cooperation should take place “to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings” (Art. 41, 1, Recast EIR). Consequently, investigations will have to be instigated as to whether Portuguese Law, as *lex fori concursus*, creates any obstacles to protocols or other arrangements.

One should look for evidence of if and how guidelines and principles have promoted value maximisation in order to obtain the maximum aggregate value, and contributed to saving jobs and businesses – this is also a way of protecting the right to employment and of free enterprise. It will also be interesting to see how trust among judges and insolvency practitioners is being built in Portuguese and Spanish courts.

Furthermore, the Project will look for evidence concerning the advantages of future recognition of cooperation and communication

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<sup>22</sup> Project reference: PTDC/DIR-OUT/0389/2021.

<sup>23</sup> Elisa TORRALBA MENDIOLA, “Cross-Border Insolvencies in the European Union: Recent Case Law and New Challenges”, *Cuadernos de Derecho Transnacional*, Madrid, 11/2 (2019) 360-378, at p. 373 (“la práctica demuestra lo muy escasamente que se hace uso de ellos”).

<sup>24</sup> United States Bankruptcy Court for the Southern District of New York (Hon. Tina L. Brozman), Case No. 91 B 15741, 15.1.1992, access in 25.9.2021, available at <<https://www.nysb.uscourts.gov/>>. See Lucian BEBCHUK / Andrew GUZMAN, “An Economic Analysis of Transnational Bankruptcies” *The Journal of Law & Economics*, Chicago, 42 (1999) 775 ff., access in 25.9.2021, available at <<https://www.journals.uchicago.edu/toc/jle/1999/42/2>>; “Cross-Border Insolvencies in the European Union: Recent Case Law and New Challenges”, 11/2 (2019) 360-378, at p. 374; and Stefan REINHART, “Artikel 41”, in Rolf STÜRNER / Horst EIDENMÜLLER / Heinrich SCHOPPMAYER, her., *Münchener Kommentar zur Insolvenzordnung*, Bd. 4, 4. Aufl., München: Beck / Beck-online, 2021, (Verordnung (EU) Nr. 2015/848 des Europäischen Parlaments und des Rates vom 20. Mai 2015 über Insolvenzverfahren), Rn. 10, access in 25.9.2021, available at <[https://beck-online.beck.de/?vpath=bibdata%2Fkomm%2FMuekoInsO\\_4\\_Band4%2Fcont%2FMuekoInsO%2E4%2EInhaltsverzeichnis%2Ehtm](https://beck-online.beck.de/?vpath=bibdata%2Fkomm%2FMuekoInsO_4_Band4%2Fcont%2FMuekoInsO%2E4%2EInhaltsverzeichnis%2Ehtm)>. See also, on the importance of SENDO and EMTEC protocols, SAUTONIE-LAGUIONIE dir., *Le règlement (UE) n.º 2015/848 du 20 Mai 2015 relatif aux procédures d'insolvabilité*, Paris: Société de Législation Comparée, 2015, 259.

duties towards public registers' offices. The Regulation pays no attention to those duties, and we want to know if that makes sense.

Finally, the research group wants to see if it would be feasible to have insolvency courts in Portugal and Spain with cross-border jurisdiction in contiguous territories (Coimbra and Salamanca, for example), and if that would help in overcoming local difficulties concerning the application of the Regulation<sup>25</sup>.

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<sup>25</sup> Updating: the Project was not recommended for funding by the Portuguese Fundação para a Ciência e Tecnologia (the Portuguese national funding agency for science, research and technology). However, the Project received support letters from the APAJ – Portuguese Judicial Administrator's Association, the Union Association of Portuguese Judges, the CAAJ – Court Officers Monitoring Board, IRN – Notaries and Registers Institute, and the Coimbra's Regional Council of the Portuguese Bar Association.