# European Model Protocol

## *Part one*

### Model Protocol between Official Representatives and/or debtors in possession of Insolvency Proceedings

### Chapter I: Recitals

#### *Article 1. Identification of the parties*

This protocol is dated DD/MM/YYYY and entered into between:

Mr/Ms _____ (Name Surname Address) in their capacity as the Official Representative of [the estate of] the debtor (name and relevant details of the debtor) appointed by decision of the court of _____ (specify name of the court including the Member State) dated _____ (insert date dd/mm/yyyy) in the procedure _____(specify the procedure)

AND

Mr/Ms _____ (Name Surname Address) in their capacity as the Official Representative of [the estate of] the debtor (name and relevant details of the debtor) appointed by decision of the court of _____ (specify name of the court including the Member State) dated _____ (insert date dd/mm/yyyy) in the procedure _____(specify the procedure).

The address and e-mail addresses of each Party for any communication to be made under or in connection with this protocol are:

(a) those identified with by name in Schedule 1; or

(b) any substitute address or officer as the Party may notify the other Party by giving not less than five days' notice.

#### *Article 2. Background*

Briefly describe the debtor, its details of incorporation, its structure if relevant and its insolvency history.

#### *Article 3. Scope, purpose and aims*

(1) The purpose of the Protocol is to contribute to the efficient administration of the debtor's insolvency proceedings and to the effective realisation of the assets in all the concurrent proceedings and/or administration of insolvency involving the same debtor or two or more members of the same group of companies.

(2) The Protocol specifies the content and limits of the legal duty to cooperate, which is imposed upon the Parties in an insolvency proceeding by EIR 2015/848.

(3) In particular, the protocol represents an agreement [Variant A] / a statement of intention [Variant B] designed to facilitate:

(a) the cooperation between the Parties referred in article 1;

(b) the identification, preservation and maximisation of the value of the debtor's assets (which includes the debtor's undertaking or business) Variant B] designed to facilitate:

(c) the communication among the Parties referred in article 1 and, when possible, among courts;

(d) the sharing of data and information in order to reduce the costs involved;

(e) the avoidance or minimization of litigation, costs and inconvenience to all parties affected by proceedings;

(f) the more efficient realisation of the total assets, including, where appropriate, the elaboration of a coordinated liquidation plan;

(g) where appropriate, to propose, achieve and implement a restructuring plan or composition.

## Chapter II: General Provisions

### *Article 4. (Non-)Binding Nature*

Parties as referred in article 1 may conclude one of the following agreements or protocols:

**[Variant A: Binding Protocol]**

(1) The terms of this protocol are legally binding on the Parties. The performance of agreed duties including the consequences of breaching those duties agreed under the protocol is as described in Article 9. Any dispute relating to the validity, interpretation, performance or non-performance of this protocol may be addressed in accordance with Article 12.

(2) The obligations, rights and remedies of each Party provided in this protocol are cumulative and not exclusive of any obligations, rights or remedies provided by law. Neither the terms of this protocol nor any actions taken under the terms of this protocol shall prejudice or affect the powers, rights, claims and defences of the debtors and their estates, the creditors' committee, insolvency practitioners or any of the debtor's creditors under the applicable law.

(3) No Party may fully or partly unilaterally derogate from this protocol. Whenever a Party to the protocol decides to depart from its terms based on any of the following grounds:

(i) that acting in accordance with the terms of the protocol is incompatible with the law applicable to the respective proceedings, or

(ii) it is not the appropriate means to facilitate the effective administration of the proceedings, or (iii) adherence to the terms of the protocol entails a conflict of interest.

The decision to depart from the terms of the protocol and the grounds for doing so shall be communicated to the other Parties without delay. Any such delay may result in the obligation to indemnify any damages caused as a consequence, without prejudice to any further measures that may result from the applicable rules.

**[Variant B: Non-binding Protocol]:**

(1) The terms of this protocol are not meant to impose any legal obligations on the Parties, which have not already existed under the respective applicable laws. The measures, rights and remedies of each Party provided in this protocol describe expectations and intentions in the way existing duties are fulfilled and discretion is being exercised with a view to establishing mutual trust.

(2) Neither the terms of this protocol nor any actions taken under the terms of this protocol shall prejudice or affect the powers, rights, claims and defences of the debtors and their estates, the creditors' committee, insolvency practitioners or any of the debtor's creditors, equity or stakeholders under the applicable law.

(3) Whenever a Party to the protocol decides to depart from its terms based on the conclusion that acting in accordance with the protocol terms is incompatible with the rules applicable to the respective proceedings, or is not an appropriate means to facilitate the effective administration of the proceedings, or entails a conflict of interest, or for any other reasons, the decision and its reason shall be communicated to the other Parties without delay. Any delay may result in the obligation to indemnify the Parties for any damages caused as a consequence.

### *Article 5. Effectiveness*

(1) This protocol does not have any **[Variant A:]** legal effect until each Party has validly signed this protocol. If this protocol is signed in counterparts, these counterparts will count as one protocol.

(2) The terms of this protocol shall come into effect upon its terms being approved by

(a) the court in _____ responsible for overseeing the proceedings there; and

(b) the court in _____ responsible for overseeing the proceedings there; and

(c) the creditors' committee in _____ responsible for approving such acts of administration/proceedings there.

### *Article 6. Amendments and Waivers*

The terms of this protocol shall not be waived, amended, terminated orally or in any other manner (including, without limitation, pursuant to a resolution plan) except by a written agreement signed by each Party, and such waiver, amendment or termination shall not come into effect unless approved, where applicable, by the supervising courts after notice and a hearing and by the creditors' committee.

### *Article 7. Assignment*

(1) No Party may fully or partly assign or encumber rights and obligations under this protocol without the other Party's prior written or otherwise explicit consent.

(2) The other Party's prior written consent to an assignment is not required if a Party to this protocol is replaced by a newly appointed administrator. The new administrator shall automatically become a Party to this protocol unless he/she withdraws from it.

### *Article 8. Liability of the parties*

1. In the case of a binding protocol remedies for the breach of the protocol would be those provided:

(a) in the protocol (whenever they have been foreseen),

(b) in the national applicable law of the party (under Article 7(1) EIR 2015/848).

2. In the case of the protocol not being binding no remedies would apply, unless any party as referred in article 1 had breached the legal duty to cooperate.

3. In the above situations, parties should be liable for any damages arising from a breach of the duty to communicate without delay that one or more of the Parties intends to depart from the terms of the protocol and the grounds thereof.

### *Art. 9: Warranties and Enforcement*

(1) Each Party represents and warrants to the other that its execution and performance of this protocol are within its power and authority and/or have been duly authorized or approved by the court (if applicable).

(2) Each Official Representative shall exercise good faith efforts to take such actions and execute such documents as may be necessary and appropriate to implement and effectuate this Protocol.

(3) Whereas the execution and performance of this protocol is subject to specific authorization, the Official Representative shall promptly notice the other Party and take any step and actions to obtain such authorization and notify the eventual denial.

### *Article 10. Language*

This protocol has been concluded in _____ (specify the language) and _____ (specify the language). Both texts should be

deemed equally authentic. The language of communication between Official Representatives shall be _____ (specify the agreed language).

### *Article 11. Terminology and Rules of Interpretation*

(1) Whenever the context requires, a word importing the singular shall be deemed to include the plural and vice versa. Any use of masculine gender shall be deemed to include the feminine or neutral gender.

(2) Indexes and headings of this protocol are for convenience only and do not affect the construction of the protocol.

(3) Any reference to clauses, paragraphs, and recitals are to be deemed referring to clauses, paragraphs and recitals of this protocol unless otherwise stated.

(4) Except as otherwise expressly provided, the reference to this protocol includes its recitals, appendixes and other documents attached to it, even if they are only attached at a later date.

(5) In respect of any computation of periods of time from a specific date to a later specific date, the word from means 'from and including' and the words 'to' and 'until' mean 'to but including'.

### *Article 12. Dispute resolution*

1. Except for the cases envisaged in paragraph 5, any dispute arising under this protocol shall be instituted by the claiming Party before the competent court, according to the applicable rules on jurisdiction specified in EIR 2015/848.

2. The court addressing the issue may consult with other courts or seek a joint hearing to decide on the matter.

3. If a dispute arises between them, prior to instituting any proceedings, the Parties shall attempt, in good faith, to come to an amicable solution of the dispute.

4. The parties shall defer the disputes arising out of the present protocol, which do not fall within the scope of the exclusive jurisdiction provided for under EIR 2015/848 referred to in paragraph 1, to a mediation managed by the following institution: _____.

*5 [VARIANT AA].* If the mediation attempt fails, without prejudice to the grounds for exclusive jurisdiction as identified under EIR 2015/848 referred to in paragraph 1, all disputes arising out of, or related to this protocol shall be submitted to the exclusive jurisdiction of _____ [State and competent local court].

*5 [VARIANT BB].* If the mediation attempt fails, without prejudice to the grounds for exclusive jurisdiction as identified under EIR 2015/848 referred to in paragraph 1, all disputes arising out of, or related to this protocol shall be settled by arbitration, administered by _____ [Arbitral Institution], under the following Arbitration Rules: _____, by a sole arbitrator appointed in accordance with the Rules. The seat of arbitration shall be: _____. The language of the arbitration proceedings shall be: _____.

### *Article 13 Applicable law*

[Variant AA] Without prejudice to the application of the relevant domestic insolvency law of the State of the opening of proceedings, including the law applicable under Article 7 of EIR 2015/848, as regards any obligation or commitment undertaken by each one of the Parties to this protocol, as well as any precondition to enter into and commit under this protocol, the validity, interpretation, effects, performance, non-performance of any obligation arising from this protocol, as well as the remedies for any breach thereof shall be governed by the law of the State where the party who is to effect the performance of the obligation in question is domiciled.

[Variant BB] Without prejudice to the application of the relevant domestic insolvency law of the State of the opening of proceedings, including the law applicable under Article 7 of EIR 2015/848, as regards any obligation or commitment undertaken by each one of the Parties to this protocol, as well as any precondition to enter into and commit under this protocol, the validity,

interpretation, effects, performance, non-performance of any obligation arising from this protocol, as well as the remedies for any breach thereof shall be governed by the law of _____ [State].

## Chapter III: Cooperation and Communication

### *Article 14. Principle of Cooperation and Coordination*

(1) The Parties agree to generally cooperate to the extent that such cooperation is appropriate to facilitate the effective administration of their proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest

(2) To facilitate the efficient administration of the insolvency proceedings, the Parties shall:

(a) cooperate with each other in connection with actions taken in the courts of _____(Member State A) and _____ (Member State B), and

(b) take any appropriate steps to coordinate the administration of the proceedings.

### *Article 15. Sharing of Information*

(1) The Parties agree to keep each other generally informed where appropriate of any information and material developments which may be relevant to the other proceedings as soon as possible.

(2) The Parties agree to share any information that is ***publicly available*** in their respective Fora and that may lawfully be shared regarding the debtor, its present and former officers, directors and employees and its assets and liabilities, which each has or may have in its possession or under its control. Each Party shall keep the other fully apprised of its activities and material developments in matters concerning the debtor known to them.

(3) The Parties agree that each shall not (and shall direct their respective agents and representatives not to) provide ***any non-public information received from the other to any third party***, unless such information is

(a) agreed to by the other party,

(b) required by applicable law, or

(c) required by order of any court.

(4) Sharing information under these provisions shall not be deemed a waiver of any attorney-client privilege or work product protection under the applicable rules of evidence or applicable law.

(5) To the extent permitted and approved by the respective committee, ***non-public information available to the committee*** in any Forum may, if relevant to a matter in which another debtor has an interest, be shared with the committees of such debtor, subject to appropriate confidentiality arrangements and all privileges under the applicable rules of evidence or applicable law.

(6) The Parties agree to ensure the right to prior and continuous information of all workers' representatives on the evolution of the economic situation of the debtor. This information will include any possible restructuring measures that the Parties may intend to carry out, in particular, when these measures may have a direct effect on other subsidiaries of the group of companies.

### *Article 16. Access to data*

Each Party should cooperate in the gathering of certain data and share analysis of certain transactions by:

(a) sharing all relevant information and data that it has the right to disclose and for which it is not required to make payment relating to

(aa) material interest holders of an asset,

(bb) restitution of assets, and

(cc) relevant information that assists such other Party to fulfil its duties, except where

(aaa) litigation has commenced (or is contemplated), or

(bbb) statutory or regulatory requirements prohibit disclosure;

(b) if a Party is in possession of the books, records, correspondence and other materials or documents that belong to another debtor, providing the Party of such other debtor's estate such books, records, correspondence and other materials or documents;

(c) coordinating in good faith the investigations of pre-filing activities with any other Parties with an interest in such activities, so long as the interests of the Parties coordinating such investigations do not diverge; and

(d) liaising with any other Parties on matters

(aa) in which such other Parties have a significant mutual interest, so long as their interests do not diverge and

(bb) relating to a significant strategy to exit from a Proceeding in which such other Party have an interest.

### *Article 17. Investigation and Realization of Assets*

(1) The Parties should, to the extent permitted under applicable law and where it is appropriate for there to be a coordinated solution to the insolvency, cooperate with each other concerning:

(a) the investigation and analysis necessary to establish the financial position of the debtor in order to explore the possibilities for restructuring and elaborating a coordinated restructuring plan;

(b) the identification, preservation, collection and realisation of the assets of the debtor, including the evaluation of proceedings for recovery of avoidable transfers and damages.

(2) Investigations with respect to the assets of the debtors located in _____ (Member State A) and _____ (Member State B) shall be conducted respectively by the Party appointed in that jurisdiction in accordance with the applicable law.

(3) The Parties agree that the Official Representative/debtor in possession appointed in _____ (Member State A) shall pursue all necessary causes of action against assets located in other Member States.

(4) If, in the course of a Proceeding, any Party to this protocol learns or believes that another Party could have a material interest in a particular asset whose value and/or recovery is at risk, such Party may notify the other Party whose estate includes such asset and, where practicable and consistent with the duties of such Official Representative under applicable laws, the Party whose estate includes such asset should consult with the other Party that may have such material interest prior to:

(a) the sale, abandonment, or any disposition of such asset;

(b) the termination, suspension, or other transition of any employees managing such asset; or

(c) the commencement of any judicial, or non-judicial, proceeding affecting such asset.

(5) Official representatives appointed in [—] (the Member State A) undertake the obligation not to perform the following acts without prior consultation with the Official Representatives appointed in the other insolvency proceedings, where appropriate to facilitate a coordinated solution to insolvency:

(a) the acquisition, sale or disposal of any asset;

(b) Subjecting any asset retained to any new mortgage, charge or security interest;

(c) the recruitment or dismissal of any employees;

(d) the unilateral adoption of whatsoever steps aimed at proposing a reorganisation plan, while the possibility for coordinating the restructuring is being explored;

(e) the undertaking of intra-group sales or purchases other than in the ordinary course of business and in compliance with the debtor's present transfer pricing policies

(6) Transactions involving debtor's assets should be approved by the competent body according to the applicable provisions of national law in every

Proceeding. In addition, transactions involving debtor's assets located in different Member States will be subject to the joint approval of the competent bodies of each Proceeding. Any proceeds from the joint sale of debtor's assets shall be maintained in a segregated account until its distribution, unless otherwise ordered by the competent bodies for disposing of this value.

### *Article 18. Supervision of the Debtor*

(1) The Official Representatives appointed in_____(Member State A) will supervise the debtor in possession to ensure that he/she cooperates according to the provisions of the Protocol.

(2) The Official Representatives appointed in_____(Member State A) shall prevent the debtor-in-possession from unilaterally performing any action that might cause harm to the other insolvency proceedings. In particular, with the aim of finding a coordinated solution to the insolvency proceedings, the Official Representatives appointed in_____(Member State A) shall not authorise the debtor in possession to perform the following acts without prior consultation with the Official Representatives appointed in the other insolvency proceedings:

(a) the acquisition, sale or disposal of any asset outside the ordinary course of business;

(b) Subjecting any asset retained to any new mortgage, charge or security interest;

(c) the recruitment or dismissal of any employees other than in the ordinary course of business. In the case of a dismissal or a recruitment, the debtor shall comply at all times with the applicable employment law;

(d) the undertaking of intra-group sales or purchases other than in the ordinary course of business and in compliance with the debtor's present transfer pricing policies;

(e) the unilateral adoption of whatsoever steps aimed at proposing a reorganisation plan in a court of a participating proceeding, while the possibility for coordinating the restructuring is being explored.

### *Art. 19. Post-commencement finance*

(1) Where post-commencement finance is necessary in one or more of the insolvency proceedings involved, the parties should cooperate to facilitate the access to new finance.

(2) In any case, each party shall notify the other parties of its intention to obtain post-commencement finance before borrowing funds or pledging or charging any assets of the debtor.

### *Article 20. Commencing further insolvency proceedings*

(1) The Party appointed in _____ (Member State A) shall attempt in good faith to obtain the consent of the Party appointed in _____ (Member State B) prior to:

(a) commencing insolvency proceedings or consenting to an undertaking under Article 36 Regulation 2015/848 (whether in Member State A, B or elsewhere) with respect to the debtor established in _____ (Member State A);

(b) causing the debtor established in _____ (Member State A or B) or any of its subsidiaries to commence insolvency proceedings.

(2) Unless it represents a legal duty under, or is otherwise forced by virtue of the applicable law, the Party appointed in _____ (Member State A) shall initiate secondary insolvency proceedings or undertakings under Article 36 Regulation 2015/848, if necessary, but only upon the agreement of both insolvency practitioners.

### *Article 21. Reorganization Plans*

(1) To the extent permitted by the laws of the respective Member States and

to the extent practicable, the Parties appointed in _____ (Member State A) and _____ (Member State B) shall submit coordinated reorganisation plans in _____ (Member State A) and _____ (Member State B) in accordance with their respective national insolvency laws.

(2) The Parties appointed in _____ (Member State A) and _____ (Member State B) shall, to the extent practicable, coordinate all procedures in connection with those reorganisation plans, including solicitation procedures regarding voting, treatment of creditors and classification of claims. To the extent not provided in this protocol, those procedures will be established according to the applicable law.

(3) The Parties appointed in _____ (Member State A) and _____ (Member State B) shall take any action necessary to coordinate the contemporaneous submission of reorganisation plans.

### *Art. 22. Claims Reconciliation*

(1) The Parties agree that in order to provide for the efficient and timely administration of their proceedings, and to reduce their cost and maximize recovery for creditors, resources and time should not be spent reviewing historical inter-company accounting records to resolve claims asserted in their respective proceedings by other Parties on the basis of

(a) the allocation of overheads or expenses from one Debtor to another Debtor,

(b) the flow of funds from one Debtor to another Debtor,

(c) the incurring of a liability by one Debtor on behalf of another Debtor, or

(d) a transaction between Debtors

(collectively, "Inter-company Claims"); but that rather, it is in the best interests of all the Debtors' creditors for Parties to agree to a common set of financial accounting records that form the basis of Inter-company Claims, and that those financial records shall be prima facie valid unless there are elements of proof suggesting that a transaction was recorded in error, or that no such transaction ever occurred or is inconsistent with the inter-company accounting records of the relevant Debtor(s).

(2) Based on the section above, the Parties shall endeavor to negotiate in good faith to attempt to reach a consensual resolution of any differences in their accounting of Inter-company Claims. If the Parties certify that they are unable to resolve in good faith any differences in their accounting of Inter-company Claims, the Parties shall resort to adjudication by a court holding jurisdiction over such claims. The Parties shall establish a committee (the "Procedures Committee"), whose members shall be jointly appointed by the Official Representatives and confirmed by the courts (where applicable) overseeing each proceeding, to resolve any differences in the accounting of Inter-company Claims, through consensus. The Procedures Committee shall propose the (i) procedures, (ii) accounting methodologies, and (iii) elements of proof that it intends to use in its calculation and consensual resolution of Inter-company Claims (the "Accounting Procedures").

### *Article 23. Distribution*

(1) Without prejudice to secured claims or rights in rem, a creditor that has received part payment in respect of their claim in the proceedings opened in _____ (Member State A) according to _____ (Member State A's) laws relating to insolvency may not receive a payment for the same claim in the proceedings opened in _____ (Member State B) as to the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received. This provision will also be applicable to partial payments made to a creditor in proceedings opened in a third country.

(2) Consistent with the above section, if any claims against one or more Debtors (a "Direct Claim") is subject to a guarantee issued by another Debtor (a "Guarantee"), the Parties shall seek to adjust distributions on the allowed Direct

Claim and allowed Guarantee claim so that distributions on the Direct Claim and distributions on the Guarantee do not exceed in the aggregate the amount of the Direct Claim or the Guarantee, whichever is highest. Subject to the preceding sentence, distributions on a Direct Claim shall not reduce the amount of any claim asserted under a corresponding Guarantee, and distributions under a Guarantee shall not reduce the amount of any corresponding Direct Claim.

(3) In support of equitable distribution, each Party is required to send to the other:

(a) a draft distribution plan specifying the payment of dividends to be made. The receiving Party shall respond and provide comments on the draft within ___ days from the date of receipt of the draft. Failure to respond within this time period shall be treated as acceptance of the draft plan;

(b) after any payment of dividends, a list providing the names and addresses of the creditors who have been paid, the amount paid and nature of the claim.

## Chapter IV: Costs

### *Article 24. Costs and Fees*

The parties agree that their respective fees, costs and ordinary course expenses (including those of the professionals and other agents retained by each of them, as well as the cost of assisting one another) in the first instance shall be payable from the funds that each Party holds in their respective estates.

# MODEL PROTOCOL BETWEEN OFFICIAL REPRESENTATIVES AND/OR DEBTORS IN POSSESSION OF INSOLVENCY PROCEEDINGS

## GUIDE TO IMPLEMENTATION

## Section I: Purpose and structure of the European Model Protocol

### A. Purpose of the European Model Protocol

The Recast European Insolvency Regulation (EIR 2015/848) establishes general duties to communicate and coordinate for decision-makers in cross-border insolvency cases in Article 41-44 for sole debtor cases and in Article 56-59 for corporate group cases. In consequence of this legislative act, the normative basis for cooperation is now found in European law. Cooperation is neither voluntary nor does it require a protocol in order to establish such duties by agreement. Thus, since 2017, a 'framework of general principles to deal with issues expected to arise in connection with cross-border insolvency proceedings' already exists within the territorial scope of EIR 2015/848.

However, the framework set in the EIR 2015/848 lacks detail. The articles and recitals of the Regulation do not provide specific provisions about the means of cooperation and lack a precise description of the limits of the respective duties. Indeed, the last sentence of Recital 48 explicitly refers to best practices in this respect 'as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL).' In addition, Recital 49 advises insolvency practitioners and courts to enter 'into agreements and protocols 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, where this is compatible with the rules applicable to each of the proceedings'. It is obvious that the European legislator is aiming to promote the cooperation of these office holders in cross-border cases, even if it only makes an abstract reference to the content and limits of such cooperation. Protocols are a key instrument for providing more detail and therefore practical standards. Their content must reflect established best practice and elaborate on existing and future soft law guidelines.

At the same time, the development of protocols requires a significant disclaimer. While it is true that the conclusion of a protocol allows for more predictability for all parties involved in parallel proceedings , such a need for coordination is not present in all cross-border insolvency cases. Indeed, spending time on negotiating a protocol might not be a useful exercise at all in cases where – and as long as – the resolution of the cross-border issues in a case is (still) in the hands of a central administrator. Often, other instruments of cross-border insolvency law provide for such central control over assets, establishments or subsidiaries abroad. In many cases, the prepared commencement of a single proceeding with EU-wide effects under EIR 2015/848 suffices to establish such control. Under these rules, foreign assets of a sole debtor remain in control of the administrator in the main proceedings until, if at all, secondary proceedings are opened. In group insolvencies, control is maintained by keeping subsidiaries solvent and thereby in control of the (insolvent) parent company ('single point of entry' restructurings or going-concern sales). And even in cases with parallel proceedings in several jurisdictions, means of procedural consolidation such as, for instance, the appointment of the same person as an administrator (often only possible in local cases) or by the concentration of several proceedings at the same court. In all these situations with centralised control, coordination and cooperation is not (yet) needed.

The essential function of any protocol is, therefore, defined by the fact that

cross-border (or even local) insolvency cases develop to a point where central control of the debtor's or the group's assets is lost or missing and where the effort of coordinating the steps taken in several parallel proceedings is obviously value-creating (cost saving) for participants. It is only under such circumstances that the need for a protocol arises and the negotiations on its content begin.

The European Model Protocol (EMP) provides the negotiating parties with model provisions that may facilitate coordinated approaches in insolvency cases with proceedings in multiple EU jurisdictions. Faced with a duty to communicate and cooperate under EIR 2015/848, courts and administrators can here find a template that can be used as the default content of a cross-border insolvency protocol and should be further adapted to the specifics of each case. The model clauses provided here serve as a baseline. Adopting them may facilitate further knowledge relatingto the duty to communicate and cooperate. It may also serve as *prima facie* proof of compliance with the obligations to communicate and coordinate under EIR 2015/848.

### B. Structure of the European Model Protocol

Whenever the existence of insolvency proceedings in more than one jurisdiction creates the demand for a coordinated approach amongst stakeholders, the need for cooperation must be addressed to those in control of private information and decision-making power. Much of this control and power is in the hands of judges as insolvency proceedings are court proceedings by definition. The respective insolvency law rules would also mandate the appointment of an insolvency practitioner or even the debtor to administer the insolvent estate on a daily basis. Creditor bodies may be installed to take certain decisions. While all of these officials are relevant for communication and coordination, the role of courts is different due to their specific position in the legal system. The structure of the EMP reflects this by designing a separate set of clauses addressing court measures. This structural differentiation also best reflects the separate standards set in Articles 41, 42 and 56, 57 EIR 2015/848 for courts and administrators. Finally, best practice in cross-border insolvency cases has developed a separate set of "guidelines" for courts and "protocols" for administrators. The EMP draws from these experiences and sets out the model content for protocols between administrators in Part One of the EMP before providing a different set of model provisions for guidelines of court-to-court communication and cooperation in Part Two of the EMP.

The EMP provides for model clauses. Such clauses are not a best fit for all circumstances by definition. The EMP reflects this by providing for a basic structure of terms that should be relevant and at least considered in all cases. In addition, the EMP offers additional terms or phrases for specific circumstances only. Their optional nature is highlighted in grey.

Finally, the EMP consists of two very basic variants for administrators – a binding and a non-binding protocol. As both options shall be made available to the parties, the EMP reflects the respective choice by referring to Variant A for possible terms that are binding and to Variant B for possible terms in non-binding protocols. Consistency is assured by choosing the variants with the same number of letters. Variants with different numbers of letters are not necessarily inconsistent with each other.

## Section II: Purpose of the guide to implementation

The European Model Protocol could become a more effective tool in practice if it were accompanied by background and explanatory information. While such information would primarily be directed to courts and insolvency practice, it could also provide useful insight to executive branches of Governments and legislators preparing the necessary legislative revisions in the area of cross-border communication and cooperation of courts. Such information might assist Member States in considering which, if any, of the provisions of their local insolvency regime should be altered in order to enable judges and practitioners

legally as well as practically to handle the challenges of a cross-border insolvency case with its specific requirements.

### Section III: Preparatory work and implementation

The European Model Protocol is meant to assist insolvency practice directly. Faced with the need to access information held in foreign parallel insolvency proceedings or to coordinate decisions taken there, practice may turn to the EMP immediately as a basis for a protocol. Negotiations on the issues covered should be facilitated by a default structure and rules reflecting best practice. They would only need to be adapted to the specific needs in each individual case. Further, the local legal background or established local judicial practice may prompt the need for the modification of some clauses.

The EMP does not require any form of implementation by a legislator. It is designed to provide model content for fully consensual, often non-binding agreements. Additional rules could, however, support the success of the EMP where the role of courts is concerned. The guidelines of court-to-court communication and cooperation that form Part Two of the EMP could be made effective in the form of a formally adopted procedural standard of a relevant court or even of all national insolvency procedures. Adopting the guidelines may require the act of a local president of a court, a ministerial order or even an act of parliament in some jurisdictions. Until such adoption, the EMP guidelines would assist each judge in exercising discretion when applying the rules on coordination and cooperation in Articles 42 and 57 EIR 2015/848.

### Section IV: Article-by-article remarks

#### *Part one*

#### Chapter I: Recitals

##### *Article 1. Identification of the parties*

Article 1 identifies the parties to the protocol and the date(s) of conclusion. The signatories to the protocol are identified in person based on their capacity to represent the debtor's estate which requires the additional information about the debtor (name and relevant details such as business address, register entry), the appointing court decision (name of the court including the Member State, date of the appointment) and the procedure (name or type of procedure and docket no.).

The term "Official Representative" is used throughout the EMP to refer to the individual who is legally administering the estate of the debtor in an insolvency proceeding under EIR 2015/848 or any functionally equivalent procedure under local law, e.g. a scheme of arrangement. The typical Official Representative is the insolvency practitioner as defined in Article 2(5) EIR 2015/848 and listed in Annex B of the EIR for Member States. It also includes a coordinator appointed in coordination proceedings (Article 71 EIR 2015/848). In procedures in which the debtor remains in possession (Article 2(3) EIR 2015/848), it is the debtor who represents the business and should therefore also sign the protocol. If the court appoints an insolvency practitioner to supervise the debtor's actions and (partially) control the estate, the practitioner should sign as well.

If the debtor or the insolvency practitioner appointed to represent the estate is a legal entity, Article 1 would principally require them to identify the individual acting on their behalf as the signatory. This principle is supported by the experience that communication and cooperation based on the protocol is driven by personal trust and direct communication among individuals, often belonging to a smaller group of renowned insolvency practitioners. Whether the individual identified in Article 1 is also the one legally bound to perform duties included in other Articles of the protocol shall not be predetermined in Article 1. The debtor of such binding clauses in a protocol shall instead by identified in the specific clause itself.

Article 1 limits the scope of the protocol to Official Representatives. It does not include persons or bodies who act as supervisors to these representatives, e.g. a judge, court official or creditor committee. While courts may adopt guidelines to communicate and cooperate as outlined in Part Two of the EMP, supervisory bodies would not sign a protocol as outlined in Part One. Their function would require them to review and approve such agreements.

The term "procedure" indicates that the scope of protocols is potentially broader than the scope of the EIR 2015/848 in terms of proceedings covered. Protocols are routinely concluded by Official Representatives of the debtor's estate in "insolvency proceedings" as defined in Article 1(1) EIR 2015/848 and, for participating Member States, listed in its Annex A and by Official Representatives in third states or other proceedings, e.g. non-public preventive proceedings or schemes of arrangements. The ability to join a protocol cannot be limited by the definition in Article 1(1) EIR 2015/848. However, in that case the scope of cooperation would not be determined by EIR 2015/848, but by the internal law of the corresponding Member States (*lex concursus*) and might eventually be subject to reciprocity. It may also be useful to allow the protocol to provide for the coordination of multiple rescue-oriented proceedings regardless of their ability to fit the definition of Article 1(1) EIR. The specific purpose of the EMP, however, is limited in the way that it only aims at providing model clauses based on the applicability of EIR 2015/848 and its duties to cooperate in parallel proceedings. The clauses formulated in the EMP are tailored to such parties. Where protocols need to include parties from third states or other proceedings, the EMP clauses may still be adopted. Yet they should be reviewed with respect to additional legal aspects concerning third state parties.

In order to facilitate direct communication, parties to the protocol are invited to provide for relevant contact information, in particular means of low-barrier direct communications like an email address. This part of Article 1 is optional (grey) but recommended.

### *Article 2. Background*

Parties should describe the background of the proceedings such as the details of the debtors incorporation, its corporate structure, and insolvency history.

Article 2 supplements the information concerning the proceedings provided in Article 1. First, the information allows for the certain identification of the debtor. Second, it supplies factual and legal context to the protocol, and it facilitates the parties in understanding the implications of the protocol and foreseeing its possible future developments.

### *Article 3. Scope, purpose and aims*

This article describes the scope, purpose and aims of the protocol. It would include a description of the degree of communication, cooperation and coordination needed to comply with the legal duties imposed in EIR 2015/848.

According to the general explanation of the Guidelines, the Protocol is aimed to provide a model of cooperation applicable between Parties in "insolvency proceedings" as defined in Article 1(1) EIR 2015/848.

The object of the Protocol is to specify the legal duty to cooperate provided for in EIR 2015/848, and enables the Parties to prove prima facie that they have complied with the duty to cooperate arising from the EIR or the law of every national jurisdiction.

The particular aims and purposes of the parties signing the Protocol depend whether it has a binding or non-binding nature. In both cases it is intended to facilitate the cooperation and coordination of the proceedings, ensure the effective administration of the proceedings, serve to share information with the Representatives of the proceedings, maximise the value of the debtor's estate and the insolvency estate, reduce the costs of the proceedings, and, when appropriate, seek that the parties negotiate in order to propose, achieve and implement a restructuring plan or composition.

## Chapter II: General Provisions

### *Article 4. (Non-)Binding Nature*

This article explains the supplemental character of the protocol and explains that it either provides for additional binding duties [Variant A] or only describes the mutually expected way to exercise discretion in the performance of rights or duties to cooperate [Variant B] under respective applicable laws.

The statutory duty of an Official Representative to cooperate to the maximum extent possible with foreign representatives has been enacted in the insolvency law regimes of many countries. Article 41(1) EIR 2015/848 establishes such a duty for insolvency practitioners in most EU Member States. Article 26(1) of the UNCITRAL Model Law on Cross-border Insolvency includes a similar rule and has been enacted in a significant number of countries. Article 4 does not intend to interfere with these legal obligations to cooperate or with other duties and rights under the laws applicable to the Parties. Paragraph 2 underlines this intention.

Existing statutory duties to cooperate commonly bestow a significant degree of discretion with regard to the content, timing and form of acts of cooperation. Even further, common limits of a statutory duty to cooperate are defined by the duties of the Parties under their respective *lex fori concursus*. General terms like, for instance, the need to act in the general interest of creditors, leave a larger margin of appreciation. Article 4 is designed to reduce the resulting uncertainty in cases where cross-border cooperation is required to function sustainably in the interest of the Parties as referred in Article 1.

Beyond this background, protocols may be designed in two principally alternative variants.

On the one hand [Variant B], a protocol could be valued by the Parties as a "simple generic agreement" emphasising "the need for close cooperation between the parties, without addressing specific issues" (Recital 49 of EIR 2015/848). Such a protocol would stress the need to share information, coordinate decisions and cooperate in other ways, without requiring the Parties to enter into any legally binding agreement. No additional, legally enforceable obligation would follow from such a protocol. In any case, the parties remain obliged to comply with the legal duty to cooperate arising from EIR 2015/848. They have to comply with their legal duty of cooperation and could suffer the consequences provided in the applicable national laws for any breach of this duty.

On the other hand, [Variant A], the Parties could agree to enter into a legally binding protocol, in particular with a view to establish reliable means and instruments of communication and cooperation. Such a protocol would often take the form of, (as Recital 49 of EIR 2015/848 describes) a "more detailed, specific agreement" establishing "a framework of principles to govern multiple insolvency proceedings". Parties would need to be willing to limit their discretion with regard to specific acts of cooperation in favour of a mutually reliable and possibly even enforceable legal regime. Adopting such an agreement may require the approval of supervisory bodies under the *lex fori concursus* (see Article 5). The extent to which binding obligations are entered into as well as any consequences of a breach of these duties can be defined within the limits of the applicable laws (see Article 9). Any dispute relating to such duties and to consequences in cases of a breach of duties shall be resolved according to the provision in the protocol (see Article 12).

The statutory duty to cooperate itself is commonly limited by the rules applicable to the Parties (*lex fori concursus*). These limits are relevant for all types of protocols and reflected in Article 4, subparagraph 3. As the extent of these limits is far from clear and commonly difficult to assess in advance, in particular for foreign representatives, Article 4, establishes a duty of timely notice whenever a Party to the protocol decides not to honour the terms of the protocol due to limits under their *lex fori concursus* or under EIR 2015/848. It also includes a "comply or explain" component in order to give the other Parties the chance to know and understand the position of the objecting Party

and, if advisable, invoke a dispute resolution procedure under Article 12. With a view to incentivise timely notice, any failure to comply with these obligations may provide grounds for the injured party to claim damages based on this protocol and the *lex fori concursus* applicable to the Party concerned.

### *Article 5. Effectiveness*

Article 5 explains the way in which the protocol becomes legally effective. Subparagraph 1 includes a basic rule of contract law or of any other legal written act. Parties may wish to include a specific date as well.

Subparagraph 2 provides for additional preconditions if the protocol requires the approval of the court or any other supervisory body, for instance the creditor committee's approval in Germany, under the *lex fori concursus* applicable to each Party respectively.

### *Article 6. Amendments and Waivers*

The article explains the way in which the protocol may be amended, revised or terminated, adopting the general principle of conforming the amendments, revision and termination to the same forms required for the effectiveness of the Protocol.

Issues related specifically to the agreement, including amending and termination, are intended to operate in cases where in the course of the proceedings changing circumstances or dynamics of a multinational insolvency need to be accommodated. Therefore, they are frequently addressed in protocols, as in Jet Airways Protocol and in the Quebecor (2008) case, where it was stipulated that the agreement cannot be supplemented or amended in any manner except as approved by the respective courts.

The article takes into account that the approval by a creditor committee may be required under national laws (as in the case of the ISA-Daisytek Protocol) for the agreement to be effective.

With the same purpose in mind, some agreements may require, in addition to Court approval and approval by the creditor committee, a written consent of parties, that should be duly specified, and that may include the debtor or certain creditors.

Amendments may occasionally involve changing the terms of the agreement or adding a party which might include, in a group context, an insolvency representative appointed in proceedings that concern additional group members, as in Lehman Brothers case.

### *Article 7. Assignment*

Parties should consider whether, and if so in which way and to what extent, the position of one of the parties as a whole, or its individual rights or claims may be assigned to a new party. The circle of potential assignees is clearly limited by the purpose of the protocol which limits the type of persons eligible to become a party (see Article 1).

Due to the function of any protocol as a mean of establishing and expressing mutual trust, the assignment of rights and obligations should be handled with care and would usually depend on the consent of all Parties. This principle is expressed in Article 1. It also applies to the encumbrance of rights as it has a similar legal effect. Recourse to an *ex ante* expression of consent in the protocol would also seem not to duly ensure that the Parties consider carefully the circumstances of the case prior to consenting to an assignment.

Under specific circumstances, however, a facilitated exchange of a Party may be useful and efficient. In jurisdictions and specific proceedings, in which the substitution of the Official Representative is predictable, the protocol could already include any newly appointed Official Representative in advance. Subparagraph 2 offers such an option. The stepping-in of the newly appointed Official Representative occurs automatically unless the Parties agree to abstain from the protocol to abstain from the protocol by mutual dissent. The option of

granting to one of the parties the right to rescind unilaterally from the protocol may also be considered given the necessarily cooperative nature of the protocol.

### *Article 8. Liability of the parties*

This article sets out the consequences of a breach by the parties, as referred to in article 1 of the Protocol. It provides for two different kinds of remedies depending on whether the protocol is binding or non-binding.

In the case of binding protocols, the remedies for breach shall be, in addition to those provided for in the protocol itself, those set out in the applicable law for breach of the legal duties of official representatives according to article 7(1) EIR 2015/848.

Non-binding protocols cannot, by definition, be deemed breached. Therefore, remedies for non-compliance with this Protocol would not apply. However, the parties should be aware of the fact that they are still bound by the legal duty of cooperation provided for in EIR 2015/848.

In both cases, the parties shall compensate for any damages caused by the breach of the duty to communicate in due time their intention to depart from the provisions of the Protocol, and the grounds for this departure.

If this Model Protocol were to be used in a cross-border insolvency proceeding by parties not subject to the EIR 2015/848, the Protocol should foresee the applicable remedies. Notwithstanding the foregoing, any remedies that might be provided by the law applicable to the Parties shall also be applicable.

### *Art. 9. Warranties and Enforcement*

Article 9 contains the reassurance that the person who has signed the Protocol is also empowered to give effect to it, if necessary, after authorization by the Court.

In addition, the Article states the principle of good faith in the implementation of the Protocol, an expression of which is, inter alia, the request to the Court for authorization to perform specific acts (if any), as well as the obligation to promptly notify the other Party of any refusal of such authorization.

These clauses are applicable for both binding and non-binding protocols.

### *Article 10. Language*

The (optional) clause implements Principle 14 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles.

### *Article 11. Terminology and Rules of Interpretation*

The article provides for a guide to interpret the protocol. Such clauses are common (see e.g. Guideline 6 of the JIN Guidelines).

In addition, given that insolvency protocols under EIR 2015/848 are a possible means for discharging the duty of cooperation between insolvency practitioners, in interpreting insolvency protocols the duty of cooperation shall be regarded as the typical purpose to be achieved by insolvency protocols, so that their content shall be construed accordingly and consistently also as a matter of interpretation.

Finally, whenever a provision to an insolvency protocol is susceptible to more than one interpretation, the mandatory limits to the duty of cooperation as provided in Articles 41(1) and 56(1) EIR 2015/848 shall be taken into account on the basis that the insolvency practitioners that are parties to the insolvency protocol in question have duly taken into account those limits in expressing their consent to the insolvency protocol.

Therefore, in the case of insolvency protocols relevant to the same debtor, the following criterion *(a)* shall apply, while in the case of insolvency protocols relevant to members of the same group of companies, the following criteria *(a), (b)* and *(c)* shall apply:

*(a)* those meanings, if any, that are compatible with the rules of the interested proceedings, shall prevail on any rival meanings;

*(b)* those meanings, if any, that appear to be more appropriate for the effectiveness of the administration of the proceedings, shall prevail on any rival meanings;

*(c)* those meanings, if any, that exclude conflicts of interest, shall prevail on any rival meanings.

### *Article 12. Dispute resolution*

Insofar as many of the clauses of the protocol are an expression of the obligation of cooperation among insolvency practitioners, the courts, and the practitioners with the courts, as provided for in EIR 2015/848, the actions concerning their validity, interpretation or fulfillment will be insolvency matters or fall within the concept of "insolvency related matters", as defined by CJEU case law and set out in Article 6 of the Regulation. As a consequence, these are questions which should be heard by the courts of the Member States of the insolvency proceedings involved in the cooperation.

To the extent that claims may arise from the protocol, which are not subject to the exclusive jurisdiction of the insolvency courts under EIR 2015/848, Parties may want to include multi-step arrangements with a view to settling non-insolvency-related disputes. These arrangements may include an informal duty to negotiate in good faith to solve the dispute (paragraph 3), a formal mediation mechanism managed by a mediation institution of the Parties' choice (paragraph 4), and a final dispute resolution step, consisting either of court litigation (paragraph 5, Variant AA), or arbitration proceedings (paragraph 5, Variant BB).

In the event of the insolvency of a group of companies, it might be useful for one of the companies in the group which is not insolvent itself to sign up to the Protocol. In such a situation, the obligations of such a company would not be a consequence of the duties imposed by the EIR 2015/848, but would be contractual in nature. Consequently, any claims relating to the duties of such a company arising from the Protocol would, in application of the two Variants in paragraph 5, be subject either to the choice of court, or to the arbitration agreement set forth therein.

### *Article 13. Applicable law*

The provision on the law applicable to the protocol is drafted so as not to interfere with the applicability of the law identified under Article 7 EIR 2015/848.

In particular, the first part of the clause acknowledges the priority as applicable law of that determined under Article 7 EIR 2015/848. Therefore, to the extent that the latter provision is applicable, it governs, on the one hand, obligations and commitments undertaken by either one of the parties to the protocol and, on the other hand, any precondition to enter into, and commit under, the protocol.

To the extent that Article 7 EIR 2015/848 should not be applicable to certain aspects covered by the protocol, the approach adopted under Variant AA as regards the determination of the applicable law is to separate each obligation and to submit each obligation to the law of the obligor, rather than to identify one single law applicable to the entire protocol. The advantage of this solution is to ensure that the law of the State of the opening of the proceedings covers not only the subject-matter identified under Article 7 EIR 2015/848, but any additional duty or commitment of each party to the protocol individually.

Under Variant BB, the option for the parties to choose a national applicable law is offered. Yet, again the option is limited to issues not falling under Article 7 EIR 2015/848.

## Chapter III: Cooperation and Communication

### *Article 14. Principle of Cooperation and Coordination*

The wording of Article 14 corresponds to articles 56(1) EIR 2015/848, also

Article 41(1) (for sole-debtor cases) EIR 2015/848. It includes the general duty of cooperation, which is as an all-inclusive concept, that embodies different manifestations of conduct in order to guarantee the best, most efficient administration of the insolvency proceedings.

In the case of a sole-debtor submitted to different insolvency proceedings, the aim of the Official Representatives' duty of cooperation of Official Representatives is to coordinate the efficient use, administration and realization/liquidation of the insolvency assets and to coordinate the administration of the realization/winding-up of the debtor's affairs.

The duty to cooperate also obliges Official Representatives to take the appropriate steps to determine the possibility of coordinating the administration and supervision of the affairs of the several entities included in a group of companies when they are subject to insolvency proceedings, and, where appropriate, to coordinate such administration and supervision.

The duty of cooperation entails taking appropriate steps to determine the possibility of restructuring the debtor or the group members subject to insolvency proceedings. When it is found appropriate to adopt these restructuring measures, the duty of cooperation includes taking the necessary steps to coordinate proposals, the negotiation and implementation of a restructuring plan or a coordinated restructuring plan.

Finally, the duty to cooperate is understood as meaning taking any appropriate steps to determine the possibility of coordinating the liquidation of the estates of the sole-debtor or of the companies of a group and, where appropriate, to coordinate proposals and the negotiation and implementation of a coordinated liquidation.

The Parties might also cooperate with regard to the coordination and taking any measure that might affect employment or paying of workers' salaries and any future payments to employees, including retirement pensions.

### *Article 15. Sharing of Information*

The duty of the parties to keep each other informed is regulated under EU law. Article 41(2)(a) EIR 2015/848 provides that as soon as possible the respective insolvency practitioners should communicate to each other any information that may be relevant to the other proceedings involving the same debtor. Accordingly, Article 56(2)(a) EIR 2015/848 provides the same duty of communication for insolvency practitioners appointed in proceedings concerning members of a group of companies.

This article in the EMP would further detail these duties based on a differentiation between information in proceedings that is publicly available and information, which is non-public. For the latter, further differentiations are optional.

In order to comply with mutual duties to communicate, the Parties have to share procedural and non-procedural topics such as, for instance: a) the assets, b) the actions planned or underway to recover assets: actions to obtain payment or actions to set aside, c) the options for liquidating assets, d) the deadline for lodging claims; e) the claims lodged, f) the verification of claims and disputes concerning them, g) the ranking of creditors, h) planned reorganization measures, i) proposed compositions, j) plans for the allocation of dividends, k) the progress of operations in the proceedings.

It shall not affect national legislation on privacy and data protection.

### *Article 16. Access to data*

This optional clause further specifies the way to share relevant information. It is modelled after clauses from Articles 4.6.1, 4.6.3 and 4.7 of the Lehman protocol. Such clauses could be relevant in cases where information is held in a centralised way by a group entity.

When the information shared involves personal data, regard must be had to the General Data Protection Regulation (Regulation 2016/679). Article 6 GDPR allows for the lawful processing of personal data when the data subject has given consent to the processing of his or her personal data for one or more

specific purposes (Article 6.1.(a) GDPR); when processing is necessary for compliance with a legal obligation to which the controller is subject (Article 6(1)(c) GDPR) and, mainly, when processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party (Article 6(1)(f) GDPR). The possibility of transfer in certain circumstances is allowed "where the data sub has given his or her explicit consent, where the transfer is occasional and necessary in relation to a contract or a legal claim, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies" (Recital 111 GDPR). Recital 113 indicates that "transfers which can be qualified as not repetitive and that only concern a limited number of data subjects, could also be possible for the purposes of the compelling legitimate interests pursued by the controller, when those interests are not overridden by the interests or rights and freedoms of the data subject and when the controller has assessed all the circumstances surrounding the data transfer. The controller should give particular consideration to the nature of the personal data, the purpose and duration of the proposed processing operation or operations, as well as the situation in the country of origin, the third country and the country of final destination, and should provide suitable safeguards to protect fundamental rights and freedoms of natural persons with regard to the processing of their personal data (...)".

Cross border transfers (Article 23 GDPR) are also subject to the general obligations of the controller defined in Article 24 (or joint controllers: Article 26 GDPR) specially that the transfers are subject to appropriate safeguards (Chapter V GDPR).

Note that the exchange of information in insolvency proceedings may in some cases give rise to conflicts of interest. Such conflicts, which constitute an acceptable limit to the duty of information and cooperation, can arise, above all, in the framework of insolvencies in groups of companies where a bankruptcy administrator instantly acquires access to all the information related to the members of the group. That may include confidential information and other sensitive data from a financial point of view that could influence the decision-making process and intra-group financial agreements harmful to a member of the group who, if had not shared the information, would not have been so hurt. In order to solve these problems, some protocols include mediation or conflict resolution mechanisms.

### *Article 17. Investigation and Realization of Assets*

Article 17 of the Model Protocol develops the rules regarding cooperation and communication between insolvency practitioners laid down in EIR 2015/848 in two aspects: on the one hand, the investigation and recovery of hidden assets of the debtor (Sections 2, 3, and 4(c)) and, on the other hand, the use, disposition and realisation of these assets (Sections 4(a)-(b) to (6). A number of international initiatives enhance cross border insolvency law through efficient best practice and guidelines, such as the UNCITRAL Model Law on Cross-Border Insolvency, the Insol Europe IOH Statement and the ALI-III Global Principles. These outline the need for coordination on matters concerning investigation and realization of assets located in different jurisdictions, through the adoption of similar standards and procedures. International protocols include also a wide range of provisions with this purpose. In fact, the general setting of this provision recalls clauses which are present in many protocols such as Sendo and Lehman Brothers, while the provisions related to transactions involving debtor's assets located in different Member States and setting a segregated account set forth in Section 5 are inspired by the AgriBio Tech Protocol.

Provisions laid down in Article 17 shall facilitate the effective coordination between the Parties in parallel insolvency proceedings with the purpose to facilitate an effective administration of insolvency proceedings. On the one hand, they contribute to an increase in the bulk of assets available for the creditors and, on the other hand, they tend to avoid any measure or decision that may destroy value to the detriment of creditors. Likewise, those provisions

shall contribute to *increase certainty in the management of parallel insolvency proceedings*, because they provide parties with rules which indicate how to proceed with debtor's assets that may be valuable for the implementation of a restructuring plan. Moreover, the rules specified under this Article assume that parties have to explore the possibility of restructuring the debtor and coordinate their efforts to elaborate and implement a restructuring plan (see Article 41(2)(b) EIR 2015/848; see also Article 56(2(c) in the case of groups). To this purpose, Article 17 underlines the need for cooperation between insolvency practitioners in order to determine the financial position of the debtor (Section 2(b)).

More specifically, Sections 2 and 3 recall that the Party appointed in the insolvency proceedings opened in a Member State in accordance with applicable law (*lex concursus*) may carry out investigations with respect to the assets of the debtor located in other Member States where an insolvency proceeding has been opened and pursue all necessary causes of action against assets located in those Member States (see Article 6(1), 7(1)(c) and (m) and 21(2) EIR 2015/848 ) with the purpose to recover them.

In addition, Section 4 *imposes on the Party having an interest in any specific asset or set of assets an active obligation, consisting in showing and communicating this interest to the Party whose estate includes them*. By the same token, it *imposes an obligation on the Party whose estate includes this asset or set of assets to consult the other Party that may have an interest on the assets before adopting certain decisions* (e.g., the sale of the assets; the termination of the contract of the employees managing these assets, or the commencement of judicial or non-judicial proceedings in relation with certain assets -which may be of particular interest in the case of groups of companies). This information will prevent the adoption of any measure that may be harmful for the interests of the Parties through an efficient administration of the insolvency proceedings. Likewise, on the basis of this information, the interested Party may ask the competent Court to adopt any measure necessary to protect its interest (e.g., ask the stay of the realization of assets; see Articles 46(1) and 60(1) EIR 2015/848). For the same purposes -avoiding harmful decisions and putting the Parties in the position to ask for protective measures-, Section 5 imposes on the Official Representatives the *obligation not to perform certain acts without prior consultation* with the Official Representatives appointed in the other insolvency proceedings, *where those may encumber the coordinated solution to the insolvency.*

Furthermore, this provision takes into consideration the fact that restructuring may involve the disposition of assets, such as for instance, the aggregated sale of certain assets or parts of the business which will permit to elude the loss of value generally linked to the piecemeal liquidation (e.g., as occurred in KPN-Qwest NV). For these cases, Section 6 recalls the general rules applicable to authorisations and introduces a provision related to the joint sale of assets located in different Member States. EIR 2015/848 demands that the *lex concursus* is to determine, case by case, the authorization regime for dispositions of assets and other transactions (Article 7(1) and (2)(c) EIR 2015/848). In contrast with the general experience gained from previous international protocols, which often include detailed provisions related to requirements and authorization of specific acts and transactions, this Section contains a renvoi to the applicable rules according to the *lex concursus* that determine which is the competent body to grant the authorization and in which cases this authorization is required. In this way, the Model Protocol makes the Parties aware of the fact that it is for the national law of the opening State to determine whether such an authorization is required -in certain cases, no authorization is required (e.g., day-to-day operations)- and which body should provide it (e.g., courts or creditor's committee). However, Parties are free to further develop such provisions and include tailored-made rules regarding certain transactions (e.g., the need to communicate to other Parties day-to-day transactions exceeding a certain amount). In this vein, this Section includes a specific provision related to transactions over assets located in different Members States and submitted to different insolvency proceedings (e.g., sale of different branches situated in different Member States). According to it, these

transactions require the joint approval of the competent bodies in every jurisdiction (e.g., courts or creditors' committees).

Finally, this Section provides that the proceeds resulting from joint sales of assets will be retained in a segregated account to ensure that it will be distributed among the proceedings, unless otherwise decided by the competent body.

### *Article 18. Supervision of the Debtor*

Within the framework of the legal duty of cooperation imposed by EIR 2015/848, this protocol is primarily aimed at facilitating cross-border cooperation between the official representatives appointed in several insolvency proceedings opened in different States, whether they relate to the same debtor or to several members of the same of group of companies. In both cases, the debtor-in-possession retains powers of administration and disposition of the insolvency assets and has the power to make decisions that may affect the other proceedings. As a consequence, Section 1 provides that also the debtor in possession may become a party under the protocol. In fact, it is highly desirable that the debtor also signs this protocol, and the official representatives should promote the signature of and compliance with the protocol.

Irrespective of the above, the debtor can be empowered to make some decisions referred to in the managing of assets or the administration of insolvency proceedings. The duty of cooperation of the Official Representatives should also include a commitment to ensure that the debtor-in-possession does not take any of the decisions to which it would be entitled without prior consultation with the official representatives of the other open proceedings.

In some legal systems, the debtor is entitled to unilaterally propose a reorganization plan without the authorization of the insolvency representative. Were this to be the case, the protocol should not limit the debtor-in-possession's ability to present a reorganization plan in due term. The aim is to replicate for groups of companies the effects foreseen in Article 41 EIR 2015/848 for a single debtor. In other words, when necessary for the efficient administration of the insolvency proceedings commenced upon different members of the same group, the insolvency practitioners shall, by virtue of their duty to cooperate, supervise the actions of debtors-in-possession in order to prevent them from taking unilateral decisions that might harm the other proceedings.

### *Art. 19. Post-commencement finance*

Article 19 regulates access to post-commencement finance. The clause provides that the parties should cooperate in order to make access to new finance easier; it may be of great relevance especially in connection with the reorganization proceedings of insolvent groups.

Cooperation could consist, inter alia, in allowing an enterprise group member in insolvency proceedings to grant a security interest over its assets for post-commencement finance provided by another enterprise group member.

As a minimum cooperation measure, the party intending to obtain new funding is required to communicate its intention to the other parties.

### *Article 20. Commencing further insolvency proceedings*

Within the framework of cooperation duties created by Articles 41-44 EIR 2015/848, Article 20 of EMP encompasses the importance of preventive communication between the Parties of the Protocol, where the Parties wish to commence further insolvency proceedings or wish to consent to an undertaking under Article 36 EIR 2015/848.

The new Regulation acknowledges the need for alignment of main and secondary proceedings, as well as cautioning against further proceedings where they may hamper the efficient administration of the insolvency estate, without an adequate reason or counter-balanced interest on behalf of the requesting Party. Nevertheless, Article 20, in order to avoid eventual inconsistency or

incompatibility with the rules applicable to each of the proceedings, conceives the duty within the boundaries of a mere attempt to obtain in good faith a prior consent. The optional nature of the last paragraph is likewise explained by the fact that according to some national legislation there is a legal obligation to request the opening of insolvency proceedings.

With reference to the other provisions of the Article, the first paragraph takes into consideration, at (a) the case of a sole debtor with assets abroad and possible secondary proceedings after discovering them, while (b) encompasses the case of a cross-border corporate group and possible further main proceedings for parts of the group that are not yet insolvent and controlled by a Party of the Protocol.

### *Article 21. Reorganisation Plans*

The resolution of the financial difficulties of the debtor or a corporate group may sometimes require the reorganisation of the debtor or several debtors in a corporate group. With several insolvency proceedings pending in different jurisdictions, such a reorganisation requires a coordinated approach and may be limited from the outset by insufficient reorganisation plan options under the applicable law of some jurisdictions. Article 21 responds to the need for coordination by safeguarding the joint development of reorganisation plans while only involving those parties to the protocol. The clause assumes that a single plan binding on all relevant stakeholders is not available.

Article 21, paragraph 1, defines the core aim as submitting the same restructuring solution to the debtor's or the group's financial difficulties in several proceedings. The participants to this clause could not be the same as the signatories to the protocol in cases where the reorganization plan solution would not require a participation of all estates.

Article 21, paragraph 2, extends the coordination efforts to preparatory measures in a reorganization plan proceeding under the *lex fori concursus*.

Article 21, paragraph 3, highlights the need to coordinate the timing of the plan submission in several jurisdictions. It obliges participants to this clause to act in concert.

Article 21 is meant to detail the duties provided in Article 41(2)(b) EIR 2015/848 and Article 56(2)(c) EIR 2015/848 whereby the insolvency practitioners are obliged to explore the possibility of restructuring the (single) debtor or group members and, where such a possibility exists, coordinate the elaboration and implementation of a coordinated restructuring plan. It does not contain further duties. For parties to the protocol which are not bound by the duties of the EIR 2015/848, the clause would introduce a similar obligation (if meant to be legally binding). This would be in line with the duty to coordinate in a group insolvency case under Article 13(1) of the UNCITRAL Model Law on Enterprise Group Insolvency. It is also recommended in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (Part III, para 113-117).

### *Art. 22 Claims Reconciliation*

This optional provision aims at solving inter-company disputes in cases where such disputes constitute a major obstacle to a timely solution.

The aim of the clause is to increase the efficiency of the management of the insolvency proceedings involved, avoiding the loss of time and the increase in costs resulting from disputes concerning inter-company claims.

In order to achieve this objective Article 22 moves along three lines:

(a) it permits the conventional creation of a set of accounting records which will serve as the basis for the calculation of inter-company claims;

b) it requires the parties to attempt to resolve out-of-court any differences in the accounting records;

c) it allows the creation of an "*ad hoc*" body, the Procedure Committee, a *panel* of impartial persons appointed to resolve a dispute concerning inter-company claims in an extrajudicial process.

The wording is inspired from the Lehman Protocol.

### *Article 23. Distribution*

These provisions aim to organize the distribution of value when creditors hold claims that may be lodged in parallel insolvency proceedings. In the framework of EIR 2015/848, rules governing the lodging, verification and admission of claims are to be determined by the law of the State of the opening of proceedings (Article 7(2)(h) EIR 2015/848). In most cases, these provisions are binding on national Courts (e.g., Spain, Germany, Italy, etc.).

Section 1 recalls Parties to the hotchpotch rule applicable where parallel insolvency proceedings are opened over the debtor's estate -main and secondary insolvency proceedings-, creditors can lodge their claims in both of them (Article 45 EIR 2015/848), and partial payments are made to creditors in one of these proceedings (Article 23(2) EIR 2015/848). This provision applies to any debtor, regardless of their condition as individual debtors or members of a group (see Section 8.2 of Lehman Brothers Protocol). However, this rule should not be extended to cases where parallel proceedings are opened against several different debtors -i.e., the members of a group of companies, which are debtor and guarantor(s). In these situations, creditors will not be concurring over parts of the estate located in different Member States. Actually, they will be concurring over different estates. Thus, there is no need to ensure fairness among creditors or different debtors.

Within the framework of EIR 2015/848, this provision recalls the applicable rule to the Parties. This may be of particular interest in cases where insolvency proceedings are also opened over debtor's assets in a third country. After this provision, no distribution of value will be made in Member States insolvency proceedings *in favor* of creditors who have already obtained a partial payment in third-country insolvency proceedings until the rest of creditors of the same class have already obtained a proportionately equivalent payment in Member States insolvency proceedings. For these cases, it would be useful to require the creditor to provide information regarding the dividends obtained in those proceedings and to link any payment to the previous submission of this information.

As mentioned, this provision ensures *fairness in the distribution of value among creditors holding a claim in different insolvency proceedings and obtaining partial payments*. In this situation, it is assumed that creditors are entitled to file a claim for its total value in the different proceedings according to the law of the State of the opening of the proceedings. However, creditors cannot recover more than 100% of the value of their claims. Where creditors only obtain a *partial payment in one of the proceedings*, they will be still entitled to take part in the distribution of value in other proceedings. Nevertheless, according to this provision, they should not obtain any payment until the rest of the creditors of the same class have already obtained a proportionately equivalent payment *("so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received").* Since all the assets correspond to the same debtor, creditors having already obtained a partial payment will not benefit from any additional payment before the rest of creditors of the same class will have had the opportunity to obtain at least proportionally the same value those have already obtained in other proceedings. The inclusion of their claims in the relevant class is to be determined according to national law applicable to the insolvency proceedings (Article 7(2)(i) EIR 2015/848).

In order to implement this provision, it is important for insolvency practitioners to obtain information about the distribution plan adopted in the different parallel proceedings and the dividends to be paid to or already paid to creditors on the basis of them (Section 3).

Section 2 contains a specific provision regarding *claims benefiting from a guarantee*. This rule appears in several national legislatures (e.g., Article 438 Spanish Insolvency Act) and has been then adopted in some protocols (e.g., Section 8(3) of the Lehman Brothers Protocol). This provision assumes that a creditor holding a claim with a guarantee is entitled to file a claim in the

insolvency proceedings opened against the debtor ("Direct Claim") and the guarantor ("Guarantee Claim"). As already explained, where the guarantee covers the full amount of the claim, the creditor will be entitled to lodge the full claim in both proceedings. In contrast, where the guarantee only covers a part of the claim, he will only be entitled to file the full amount of the claim in the debtor's insolvency proceedings and just the part of the claim corresponding to the amount covered by the guarantee in the guarantor's insolvency proceedings.

On the previous basis, Article 21(2) of the Model Protocol provides that *the creditor cannot recover more than 100% of the value of his claim from the different proceedings where the claims were admitted*. More precisely, in the cases where the value of the direct claim is higher that the value of the guarantee claim (*i.e.*, partial guarantees), it underlines that the value obtained by the debtor from the different proceedings should not exceed the highest of the above mentioned values. In order to achieve this outcome, no deductions will be made in the admitted claims after the creditor has obtained a partial payment in other insolvency proceedings. The purpose of this rule is twofold: on the one hand, it aims to protect the interest of the creditor to obtain the full satisfaction of his claim by lodging it -or a part of it- in the different insolvency proceedings, and, on the other hand, it seeks to maintain the claims as already asserted in the insolvency proceedings and not to alter them -which may be costly and time consuming and will, therefore, reduce the efficiency of insolvency proceedings. It corresponds to insolvency practitioners to ensure that the dividends obtained by a creditor in the different insolvency proceedings where they can lodge their claims do not exceed the total amount of his (highest) claim. In this regard, Section 3 provides with a *useful tool* to check whether a claim has been fully or partially paid in other insolvency proceedings before making any payment. According to this section, on the one hand, insolvency practitioners will be entitled to *obtain information* from other proceedings regarding the payments to be made to creditors or the payments already made according to the distribution plan adopted in those proceedings. On the other hand, this provision imposes the corresponding *obligation* to the insolvency practitioners *to share the information* regarding payments to be made or already made to creditors according to the distribution plan.

## Chapter IV: Costs

### *Article 24. Costs and Fees*

In the course of administration of cross-borders insolvency proceedings costs may be incurred in relation to the investigation of the debtor's assets, the insolvency representative's remuneration, costs of the proceedings and so forth. With regard to these, the clause on costs leaves them where they occurred, following the generally adopted principle that obligations incurred by insolvency representatives should be funded from the respective insolvency estate.

Regarding cooperation and communication costs among proceedings, although not expressly encompassed at a general level, EIR 2015/848 endorses this general principle with reference to a group of companies by Article 59, since the costs of 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.

Without prejudice to compliance with Article 7(2)(l) EIR 2015/848 according to which the *lex concursus* also regulates who is to bear the costs and expenses incurred in the insolvency proceedings, where an insolvency agreement covers parallel insolvency proceedings, the costs' apportionment between them may be expressly provided for, by adopting for instance the CoCo Guidelines. In particular, according to Guideline 11.2, in cases involving both main and non-main proceedings, it is recommended that obligations and fees incurred by the insolvency representative in the main proceedings prior to the opening of any non-main proceedings, but concerning assets to be included in the estate, should be funded by the estate corresponding to the non-main proceedings.

## European Model Protocol

# *Part two*

### Model Protocol between Courts

### Chapter I: Recitals

#### *Article 1. Identification of the parties*

This protocol is dated DD/MM/YYYY and entered into between Justice _____ (Name Surname Address) in his capacity as the judge presiding over the [insolvency] proceedings regarding the estate of the debtor (name and relevant details of the debtor) commenced by decision of the court of _____ (specify the court and the Member State) dated _____ (insert date dd/mm/yyyy) in the procedure _____(specify the proceedings, e.g. type of procedure, docket no.)

AND

Justice _____ (Name Surname Address) in his capacity as the judge presiding over the [insolvency] proceedings regarding the estate of the debtor (name and relevant details of the debtor) appointed by decision of the court of _____ (specify the court and the Member State) dated _____ (insert date dd/mm/yyyy) in the procedure _____(specify the proceedings, e.g. type of procedure, docket no.).

#### *Article 2. Purpose and Aims*

(1) The aim of this Court-involving Protocol is to facilitate the coordination of the administration of international insolvency cases involving the same debtor, through the use of a protocol.

(2) In particular, these rules aim to promote:

(a) the efficient and timely coordination and administration of Parallel Proceedings;

(b) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders' interests are respected;

(c) the identification, preservation, and maximization of the value of the debtor's assets, including the debtor's business;

(d) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;

(e) the sharing of information in order to reduce costs; and

(f) the avoidance or minimisation of litigation, costs, and inconvenience to the parties in Parallel Proceedings.

### Chapter II: General Provisions

#### *Article 3. Limitation*

(1) The approval and implementation of this protocol shall be based on the

principle of mutual trust. The approval and implementation of this protocol shall not diminish the independent jurisdiction of the court of the Member States involved in the protocol.

(2) Nothing in these rules is intended to:

(a) interfere with the independent exercise of jurisdiction by a national court involved, including in its authority or supervision over an insolvency practitioner;

(b) interfere with the national rules or ethical principles by which an insolvency practitioner is bound according to applicable national law and professional rules;

(c) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction, or

(d) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law and professional rules or to encroach upon any local law.

(3) This protocol is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the other court or a waiver by any of the parties of any of their substantive rights and claims.

### *Article 4. Interpretation*

In the interpretation of this protocol, due regard shall be given to its international origin and to the need to promote good faith and uniformity in its application.

## Chapter III: Case Management

### *Article 5. Principle of cooperation and coordination*

(1) The Parties acknowledge that actively managing an international insolvency case involves coordination of proceedings with those in other States, except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be necessary in the circumstances. Depending on national law, case management is provided by an insolvency practitioner, a court or in a form of cooperation between these two.

(2) The Parties agree that, when managing the international insolvency case, they will:

(a) seek to achieve disposition of the international insolvency case effectively, efficiently and in a timely fashion, with due regard to the international character of the case;

(b) manage the case to the maximum extent possible in consultation with the parties and the insolvency practitioners involved and with other courts involved;

(c) arrange for the proper information to be sent to the insolvency practitioner(s) about the coordination of the international insolvency case;

(d) determine the sequence in which issues are to be resolved, preferably laid down in an overall schedule for all stages of the proceeding;

(f) aim to hold status conferences regarding the international insolvency case.

### *Article 6. Supervising Office Holders*

(1) The Parties agree that they will encourage supervised office holders to:

(a) achieve the disposition of the international insolvency case effectively, efficiently and in a timely fashion, with due regard to the international character of the case;

(b) manage the case in consultation with the parties, insolvency practitioners and with the courts involved;

(c) inform the court and/or the creditors about the coordination and harmonisation of the international insolvency case;

(d) arrange for the determination of the sequence in which issues are to be

resolved, preferably laid down in an overall schedule for all stages of the proceeding;

(e) hold status conferences regarding the international insolvency case.

(2) In furtherance of the section above, the Parties agree to encourage office holders in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may

(a) affect those proceedings; and

(b) benefit from communication and coordination between the courts.

(3) In particular, the Parties encourage office holders, the debtor and other parties to their proceedings to cooperate in order to obtain the maximum aggregate value for the assets of the debtor as a whole, across national borders.

(a) Where required to approve, the Parties agree to make orders approving disposals of the debtor's assets which will produce the highest overall value for creditors, in particular sales of the cross-border assets of the debtor or of several group companies as a whole on a going-concern basis.

(b) Where required to approve a restructuring plan, the Parties agree to encourage the office holders, the debtor and other parties to their proceedings to cooperate for a coordinated plan solution in order to obtain the maximum aggregate value for the assets of the debtor as a whole.

(4) The Parties agree to manage any parallel secondary proceeding in a manner that is consistent with the rescue objective in the main proceeding (either a restructuring plan or a going concern sale) so far as national law permits.

### *Article 7. Equality of arms*

(1) The Parties agree that all judicial orders, decisions and judgments issued in an international insolvency case are subject to the principle of equality of arms, without any conditions, so that there should be no substantial disadvantage to a party concerned. Accordingly:

(a) Each party should have a full and fair opportunity to present evidence and legal arguments and each party shall receive reasonable time to do so;

(b) Each party should have a full and fair opportunity to comment on the evidence and legal arguments presented by other parties.

(2) For the purpose of deciding a dispute, the court should inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure.

(3) Where the urgency of a situation calls for a court to issue an order, decision or judgment on an expedited basis, the court should so far as national law permits ensure:

(a) That reasonable notice, consistent with the urgency of the situation, is provided by the court or the parties to all parties who may be affected by the order, decision or judgment, including the major unsecured creditors, any affected secured creditors, and any relevant supervisory governmental authorities;

(b) That each party may seek to review or challenge the order, decision or judgment issued on an expedited basis as soon as reasonably practicable, based on local law;

(c) That any order, decision or judgment issued on an expedited basis is temporary and is limited to what the debtor or the insolvency practitioner reasonably requires in order to continue the operation of the business or to preserve the estate for a limited period, appropriate to the situation. Such order, decision or judgment will contain a 'come back' clause to allow objections to be heard on a timely basis. The court should then hold further proceedings to consider any appropriate additional relief for the debtor or the affected creditors.

### *Article 8. Language*

(1) The Parties select the English language as the principle language in which

communications should take place with due regard to convenience and the reduction of costs. Notices should indicate this choice.

(2) The Parties permit the use of languages other than those regularly used in local proceedings in all or part of the proceedings, if no undue prejudice to a party will result.

(3) The Parties accept documents in the language designated by the insolvency practitioners without translation into the local language provided that

(a) any such document is accompanied by a short description, written in the local language and signed by or on behalf of the insolvency practitioners, confirming in generic terms the nature of the document being filed and provided also that

(b) if having considered such description the court concludes that a translation of part or all of such document is required in order to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties, it may require the insolvency practitioners to provide the same on such terms as the court may think fit.

(4) The parties agree to promote the availability of orders, decisions and judgments in languages other than those regularly used in local proceedings, if no undue prejudice to a party will result.

### *Art. 9 Notice*

(1) The Parties ensure that any Official Representative in their proceedings 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 proceedings in which that practitioner has been appointed.

(2) Notice of the opening of any proceedings, appointments, motions, applications or other pleadings or papers filed in one of the insolvency proceedings involving or relating to these proceedings, and notice of any other related hearings or other proceedings shall be given using the standard forms published in the European e-Justice Portal or, if that is not practicable, by appropriate means (including, where circumstances warrant, by courier, facsimile or other electronic forms of communication) to the following parties:

(i) all creditors and other interested parties, in accordance with the practice of the jurisdiction where the papers are filed or where the proceedings are to occur; and

(ii) to the extent that they are not otherwise entitled to receive notice under any other clause, Official Representatives of the estate of the Debtor and other parties as may be designated by the Courts from time to time.

(3) In any case, any measure that might affect the degree of satisfaction of the creditors of any of the insolvency proceedings must be communicated to the Official Representatives of all the proceedings open against the debtor.

### *Article 10. Decisions*

(1) The Parties agree that, upon completion of the parties' presentations relating to the opening of an insolvency case or the granting of recognition or assistance in an international insolvency case, the court should promptly issue its order, decision or judgment.

(2) In cases where the court decides ex officio regarding the scheduling of proceedings, it should take into consideration Parties' submissions on scheduling; all Parties will cooperate and consult with one another concerning the scheduling of proceedings.

(3) The court may issue an order, decision or judgment orally, which will be set forth in written or transcribed form as soon as possible.

(4) If the order, decision or judgment is opposed or eligible to be appealed, the court will set forth the legal and evidentiary grounds for the decision.

(5) To the maximum extent possible, courts will encourage their orders, decisions or judgments to be published as soon as possible.

### *Article 11. Stay*

(1) The Parties agree to minimise conflicts between the stays or moratoriums effective in their respective jurisdictions.

(2) The Parties agree that 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 and to the extent possible under national law. Exceptions to the stay or moratorium should be limited and clearly defined.

## Chapter IV: Court Access

### *Article 12. Principle of Mutual Access*

The Parties agree to give any Official Representative of a foreign insolvency proceeding, upon recognition, direct access to their courts for the exercise of its legal rights. Without prejudice to rights under the EIR 2015/848, such a representative shall have the same access to the court as a domestic office holder has or would have had were domestic proceedings opened without thereby becoming subject to its jurisdiction.

### *Article 13. Authentication*

Where authentication of documents is required, courts should permit the authentication of documents on any basis that is rapid and secure, including via electronic transmission, unless good cause is shown that they should not be accepted as authentic.

### *Article 14. Extended Right to Appear and be Heard*

(1) The Parties agree that Official Representatives of the debtor, the creditors committee, individual creditors, and any other party interested in the insolvency proceedings shall have the right and standing to:

(a) appear and be heard in the insolvency proceedings before either the _____ (Member State A) or the _____ (Member State B) court to the same extent as the creditors and other parties in interest domiciled in the forum of that Member State, subject to the applicable law of the Member State within the territory of which they intend to appear.

(b) file notices of appearance or other applications or documents with a _____ (Member State A) or _____ (Member State B) court provided however that any appearance or filing may subject the creditor or party in interest to the jurisdiction of the court in which the appearance or filing occurs.

Appearance by the creditors' committee in the_____(Member State B) proceedings shall not form the basis for personal jurisdiction in this Member State over the members of the creditors' committee.

(4) The _____ (Member State A) court shall have jurisdiction over the insolvency practitioner appointed in _____(the Member State B) solely with respect to particular matters on which the insolvency practitioner appointed in the latter Member State appears before the _____ (Member State A) court.

(5) The _____ (Member State B) court shall have jurisdiction over the insolvency practitioner appointed in _____(the Member State A) solely with respect to particular matters on which the insolvency practitioner appointed in the latter Member State appears before the _____ (Member State B) court.

## Chapter V: Court-to-Court Communication

### *Article 15. Principle of Communication*

(1) The courts of _____(Member State A) and _____(Member

State B) may communicate with one another with respect to any matter relating to the proceedings opened in either Member State.

(2) A court may receive communications from the other court and may respond directly to them. Such communications may occur for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing.

### *Article 16. Means of communication*

(1) Such communications may take place through the following methods or such other method as may be agreed by the two courts:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decisions, endorsements, transcripts of proceedings or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(b) Directing the insolvency practitioners to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the court to the other court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(c) Participating in two-way communications with the other court.

### *Article 17. Rights of Parties to Acts of Communication*

(1) In two-way communications, parties may be present.

(2) If the parties are entitled to be present, advance notice of the communications shall be given to all parties following the applicable procedural law in each of the courts involved in the communications.

(3) The communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.

(4) Copies of any recording of the communications, of any transcript of the communications prepared according to any direction of any court involved in the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.

(5) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

## Chapter VI: Joint Hearings

### *Article 18. Joint hearing*

**[Variant AAA – more welcoming version]:**

(1) The Parties may conduct joint or coordinated hearings concerning any matter relating to the conduct, administration, determination or disposition of any aspect of those proceedings, provided both courts consider such hearings to be necessary or advisable and, in particular, to facilitate or coordinate the proper and efficient conduct of the proceedings.

(2) Concerning any such hearings, unless otherwise ordered, the following procedures will be followed:

(a) A telephone and/or video link shall be established to enable both courts to hear the proceedings in the other court simultaneously;

(b) The judges may appear and sit jointly in either court as agreed between them, provided that creditors and parties in interest may appear and be heard in

person or at the courtroom of the judge who has traveled there to appear in the other courtroom;

(c) Any party intending to rely on any written evidentiary materials in support of a submission to either court in connection with any such hearing shall file those materials, which shall be consistent with the procedural and evidentiary rules and requirements of each court, in advance of the hearing.

If a party has not previously appeared in or does not wish to submit to the jurisdiction of either court, it shall be entitled to file such materials without, by the act of filing, being deemed to have submitted to the jurisdiction of the court in which such material is filed, provided it does not request in those materials or submissions any affirmative relief from the court to which it does not wish to submit;

(d) Submissions or applications by any party shall be made initially only to the court in which such party is appearing and seeking relief. Where a joint or coordinated hearing is scheduled, the party making such applications or submissions shall file courtesy copies with the other court. Applications seeking relief from both courts must be filed with both courts;

(e) The judges who will hear any such application shall be entitled to communicate with each other, with or without counsel present, to establish guidelines for the orderly submission of documents and other materials and the rendering of decisions of the courts and to deal with any related procedural or administrative matters;

(f) The judges shall be entitled to communicate with each other after any such hearing, without counsel present, for

(i) determining whether both courts can make consistent rulings

(ii) coordinating the terms of the courts' respective rulings and

(iii) Addressing any other procedural or administrative matter.

**[Variant BBB – more restrictive]:**

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply:

(a) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings;

(b) Each court can simultaneously hear the proceedings in the other court. Each court shall seek to provide the best audio-visual access possible.

(c) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.

(d) A court, after the joint hearing, should be entitled to communicate with the other court, with or without counsel present, to determine outstanding issues.

## Chapter VII: Allocation of Responsibilities between Courts

### *Article 19. Coordinated Exercise of Jurisdiction by Courts of different Member States*

(1) Without prejudice to the allocation of jurisdiction to courts of different Member States pursuant to EIR 2015/848, and to their autonomy in determining how to manage proceedings pending before them, (A) courts of the main insolvency proceedings shall be responsible for: (*i*) the main insolvency proceedings, (*ii*) the actions that derive directly from the main insolvency proceedings and are closely linked with them, and (*iii*) the determination as to whether such main insolvency proceedings and related actions require coordination with proceedings and actions in other Member States; and (B) court of secondary insolvency proceedings shall be responsible for: (*i*) the secondary insolvency proceedings, (*ii*) the actions that derive directly from the secondary insolvency proceedings and are closely linked with them, and (*iii*) the

determination as to whether such secondary insolvency proceedings and related actions require coordination with proceedings and actions in other Member States.

(2) With a view to effectively coordinating the respective exercise of jurisdiction, the above referenced Courts shall consult and hold coordination conferences whenever either one of them is seized with an action in civil and commercial matters against the same defendant as an action that derives directly from the insolvency proceedings and is closely linked with them, to the extent that the other Court would have had jurisdiction over the said action other than for the close relation of the action in civil and commercial matters to the action that derives directly from the insolvency proceedings.

### *Article 20. Verification of Lodged Claims*

(1) To ensure a complete and effective overview of the claims lodged in each proceeding under Article 45 EIR 2015/848 and to avoid unnecessary duplication of effort and expenses or inconsistent rulings by the Parties, the following principles shall apply concerning the verification and admittance of lodged claims:

(a) Any creditor lodging a claim against the debtor in the proceedings opened in the Member State _____ (where the debtor has its COMI) shall be deemed to have accepted to have their claim verified according to the applicable national law. Courts of this Member State ____ will have jurisdiction for actions deriving from the operations of verification and admission of claims.

(b) Any creditor lodging a claim against the debtor in a participating jurisdiction other than where the debtor has its COMI shall be deemed to have accepted to have their claim verified according to the applicable national law. Courts of this Member State_____ will have jurisdiction for actions deriving from the operations of verification and admission of claims.

(2) Decisions regarding the verification and admission of claims adopted in the proceedings opened in one Member State may be considered as means of proof of the corresponding claims in the proceedings opened in other participant jurisdiction.

## Model Protocol between Courts
## Guide to implementation

### Article-by-article remarks

#### *Part Two*

The Recast European Insolvency Regulation (EIR 2015/848) addresses the need for court-to-court communication and cooperation in Article 42 for sole debtor cases (main and secondary proceedings) and Article 57 for group cases (several main proceedings for group entities). Recital 48 refers to the 'principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law' when courts wish to communicate or cooperate. Relevant texts are

the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and the EU Cross-Border Insolvency Court-to-Court Communications Guidelines; [1]

the Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation between Courts in Cross-border Insolvency Matters; [2]

ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases. [3]

Part two of the EMP reflects the provisions and the specific nature of court-related rights and duties imposed by EIR 2015/848 and develops them by drawing on these soft law sources.

There are two principal ways how to make the content of Part Two of the EMP effective.

(1) Ad-hoc protocol: In line with the basic approach of a Model Protocol, the judges seized with proceedings in a cross-border insolvency case may agree to conclude a protocol with principles guiding their case management decisions ad-hoc. This approach would not differ much from the approach taken by Official Representatives when they conclude a protocol. However, the conclusion of an ad-hoc protocol may not present the most effective way of establishing standards for court-to-court communication and coordination. Judges with a civil law background, in particular, are rather accustomed to the traditional function of judges as independent office holders and may find it difficult to individually sign up for a protocol in a specific case which would define ways to manage the case.

(2) General procedural standards: Instead of individual ad-hoc adoptions, the principles of Part Two of the EMP could become effective more efficiently by way of establishing them as general rules of guidance applicable beyond an individual case when dealing with the duties to communicate and cooperate under EIR 2015/848. This option would probably involve the legislator, possibly even the European legislator in a new EIR Recast. In some jurisdictions, courts may be authorised to implement such guidelines on their own independent of a specific case. Finally,

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[1] See EU Cross-Border Insolvency Court-to-Court Cooperation Principles, December 2014, available at http://www.ejtn.eu/PageFiles/16467/EU_Cross-Border_Insolvency_Court-to-Court_Cooperation_Principles.pdf.

[2] As presented on the Judicial Insolvency Network Conference on 10–11 October 2016, available at http://www.jin-global.org/content/jin/pdf/Guidelines-for-Communication-and-Cooperation-in-Cross-Border-Insolvency.pdf.

[3] See ALI-III Global Principles for Cooperation in International Insolvency Cases 2012, available at https://www.iiiglobal.org/sites/default/files/ALI-III%20Global%20Principles%20booklet_0.pdf.

local *lex fori* may allow the court to implement these principles by way of a case management court order, which would also have a significant effect if courts in parallel proceedings would enact them in concert. [4]

Part Two of the EMP was developed with a focus on enabling courts to implement existing soft law principles by concluding an ad-hoc protocol (option 1). The model rules imply that all judges concluding the protocol have already been seized with relevant proceedings. Judges of courts who are only yet potentially confronted with (secondary) insolvency proceedings find no basis to already participate. Duties to communicate and cooperate when a judge is first confronted with a motion to commence (secondary) proceedings, as e.g. found in Principles 11 and 12 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles, would need to be part of a pre-existing legal framework implemented under option 2.

## Chapter I: Recitals

### *Article 1. Identification of the parties*

Article 1 identifies the parties to the protocol and the date(s) of its conclusion. The signatory judges are identified in person based on their capacity to hear the insolvency case. In addition, information about the debtor (name and relevant details such as business address, register entry) is given, which is particularly useful in the case of a corporate group. The details about the procedure (name or type of procedure and docket no.) describes the substantive scope of the protocol.

The term "procedure" indicates that the scope of the EMP is potentially broader than the scope of the EIR in terms of proceedings covered. For more details, see the Guide on Article 1 in Part One.

The scope of the EMP is prima facie limited to parties from Member States of the EU where EIR 2015/848 is applicable. Judges hearing insolvency cases in other countries are nonetheless eligible to become parties to a protocol. The neutral language used in Article 1 is meant to allow for such a wider application. Parties must be aware, however, that the specific model clauses developed in the EMP are designed based on the rules of EIR 2015/848. The inclusion of third parties may require more specific clauses for situations where either the EIR 2015/848 contains obligations, which may need to be autonomously constructed by a protocol for third parties, or where third state laws demand other solutions.

### *Article 2. Purpose and Aims*

Article 42 of EIR 2015/848 encourages cooperation and communication among courts with insolvency proceedings opened against the same debtor. Where appropriate, a protocol paves the way for an efficient and timely coordination and administration of the proceedings by laying down a pre-emptive agreement between the parties concerning coordination, cooperation and communication.

The Model Protocol provides a draft of rules that the parties may select, modify and adopt. Article 2 provides a list of benefits that the courts should consider in deciding to participate in the protocol. Practice demonstrates that the agreement between the parties concerning the coordination of the proceedings, reduces the time and costs of the proceedings, increasing their efficiency as well as reducing litigation between the parties.

Moreover, the flexibility of protocols allows the courts to make sure that the

[4] See e.g. the implementation of the JIN Guidelines by the Supreme Court of Singapore on Feb. 1, 2017. See also the implementation of the Jet Airways Protocol on September 26, 2019, by way of a court order.

interests of the local stakeholders are respected while seeking to maximize the value of the debtor's estate. Similarly, the customisable nature of protocols permits the suitable management of the debtor's estate in proportion to nature, complexity of the proceedings and value of the estate.

## Chapter II: General Provisions

### *Article 3. Limitation*

Article 3 anchors the court's application of the protocol to the principle of mutual trust as elaborated by the Court of Justice of the European Union. The principle seeks to assure that the Member States respect and ensure an equivalent level of certain common values, such as the principles of freedom, democracy, respect for human rights and the rule of law.

At the same time, Article 3 aims to safeguard the courts' independence involved in the implementation of the protocol, including in their power to supervise the actions of the insolvency practitioners. It seeks to guarantee that nothing in the protocol interferes with existing applicable laws or professional rules or ethical principles under the national legal system. Similarly, the Article aims to guarantee the courts powers in maintaining national public policies and the application of national rules concerning the attribution of jurisdiction and the applicable law.

### *Article 4. Interpretation*

The effectiveness of the Protocol may be jeopardized if its interpretation is based on purely national criteria and does not take account of the international context in which it is signed and the need to ensure its uniform application in all the procedures to which it relates.

Therefore, when interpreting the Protocol, courts must consider its international origin and make the State's criteria more flexible to adapt them to it. In particular, interpretation must be made in accordance with EIR 2015/848 and with the cooperation obligations in mind which, in general, are established in Article 81 TFEU. From this perspective, information on how the protocol is being applied and the possible interpretations made for its application in a given State should flow between the participating courts in order to ensure the aforementioned uniformity of solutions as far as possible. Information on possible interpretations of similar provisions in other protocols, where available, may be appropriate to establish long-term homogeneous criteria to facilitate the application of these instruments.

A provision similar to this Article 4 is contained in the JIN Guidelines (No. 6) and in Article 8 of the UNCITRAL Model Law on Cross Border Insolvency 1997, which, in turn, takes the formula found in Article 3(1) of the UNCITRAL Model Law on Electronic Commerce. As highlighted in the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency, provisions similar to the one envisaged here are also found in several private law treaties, including Article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods, and in non-conventional uniform law texts.

## Chapter III: Case Management

### *Article 5. Principle of cooperation and coordination*

The coordination of parallel proceedings is part of the most general duty to cooperate and will mostly require the coordination of case management in several courts. This article provides for a more detailed rule on the subjects of such coordination and in no way claims to be exhaustive, nor is it necessary to adopt all of the coordination scenarios listed.

This provision is respectful of national laws and does not prejudge who - the insolvency administrator, a court or both- should carry out the actions necessary for

such cooperation. It is also in line with Articles 41 to 43 EIR 2015/848 that provides for the obligations of communication and information both as regards courts and insolvency administrators.

The use of the term "coordination" is used in this article in its general meaning, without referring to the specific coordination procedure foreseen for groups of companies in Articles 61 et seq. of EIR 2015/848.

As in the EIR 2015/848, cooperation is subject to the existence of reasons which may justify its non-implementation, such as the fact that the cooperation is harmful for the bankruptcy itself or, if such is the case, that the internal mandatory rules of the State of the court prohibit any of the activities which may be appropriate from the point of view of cooperation.

Paragraph c) concerns the exchange of "proper" information relating to each of the procedures, in the absence of which coordination would hardly be possible. What information should be considered the "proper" one is open to doubt and may lead to disagreements between the parties. It should be considered that such a concept includes any information that may be useful for other proceedings, the transfer of which does not adversely affect the interests of the individual proceeding to which it concerns. For this purpose, Virgos/Schmit's Report on the Convention on Insolvency Proceedings may serve as a guide for the interpretation of this concept. Due attention to data protection rules or other national laws limiting the transfer of information should also be paid.

### *Article 6. Supervising Office Holders*

This article acknowledges that in several Member States courts are not involved in the preparation of solutions for the parties involved, but only have a supervisory role. Thus, according to the fact that where the management of a case is also in the hands of an Official Representative (insolvency practitioner or debtor in possession), the court commonly supervises their acts, this article seeks to support the cooperation and coordination between parallel proceedings by guiding supervision powers, encompassing the importance of furthering the timely and efficient administration of insolvency cases.

Although similar definitions may be found also in the ALI/UNIDROIT and in the EU JudgeCo Principles, the wording is resumed - with regards to subparagraph 1, 3 and 4 of Article 6 - from respectively Principle 5(3), Principle 21 (which in turn reflects CoCo Guideline 13) and Principle 22 (reflecting CoCo Guideline 14) of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles. The latter part of the provision, in particular, recognizes the importance of aligning also on a Court-to-court level the process of liquidation with the reorganization/conservation objectives of the main proceedings, as expressly established in Recital 48 and Article 42 et seq. of EIR 2015/848. The risk of detrimental effects on a meaningful reorganization of the main proceedings as a consequence of a non-effective cooperation among the courts and authorities of the other States was particularly warned of in the previous version of the EIR 2015/848, in which the secondary proceedings could only have liquidation purposes. This was recognized in the judgment of 22 November 2012, in the matter of *Bank Handlowy w Warszawie Sa V. Christianapol sp.z o.o.* (Case C-116/11), affirming that the principle of Article 4(3) (consolidated version of the Treaty Estabilishing the EU) requires the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings.

With respect to subparagraph 2, the wording is resumed from Guideline 1 of the JIN Guidelines, also aiming, as an overarching objective, to improve efficiency and effectiveness of cross-border proceedings in the interests of all stakeholders.

### *Article 7. Equality of arms*

This article safeguards existing procedural rights of parties in all participating courts. This provision is respectful of national laws and is therefore subject to the limits set in each State by its respective procedural law.

From that perspective, it might seem a superfluous precept, but it ensures compliance with essential procedural principles in European proceedings and avoids that the international nature of the case and the need for cooperation could be used a pretext for ignoring them.

While the term Parties, in capital letters, used at the beginning of the article, refers to the signatories of the protocol, the reference to "party" or "party concerned" in lower case, comprises those who participate in the proceedings (the debtor, creditors or interested third parties).

### *Article 8. Language*

The clause (with optional choice for the English language) implements Principle 14 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles.

### *Article 9. Notice*

Article 9 implements Principle 20 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles.

This clause pursues the objective of enabling interested persons to become aware of the most relevant facts concerning insolvency proceedings through the timely, secure and complete circulation of information. Timely and complete notice allows interested parties to exercise their rights in a comprehensive manner.

As far as the form of transmission of the notice is concerned, it has been deemed appropriate to refer to the standard forms published in the European e-Justice Portal, with the possibility of using other means of transmission if it is not possible or appropriate to adopt those standard forms.

### *Article 10. Decisions*

This article aims to promote the minimization of litigation and to contribute to the overriding objective of efficient and effective dealing in insolvency proceedings. It reflects the principles of mutual trust, based on Article 4(3) of the Treaty on European Union (TEU), and procedural efficiency.

To increase the efficiency of procedures, the parties agree to a set of rules of cooperation aimed at avoiding undue delay. Once agreed, the courts undertake to issue an order, decision, or judgment which will set these out in written or transcribed form, and they will promote their publication as soon as possible.

Moreover, the article contains a safeguard regarding the advice of the parties and respects the independence of the court and the legal system where it states that if an order, decision, or judgment is opposed or eligible to be appealed, the court will set forth the legal and evidentiary grounds for the decision.

### *Article 11. Stay*

Among others, this Article aims to contribute to the overriding objective of efficient and effective dealing in insolvency proceedings.

The cross-border effect of a stay of enforcement actions or a moratorium is regulated under EU law. Article 20 EIR 2015/848 safeguards the cross-border effects of a stay stating that any restriction of creditors' rights shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent. The effects of a stay or other restrictions of creditors' rights are therefore limited to the scope of the proceedings and in principle only prevent enforcement against the assets situated in the Member State where the proceedings have been opened.

Therefore, the rule laid down in subparagraph 1 is limited to the remaining issues of adjusting a foreign stay to the local legal background.

Subparagraph 2 is optional and would provide for additional relief where is not available under domestic law.

## Chapter IV: Court Access

### *Article 12. Principle of Mutual Access*

Access to justice is a fundamental prerequisite to the exercise of legal rights and remedies. In any cross-border insolvency case, any appointed Official Representatives must be able to represent the interest of stakeholders in their proceedings in foreign courts. The right to appear before and be heard by a foreign court is essential to give effect to the fundamental protections for the estate under applicable insolvency laws. Clauses similar to Article 12 are common in soft law and represent best practice (see Global Principle 20 of the ALI-III Global Principles; Principle 13 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles, or Guidelines 10 and 11 of the JIN Guidelines).

As far as Parties to the protocol are bound by the rules of EIR 2015/848, the subject matter cover by Article 12 is fully regulated already and the wording of Article 12 ensures that there is no deviation. Article 19(1) EIR requires foreign courts to automatically recognise the opening of a foreign (main) proceeding. Art. 20(2) EIR indicates the same for foreign secondary proceedings insofar as they have a cross-border effect, which is the case particularly with respect to creditors and the appointed administrator (see Article 21(2) EIR 2015/848. Based on the principle of automatic recognition, the appointed Official Representative of the recognised foreign proceeding would principally exercise his or her original competences provided by foreign insolvency laws (Article 21(1) EIR), limited, however, by the laws of the recognising jurisdiction (Article 21(3) EIR). More specifically, Article 43 and 45(3) EIR 2015/848 authorise any appointed foreign insolvency practitioner in main or secondary proceedings to appear and be heard in other proceedings, including the right to communicate and cooperate. Article 58 extends these rights to insolvency practitioners appointed in several main insolvency proceedings concerning members of a corporate group. As far as these provisions implement and safeguard the principle of mutual access, Article 12 does not intend to deviate. Instead, Article 12, first sentence, reiterates the right to access and to be heard in a foreign court upon (automatic) recognition. Article 12, second sentence, would not apply as the rules of EIR 2015/848 would prevail.

If the protocol would include parties from third countries, which are neither bound nor entitled under EIR 2015/848, Article 12 would be essential to safeguard mutual access to courts upon recognition. As the legal position of Official Representatives of foreign third-country proceedings would be determined by national laws, Article 12 implements the best practice enshrined in Article 9 and 12 of the UNCITRAL Model Law on Cross-border Insolvency and other soft law texts mentioned above. Article 12, first sentence, would provide direct and expedited access to the court without the need for prior licensing or consular action. It would give standing, but does not vest the foreign representative with any specific powers or rights. Article 12, second sentence, reiterates the principle of non-discrimination of foreign representatives by including the wording of Principle 13(2) of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles. In contrast to Article 21 EIR 2015/848, the foreign representative would not be able to act in a foreign jurisdiction based on his or her "home" laws. Instead, the rules in the host jurisdiction defining the access to their courts would also apply to the foreign representatives. Such a treatment represents best practice and is suggested in soft law (Global Principle 20.2 of the ALI-III Global Principles; Principle 13.2 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles).

The final part of the second sentence in Article 12 safeguards the interest of foreign representatives to not become subject to the foreign jurisdiction for other actions by simply cooperating in a cross-border case. Such protection is common with respect to common law jurisdictions and well-established in soft law (see Guideline 11 of the JIN Guidelines).

### *Article 13. Authentication*

Article 13 implements an established soft law standard for the authentication of a person who claims to act as an appointed Official Representative of a foreign proceeding in order to access the court. The provision describes a compromise between the need to formally prove the existence of a foreign proceeding including the appointment as their representative and the need for an efficient, simple and expeditious way to accept proof. The wording in Article 13 reflects the standard of authentication required according to Principle 15 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Global Principle 22 of the ALI-III Global Principles.

The standard reflects the common belief that a foreign representative shall not be required to authenticate his formal position through traditional forms of diplomatic or consular communications, e.g. letters rogatory or formal legislation. Instead, courts should rely on any procedure for the authentication of documents that is rapid and secure unless there is good cause shown that they should not be accepted. Such a standard would allow the transmission of electronic documents.

Under the applicable insolvency laws, the produced documents would commonly need to be certified in the state of origin. National provisions modelled after Article 15(2)(a) of the UNCITRAL Model Law on Cross-border Insolvency would require a "certified copy" of the decision commencing the foreign proceeding and appointing the foreign representative, but allow for other evidence if such a certified copy is not available (c). The standard of authentication set by Article 22 EIR 2015/848 is even stricter because it lacks any exception to the need for a certified copy of the original decision or any other certificate issued by the court of the foreign proceeding. The wording of Article 13 is meant to be sufficiently flexible to cater for the need to certify documents or send original documents issued by the foreign court. It should be able to include the further development and proliferation of certification standards for electronic documents under existing or future legal rules. In any case, the interpretation of Article 13 shall be guided by the applicable laws and, in case of any conflict, the statutory rules prevail.

### *Article 14. Extended Right to Appear and be Heard*

Article 14 is meant to further detail the principle right to access a foreign court for Official Representatives under Article 12. It would also cover the situation where participating judges wished to extend this privilege to other parties in a foreign proceeding. The clause would exercise the discretion of the court to hear statements or objections from appropriate persons when managing an insolvency case under the applicable *lex fori concursus*. This approach is reflected in Guideline 11 of the JIN Guidelines.

As the applicable law defines the right of (purely) foreign stakeholders, insolvency practitioners or creditor bodies to appear and be heard in court, the clause is drafted as optional in several ways. First, participating judges decide whether to include such an extension at all. Second, the judges may draft the clause in a way that includes only some of them but not all. Third, the judges may limit the extension of rights to certain foreign stakeholders or bodies.

As far as EIR 2015/848 is governing the issue for participating judges, the right to appear, to be heard and file motions in foreign proceedings is defined in Article 43, 45(3) and 60 for foreign insolvency practitioners and in Article 45(1) for foreign creditors.

## Chapter V Court-to-Court Communication

### *Articles 15-16-17*

The justification to communicate is now provided by Article 42 and 57 EIR 2015/848. It could therefore be thought that it is not necessary to include a rule to this effect when it comes to communication between courts of Member States.

However, its inclusion makes it possible to emphasise the importance of communication as a starting point for cooperation.

The legal basis for such communications may be questionable in some States if national law does not expressly provide for it and/or this national law does not provide for mechanisms to carry it out. EIR 2015/848 should be understood as being a sufficient legal basis for communications, but it would be desirable for the Member States to facilitate the work of their courts by laying down rules enabling them to know how to carry out such communications and the principles to which they should be subject. This is particularly necessary in relation to direct court-to-court communications, where national judges in many States have doubts about the extent of information that may be provided to the parties, their documentation for the purposes of the proceedings, the use of new technologies and their compliance with the principles and rules governing confidentiality, data protection, possibility of storing communications on a durable record, etc. and other possible issues. From this point of view, it would be advisable for the Member States to clarify the legal-procedural framework of cooperation, providing the courts with the necessary certainty when proceeding with cooperation in the field of insolvency.

Provisions similar to those contained in these articles can be found, for example, in the JIN Guidelines (nr. 7) or in Principle 16 of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles. In that respect, the aforementioned Principle 16 of the EU Cross-Border Insolvency Court to Court Cooperation Principles refers to the possibility of using modern methods of communication, including electronic communications providing that they use a technology which is commonly used and which is reliable and secure. That same text contains in its Guidelines detailed references to the possible modalities of communication and the way they should be carried out, as well as to the Rights of Parties to Acts of Communication, which may be useful for interpreting these Articles, within the limits set by national procedural laws.

## Chapter VI: Joint Hearings

### *Article 18. Joint hearing*

Joint hearing are the most extreme ways for courts to cooperate. It is a way to ensure 'coordination of the conduct of hearings' under Article 42(3)(d) and 57(3)(d) EIR 2015/848. The current version of the text provides for two optional versions which represent a different approach to joint hearings. As an alternative, we could as well refer to existing models in Guideline 10 of the EU Cross-Border Insolvency Court-to-Court Communications Guidelines or Annex A of the JIN Guidelines.

**Alternative version:**

EIR 2015/848 regulates cooperation between the courts in proceedings relating to the same debtor or where insolvency proceedings relate to two or more members of the same corporate group. In both cases, the Regulation provides that one of the means of carrying out such cooperation may be the "coordination of the conduct of hearings" [Article 42(3) and 57(3)d]. The purpose of such coordination is to ensure that the interests of the parties concerned are respected, to preserve or enhance the value of the debtor's assets, and to reduce the costs of litigation and the inconvenience to the parties of parallel proceedings.

All type of cooperation is based on the premise of the existence of various forms of communication between courts, with or without the presence of the parties (some modalities of communication between courts in parallel insolvency proceedings can be found in the JIN conference paper reached in Singapore in April 2019: Modalities of Court-to-Court Communication). The coordination of hearings may mean that they are held at different times but there is permanent communication between the courts involved on the allegations or problems raised, before or after the respective proceedings. But, undoubtedly, a protocol between courts could contemplate a more extreme means of judicial

coordination: joint and simultaneous hearings. In such a case, general rules of conduct between courts should be contemplated (such as direct communication, the means, language and time for such communication, the means of secure transmission of documents or decisions, the decision to record and transcribe the communications and make them available to the interested parties, etc.). But the establishment of a protocol on coordinated or joint hearings and its articulation does not modify or reduce the exclusive competence of each court on its own procedures, hearings, resolutions or appeals. It is therefore important to emphasize in the text that the fact that evidence or arguments are presented, or have been presented in advance, by the parties at the joint hearing does not imply that the party doing so is subject to the jurisdiction of the other court by the mere fact of doing so at a joint hearing, except when a pronouncement is requested from both with respect to a specific issue.

There are alternatives of principles of joint hearings in Guideline 10 of the EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014) or Annex A of the JIN Guidelines (2016).

## Chapter VII: Allocation of Responsibilities between Courts

### *Article 19. Coordinated Exercise of Jurisdiction by Courts of different Member States*

The terms agreed upon under the clause at hand do not deviate from Article 3 EIR 2015/848, but rather they reaffirm the rules on jurisdiction set forth in Article 3 so as to reassure that provision.

The clause at hand, however, besides reaffirming rules on jurisdiction, allocates between courts of main insolvency proceedings and courts of secondary insolvency proceedings responsibility in triggering communication and coordination with a view to parallel proceedings, or the institution of proceedings in a forum which might prove less convenient for the most effective and fruitful management of the case.

Furthermore, under this clause the courts commit to consult and hold coordination conferences in the event that actions in civil and commercial matters are instituted on the grounds that they are related to actions that derive directly from the insolvency proceedings and are closely linked to them, to the extent that the jurisdiction based on the related nature of the actions results in a derogation to the jurisdiction of the other court.

### *Article 20. Verification of Lodged Claims*

Article 20 applies to Court-to-court cooperation where main and secondary insolvency proceedings are opened over the debtor's estate. In these cases, any creditor will be entitled to lodge their claims in both proceedings (Article 45(1) EIR 2015/848). Then, there is an obvious risk of duplication of effort regarding the verification and admission of claims, which may result in time consuming operations and value destruction. Setting aside the different national regimes applicable to such operations -that according to EIR 2015/848, must be respected (Article 7(2)(g) and (h)), there is also a risk of inconsistencies among the different judicial decisions regarding the verification and admission of claims. In contrast, this situation does not seem problematic for lodging operations, since insolvency practitioners of main and secondary proceedings are entitled to lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed (Article 45(2) EIR 2015/848).

Section 1 reaffirms to the Courts that verification and admission operations must follow the rules of the law of the State of the opening of proceedings (*lex concursus*). As a result, creditors having lodged their claims in the corresponding proceedings, are not entitled to raise any objection with regard to the *lex concursus* applicable to verification and admission operations. Likewise, this provision develops Article 45(2) EIR 2015/848 since it points out that Courts of Member States where main and secondary proceedings are opened

will have jurisdiction for actions deriving from the operations of verification and admission of claims (in line with Article 6(1) EIR 2015/848).

Section 2 aims to reduce the costs of verification and admission operations and the risk of inconsistencies, by considering the *means of evidence* used in the decisions already adopted in one of the proceedings regarding the claims to be verified in the other proceedings.