Should issues of mutual exchange of information be addressed in future regulation on cross-border insolvency?

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Abstract:

The paper discusses the increasing complexity of cross-border insolvency proceedings and the importance of streamlining information exchange. It argues that non-binding procedural mechanisms can promote similar principles and facilitate cooperation in cross-border cases.

Keywords: Cross-border insolvency, information exchange, procedural mechanisms, international cooperation

A. Introduction

Recognizing that the increasingly complex character of cross-border insolvency proceedings creates difficulties, streamlining the exchange of information, as well as the use of a set of non-binding procedural mechanisms, are likely to promote similar principles for cross-border insolvency, more above the regulatory limitations in various jurisdictions.

B. Legal regime for communication in cross-border insolvency

Analysing the mechanisms proposed by the Recast EIR, we can see that communication and cooperation are key concepts. The Recast EIR contains references to this in Recitals 48, 49 and 50, Articles 41, 42 and 43 and Chapter V, Insolvency proceedings applicable to members of a corporate group. The Recast EIR regulates the duty to cooperate based on general principles arising from EU rules and the case law of the European Court of Justice (CJEU). The amendments made by Articles 42–43 of the Recast EIR on communication and cooperation between courts, between courts and insolvency practitioners are relevant in this respect. Articles 41–44 represent the legal basis in the EU system, where previously there was uncertainty as to whether the law allows direct judicial communication. In order to facilitate the coordination of insolvency proceedings, Article 42 of the Recast EIR provides that a court before which an application for the opening of insolvency proceedings is pending or which has opened such proceedings must cooperate with any other court before which an application for the opening of 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 proceeding. In the Romanian Law No 85/2014 on pre-insolvency and insolvency proceedings (Insolvency Code) lays down the rule that cross-border cooperation may be implemented by any means the court deems appropriate (Article 299(b)).

Cooperation is subject to the requirement that it does not contravene the national rules applicable to the proceedings. Courts are obliged to cooperate and communicate with each other to facilitate the efficient administration of insolvency proceedings to the extent that the conduct of such proceedings so requires. Examples of situations where communication is required may be the appointment of insolvency practitioners, the administration and supervision of the debtors' assets and affairs, the conduct of hearings and the confirmation of protocols.[1] Insolvency practitioners appointed in foreign insolvency proceedings may be heard to the extent appropriate to facilitate the efficient administration of the proceedings, they shall cooperate and communicate with the courts. Practitioners may also ask the courts for information about the insolvency proceedings or for assistance in connection with the insolvency proceedings for which they are appointed, for a stay of any action to recover the debtors' assets.

From the perspective of the MLCBI, communication between courts is possible, *but it should be done carefully and with adequate safeguards to protect the substantive and procedural rights of the parties, with prior notice and in the presence of the parties.*[2] The subject matter of communication may be formal orders or judgments, notices of general information, questions and submissions, transcripts of court proceedings. Communication may be by telephone, video-link, fax and e-mail.[3]

1 Article 57 EIR.

2 UNCITRAL Working Group V, Insolvency Law, *Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency*, A/CN.9/WG.V/WP.97 Thirty-ninth session, Vienna, 6–10 December 2010, p.10, par.160; for details, see Stuart Slatter, David Lovett, *Corporate turnaround, Managing Companies in Distress*, Revises edition, Penguin Books,1999.

3 Ibidem.

C. Problems and difficulties in cross-border communication

Some existing discrepancies between insolvency regulations in the EU Member States demonstrate the need and efforts to harmonise procedural and even substantive aspects of insolvency laws.

In connection with procedural difficulties, multiple challenges related to the communication process have manifested in practice. Firstly, we note that there are differences between the basic procedural terms used in insolvency, the official languages in national legal systems, which require the translation of procedural documents and acts. We also observed:[4] lack of knowledge of a foreign language at academic level; lack of appreciation of the possible loss of time and increased costs in organising the communication process, of the risk and consequences of failure of the procedure; (poor) infrastructure of the courts and the technical means available; limited experience in dealing with insolvency cases; lack of a general vision of the impact of insolvency and local procedures in international business, unwillingness to communicate due to lack of mutual trust between participants and other actors involved in the process. Problems at EU level also create the European standards on the protection of personal data. Courts need to be cautious in the process of cooperation and provision of information in order not to overstep these boundaries.[5] It is not clear whether cross-border insolvency requires a more active judiciary or whether it is sufficient to have well-trained practitioners in insolvency cases and judges only to merely oversee the legality aspects of the various proceedings. From this perspective, soft-law guidelines develop rules for cross-border communication based on the premise of an active judiciary and courts on an equal footing, working together towards a common goal.[6]

When addressing communication issues in cross-border insolvency proceedings, it is necessary to look at them from *different perspectives, including the debtor's point of view*. Restructuring processes and court proceedings can create serious challenges for companies, especially for groups of companies located in multiple jurisdictions, as group members are faced not only with economic and financial problems, but also with declining trust from employees, customers, shareholders, investors, suppliers, communities to which they belong. In this context, communication challenges

4 Wessels, Insolvency Intelligence, 2014, p. 100–105.
5 Vallender, p.6.
6 Wessels, Insolvency Intelligence, 2014, p. 105.

during restructuring and insolvency proceedings are difficult to avoid. The US experience brings to the fore important lessons. *Four stages of communication during restructuring proceedings* are described as requiring different strategies in the management of a company: when financial difficulties arise, when a petition to open insolvency proceedings is filed, when a reorganisation plan is presented, and when the company's reputation is restored.[7] At some of these stages, practitioners and specialised courts can influence the course of business and the success of insolvency proceedings through their own way of communicating with practitioners and other courts. In practice, it is recognised that for a company in financial difficulty wishing to initiate preventive restructuring proceedings or to propose a reorganisation plan, it is advisable to give advance notice, particularly to creditors, focusing the communication process on the benefits of continuing business. It is also noted that after the submission of the restructuring plan, to maintain control over the negotiation and approval procedures, the company should reduce the amount of public information on the financial aspects of the plan.[8] This becomes imperative in the case of a pre-negotiated plan, amicably accepted prior to applying for judicial reorganisation or pre-insolvency proceedings. In this respect, information made public by courts and practitioners or transmitted to foreign courts or proceedings should not undermine the chances of success for the approval of the restructuring plan or the efforts of companies or groups of companies to regain their reputation and rebuild business relations.

Real difficulties may bring technological limitations. A relevant example is the NORTEL case, where the US and Canadian courts had closed-circuit video cameras and high-tech equipment at their disposal for joint cross-border hearings.[9] Cross-border ad hoc communication and cooperation requires both high quality technical means and, equally, relevant national legislation, training of authorities and specialists to use them.[10]

In the area of communication, major problems are also caused by differences in the status of the judge and the organisation of the judicial systems. What defines judicial systems in the European Union is the existence of

7 Jampole, American Bankruptcy Institute Journal 2001, p. 24.

8 Ibidem.

9 Peacock, American Bankruptcy Institute Law Review 2015, p. 559; In re Nortel Networks Inc (Bankr Court, D Delaware), 2015; In re Nortel Networks Corp. Sec. Litig., 238 F. Supp. 2d 613, 617 (S.D.N.Y. 2003.

10 Mevorach, International Insolvency Review 2012, p. 185.

important variations, determined by national regulations, traditions, rules for appointing or designating judges and continuing education, the way judges understand their independence, influence, place, and role in the national and European legal system.[11]In this respect, challenges for communication in cross-border insolvency litigation arise in relation to the need for constitutional authorisation and procedural legislation to enable the judiciary to adopt and endorse soft-law mechanisms and guidelines. In civil law systems judges rely mainly on domestic law, which determines the limits of their action and powers. This raises the question of whether international guidelines should be formally approved before following their rules, and what constitutional or procedural regulation is required to do so. The observation about the relationship between national law allowing '*the court (fully) to collect facts or evidence*' and effective communication in international insolvency is still topical.[12]

We also note that the reality of the work of members of the judiciary is not an easy one. Judges are part of a hierarchical professional structure. While in national civil litigation under ordinary law the aim of communication between courts, lawyers and parties is ultimately to persuade the judge to do justice to the relationship between the parties, in cross-border insolvency proceedings things are far from being so simple or transparent. One explanation may be the existence of different goals pursued by entities acting in more than one jurisdiction, their representatives, creditors and interested third parties, in addition to the classic objectives of maximising asset value and increasing profits for creditors.

Not only differences in connection with law and culture are described in the doctrine as impediments to communication, but also the possible reluctance of judges based on the fear that their powers and authority may be diminished in this way.[13] There are real challenges that judges in different jurisdictions face in resolving international insolvency disputes, caught '*between the temptations of international law and compliance with the domestic law of the country,*' on the one hand, and the reality that the judge '*must apply foreign law, whether or not he or she is familiar with it.*'[14] Accordingly, it is the role of the legislative and political authorities to provide judges with domestic legislative provisions in accordance with

11 Alter, passim.

12 Wessels*,* Insolvency Intelligence, 2014, p. 100–105.

13 Mears/McFadden, ABI Journal 2012, p. 32, 98–100.

14 *Multilateral Meeting of the Council of Eur. Legal Co-operation with Cent. and E. Fur. Countries*, Bucharest, Rom., Nov. 28 30, 1995, Presentation by Dinu lanculescu, Dir.

the requirements of international law, as well as information about developments in practice and jurisprudence. Among the difficulties associated with the judicial communication process, the lack of legislatively regulated authorisation in civil law systems, explaining the reluctance of judges to engage in this type of communication, is connected, among other things, to the constraints associated with the process of deliberation 'in secret'.

Cross-border inter-professional communication, between professionals and insolvency practitioners, between insolvency practitioners and courts, raises specific issues. The EIR authorises cooperation and communication between insolvency practitioners, courts, and insolvency practitioners. In the application of these regulations, a problem for the fulfilment of cooperation obligations may be in connection with the subject matter and limits of communication, which both courts and practitioners must consider in insolvency proceedings. From a narrow perspective, the duty to communicate should concern mainly organisational, administrative matters, and less substantive law aspects regarding the relationship between the parties involved in the various insolvency proceedings.[15] In another view, communication involves more than the mere exchange of information, since it is impossible that, whatever the circumstances, the substantive rights of creditors, for example, should not be affected in any way.[16]

A difficult issue is the possible conflict of interest between insolvency practitioners appointed in parallel proceedings as an obstacle to communication from the perspective of the relationship between the independence of insolvency practitioners and conflict of interest, as well as that of harmonising ethical requirements for insolvency practitioners. Another aspect relates to the necessity and usefulness of the developing of the notion of conflict of interest in the rules on cooperation in insolvency proceedings. The conflict-of-interest issue is more evident in the case of group companies where group members are in insolvency proceedings in different jurisdictions and the collective interest of creditors of one member may become divergent from the interest of creditors related to other group entities. It is considered in the literature that conflicts of interest in corporate group insolvencies can be reduced by bringing together all subsidiaries

of Int'l ud. Rel. and Eur. Integration, Ministry of Justice, Romania, in *The Judge and international law*, 165 (Council of Eur. Pub. 1998), Abud Adams, Edward and Fincke, Jason, op. cit., p.72 – 73.

15 Moss/Fletcher/Isaacs, p. 500–503.

16 Reumers, Int. Insolv. Rev., 2016, p. 237.

in the same jurisdiction under the control of the same practitioner.[17] The appointment of the same practitioner in the proceedings of several group companies, albeit in the form of a conflict of interest, could more effectively support a reorganisation or judicial liquidation procedure.[18] As far as we are concerned, we appreciate that the answer must be circumscribed in relation to the concrete circumstances of each particular situation.

From the perspective of communication between court and practitioners, the court should not be seen as an abstract, impersonal entity, but rather as a group of judges, unique individuals with personal mental and emotional characteristics and different views on life. There is no standard or ideal model of a judge, but individuals with different levels of knowledge, life experience and professional training. Insolvency practitioners and judges alike who wish to promote the communication process in insolvency proceedings should be aware of this reality.

Recognising characteristics and mechanisms for communication can lead to goal-oriented, persuasion-oriented communication. In cross-border insolvency proceedings it is subsumed under the objective of persuading the foreign court, through strong arguments and transparent information, to respond favourably to the idea of communication and cooperation. Communication must be pragmatic, effective and deliver results in real time, which is essential for insolvency proceedings, whether they concern judicial liquidation, reorganisation, or preventive restructuring.

We should not forget that communication involves two parties, the sender, and the receiver of the message, both of which are equally important and play a fundamental role in the efficiency of the process. In this context, some questions become pertinent. What is the most appropriate formula to approach the judge? Is an impersonal approach always necessary or is another way of communicating possible? Is it always mandatory to use strict, pre-agreed formulas in communication between courts? Is there a need for a set of global standards for the approach of courts in different jurisdictions? What is the most efficient way of communication to ensure that the court receives promptly and correctly the object and purpose of the procedural document or other communication?

From a procedural perspective, identifying appropriate methods to enable the beneficiary, the court, or the insolvency practitioner to formulate

17 van Galen, ERA Forum, p. 241–243.
18 Ibidem.

requests for assistance or helpful explanations quickly and easily can generate an appropriate response and effective communication. In conveying information, greater attention should be paid to the psychological aspects of communication as a complex process for all parties. In this context, the reason and purpose of the request or information must be strongly and clearly explained, to put the judge or the recipient of the communication in a position to understand the legal position of the sender and to provide the answer, to mediate the solution. It can be concluded that a condition for effective communication is the knowledge and understanding of the judge. In insolvency proceedings this idea can be translated by the need to provide the judge with legal and procedural tools to become comfortable in his or her position and increase the chances that the message of a foreign practitioner or court will reach the judge and make international assistance more effective. It can be said, in this sense, that judicial communication is a real form of rhetoric in connection with the various relationships involved in a judicial dispute.[19]

There is a favourable trend in European law towards involving the courts in the process of cooperation and coordination of cross-border insolvency proceedings. However, the reality is that stakeholders are generally reluctant to initiate cooperation mechanisms, partly out of a desire to achieve quicker results in domestic proceedings and partly because they fail to fully appreciate the possible favourable outcomes of cooperation. Analysis of existing legislation and international guidelines shows that legislative structures and general principles supporting communication as an important procedural mechanism for cross-border insolvency are promoted at national and international level, but what happens in practice?

D. Practical aspects of communication in cross-border proceedings

I. Management of cross-border insolvency cases

The management of cross-border insolvency cases is one of the important elements for a successful cooperation process. At international level, there has been a trend in recent decades to reduce the freedom of the parties in the proceedings and to give the judicial authority more effective control, a trend which is considered necessary, not least because it is recognised as

19 Ibidem.

a matter of principle. We believe that the idea of implementing a system in which the management and control of proceedings is the responsibility of the judicial authority (managerial judging) requires judges to accept a managerial approach to their work, both in relation to the purely procedural aspects of civil proceedings and to the complex issues of substantive law arising in this type of cases. This means more rigorous control by the court as the authority that actively directs and manages the proceedings. Romanian legislation has gone in the opposite direction in terms of the management of local insolvency cases, from the total administration and control of the court to a greater freedom for the parties and the insolvency practitioners in this respect.

The obligations regulated in the EIR for national courts to communicate with courts and practitioners in other jurisdictions can be analysed as part of the judicial work of managing cross-border insolvency proceedings. There are clearly major differences in the management of insolvency cases in the Member States, ranging from proceedings where judicial review is carried out continuously by the judge with powers in this regard, to systems where judicial review is exercised at the request of the parties, at fixed intervals, in a structured manner. It is a real challenge for insolvency practitioners or judges to be involved in deciding an international insolvency case, especially when they do not specialise in insolvency but in civil law in general and have not had training in dealing with cases with cross-border implications.

This is why the management concept should be described as a body of general rules in cross-border insolvency for the coordination and harmonisation of parallel proceedings for their real efficiency. Possible tools are information and ongoing consultation between courts, insolvency practitioners and other parties involved in cross-border proceedings. Courts and insolvency practitioners managing the proceedings should establish '*a general timetable for all stages of the proceedings*,' identify the times for resolving various practical issues, organise hearings and '*status conferences*,' identify and implement appropriate tools for the transmission of information.[20] Some examples of concrete steps that courts and insolvency practitioners could take in case management would be to determine the issues to

20 *EU Cross-Border Insolvency Court-to-Court Cooperation Principles Final Public Draft*, (extended version); June 2014, B. Wessels, J. Adriaanse, P. Omar, Jean-Pierre van der Rest, Bernard Santen, p. 43–45; Principles 9.3 and 14 ALI / *UNIDROIT Principles*, principles 6.4 and nr. 6.5 from *Hague Principles for Direct Judicial Communications* (2013); Principles 9.3.3 – 9.3.5 ALI / UNIDROIT Principles; Principle 14 ('*Court Re-*

be addressed and the timetable, specifying the general orientation and dates for different proceedings and briefings, discussing relevant issues related to the international nature of the dispute, determining the most effective methods of communication, etc.

Various questions arise in relation to the issue of judicial management of insolvency proceedings with foreign elements. What is the management of such a case before a national judge? What is the specificity of the management of such cases in the courts of different jurisdictions? What are the procedural conditions and characteristics, considering the provisions of national and relevant civil procedure law?

Harmonisation of national procedural rules in jurisdictions involved in cross-border insolvency can be a powerful tool for active and coordinated management of proceedings, including the communication process. For the European Union area, the general principle is laid down in Article 81(2) TFEU, concerning the possibility for the European Parliament and the Council[21] to adopt measures *'(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;'* for the development of judicial cooperation in cross-border civil matters and situations. The question of whether Article 81(2)(f) TFEU can be a basis for harmonising or approximating Member States' rules on civil procedure, even as regards the management of cross-border insolvency proceedings, is still to be answered.[22]

Pending legislative solutions, soft-law mechanisms can mediate the process. We note that the differences between judicial systems are significant, ranging from courts where the application of soft-law communication guidelines would violate national procedural rules, to courts with complete freedom to decide, especially in urgent cases. In some EU jurisdictions, such as Germany, Hungary, Italy, the use of soft law rules is only possible if there are express provisions to this effect in national laws.[23] In the attempt to achieve a minimum harmonisation of procedural rules in cross-border

sponsibility for Direction of the Proceeding'), *ALI-III Global Principles for Cooperation in International Insolvency Cases 2012*, International Insolvency Institute, 2017; for details, see Westbrook, Am. Bankr. L.J. 2002, 1.

21 Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01, http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A12012E%2FTXT.

22 van Ree, in Xandra/van Ree (eds.), 39.

23 Ibidem.

insolvency disputes, some issues to be considered are those relating to the procedural obligations of the parties and their representatives, regulated powers and duties for judges and other authorities, the application of the principle of proportionality, the most effective ways of creating a system of procedural rules to play a functional role in supervising language problems arising in practice, etc.

Judicial cooperation based on Articles 25, 26 and 27 of the MLCBI[24] is a common practice in the work of judges in common law systems. For a judge in civil law systems, the duty to communicate may be more difficult to put into practice as there are no concrete methods in national law for such cooperation. This raises the question of whether the judge, who is required to communicate under general rules, such as the duty to communicate in European law, is dependent on the existence of an actual practice, or whether a more flexible, creative attitude is permissible. In this respect, there is a real and increasingly positive attitude of courts in the European civil law systems towards a more open approach in cross-border insolvency cases,[25] which creates new possibilities for judicial practice, even in the absence of expressly regulated rules and procedural forms in national proceedings.

II. Language used in cross-border insolvency cooperation and communication.

In most European systems the translation of documents and notifications prior to communication is mandatory and the burden of bearing the costs falls primarily on the applicant.

For example, regarding the language used in the process of cooperation, communication and coordination in cross-border insolvency matters, Article 18 of the Romanian Civil Procedure Code, which regulates *the language of proceedings,* states that civil proceedings shall be conducted in Romanian and that applications and pleadings shall be formulated only in Romanian. According to Article 8 of Law No 189/2003 on international legal assistance in civil and commercial matters, unless otherwise provided in international conventions, the request and supporting documents shall be translated

24 *The Model Law on Cross-Border Insolvency,* (UNCITRAL) Resolution No 52/158 from 15 December 1997.

25 Ibidem.

into the language of the requested State.[26] To this end, requests for international legal assistance shall be transmitted by the Ministry of Justice, the documents attached to the request shall be transmitted by the requesting Romanian authority and at the expense of the interested parties; the proofs of the communication form shall have the title and documents printed in French, English and German by the Ministry of Justice. Under the chapter '*Form of applications*', Article 150 of the Code of Civil Procedure provides that each copy of the application shall be accompanied by copies of the documents; if the documents are drawn up in a foreign language, they shall be submitted in a certified copy, accompanied by a certified translation. In the absence of an authorised translation, translations by persons with knowledge of the language concerned may be used. In conclusion, we note that in Romania the translation of documents and notifications prior to communication is mandatory, and the burden of bearing the costs lies primarily with the applicant. In this general legislative context, we should consider the specifics of insolvency proceedings with cross-border implications.

In international insolvency cases it is necessary to determine the language of communication to identify and resolve divergences, overlaps, gaps, and preliminary problems with legal terms, to assess greater consistency in scope and to ensure uniform use of language terminology. When determining the language of communication in cross-border proceedings, courts should focus on objectives such as reducing costs using available resources, avoiding prejudice to the parties involved, finding practical solutions for efficient and rapid communication. As various European laws require the translation of written documents as evidence, the possibilities for courts to exercise their discretion in this respect are extremely limited. Some legal concepts have no equivalent in another jurisdiction, may have a different meaning or may have different consequences, which would lead to misunderstanding of the legal effects of some of the domain-specific legal terms. In this context, can a European judge to improve the communication process by allowing the use of a language other than the official language, or accepting documents, decisions, judgments, without translation? Given the existing procedural law, the answer seems negative.

26 Năstasie, Phoenix 63/2019, pp. 35–42.

III. Public proceedings. Oral and written submissions in cross-border insolvency proceedings

In the insolvency field, there is a need to strike the right balance between the public and confidential nature of cross-border insolvency proceedings, including hearings and court decisions. To this end, the following should be open to the public, with limited exceptions: hearings and recordings of court hearings; judgments, orders, and their reasoning. In civil law systems, court records are usually available to the parties, with disclosure to the public possible only as an exception, with good justification; in common law systems, by contrast, records of hearings are generally public. It should not be forgotten, however, that in insolvency litigation, particularly in pre-insolvency proceedings, confidentiality is essential, so the specificity of the proceedings should be considered in applying the general principles.

About *oral and written submissions*, a real challenge for foreign creditors, and sometimes for their representatives and insolvency practitioners in cross-border insolvency disputes is the possibility to present oral arguments, to participate in the final hearing before the judges in the proceedings. It remains difficult for creditors and interested third parties to participate in the process of hearing witnesses and experts, particularly where the presence of creditors, for example, involves high costs in relation to the value of their claims.

In the case of witness statements, it is noted that traditional legal systems regulate the oral hearing of witnesses, but in modern jurisprudence a new general direction is developing, aimed at replacing the oral statement of a witness by a written statement. In Romanian law, as in many civil law systems, the hearing of a witness is carried out by the court; the parties have the possibility to ask *additional questions* to a witness or expert under the supervision of a court. Article 321 of the Code of Civil Procedure, which regulates the hearing of witnesses, establishes that this procedure is oral, during the hearing the witness is allowed to formulate the testimony freely, without reading a written answer beforehand; the witness may use notes, with the approval of the judge, but only to specify numbers or names. The testimony shall be drafted by the court clerk, who shall record the witness's statement verbatim and verbatim in accordance with Article 323 of the Code of Civil Procedure. Regard to the above, we propose to recognise the possibility for the court, after consultation with the parties, to require that the initial witness statement be in writing, provided to the parties prior to the hearing. We consider that this alternative may be more efficient and economical in cross-border insolvency disputes if the parties have the legal right and can attend and question witnesses.

IV. Methods of communication in cross-border insolvency proceedings

Before communicating with another court, the judge should check that this is in accordance with all the procedural rules applicable in his or her state, as the process cannot promote or harm existing domestic rules, procedures, or ethics. The exception could be justified by the existence of emergency situations, where rapid and necessary measures must be taken in insolvency proceedings to save assets, values or to reduce losses. The question is to what extent the judge, or the insolvency authority can interpret the *urgent circumstances* and whether some harmonisation at EU level would be possible in this respect.

Ad hoc means of communication have been used successfully in some of the international insolvency cases of groups of companies. An example of this is the *Cenargo* case, involving courts in the US and UK.[27] Although insolvency proceedings were initially promoted in both the UK and the US, following discussions between the appointed judges in the two jurisdictions, the difficulties and conflicting issues were resolved to the extent that the US court, finding that the COMI of the group was in the UK, stayed the proceedings opened under Chapter 11 and accepted the continuation of joint administration proceedings by the English court. The centralisation of proceedings and direct judicial communication have facilitated the restructuring of a significant part of the group entities. In the *Cenargo* case, US and UK judges involved in resolving parallel insolvency disputes used the telephone as a rapid mode of communication, allowing the parties involved to participate directly, listen to the telephone communication, and have access to a transcript of the conversation.[28]

Regarding cross-border insolvency cases, what methods of notification would be feasible, traditional procedural mechanisms or modern ones such as transmission of information by telephone, e-mail, fax, videoconference? In the near future, would it be possible for cross-border hearings to be organised on a routine basis by technical means of remote communication in an international language with the participation of creditors and other interested parties in different jurisdictions?

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27 LoPucki, 189, 191–193, 204–205.

28 *In re Cenargo Intl, 294 BR 571* (Bankr SDNY 2003).

Analysis of communication methods in cross-border insolvency proceedings, communication within and between national court systems involves the storage and analysis of information that typically accumulates during court proceedings and requires systems that provide long-term security. It is mandatory to ensure secure conditions for the transmission and communication of documents and information between judicial authorities, practitioners, and other parties. Identifying ways to protect the integrity and confidentiality of information, in particular in restructuring and pre-insolvency proceedings, and balancing the need for transparency with the protection of data and information is essential for the competitiveness of companies in the international context. It must be recognised that insolvency proceedings usually involve lengthy and costly written submissions. Communication of documents by physical transmission, for example through post offices, involves risks, including the possibility of loss and alteration of their integrity. In the case of transmission of information by electronic means, there may be some risks related to cybersecurity in the public sector or data transfer[29], which require additional measures to protect confidential data that should not be disclosed to the public. Storage of information, retention of documents, regardless of the mode of transmission, may be subject to different standards in various jurisdictions involved in cross-border proceedings.

V. Judicial system. The deliberation process and the role of case law in cross-border insolvency proceedings

In international insolvency cases, dealing with the opening of proceedings, recognition or legal assistance, the judge or authority with competence in the field resolves the various issues arising by means of judgments or orders. These decisions must contain elements generally recognised for judgments and take account of the specific features of the insolvency field. If necessary, an oral judgment or order may be given, but it must be transcribed within a short period of time and made available to the persons concerned in accordance with national procedural rules.

In civil law systems, in the application of European rules on the duty to cooperate, a concern may be how the process of communication between courts is organised so that it does not influence the court's decision and

29 Yuksel/Heindler, *passim.*

does not significantly affect the independence of the judge and the individual's freedom of decision.[30] The issue of collective deliberation through judicial dialogue remains an open discussion. While judges in common law systems have greater freedom of decision, it is more difficult for civil law judges to set the limits of dialogue to actively participate in the creation of new models of international cooperation in insolvency matters that can be followed in future cases[31] while respecting the legal rules of national law.

For example, the Romanian judge is obliged to express his opinion on the various aspects of the case only in the process of secret deliberation. He can be held liable for failure to maintain the secrecy of deliberations or the confidentiality of documents of this nature and other information. In this respect, Article 395 of the Code of Civil Procedure *enshrines the rule of secrecy of deliberations.* Art. 10 para. (1) of Law 303/2004 on the Status of Judges and Prosecutors establishes the prohibition of the judge to publicly express his/her opinion on ongoing trials. According to Article 91 of the Law, judges are obliged to respect professional secrecy (para. (1)) and to maintain the secrecy of deliberations and votes in which they have participated, even after they have ceased to hold office (para. (2)). Section 99(j) of the Law regulates a disciplinary violation: the failure to observe the secrecy of deliberations or the confidentiality of such proceedings. Disciplinary misconduct is described as including three distinct situations, non-compliance with the secrecy of deliberations, failure to observe the confidentiality of proceedings of this nature, non-compliance with the secrecy or confidentiality of other information of which the magistrate has become aware in the performance of his duties. As regards the constituent elements of disciplinary misconduct, which must be met cumulatively, they were compared with those of delicts.[32] This may require harmonisation between jurisdictions to standardise *'the cross-border resolution of these disputes as a whole' in accordance with 'their own fundamental principles of jurisprudence'.*[33]

In insolvency, some controversies, and differences of interpretation between the European Court of Justice and national courts may express the power of the latter to influence European law. The process of *integrating European Union law into national judicial activity* is not just a passive

30 Vallender, *passim.*
31 Unt, International Insolvency Cooperation, 1077.
32 Gârbuleț, Universul Juridic nr. 1/2016.
33 Unt, International Insolvency Cooperation, 1077.

acceptance of the supremacy of European law, but a creative interpretative activity in which national judges can express their influence in the process of European integration.[34]

VI. Mechanisms to improve communication in the international context.

Unprecedented changes in the way businesses operate and the internationalisation of business have put increasing pressure on courts and practitioners to address multiple issues that go beyond their own jurisdictions and require creativity in finding practical solutions.[35] In this context, although they may create tensions within national systems, the mechanisms proposed by international bodies in the field of cross-border insolvency can be valuable.[36]

VII. Institutional and organisational mechanisms

To determine the application and effects of the EIR and those of the MLCBI on judicial activity in cross-border insolvency proceedings, a first step is to analyse the various national judicial structures, from courts of first instance to supreme courts.[37] Court-to-court dialogue in international insolvency cases is seen as a useful mechanism to fulfil not only the general principles of collective insolvency proceedings, but also to help harmonise ideas in different legal systems and *'enable a process of collective deliberation on common issues.'*[38]

We agree that effective cooperation between the courts involved in parallel insolvency proceedings can lead to a simplification of the transfer of information to reduce the risk of conflicting solutions. And apart from differences in national insolvency laws and possible conflicting objectives, there remains a serious psychological issue, namely the willingness and trust of judges to cooperate and communicate. To encourage the judiciary towards a communication-friendly attitude, European legislation supporting cooperation should be accompanied by means for developing the spirit

34 Alter, pp. 48–49.
35 Clark, Brook. J. Corp. Fin. & Com. L. 2014, 22–29.
36 Ibidem.
37 Alter, pp. 39–40.
38 Unt, International Insolvency Cooperation 1072 -1087.

of cooperation, including direct meetings between members of the judiciary. It is also a fact that the organisation of specialised courts can have the effect of streamlining cross-border insolvency proceedings, but whether there is a real need for specialised courts in this type of litigation depends on the specificities of the different jurisdictions.

Judges are some of the most important actors for the functioning of any legal system. Mutual trust is the essential bond of judicial cooperation in cross-border insolvency. This requires, however, not only the promotion of the principle of mutual recognition at legislative level, but also the harmonisation of different judicial systems, or of civil law systems with common law systems, bringing them and the insolvency profession up to international standards. I have listed just a few of the topics of heated debate over at least the last ten years.

What mechanisms can be put in place to develop an environment of mutual trust in cross-border insolvency? One option may involve the development of direct international relations and meetings between members of the judiciary, insolvency practitioners, academics, not only for the resolution of a cross-border insolvency case, but also within meetings organised by international institutions and bodies. Despite possible doubts about the effectiveness of procedural mechanisms, the experience of recent years shows that direct inter-judicial and inter-professional communication is likely to enable professionals from different jurisdictions to get to know each other and to realise that common ideals and mutual trust are likely to make the principle of cooperation a reality.

Judicial training programmes on cross-border insolvency cooperation are increasingly common, demonstrating the need for legal security and certainty in this area and the particular importance of the judiciary for restructuring and rescuing cross-border businesses. The prospect of creating a network of insolvency judges organised in an association similar to the National Conference of Insolvency Judges that has existed in the US since 1926[39] remains a topical issue. National training of judges should be accompanied by a methodical and organised dialogue with judges specialising in insolvency litigation in a large number of jurisdictions around the world, having the capacity, knowledge and skills to successfully analyse the appropriateness of international principles and guidelines in their actual work. In this way, it is possible not only to assess the effectiveness of soft-law guidelines, but also to determine the practical impediments for

39 Năstasie in INSOL Europe, passim.

their use depending on the national legal framework, traditions, or different perspectives in the jurisdictions in which judges work. As a member of the professional body of judges, I have found that there is a need for a permanent connection between researchers, academics, judges, and day-to-day practice to identify and develop the most effective mechanisms from those proposed theoretically and to draw on practical judicial experience.

The UNCITRAL-World Bank Group Judicial Capacity-Building Initiative on International Best Practices[40] is a relevant project for members of the judiciary around the world. The project brings together and enables communication between judges from common law and civil law systems, allowing them to share experience about national legislation, procedural acts, practical difficulties, as a basis for future collaboration. The INSOL International's Judicial Group[41] and INSOL Europe Judicial Wing[42] which brings together judges, regulators, and judicial officials, provides opportunities to expand international cooperation with judges in common law and civil law systems worldwide through participation in the meetings and direct judicial communication channels. Another example, the Judicial Insolvency Network[43] formed in 2016, is a project of the judiciary around the world that is developing a set of standards, guidelines for communication and cooperation between courts in cross-border insolvency matters, proposing concrete mechanisms for judicial communication in insolvency proceedings. The Cross-Border Guidelines[44] have been implemented by the Supreme Court of Singapore, effective from 1 February 2017, have been adopted by US bankruptcy courts, the Supreme Court of Bermuda, other courts, including the Netherlands, guidelines applicable when courts approve cross-border insolvency protocols. The examples are undoubtedly evidence of the interest in promoting international best practice for cooperation and communication in insolvency.[45] These initiatives encourage not only judges in common law systems but also the continental European judiciary to become actively involved in the process of judicial cooperation in cross-border insolvency.

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40 https://uncitral.un.org/en/content/uncitral-world-bank-group-judicial-capacity-building-initiative-international-best-practices

41 https://www.insol.org/Focus-Groups/Judicial-Group

42 https://www.insol-europe.org/judicial-wing

43 https://jin-global.org

44 *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters*, Judicial Insolvency Network Conference.

45 Martin/Fairbairn, American Bankruptcy Institute Journal 2017, p. 24–25.

Meetings between judges and practitioners from common law and civil law systems, including presentations of the latest case law, procedural acts of cooperation, communication, and coordination, where the exchange of views with colleagues from different jurisdictions is fostered, can be the basis for future collaboration. In this respect, the flow of information must be efficient for positive effects. Presentations of common law and civil law judicial systems, organisation, appointment, management, case law, etc., focusing less on general descriptions and more on practical aspects of how communication has worked in concrete cases or should be improved through international instruments, direct debates by judges of common themes or problems arising in the resolution of cross-border insolvency proceedings that may be subject to harmonisation, are relevant topics. The confidence of members of the judiciary that everyone's opinion matters will improve the exchange of information, even if only some judges have wider expertise in international litigation and cross-border insolvency. The main idea of such international meetings is to give judges from different Member States and outside the EU the opportunity to get to know each other and try out the experience of real communication.

VIII. Procedural mechanisms

In the continuation of the analysis, we will address the issue of procedural mechanisms to make the communication process more efficient. Some factors to be considered are the existence of significant assets located in more than one jurisdiction, the complex structure of the debtor, different types of insolvency proceedings in the States involved, the availability of time for negotiations, practical issues related to the choice of applicable law and jurisdiction.[46] In-depth analysis of European and international case law regarding judicial cooperation in cross-border insolvency proceedings can be a step towards more effective communication.

In this respect, the first edition of the Digest of Case Law on MLCBI, 2021, and the Judicial Perspective updated this year promote uniformity in the application of the UNCITRAL Model Laws. As such, they may be helpful to judges from civil law jurisdictions who for various reasons

46 The *UNCITRAL Practice Guide on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings* (Part I and Part II 25 June 2004; Part III 1 July 2010; Part IV18 July 2013), p. 75–78.

might have had limited exposure to complex cross-border insolvency cases. In the absence of domestic cases and guidelines, civil law courts may look for assistance in the practice of foreign courts. The Digest and the Judicial Perspective are important sources of information for their judicial activity. Both publications build on the MLCBI-related case law collected in the Case Law on UNCITRAL Texts (CLOUT) assist judges by making available decisions of courts and arbitral tribunals interpreting UNCITRAL texts. While the Digest systematizes that case law per article of MLCBI, the Judicial Perspective takes a more practical approach.

Practical experience leads us to recognise that, in contrast to the classic rules on international communication in common law civil cases based on certified techniques or authorisations, cross-border insolvency requires modern and rapid methods of communication. In this respect, the MLCBI[47] proposes communication independently of the requirement of recognition of a foreign proceeding. We also note that *the protocol* is one of the most important mechanisms in international insolvency.[48] In this respect, the economic and business reality calls for domestic legislation to encourage the use of protocol, courts to approve protocols in cross-border insolvency and an international legal framework for protocols as a common technique in cases involving multiple jurisdictions.[49] An example of this is the Lehman Brothers protocol, whereby practitioners appointed in parallel proceedings have established effective ways of communicating and resolving other procedural issues.[50]

Various questions about the role of justice in the communication process remain actual. Is it really at the discretion of the judiciary to develop standards for transnational legal relations? What is the real freedom of the judge to decide the method and language of communication? What methods would be most effective in creating an international group of judges dealing with insolvency cases in civil and common law systems, working as a team to harmonise cross-border insolvency while ensuring judicial status and independence? At this stage it is not possible to predict how the new European rules on communication and cooperation in cross-border insolvency will be implemented. Will judges be creative in developing informal ways of connecting courts or will they maintain the problem of communi-

47 Art. 25(1) and 26(1) MLCBI.
48 Bufford, American Bankruptcy Law Journal, 2012, p. 731–733.
49 Ibidem.
50 *The Cross-border Insolvency Protocol for The Lehman Brothers Group of Companies*, http://www.tri-leiden.eu/project/categories/insolvency-protocols-project/.

cation within the traditional parameters of purely formal proceedings as adopted by different national rules?

E. Proposals for improving cooperation and communication in cross-border insolvency.

The previously described aspects demonstrate demand for concerted actions to promote soft-law mechanisms in an effective way, in the form of practical, simple guidelines translated into several international languages. Translations accessible online to all interested persons, practitioners, judges, company representatives and authorised individuals, mainly of the UNCITRAL Model Laws and Implementation Guidelines, are beneficial.

In practice, bringing the UNCITRAL texts in everyday judicial work is a difficult task, as they are not translated into the languages of different states. This is an area where UNCITRAL and assistance is particularly needed. I believe that the UNCITRAL Model Laws and Implementation Guides should be translated in national languages in different jurisdictions, accessible online for all interested parties, practitioners, judges. As far as the European Union is concerned, it is possible in collaboration with the European Commission to translate at least some of the UNCITRAL texts and make them available to the public in the EU Member States. In this way, they can be promoted more easily through the national authorities and institutions, as, in the case of Romania, the Ministry of Justice, the National Institute of Magistracy, the National Institute for the Training of Insolvency Practitioners (INPPI), The National Union of Romanian Bar Associations (UNBR), the Romanian Banking Institute (IBR).

This process may be, also, a further step for European legislators to consider the possibility of harmonizing UNCITRAL proposals with the EIR on insolvency proceedings, in terms of concrete communication modalities in cross-border insolvency proceedings could be an important step towards efficiency. If a directive would be seen as a more appropriate way of reducing the differences between European jurisdictions, we believe that such a legislative measure would be welcome.

It is necessary to promote, at European level, protocol models, cross-border agreements, adaptable and flexible standard forms, valuable tools for determining the content of protocols in specific cross-border cases, mechanisms that can at least partially reduce procedural differences. A European model protocol, translated into the languages of the EU Member States, used at least as a tool in the learning experience in civil law jurisdictions, a standardised formula containing the possible elements that can be the subject of negotiation and agreement in parallel insolvency proceedings, would encourage practitioners and judges to make more use of this procedural mechanism and, in time, to turn it into a real customary form in international insolvency law.

In a broader approach to the issue of cross-border communication, the following proposals may be of interest at European level. There is a need to promote international standards for the profession of insolvency judge and to support judges from the civil and common law systems to participate in joint meetings conducted, supervised, mediated by international institutions and bodies such as the WORLD BANK, UNCITRAL and INSOL International, etc., or to create and support an International Judicial Institute of Insolvency, which would allow for educational harmonisation in the field of international insolvency law, facilitate communication and inter-professional cooperation in insolvency proceedings.

There are European regulations on cooperation between main and secondary insolvency proceedings in the case of a single company, and those on coordination of insolvency of groups of companies. However, given the need to streamline and bring the provisions of Regulation (EU) No 848/2015 closer to national specificities and traditions, it would be worth considering revising European and national legislation by including relevant legal provisions on the implementation of international communication methods, the use of protocols in the process of judicial and inter-professional cooperation in cross-border proceedings.

We list by way of example some proposals for new regulations that could be included in national and European legislation:

- regulations allowing the establishment of a common language for communication in the process of cooperation in cross-border proceedings, other than the official language, including by means of a protocol.
- regulation of the possibility of accepting documents, orders, decisions, judgments, without their translation into the official language, except for those parts which are really necessary for the procedure.
- regulating the possibility of direct international judicial communication, at least in urgent cases, by telephone, videoconference call or other electronic method, by laying down rules for communication (possibility for the parties and their representatives to participate in person; need

to record the communication; written transcript of the oral communication filed immediately and available to the parties; arrangements for determining the time and place of communication).
- procedural rules for the organisation and conduct of joint hearings in courts corresponding to parallel insolvency proceedings, concurrent hearings by means of videoconferencing, regulation of concrete procedural conditions for joint cross-border hearings;
- regulation of the procedural conditions for cross-border cooperation in cross-border pre-insolvency proceedings.
- regulation of the possibility for the parties to establish, by means of a cross-border agreement or protocol, other forms of cooperation and coordination than those expressly provided for in national law, if they do not conflict with the European Regulation and national law.

Other regulatory proposals to streamline communication and coordination in cross-border insolvency proceedings concerning groups of companies concern the following procedural aspects:

- the regulation of the elements of the applications, of the conditions, procedures, stages to be followed in the field of cross-border insolvency procedural coordination (the person to be notified and the content of the notification to promote such a mechanism in foreign proceedings, who has the initiative for a coordination proposal, the procedure for implementing coordination and whether a decision of the national court is required to promote such an approach).
- regulations in the cross-border coordination of procedures for the notification, filing and examination of claims, to lay down concrete procedural modalities to facilitate equal and fair treatment of claims of the foreign and local creditors.
- procedural rules for different types of coordination and the applicable legal regime, concrete rules for the joint administration regime, or for the mutual liquidation regime, for example, procedural coordination rules for situations where such solutions would include reorganisation, a sale as a going concern of a part or of the business as a whole, a sale of assets or a combination of liquidation and reorganisation of group members.
- regulation of the cases and conditions in which modification or termination of procedural coordination may be requested and ordered, the limits of judicial review in these situations.

- regulations regarding the costs of coordination of insolvency proceedings, on the possibility of concluding cost-sharing agreements and simplified dispute resolution mechanisms [n this respect.
- regulation of the procedure for appointing a creditor or a committee of creditors from among local creditors to attend meetings of creditors organised at the level of the corporate group, procedural obligations of the parties and their representatives.

Consideration should be given to the need for the procedural rules to be supplemented by practical instructions, rules, guidelines, e.g. on the appropriate forms of communication and cooperation between courts, between courts and practitioners.

F. Conclusions

There is currently no uniform European legal regime applicable to cross-border insolvency from the perspective of procedural law and procedural rules. However, court practice, particularly in jurisdictions with close traditions, has sought to develop communication mechanisms and identify solutions for cooperation or harmonisation of insolvency proceedings including through ad hoc communication mechanisms. It must also be recognised that for most European jurisdictions the process is still timid, under uncertainty in terms of practice and case law.

Reality demands a reduction in the gap between the direct interaction of companies and businesses around the world, whose borders are almost non-existent, and the procedural restrictions still faced by public authorities dealing with cross-border insolvency proceedings. Territoriality is no longer a criterion for determining the characteristics and evolution of jurisdiction towards a practical and functional approach.

A first conclusion we reach, in relation to the previous analysis, is that if cross-border insolvency in the EU is to expand and communicate internationally, flexible, evolving legislative, legal, and high-performance systems must be developed as appropriate. On the other hand, international communication is the essential mechanism for the functioning of all cooperation and coordination procedures proposed by the UNCITRAL Model Laws and Guidelines instruments, which can be used effectively in the EU. The absence of effective communication in international insolvency proceedings may be due to legal and practical reasons. Differences between national insolvency laws and those relating to the status of the judge, the organisation of judicial systems, court infrastructure, limited experience in dealing with international insolvency cases, procedural difficulties, different official languages used in national legal systems, technological limitations, are, from this perspective, only a few aspects. Efficient institutional and organisational mechanisms used in a coherent and creative way are needed to improve the process of cross-border communication.

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