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# PROTOCOLS IN THE RESTRUCTURING OF GROUPS OF COMPANIES

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**ABSTRACT:** The principle “one estate, one insolvency procedure” informs EIR 2015/848 with regard to the insolvency of the members of a group of companies. However, it leads to a fragmented treatment of insolvency within the group. This principle, which respects the separate legal personality of the members of a group, can, however, destroy the synergies that exist between them. This work highlights the value of cooperation as an alternative to the unified treatment of insolvency within a group of companies to provide an efficient solution to insolvency. Moreover, insolvency protocols are shown as a relevant instrument through which cooperation between insolvency practitioners of the different proceedings - or, where appropriate, debtors in possession - is articulated for each particular case, in order to find a solution that maximizes the value existing in the group in the interest of the creditors of different companies.

**KEYWORDS:** Insolvency; European Insolvency Regulation, Protocols; Cooperation; Corporate groups; Business restructuring.

## **1. Insolvency, groups and coordination**

### **1.1. Approach to the issue**

The insolvency of corporate groups raises the issue of how to coordinate the proceedings of different companies within a group that are in or close to a state of insolvency, with the aim of achieving a solution that maximizes the aggregate value of the various estates and, therefore, the value of the claims that are to be met out of them. The aim is to prevent separate insolvency proceedings, opened in respect of the different

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companies in the group, from destroying the synergies between the companies in the group, in particular where the most valuable solution for the group is restructuring, either by the owners or by a third party.<sup>1</sup> The coordination of the different insolvency proceedings concerning the companies of a group is particularly important if, in addition, we consider how corporate groups are organised. In practice, the usual type no longer corresponds to a group which carries out different business activities through its subsidiaries, which allows the different risks of each of them to be compartmentalized.<sup>2</sup> More commonly, the different phases of a given productive activity are carried out through the subsidiaries that make up the group.<sup>3</sup> The states of insolvency experienced by business groups such as Toys'R'Us, Abengoa or Fagor not so long ago are a good example of this.

The need to co-ordinate insolvency proceedings opened in respect of insolvent companies within a group becomes even more apparent in *cross-border situations*. In such cases, groups are made up of companies incorporated in different States, so that, in principle, each of the insolvency proceedings is subject to the jurisdiction of a judge and governed by national law. As is known, in the field of European Union law, it is the centre of main interests of each of these companies (COMI) that determines which judge is competent to hear the insolvency proceedings opened and which law is applicable (see Article 3 EIR 2015/848). In this situation, where each company that is part of a group is incorporated in a different State, the insolvency of each company will be dealt with through different proceedings, which will be conducted under different rules and before different judges, and will be managed by different insolvency practitioners.<sup>4</sup> This solution respects the separation of estates between group companies, but it is also of interest from the point of view of creditors, insofar as it allows them to ensure that, in the event of

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<sup>1</sup> I. Mevorach, "Insolvency of corporate groups under the recast Insolvency Regulation: progress or reason for concern?", B. Hess et al. (eds), *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, 290, 292 (Nomos 2017).

<sup>2</sup> This is the model that R.A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U.Chi.L.Rev. 499, 508-509 (1975-1976), starts with in his analysis. Highlighting this value of the separation of estates within groups, C. Paz-Ares, *Uniones temporales de empresas y grupos de sociedades*, in R. Uría & A. Menéndez (eds), *Curso de Derecho Mercantil*, vol. 1, 1469, 1479 (2nd ed., Civitas 2006).

<sup>3</sup> Recently, see N. Bermejo, *Separación de activos, garantías intragrupo e insolvencia*, in N. Bermejo, A. Martínez Flórez & A. Recalde (eds), *Las reestructuraciones de las sociedades de capital en crisis*, 627, 633-639 (Thomson Reuters - Civitas, 2019), which sets out some of the reasons for this fragmentation. See also the economic literature cited there.

<sup>4</sup> On this, the judgment of the CJEU of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04, ECLI:EU:C:2006:281, para. 30: "[...] in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction".

insolvency, their interests will be treated under a single legal system - e.g. the law of the opening State, which is determined by the COMI of the insolvent company -, which they have anticipated when shaping their debt-claim contractually.<sup>5</sup> However, it is clear that this “piecemeal” treatment of a group’s insolvency may have a negative impact on the synergies between the companies in the group and, consequently, may destroy value to the detriment of the creditors affected by the insolvency of the various subsidiaries.<sup>6</sup> This also increases the risk of conflicting solutions being adopted in the various insolvency proceedings concerning the companies in the group.<sup>7</sup>

The purpose of this paper is to provide an answer to the problems of adopting an efficient solution to the insolvency of companies in a group by dealing with “piecemeal” insolvency in cross-border situations, in particular in the field of EU law. To this end, we will first examine the unification strategies followed in practice, as well as the proposals made in this respect at the theoretical level (see 1.2), and then highlight the value of the duty to cooperate as an alternative to those strategies and proposals (see 1.3). In this context, the value of agreements or protocols as instruments for specifying their content in each case will be stressed (see 1.4). Once this has been done, we will examine the specific problem posed by this fragmented approach to the restructuring of groups in the context of EIR 2015/848 (see 2). From there, we will see how the various provisions contained in protocols can be used to encourage the coordination of insolvency practitioners -and, where appropriate, debtors in possession-, with regard to the preparation, adoption and implementation of a common plan for dealing with the insolvency of group companies that maximizes the aggregated value of the various estates involved (see 3). We will also examine how the distribution of value generated by the restructuring among creditors of different insolvent companies can be organised through protocols (see 4). Finally, we will analyze the possibility of including clauses in protocols

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<sup>5</sup> M. Virgós & F. Garcimartín, *Comentario al Reglamento Europeo de Insolvencia*, 77 (Thomson-Civitas 2003).

<sup>6</sup> They already warned about this risk, *ibid.*, 54. In a similar vein, the European Parliament has expressed itself in its resolution of 15 November 2011, with recommendations to the Commission on insolvency proceedings under EU company law (2011/2006(INI)) (2013/C 153 E/01). It notes that “[...] the insolvency of a group of companies is likely to result in the commencement of multiple separate insolvency proceedings in different jurisdictions with respect to each of the insolvent group members; whereas unless those proceedings can be coordinated, it is unlikely that the group can be reorganized as a whole and it may have to be broken up into its constituent parts, with consequent losses for the creditors, shareholders and employees” (v. recital P).

<sup>7</sup> H. Eidenmüller, *Der nationale und der internationale Insolvenzverwaltungsvertrag*, 114 ZZZ 3, 4-5 (2001).

that order the claims among the different companies of the group (see 5). All of this within the necessary limit set by national law for such clauses.

## 1.2. Unification of the treatment of the insolvency of group companies

In these circumstances, it is not surprising that legal practitioners have sought to explore various techniques for *unifying the treatment of insolvency*, in order to avoid fragmentation into different proceedings that could destroy value to the detriment of creditors. Thus, *strategies have emerged to move the COMI, before the opening of insolvency proceedings*, to the domicile of the parent company, giving it the necessary public disclosure so that it can be known by third parties - e.g. informing creditors by means of a press release. After this change of domicile, it can already be said that it is from there that the effective administration of the company takes place and all its activities are carried out - for example, it is there that all its bank accounts are located.<sup>8</sup> In addition to these strategies for relocating the COMI, there are what are known as *COMI's concentration strategies*, which consist in attracting or dragging the insolvency proceedings of the subsidiaries to the domicile of the parent company once the state of insolvency becomes apparent, since that is the place where the central administration of that company is *de facto* located.<sup>9</sup> In such cases, the group companies affected by the insolvency are subject to insolvency proceedings opened according to the same national law, conducted before the same judge and managed by the same insolvency practitioner.<sup>10</sup>

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<sup>8</sup> J. Schmidt, *Commentary to Article 56 EIR*, in P. Mankowski et al. (eds), *EUInsVO 2017*, RdN 3 (Beck 2016), citing the case of *Hellas Telecommunications (Luxembourg) II SCA*, decided by the English court, which declared itself competent to deal with the insolvency of this Luxembourg subsidiary of the group. In the event of a change of registered office address, the Court stated as follows "The fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the European Union legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State" (judgment of 20 October 2011 in Case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA.*, ECLI:EU:C:2011:671, para. 53).

<sup>9</sup> This is the relevant criterion for establishing the jurisdiction of the insolvency judge. On this point, see Case C-396/09, para. 48: "[T]he presumption in the second sentence of Article 3(1) of the Regulation that the place of the company's registered office is the center of its main interests and the reference in recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction."

<sup>10</sup> On these "creative" practices, see J. Schmidt, *Commentary to Article 56 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation*, 590, 590 RdN 56.02 (OUP 2016). In more detail, Schmidt, *supra* n. 8, at RdN 3. See also, Mevorach, *supra* n. 1, at 292. They argue that the subsidiary should be allowed to open insolvency proceedings in the jurisdiction of the parent company, I. Fletcher & B. Wessels, *Global Principles for Cooperation in International Insolvency Cases*, 2 IILR, 1,

It is true that, in view of the case law of the Court of Justice of the European Union, the possibilities for COMI's concentration strategies to succeed under EIR 2015/848 are very limited.<sup>11</sup>

Nevertheless, under Spanish law, it is in principle possible to notify the judge where the COMI of the parent company is located at the commencement of negotiations to reach a collective refinancing arrangement - which may be a group arrangement - with the creditors of the various companies affected by the insolvency (Articles 583 and 603 of the Codified Text of Spanish Insolvency Act). In these cases there is, in principle, no review of the jurisdiction.<sup>12</sup>

Outside the Union, however, there are forums which are conducive to the development of this type of strategy, based on a broad definition of the debtors who can apply there for the opening of insolvency proceedings - for example, those who have an establishment or some property there. This is the case with *Chapter 11* in the United States, where the broad definition of who is a debtor for the purposes of filing for insolvency (§ 109 US Code) makes it possible for non-US domiciled companies to be restructured in that forum.<sup>13</sup> In such cases, the different companies in the group must separately file for commencement of insolvency proceedings and then apply for joint administration of all of them, which means that they will be heard by the same judge.<sup>14</sup>

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10-11 (2013) (electronic version). In Spanish practice, an attempt of this type is recorded in the Fagor Group's insolvency proceedings. In this case, the Commercial Court No. 1 of San Sebastián understood that the COMI of *Fagormastercook, SA*, the Polish subsidiary of *Fagor Electrodomésticos, S.coop*, was in Spain since, on the one hand, this company was managed from the registered office of the parent company, where the group's strategic commission was located, and on the other hand, there was data to understand that the third parties that were related to the subsidiary were aware that the effective management of the company was there. On these issues, v. E. Torralba, *Concurso FAGOR. El centro de los intereses principales de una sociedad domiciliada en Polonia puede estar en Mondragón a efectos concursales: ventajas e inconvenientes de desvirtuar la presunción a favor del domicilio social*, 1, <https://www.gap.com/wp-content/uploads/2018/03/concurso-fagor.pdf> (accessed 20 Oct. 2020). A different matter is that the interpretation given by the Commercial Court of San Sebastián was not subsequently shared by the Polish judges, who opened main proceedings in Poland concerning that subsidiary. In addition, attention should be drawn to the imbalances to which a solution such as the one described above may give rise (for example, in relation to the realization of assets subject to security *in rem* located outside Spain). On this point, *ibid.*, 2.

<sup>11</sup> On this, the judgment in *Eurofood IFSC Ltd*, C-341/04, must be cited. In said judgment, the Court held that the fact that the economic decisions of a group are or may be controlled by the parent company, which has its registered office in another Member State, is not sufficient to rebut the presumption laid down in Article 3(1) of EIR 2015/848 in relation to the COMI (see paras. 31-37).

<sup>12</sup> I am grateful to Professors Garcimartín and Heredia for providing me with this example.

<sup>13</sup> This provision states the following: 'Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title'.

<sup>14</sup> Recently, however, in relation to *Chapter 11* opened on *Videology Group*, an English judge refused to recognize the proceedings opened on the English company of the group, *Videology Limited*. The judge held that the COMI of that company was in the United Kingdom, considering it irrelevant that it was wholly owned by its American parent, that its sole director was the co-founder and CEO of the parent company

The first attempt to concentrate the COMI of the group companies is provided by the *Eurofood* case. On 24 December 2003, “amministrazione straordinaria” proceedings were opened in Italy against the parent company of the Parmalat group, *Parmalat SpA*. The extraordinary administrator of that company sought to establish a single COMI on the basis of the idea of “one group-one COMI”. That strategy worked for the subsidiary *Parmalat Netherlands NV* but not for *Eurofood*, which was wholly controlled by *Parmalat SpA*, whose registered office was in Ireland and which was responsible for providing financing for the companies in the group. In response to the threat of centralization of COMI in Italy, the *Bank of America*, a creditor of *Eurofood*, reacted by applying in Ireland for insolvency proceedings in respect of *Eurofood*.<sup>15</sup> This is precisely one of the risks to which COMI’s concentration strategies are exposed, as an instrument for the unification of insolvency proceedings in respect of companies belonging to a corporate group. In a legal framework where main insolvency proceedings can be opened in respect of each company in a group, *creditors have the possibility of controlling the determination of the competent judge and the law applicable to each of those companies*. And, as the *Eurofood* case shows, creditors have a powerful incentive to anticipate and apply for the opening of main proceedings in respect of subsidiaries in order to protect their interests, thereby curbing any attempt to concentrate COMI at the domicile of the parent company and to attract the treatment of the insolvency of the subsidiary to the forum where the latter’s insolvency is handled. As we have already indicated, in this way they ensure that their interests will be treated in accordance with the legal system which they took into consideration at the time of contracting in order to shape their creditor position. And this is regardless of the fact that coordinated action may be in the interest of maximising the value of the different estates that make up the group for the benefit of all its creditors.<sup>16</sup>

However, practical efforts to develop COMI concentration strategies, which would make possible a unified treatment of insolvency affecting group companies, have not been reflected in the new version of EIR 2015/848. For their part, COMI’s relocation strategies, in addition to being costly, are always subject to the risk that the presumption laid down in Article 3(1) of EIR 2015/848 in favour of the registered office may be rebutted where “[...] factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which

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and that the software used was owned by the parent company. However, despite that conclusion, the English judge granted the protection sought against the actions of the local creditors in respect of that company, holding that *Chapter 11* opened on it was to be regarded as “foreign non-main proceedings”, in relation to which he could order protective measures. And so he did because negotiations for a Section 363 sale, which included the assets of *Videology Limited*, were well underway. On this issue, v. D. Conaway, *Cross-Border insolvency: English High Court ruling impacts Delaware Chapter 11 Case*, *Eurofenix*, 36-37 (2019).

<sup>15</sup> C-341/04, paras. 18-20. Also, v. R. Mangano, *From Prisoner’s Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases*, 26 *Int. Insolv. Rev.*, 314, 318-319 (2017).

<sup>16</sup> However, Mangano, *supra* n. 15, at 319, holds judges and insolvency practitioners responsible for such behaviour. This author considers that the lack of cooperation poses a “prisoner’s dilemma”, in which individual selfishness leads to an inefficient solution in terms of higher cooperation costs, longer duration of proceedings, poor satisfaction of the interests of the parties, whether local or not. We do not share this view in the case of groups, since those legal operators do not have the power to request the opening of the insolvency proceedings, which actually corresponds to creditors who prefer to make their claims in accordance with the legal framework they anticipated at the time of contracting rather than being subject to a different and unknown legal regime.

locating it at that registered office is deemed to reflect”.<sup>17</sup> It should also be recalled that this presumption does not apply where the transfer of the registered office to another Member State has taken place within the three months preceding the application for the opening of insolvency proceedings (Article 3(1) EIR 2015/848).

Nor have other strategies for unifying the treatment of the insolvency of group companies, such as proposals for *consolidation, whether of estates (substantive) or procedural*, been reflected in EIR 2015/848. There was certainly no shortage of studies in which it was argued that, to the extent that the level of integration of a group is very high, consideration should be given to aggregating the estates of the various insolvent companies in the group.<sup>18</sup> However, *the more efficient management of the various insolvency proceedings concerning the companies in a group is not a reason to disregard the separation of estates between them*. As is well known, companies which make up a group are different legal entities which keep their estates separate from each other. This separation of estates means that the assets and rights which make up the estates of those companies are reserved for the creditors of each of them (“one person, one estate, one insolvency”).<sup>19</sup> Thus, the creation of such separate estate constituting a subsidiary (S2) gives *preference* to the creditors of that company over the creditors of the company which controls it (S1) - the parent company or another company in the group.<sup>20</sup> This means that satisfaction of the creditors of S1 on the value that it has on the subsidiary S2 must be subordinated to full payment of the creditors of S2 on the assets of this company (S2). That being so, the aggregation of the estates of those companies would disregard *ex post* their separation and the preference of the creditors of the subsidiary over its assets with respect to the creditors of other companies in the group precisely when it is most important to maintain this separation, that is, when there are not sufficient assets to satisfy all the claims.<sup>21</sup> It is clear that such a solution would be anticipated by the potential

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<sup>17</sup> C-341/04, para. 34 and C-396/09, para. 51.

<sup>18</sup> Fletcher & Wessels, *supra* n. 10, at 10-11; Mevorach, *supra* n. 1, at 300.

<sup>19</sup> On the principle of “one person, one estate, one insolvency”, see J. Schmidt, Das Prinzip “eine Person, ein Vermögen, eine Insolvenz” und seine Durchbrechungen vor dem Hintergrund der aktuellen Reformen im europäischen und deutschen Recht, 1 KTS 19 (2015). Also, v. F. Garcimartín, El nuevo Reglamento europeo sobre procedimientos de insolvencia: cuestiones seleccionadas, 26 RCP 1, 19 (2017) (Smarteca version).

<sup>20</sup> See H. Hansmann & R. Kraakman, The *Essential Role of Organizational Law*, 110 Yale L.Rev. 387, 393-395 (2000). Also, see F. Garcimartín, ¿Qué sentido tiene subordinar los créditos de la filial en el concurso de la matriz? 2, <https://almacendederecho.org/sentido-subordinar-los-creditos-la-filial-concurso-la-matriz/> (accessed 20 Oct. 2020) and Bermejo, *supra* n. 3, at 639-640

<sup>21</sup> On what they call ‘risk of overcentralization’, Virgós & Garcimartín, *supra* n. 5, at 54.



financiers of the companies in a group. The latter would discount the increased risk represented by the possibility of such aggregation occurring *ex post*, increasing the cost of loans and thus making access to financing for such companies more difficult.<sup>22</sup>

Having said that, we are aware that in groups of companies there may be situations where entities are mixed and it is not possible to establish either which assets correspond to which estates or which claims encumber them. However, this is a problem of a very different nature from the need to ensure, in the case of groups, an efficient administration of insolvency proceedings in cross-border situations and, therefore, goes beyond the stated objectives of EIR 2015/848.<sup>23</sup> It should be for the rules of national law applicable to these situations to determine how the problem should be addressed.<sup>24</sup> A different question is how these rules should be applied when it comes to aggregating the estates of companies located in different Member States. In particular, it will have to be determined whether the decision of a court, adopted on the basis of the provisions of the national insolvency law, to aggregate the estate of a company (S1) in the insolvency proceedings concerning this company with that of another company in the group (S2), domiciled in a different Member State, should be recognised in other Member States (see, for example, Article 43 of the Codified Text of Spanish Insolvency Act concerning the aggregation of estates). The answer on this point must be affirmative. If the judge in insolvency proceedings concerning one of the companies (S1) finds that there is a situation where their assets are mixed with those of another company (S2), and its *lex concursus* provides for the possibility of aggregating different estates, he may do so as part of his proceedings and this decision must be recognised in other Member States. This situation, where the entities are mixed, explains that the COMI of both will be in the same place.<sup>25</sup>

Furthermore, the option of *procedural consolidation*, based on the insolvency treatment of individual companies through single proceedings, has been ruled out.<sup>26</sup>

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<sup>22</sup> In the same vein, see Eidenmüller, *supra* n. 7, at 7, as well as C. Thole, *Das neue Konzerninsolvenzrecht in Deutschland und Europa*, 4 KTS 351, 352-353 (2014) and Schmidt, *supra* n. 19, at 35; *id. supra* n. 8, at RdN 56.03, 591; *id. supra* n. 10, at RdN 5.

<sup>23</sup> See Recitals 3 and 8 of EIR 2015/848, stating the aim “of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects”. However, the Recommendation of the European Parliament on insolvency proceedings proposed that the Commission should allow the aggregation of estates, on an exceptional basis, where it is not possible to determine which assets belong to which companies in the group, or which claims exist between the companies in the group (see Part 3, paragraph 1(E)).

<sup>24</sup> By way of example, Spanish insolvency law provides for a specific rule of aggregation of estates, for cases where there is confusion between the two (see Article 43 of the Consolidated Text of Spanish Insolvency Act). Regarding this rule, see the interesting reflections of A. Martínez Flórez & M. Flores, *La confusión de patrimonios en los procedimientos de insolvencia: consolidación sustantiva y mecanismos alternativos*, in N. Bermejo, A. Martínez Flórez & A. Recalde (eds), *Las reestructuraciones de las sociedades de capital en crisis*, 571, 579-600 (Thomson-Reuters Civitas 2019).

<sup>25</sup> Virgós & Garcimartín, *supra* 5, at n. 54.

<sup>26</sup> Schmidt, *supra* n. 10, at RdN 6. By contrast, the recommendation of the European Parliament in the case of centralized groups was that the insolvency proceedings should be opened where the operational headquarters of the group are located, which would be automatically recognized (see Part 3, paragraph 1(A)). Coordination was reserved, in that recommendation, to decentralized groups (see Part 3, paragraph 2(A)). Mevorach, *supra* n. 1, at 300 states that procedural consolidation could be considered excluded only within the framework of the group coordination procedure (Article 72(3) EIR 2015/848). By contrast, she considers that it would be possible in the jurisdiction where the parent company has its registered office, provided that national law does not prohibit it. It is difficult to see how such a solution could be achieved, when the general rule is that jurisdiction to open insolvency proceedings in respect of a company, whether or not it is part of a group, lies with the judge of the Member State where the company has its COMI (Article

Although at first sight this might be an acceptable solution as it would respect the separation of estates between the different companies in the group, it poses *significant difficulties* in practice. In a cross-border insolvency situation, such a solution would require the reduction of the various insolvency proceedings that could be opened against group members to a single one, heard by a single judge, and subject to a single law - for example, the *lex concursus* of the parent company. On the one hand, such procedural consolidation would result in proceedings which, because of their size and complexity, would consume numerous resources in terms of effort, time and money and would ultimately destroy value to the detriment of creditors.<sup>27</sup> On the other hand, ensuring that consolidation is strictly procedural requires that the various estates affected by the insolvency be kept separate within the proceedings. However, reality shows that ensuring separation of estates requires certain procedural separation measures to be taken. In particular, it would be necessary to limit the actions of creditors in the proceedings which could have an impact on the composition of the estates of others - for example, contesting the verification of a claim to be made on the estate of a group company other than its debtor; contesting the inclusion of certain assets in the estates of other group companies, etc. Moreover, the reduction of the different insolvency proceedings to a single one lowers transparency and makes it difficult to monitor the actions taken within the latter.<sup>28</sup> Finally, such a solution may increase the risk of situations of conflict of interest arising as a result of one and the same person being the insolvency practitioner for all the insolvent estates and having to take, within those proceedings, a decision which benefits the creditors of one estate to the detriment of the creditors of another. Such a conflict of interest may, for example, arise where it is necessary to seek the lodgement of a claim in the insolvency proceedings of a company (S1) for the payment of claims against S1 which are secured

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3(1) EIR 2015/848) and the applicable law is none other than the law of the State of the opening (Article 7(1) EIR 2015/848). Since the COMI of a company belonging to a group is located in a Member State (F1) other than the Member State where its parent company is located (F2), the insolvency proceedings of the subsidiary cannot, in principle, be subject to the jurisdiction of the court of the Member State of the parent company and its *lex concursus*. That is so even if the *lex concursus* of the subsidiary does not prohibit it. The procedural consolidation is different from the joinder of insolvency proceedings, which is provided for in Spanish law (Article 41 of the Consolidated Text of Spanish Insolvency Act). On this point, see the explanations of M. Flores, *Los concursos conexos*, 104-106 (Thomson Reuters - Civitas 2014).

<sup>27</sup> In a similar vein, Thole, *supra* n. 22, at 353-354.

<sup>28</sup> *Ibid.* 354 and Schmidt, *supra* n. 8, at RdN 6.

by S2, or where it is necessary to bring avoidance actions between the insolvent companies of the group or to hold another company of the group liable.<sup>29</sup>

In light of the above, *efficiency in the management of insolvency affecting corporate groups must be achieved by other means*. In EIR 1346/2000, the EU legislator was deliberately silent on this issue.<sup>30</sup> This was, however, perceived by legal practitioners as an important limitation of EIR 1346/2000 itself. This, together with the strategies developed in practice to address the problems of “piecemeal” insolvency treatment of cross-border groups, has led the legislator to address this issue in EIR 2015/848.<sup>31</sup> To this end, two sets of rules have been introduced to “ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies”.<sup>32</sup> On the one hand, the legislator has imposed a *duty of cooperation* on those who conduct and manage the proceedings in respect of the various companies in the group, i.e. judges and insolvency practitioners, for the purpose described above (Articles 56 to 60 EIR 2015/848).<sup>33</sup> On the other hand, the legislator has introduced voluntary *group coordination proceedings*, which provide a set of procedural rules designed to enable a coordinated restructuring of the group, whilst respecting the separation of estates between the various companies within it (Articles 61 to 77 EIR 2015/848).<sup>34</sup> In the

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<sup>29</sup> Eidenmüller, *supra* n. **¡Error! Marcador no definido.**, at 9; Thole, *supra* n. 22, at 354 and Schmidt, *supra* n. 8, at RdN 6. In the Spanish literature, for situations giving rise to a conflict of interest, see, in more detail, Flores, *supra* n. 26, at 211-212.

<sup>30</sup> On this point, see the report issued by M. Virgos and E. Schmidt of 3 May 1996 on the Convention on insolvency proceedings, which served as a basis for the subsequent drafting of EIR 2015/848. That report explained that the Convention did not contain any specific rules concerning companies forming part of a group and merely recognized the possibility that, in respect of each company in a group forming a separate legal person, there was jurisdiction to open proceedings. It also left it to European company law to lay down more specific rules governing the internal relationship between companies in a group. Thus, paragraph 76 provided the following: “The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity. Naturally, the drawing up of a European norm on associated companies may affect this answer”. In this respect, v. also Schmidt, *supra* n. 8, RdN 2.

<sup>31</sup> B. Wessels, S. Madaus & G.J. Boon, *Rescue of Business Insolvency Law*, 349 (European Law Institute 2017), available at [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/Instrument\\_INSOLVENCY.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf) (accessed 20 Oct. 2020).

<sup>32</sup> Recital 51. In the doctrine, Schmidt, *supra* n. 10, at 591 RdN 56.03. Also Garcimartín, *supra* n. 19, at 18-19.

<sup>33</sup> Recital 50.

<sup>34</sup> Recitals 54 and 56. According to one author, the coordination procedure is a form of cooperation in which “the contract is supplemented by the hierarchy”. Thus, Mangano, *supra* n. 15, at 315. Unlike cooperation, which was introduced by the Commission, the coordination procedure was introduced by the European Parliament. On the gestation of the two regulatory blocks, see S. Reinhart, *Vor Artikel 56 EUInsVO*, in *Münchener Kommentar zur Insolvenzordnung*, vol. 4 (3rd ed. Beck 2016) RdN 9. However, this procedure

following pages, we will focus our analysis on the study of how this cooperation is organized through instruments such as agreements or insolvency protocols (Article 56(1) EIR 2015/848).

### 1.3 Duty to cooperate as an alternative to unification

As we have just seen, the EU legislator has relied on cooperation to try to avoid that the fragmented handling of insolvency proceedings concerning companies of a group established in different Member States could dismantle existing synergies within the group and destroy value to the detriment of creditors.<sup>35</sup> To that end, it has imposed a duty to cooperate on those responsible for conducting and managing those proceedings, namely the judges and insolvency practitioners of the various companies in respect of which insolvency proceedings have been opened. Where the debtor remains totally or, at least, partially in control of its assets and affairs the duty to cooperate extends *mutatis mutandis* to the debtor (see Article 41(3) EIR 2015/848, for the single debtor, and Article 76 EIR 2015/848, for groups of companies).<sup>36</sup> Cooperation and mutual trust are deeply rooted in the Union Treaties: they are recognised in Article 4(3) TEU, as well as in Articles 67(1) and (4) and 81(2)(a) and (c) TFEU and are transferred to the area of cross-border insolvency through the provisions of EIR 2015/848 (see Article 41 to 43 EIR 2015/848, for the single debtor, and Article 56 to 60 EIR 2015/848, for groups of companies).<sup>37</sup>

Cooperation is thus presented as an *alternative to the unification of the treatment of insolvency*. Its purpose is to make it *possible to reach a solution that makes the actors involved in the various insolvency proceedings act as the “sole owner” of those estates*, that is, maximizing their value in the interest of all the creditors.<sup>38</sup> In a situation where

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has been heavily criticized for its complexity, which makes it largely impracticable. In fact, it is suggested that in practice it may be overcome by more flexible options, such as the transfer of certain powers to one of the insolvency practitioners. *Ibid.* RdN.13.

<sup>35</sup> Schmidt, *supra* n. 10, at 594 RdN 56.12.

<sup>36</sup> S. Reinhart, *Commentary to Article 76 EUInsVO*, in *Münchener Kommentar zur Insolvenzordnung*, vol. 4 (3d. ed. Beck 2016); J. Schmidt, *Commentary to Art. 76 EIR*, in P. Mankowski et al. (eds), *EUInsVO 2017*, RdN 3-5 (Beck 2016). On the legislative *iter* of this rule, whose systematic location is surprising at first sight, see H. Braun, *Commentary to Art. 76 EIR, Insolvenzordnung*, RdN 2 (8th. ed, Beck 2016). For the definition of “debtor in possession” for the purposes of EIR 2015/848, see Article 2(3) EIR 2015/848.

<sup>37</sup> In this respect, see B. Wessels, *Commentary to Article 42 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation*, 492, 493 RdN. 42.01 (OUP 2016).

<sup>38</sup> See the seminal work of T.H. Jackson, *The Logic and Limits of Bankruptcy Law*, 12-13 (Harvard University Press 1986).

respect for the separation of estates between group companies has led to the exclusion of consolidation, whether substantive or procedural, the cooperation between judges and insolvency practitioners in insolvency proceedings concerning different group companies is intended to achieve the result of maximizing the value of those estates for the benefit of creditors, e.g. by allowing them to be jointly exploited, avoiding decisions which could jeopardize the restructuring of the group, reducing the costs of unified management, etc.<sup>39</sup>

To this end, the Union's lawmakers have defined what is to be understood by a group and has done so from the *perspective of control*.<sup>40</sup> Thus, in Article 2(13) EIR 2015/848, a group of companies is defined as a parent undertaking and its subsidiary undertakings, and the next paragraph states that the parent undertaking is one which directly or indirectly controls one or more subsidiary undertakings (Article 2(14) EIR 2015/848). For this purpose, a parent undertaking is considered to be that which complies with the obligations to consolidate financial statements in accordance with Directive 2013/34/EU. Since Union law has not established an autonomous concept of "exercise of control", it will be for national law to determine what is to be understood by this concept (in Spanish law, see Article 42 of the Code of Commerce, where control is defined as the possession or disposal through agreements concluded with third parties of the majority of the voting rights, the power to appoint or dismiss the majority of the members of the governing body, etc.). That said, for the rules contained in EIR 2015/848 to apply to a group of companies, it is not necessary for the parent undertaking to have its COMI in an EU Member State. It will be sufficient for this purpose for some of the companies in the group to have their COMI in one of those States.<sup>41</sup>

*The rules relating to the duty to cooperate are material rules*-and not mere conflict rules - which impose duties of conduct on insolvency practitioners - or, where appropriate, on debtors in possession - and judges in insolvency proceedings opened in respect of companies belonging to a group. In that sense, they should be seen as obligations of means - and not results - designed on the model of the single debtor's duty to cooperate<sup>42</sup>. However, the duty to cooperate is outlined in a particular way in the case of corporate groups. While in the case of the single debtor it is almost unqualified - it is only limited by compatibility with the rules applicable to the respective proceedings (Articles 41(1) and 42(1) EIR 2015/848), *in the case of groups of companies the duty to cooperate is subject to greater limitations*. Since the companies of a group constitute different entities -and therefore separate estates- the duty to cooperate is only justified where such cooperation serves the purpose of maximizing the value of the insolvent estates. Hence, cooperation is required to be appropriate "to facilitate the efficient administration of those

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<sup>39</sup>M. Becker, Kooperationspflichten in der Konzerninsolvenz, 144-146 (RWS Verlag 2012).

<sup>40</sup> On these issues, see Reinhart, *supra* n. 34, RdN 10.

<sup>41</sup> *Ibid.* RdN 11.

<sup>42</sup> *Ibid.* RdN12.

proceedings”, without, moreover, entailing “conflicts of interest”<sup>43</sup>. As in the case of the single debtor, cooperation must also be compatible with the rules applicable to such proceedings (see Articles 56(1), 57(1) and 58 EIR 2015/848).<sup>44</sup>

With regard to the first requirement, the requirement that *cooperation is appropriate to facilitate the efficient administration of the insolvency proceedings*, this is fully justified. After all, cooperation is not an end in itself, but a means of maximizing the value of insolvent estates in a cross-border context in the interests of the creditors of the various group companies affected by the insolvency. Moreover, it must be borne in mind that cooperation is a costly undertaking. And precisely because it is costly, cooperation is only justified where the creditors of the insolvent group members as a whole are better off with it than without it. Indeed, investing time, effort and money in cooperation is not justified when an alternative solution can yield greater aggregate benefit. Ignoring this fact may lead to efforts that nevertheless destroy value to the detriment of creditors. This explains, for example, the obligation for insolvency practitioners - or, as the case may be, debtors in possession - to consider “whether possibilities exist for coordinating the administration and supervision of the affairs of the group members which are subject to insolvency proceedings, and if so, coordinate such administration and supervision” (Article 56(2) EIR 2015/848).

It can be expected that the cases in which cooperation is called to produce better results are those in which the different phases of the productive activity carried out in the group are distributed among different subsidiaries among which, moreover, there is usually a strong interrelationship (for example, through contracts for the provision of services, assignment of rights, financing, etc.). When the group is structured in a decentralized manner, however, the value that can be generated by cooperation in the conduct of proceedings opened in respect of such subsidiaries will be more limited.<sup>45</sup> Thus, the need for cooperation and the activities in which it can be implemented must be considered on a case-by-case basis in the light of the specific needs of the insolvent companies within the group.<sup>46</sup> One size does not fit all.

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<sup>43</sup> In the case of single debtor, the requirement to avoid any “conflict of interest” appears only in relation to “Cooperation and Communication between insolvency practitioners and Courts” (Article 43(1) EIR 2015/848).

<sup>44</sup> Schmidt, *supra* n. 10, at 595 RdN 56.20, where he points out that these should be understood to include, for example, the guidelines established by professional organizations to which insolvency practitioners should conform their behavior.

<sup>45</sup> On this group model, v. P. Milgron & J. Roberts, *Economía, organización y gestión de la empresa*, 94 (Ariel 1993).

<sup>46</sup> In the same vein, S. Madaus, *The Topic of Protocols: An Empirical Study*, in this same work, section 1.

It follows that in order for cooperation to be required in the conduct of insolvency proceedings initiated in respect of companies belonging to a group, it is necessary that, *in a prospective calculation, the creditors of the insolvent companies will be better off with a cooperative solution than without it*. It will be sufficient that some of the creditors are better off and the rest are no worse off than if an alternative solution were adopted.<sup>47</sup> Conversely, cooperation should be excluded where the improvement of the situation of some of the creditors of the companies in the group occurs at the expense of imposing a loss on other creditors.<sup>48</sup>

With regard to the second requirement, the exclusion of cooperation in cases of *conflict of interest* is also justified.<sup>49</sup> In this context, this means that the insolvency practitioner - or, where appropriate, the debtor in possession - must, *when taking decisions based on the duty to cooperate, put the interest of the insolvency proceedings* – and, thus, of all the creditors participating in them - before any other interest, including the fulfilment of the duty to cooperate.<sup>50</sup> Examples of conflicts of interest are situations where cooperation might require the transfer without consideration of valuable assets - such as know-how, patents, etc. - from one company in the group to another in order to make possible the restructuring of all the companies affected by the insolvency, or the imposition on one company in the group of an obligation to transfer to another the exploitation of an asset of which the former could have made better use.<sup>51</sup> In those cases, cooperation is not required.

#### **1.4. Duty to cooperate and the protocols**

Having established the duty to cooperate as a key element in the strategy to address the problems of fragmented insolvency treatment of group companies, EIR 2015/848 has set out the terms on which such cooperation should take place - e.g. between insolvency practitioners or, where appropriate, debtors in possession, the sharing of

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<sup>47</sup> In this sense, v. Eidenmüller, *supra* n. 7, at 14; B.M. Kübler, *Inhalt und Grenzen der Kooperationspflichten der Insolvenzverwalter in der Konzerninsolvenz*, in *Festschrift für H. Vallender*, 291, 294 (RWS Verlag 2015) and Becker, *supra* n. 39, at 178-179.

<sup>48</sup> Eidenmüller, *supra* n. 7, at 15 considers that agreements are inefficient when they impose externalities on third parties. He also explains that, if the interests of all the creditors are not taken into account, the insolvency practitioners will be liable for the harm they cause.

<sup>49</sup> However, S. Reinhart, *Commentary to Article 56 EUInsVO*, in *Münchener Kommentar zur Insolvenzordnung*, vol. 4, RdN 2 (3d. ed., Beck 2016), considers this requirement unfortunate and proposes that it be interpreted strictly.

<sup>50</sup> *Ibid.* RdN 2.

<sup>51</sup> Schmidt, *supra* n. 10, at 595-596 RdN 56.22.

information, coordination of management and supervision of the activities of group members where this is possible, and coordination with regard to the proposal and negotiation of a common restructuring plan where restructuring of the group is possible (Article 56(2) EIR 2015/848). However, the EU legislator has only identified a few concrete examples of the duty to cooperate and has not exhausted all of the ways and means in which cooperation can take place.<sup>52</sup> This makes sense, given that the scope of the duty to cooperate depends on the specific circumstances of the case and is, moreover, limited by compatibility with national law (Article 56(1) EIR 2015/848). All this makes it difficult to establish it in advance and in a uniform manner for all Member States and for any case beyond the minimums established in the Regulation.<sup>53</sup>

These circumstances highlight the importance of specifying, in each individual case, what cooperation consists of in order to achieve the objective of ensuring effective and efficient management of the various insolvency proceedings.<sup>54</sup> But there is another reason for this interest. This is the need to *generate predictability and legal certainty for all those affected by it*.<sup>55</sup> Indeed, the specification of the duty to cooperate makes it possible to clarify what specific activities may be expected or required of judges and insolvency practitioners - or, where appropriate, of debtors in possession - in the conduct of insolvency proceedings concerning companies that are part of a group and, where appropriate, to determine whether they have satisfied that duty. This is particularly important in a context where, on the one hand, experience with cooperation is not as extensive as in other jurisdictions and, on the other hand, the addressees may have some difficulties in handling and enforcing that duty.<sup>56</sup> Seen from this perspective, the concretisation of the duty to cooperate in specific actions to be carried out by judges and

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<sup>52</sup> He considers that Article 56(2) EIR 2015/848 does not contain a detailed list of the cases in which cooperation may take place, Reinhart, *supra* n. 49, at RdN 5. S.H. Undritz, “Internationales Konzerninsolvenzrecht”, in L.F. Flöther, *Konzerninsolvenzrecht Handbuch*, §8 RdN 80 (2nd. ed. Beck 2018), considers that the Insolvency Statute leaves room for specifying and detailing the duties of cooperation by means of protocols, but that the provisions of the Regulation are a minimum that cannot be dispensed with.

<sup>53</sup> In this sense, Thole, *supra* n. 22, at 378.

<sup>54</sup> Reinhart, *supra* n. 49, at RdN 3, considers that EIR 2015/848 makes it possible to use the scope of freedom left by national law to give effect to that duty of cooperation in a manner consistent with it.

<sup>55</sup> Mangano, *supra* n. 15, at 318. In the same sense, E. Flaschen & R. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 Texas International Law J. 1998, 587, 589 and A. Martínez Flórez, *Meaning, function and nature of the protocols or agreements among insolvency practitioners*, in this same book, section 2.2.2.

<sup>56</sup> M. Requejo, Cooperation, Communication, Coordination, in B. Hess et al. (eds.), *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, 139, 143 and 147 (Nomos 2017).



insolvency practitioners does not only operate in the interest of the beneficiaries of such a duty - e.g. the creditors, for whose benefit the value of the insolvent estates is maximized -, but also of the obligors themselves, who will be able to know more precisely what they can demand from them.

EIR 2015/848 leaves the addressees of the duty to cooperate free to determine the form that this should take and, in this framework, *recognises the possibility of cooperation through “agreements or protocols”*, which may be concluded by the insolvency practitioners in the various proceedings opened in respect of the insolvent companies making up the group - or, where appropriate, debtors in possession (Articles 56(1) and 76 EIR 2015/848).<sup>57</sup> In effect, the conclusion of these agreements or protocols constitutes a way of complying with this duty, so that the insolvency practitioner - or, where appropriate, the debtor in possession - who refuses to sign them without just cause, e.g. contrary to the *lex concursus*; lack of convenience to facilitate the efficient administration of the insolvency proceedings, or the existence of a conflict of interest -, infringes that duty and must therefore be held liable if, as a result of that infringement, it causes harm to the creditors of the companies making up the group.<sup>58</sup> Where different alternatives for complying with the duty to cooperate are available, insolvency practitioners infringe this duty when they refuse without just cause to sign a protocol or agreement which in a prospective calculation is a better option than other alternatives available for the efficient administration of the insolvency proceedings -i.e., more creditors will be better off and no one will be worse off. But, in this framework, the agreements or protocols are, above

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<sup>57</sup> Reinhart, *supra* n. 49, at RdN 4. Also, A. Espiniella, *Los concursos transfronterizos*, in A.B. Campuzano & E. Sanjuán (eds), *El Derecho de la Insolvencia*, 1129, 1151-1154, (3d. ed., Tirant lo Blanch 2018), warns of the usefulness of protocols to make such cooperation possible. On the use of protocols as a form of cooperation in group insolvency, as well as on their content, E. Torralba, *El nuevo reglamento en materia de procedimientos de insolvencia*, in M. Jimeno Bulnes (ed), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, 85, 112-113 (Bosch 2016). For some authors the expression “agreements or protocols” used by EIR 2015/848 could serve to distinguish between the two depending on their binding or non-binding nature. For example, M. Gargantini & G. Koutsokou, *Protocols*, in B. Hess et al, *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, 157 (Nomos 2017). However, some consider that an association between each of these terms and the binding or non-binding nature of such instruments cannot be established with certainty. In this sense, Martínez Flórez, in this book, section 1.3, note n. 7 and section 2.4.2. In fact, for other authors, it must be considered that the legislator uses them as synonyms. Thus, Torralba, in this book, section 1, note n. 2.

<sup>58</sup> Eidenmüller, *supra* n. 7, at 24 and 33. On the possibility that not only the creditors of the estate managed by the insolvency practitioner who infringes the duty of cooperation may claim liability, but also the creditors of other estates that may suffer harm as a result of the infringement of this duty, A Recalde & A. Martínez Flórez, *Conclusion of and (non-)compliance with agreements and protocols between insolvency practitioners*, in this book, section 2, section 3.2.2.3.

all, instruments that make it possible to give concrete expression to the duty of cooperation in each specific case by translating it into a series of actions that determine the conduct of those who are party to them in the management of the various insolvency proceedings affecting group companies.<sup>59</sup> However, protocols or agreements are only one of the forms of cooperation that can be chosen from among all the possible ones. It will then be for the addressees of the duty to cooperate to decide, according to the circumstances of each case, how that cooperation should be structured and in respect of which particular areas or aspects.

It should not be overlooked that *negotiating for cooperation can be costly*. It is precisely for this reason that formulas are needed to reduce the costs of such negotiation - e.g. in terms of initiative and proposal to draw up a protocol; promotion of the proposal; discussion and drafting of the clauses; obtaining consensus on them, etc. The costs of negotiating these protocols or agreements can be reduced through instruments such as *protocol templates* and the *guidelines*. Indeed, the preparation and publication of protocol templates makes it possible to standardise those clauses that respond to the most frequent coordination problems and make them available to interested parties. Likewise, the *guidelines*, which guide the conduct of judges and insolvency practitioners in the fulfilment of their duty to cooperate, can also serve as a source of inspiration in the design of new clauses.<sup>60</sup>

In cases where it is not possible to reduce these costs, *alternatives can be considered which may be less costly than the negotiation of a protocol*. Think, for example, of judges. Although EIR 2015/848 provides that cooperation in their case may consist of “coordination in the approval of protocols” [Article 57(3)(e) EIR 2015/848], the costs of negotiating a protocol through which specify the duty to cooperate may be prohibitive in view of the restrictions that may exist in the different national legal systems.<sup>61</sup> The drawing up of *guidelines* by judicial cooperation networks to encourage and promote cooperation between judges in the various Member States is a reasonable substitute for protocols.<sup>62</sup> Likewise, EIR 2015/848 itself provides certain simplified formula for

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<sup>59</sup> Virgós & Garcimartín, *supra* n. 5, at 227. In this same work, see also Torralba, section 3.2.2 and Martínez Flórez, sections 2.2.1 and 2.2.2. Eidenmüller, *supra* n. 7, 6, describes protocols as instruments that make possible an ‘*ad-hoc Koordination*’. From a general perspective, on the interest of concretizing the duty of cooperation, M. Becker, *Kooperationspflichten in der Konzerninsolvenz* (RWS Verlag 2012), at 177. In fact, it has been stated that ‘[t]he best approach to cooperation may be through the insolvency protocol agreement on a case-level basis’. See L. Barteld, *Cross-Border Bankruptcy and the Cooperative Solution*, 9 International Law & Management Rev 2012, 27, 59.

<sup>60</sup> On these issues, v. K. Ramesh, *Cross-Border Insolvencies: A New Paradigm*, 16, [https://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech\\_Ramesh%20JC\\_delivered.pdf](https://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_Ramesh%20JC_delivered.pdf) (accessed 20 Oct. 2020).

<sup>61</sup> The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, 35 para. 16 (New York 2010), notes that agreements between courts have rarely been concluded, although it acknowledges that this may be possible in some jurisdictions. For her part, Torralba, in this book, section 3.1, explains that the possibility of courts in different jurisdictions concluding protocols ultimately depends on the provisions of the national rules applicable to said courts. Martínez Flórez, in this book, section 1.2, footnote n. 6, considers that it is not clear whether judges may conclude protocols laying down rules of conduct which give concrete expression to their duty to cooperate. He understands that this does not, however, exclude the possibility that they may reach specific agreements on particular issues such as the appointment of a single insolvency practitioner or the holding of a joint hearing.

<sup>62</sup> Ramesh, *supra* n. 60, at 16.

articulating cooperation within groups.<sup>63</sup> To that end, it provides that the courts dealing with insolvency proceedings concerning group companies in different Member States may *appoint a single insolvency practitioner for the various proceedings*, provided that he meets the requirements laid down in those States with regard to qualification and authorisation as an insolvency practitioner [Article 57(3)(a) EIR 2015/848].<sup>64</sup> As we have already said, a solution such as the one described above has as its counterpart the possibility that situations of conflict of interest may arise. These, however, can be neutralised by appointing a “special insolvency practitioner” who can take decisions relating to the management of the insolvent estate independently and in the best interests of the creditors - for example, in German Insolvency law, by appointing a *Sonderinsolvenzverwalter* (§ 56 b InsO); under Spanish law, in the absence of provision in this respect, the possibility can be considered of appointing a third party to intervene as an independent assistant to deal with these situations, as is the case in the context of challenges of company resolutions (Article 206(3) of Spanish Companies Act), or in respect of the *ad hoc* management of an estate (Articles 630-633 of Spanish Civil Procedural Act).<sup>65</sup> Other solutions can also be used, such as requesting authorisation from the insolvency judge for operations in which a conflict of interest is apparent (Article 518 of the Consolidated Text of Spanish Insolvency Act).<sup>66</sup>

The *Union’s lawmaker has been flexible in its consideration of protocols or agreements*. It cannot be otherwise, as they are designed to meet the needs of individual cases.<sup>67</sup> On the one hand, they are not subject to any formal requirements and could therefore, in principle, be purely verbal. In practice, this may be of interest in order to fit in with certain relatively informal practices that have been developed amongst insolvency practitioners in insolvency proceedings of the various companies in a same group structure.<sup>68</sup> On the other hand, the degree of complexity of these practices also varies.

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<sup>63</sup> With regard to the transaction costs imposed by the negotiation of the ‘*ad-hoc Koordination*’, see Eidenmüller, *supra* n. 7, at 6. That explains the interest of reducing these costs.

<sup>64</sup> Recital 50. In the same vein, v. *UNCITRAL Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency*, paras 43-46 (New York, 2012). This form of cooperation has already produced positive results in practice (e.g. see *Nortel* case). See J. Schmidt, *Commentary to Article 57 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation*, 598, 601-602 RdN 57.16 (OUP 2016), and *id. supra* n. 8, RdN. 3.

<sup>65</sup> Schmidt, *supra* n. 19, at 34 and 48. In Spanish law, on the possibility of appointing an independent assistant to save situations of conflict of interest, v. Flores, *supra* no. 26, at 210, 219-229, which excludes the delegated assistants from such task (Articles 75 and 76 of the Consolidated Text of Spanish Insolvency Act) due to their lack of independence from the delegating insolvency practitioner.

<sup>66</sup> *UNCITRAL Legislative Guide*, at 48, paras. 68 and 85, para 144. In Spanish scholarly writings, Flores, *supra* n. 26, at 217-219, referring to so-called voluntary authorisations.

<sup>67</sup> Recital 49. N. Wouters & A. Raykin, *Corporate Groups Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 Emory Bankruptcy Dev.J. 1, 9 (2013) (electronic version): ‘The content of Protocols depends on the need of parties. Protocols flexibility caters to those needs’. Regarding the necessary flexibility of the protocols, as well, v. M. Hortig, *Kooperation von Insolvenzverwaltern*, 220 (Nomos 2008), from which he then draws consequences with respect to the model-contractual, as guidelines, etc.- to which they must conform.

<sup>68</sup> The example provided by the lawyers of the firm Uría&Menéndez, Alberto Núñez-Lagos and Ángel Alonso, in the Isolux insolvency case, is particularly interesting here. The Spanish parent company had guaranteed the issue of bonds through a subsidiary company (BV) incorporated in the Netherlands. On the basis of telephone contacts between the insolvency lawyers of the Spanish parent company and the Dutch subsidiary and at the initiative of the former, the co-operation of the Dutch insolvency practitioner was achieved. The lawyers of the Dutch company passed on the information to the company’s insolvency

They may be either *generic* - highlighting “the need for closer cooperation between the parties, without addressing specific issues”-, or *specific*, which will be more detailed and establish “a framework of principles to govern multiple insolvency proceedings”.<sup>69</sup> They may even “reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions”. Indeed, inasmuch as many protocols are submitted with an application for the opening of insolvency proceedings, they often address, in a general way, issues of communication between proceedings or cooperation, leaving the specific treatment of other more specific issues to other agreements that may be adopted at a later stage.<sup>70</sup> They may be binding on the parties to the agreement, but parties may also choose to reduce the intensity of such a commitment and exclude a requirement for agreements or protocols to be binding in nature.<sup>71</sup> To be effective, such agreements must be approved by the competent courts where the national laws applicable to the proceedings so require - for example, in terms of their content, scope, etc.<sup>72</sup> Otherwise, such approval is not in principle necessary. However, this does not prevent the parties to the Protocol from choosing to submit it to the courts for approval in order to avoid the effectiveness of the agreement being undermined by possible challenges. They may also submit it for approval by third parties, e.g. creditors, the debtor itself if it is entitled under national law to submit a proposal for composition with creditors, etc., in order to obtain the cooperation

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practitioner so that he could wait for approval of the composition in Spain before submitting any composition for approval in the Netherlands. For other examples, M. Maltese, *Court-to-Court Protocols in Cross-Border Bankruptcy Proceedings: Differing Approaches Between Civil Law and Common Law Legal Systems*, at 24-25, [https://www.iiiglobal.org/sites/default/files/media/maltese\\_michele%20submission.pdf](https://www.iiiglobal.org/sites/default/files/media/maltese_michele%20submission.pdf) (accessed 20 Oct. 2020). S. Orlando & G. Capaldo *The Legal Nature of the Insolvency Protocols between Insolvency Practitioners under the EIR Recast and the “Comply or Explain Rule”*, in this same work, section 2, consider, however, that the written form is preferable.

<sup>69</sup> In the same vein, *UNCITRAL Legislative Guide*, at 120, para. 49. Also, see Schmidt, *supra* n. 10, at 595, RdN 56.16.

<sup>70</sup> *UNCITRAL Legislative Guide*, at 120-121, para. 50. On the preparation of protocols prior to submission of the request for the opening of insolvency proceedings, see B. Leonard, *Co-ordinating Cross-Border Insolvency Cases*, 1, 9 (2001), [https://www.iiiglobal.org/sites/default/files/media/Coordinating\\_Cross\\_Border\\_Insolvency\\_Leonard.pdf](https://www.iiiglobal.org/sites/default/files/media/Coordinating_Cross_Border_Insolvency_Leonard.pdf) (accessed 20 Oct. 2020) and Maltese, *supra* n. 68, 24-25. See also J.L. Westbrook, *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court*, 96 Texas Law Rev., 1473, 1490 (2018): ‘Early cooperation permits the establishment of protocols and lines of authority in a cooperative direction from the start’. In this book, see Martínez Flórez, section 2.4.2.

<sup>71</sup> On these issues, see Martínez Flórez, in this book, section 1.4. The considerations presented in this work are made regardless of the binding or non-binding nature that the agreements or protocols may have.

<sup>72</sup> Recital 49. In the doctrine, on this subject, see Torralba, in this book, section 3.2.1. Also, see *UNCITRAL Legislative Guide*, at 120, para. 48, which notes the possibility that protocols may also need to be approved by other bodies in the insolvency proceedings (e.g. creditor committees).

of those who will then have to take the decisions at national level necessary to implement the content of the protocol.<sup>73</sup>

An examination of the various protocols applicable to cross-border groups reveals that *many of the provisions contained in them “seek to highlight the harmonisation of procedural, rather than substantive, issues between the jurisdictions concerned”*.<sup>74</sup> Among them, it is worth mentioning the so-called “jurisdictional issues”, such as whether the courts have jurisdiction to adopt acts of disposition of the assets of individual companies, the proceedings in which claims are to be lodged, etc.<sup>75</sup> This can be explained by the need to overcome the absence of rules governing the relationship between the various insolvency systems involved - for example, between the American and Canadian or British systems.<sup>76</sup> In contrast, in the field of Union law, where EIR 2015/848 regulates relations between these different systems, there is not such a strong need for protocols to regulate this type of issue. They can therefore focus on regulating cooperation between the various insolvency proceedings opened in respect of group companies within the framework of the provisions of EIR 2015/848.<sup>77</sup> This explains, for example, why it is common for protocols adopted outside the scope of EIR 2015/848 to incorporate rules on the lodgement of claims, enabling creditors to choose the proceedings in which to assert their rights.<sup>78</sup> However, the possibility of incorporating provisions such as these in protocols adopted under EIR 2015/848 is much more limited. Indeed, EIR 2015/848 already provides for rules in this respect, which set out how the lodgement of claims should be carried out. In particular, in accordance with EIR 2015/848, the rules applicable to the lodgement and verification of claims are those laid down by the law of the State of

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<sup>73</sup> *UNCITRAL Practice Guide*, at 42-43, paras. 32-33. In comparative practice, there is no shortage of examples where the effectiveness of the protocol is made conditional upon approval by the judges hearing the insolvency proceedings. See *Nortel* protocol (2009), sections 23-24 and *Barzel* protocol (2009), sections 24-25. Regarding the advisability of collaboration with other actors in the event of the opening of main and secondary proceedings, see M. Flores, *Content and limits of insolvency protocols in the insolvency proceedings of a single debtor*, in this book, section 1, footnote n. 7.

<sup>74</sup> The protocols consulted for this paper are taken from the database of the research project ‘Insolvency Protocols Project’ of Leiden University (<https://www.universiteitleiden.nl/en/research/research-projects/law/insolvency-protocols-project>). They have also appeared in some internet searches. The reference to the “procedural” nature of the provisions is taken from the *UNCITRAL Legislative Guide*, p. 120, para. 49.

<sup>75</sup> Maltese, *supra* n. 68, at 27-28.

<sup>76</sup> L. Fumagalli, I protocolli tra le procedure nella disciplina transfrontaliera dell’insolvenza, in A. Leandro, G. Meo, A. Nuzzo (eds), *Crisi transfrontaliera di impresa: orizzonti internazionali ed europei*, 181, 188 (Cacucci ed., 2018). In this regard, the UNCITRAL Practice Guide states that ‘[t]heir use has effectively reduced the cost of litigation and enabled parties to focus on the conduct of the insolvency proceedings, rather than on resolving conflict of laws and other similar disputes’ (at 30-31, para 7).

<sup>77</sup> In this regard, see Maltese, *supra* n. 68, at 39.

<sup>78</sup> Flaschen & Silverman, *supra* n. 55, at 593, regarding the *Everfresh* protocol.

opening (Article 7(2)(g) and (h) EIR 2015/848).<sup>79</sup> It is therefore this insolvency regime that establishes how to proceed with regard to the lodgement and verification of claims and the provisions included in the protocol cannot contradict the provisions of the said law (Article 56(1) EIR 2015/848). This means that, unless the law of the opening State considers these rules non-mandatory - something which is not usually the case - they cannot be adapted to the needs of the specific case by means of a protocol. The same applies to priority schemes, which are included in certain protocols [Article 7(2)(h) EIR 2015/848, with an exception foreseen in the case of synthetic proceedings (Article 36 EIR 2015/848)], or in relation to the rules applicable to avoidance actions (Article 7(2)(m) EIR 2015/848, with an exception foreseen in Article 16 EIR 2015/848).<sup>80</sup> A different matter is whether, in view of the various rules of national law, provisions can be included in the protocols to coordinate the application of those rules in the interests of efficient management of the proceedings. Thus, in principle, there should be no difficulty in including a clause providing for the possibility of coordinating the submission for approval of the restructuring plan in the various insolvency proceedings (see 3.1.3), or establishing a duty on the part of the various insolvency practitioners to inform each other about the bringing of avoidance actions, in particular where these may affect the estate of another insolvent company in the group (see 3.1.2).

## 2. The problem of fragmentation in restructuring

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<sup>79</sup> On the recent case law of the CJEU on this subject, see Judgment of the Court of 18 September 2019, *Skarb Państwa Rzeczypospolitej Polskiej – Generalny Dyrektor Dróg Krajowych i Autostrad v Stephan Riel*, acting as liquidator of Alpine Bau GmbH, C-47/18, ECLI:EU:C:2019:754, para. 38.

<sup>80</sup> The *UNCITRAL Legislative Guide*, at 82, notes that insolvency agreements may provide for the classification and treatment of creditors. See also A. Sexton, *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation*, 12 Chicago J. International L., 811, 822 (2012), and Leonard, *supra* n. 70, at 9. However, Flores also notes the unavailability of the priority system for claims through the protocols, in this book, section 3. The *UNCITRAL Practice Guide*, at 59, para. 67, notes the existence of protocols that contain clauses relating to the investigation and recovery of assets that may belong to the estate of one of the debtor companies. However, it immediately states that the standing to bring such actions and the rules applicable to avoidance may depend on the applicable national law. In this respect, in the light of Spanish law (Article 231 of Consolidated Text of Spanish Insolvency Act), it does not seem that a clause making the avoidance actions by an insolvency practitioner in insolvency proceedings subject to the mandate of the judge in those proceedings or to the express consent of the debtor in possession of other proceedings can be included in a protocol (*Everfresh* protocol, Section 12). On the powers of the insolvency practitioner, in Spanish law, to bring these actions without the need for judicial authorization, see F. León, *Comentario del artículo 72 LC*, in A. Rojo & E. Beltrán (eds), *Comentario de la Ley concursal*, vol. 1, 1322, 1324 (Thomson-Civitas 2004). Moreover, such a clause may place insolvency practitioner in a situation of conflict of interest, which does not seem compatible with Insolvency Regulation (Article 56(1) EIR 2015/848).

In the case of corporate groups, adopting a solution that maximizes the value of the estates affected by the group's insolvency in the interest of the creditors as a whole requires, in most cases, the joint exploitation of the various estates in respect of which insolvency proceedings have been opened. Here the work of insolvency practitioners - and, where appropriate, of the debtors in possession - is essential. It is therefore on this point that we are going to focus our analysis.

As indicated, it is increasingly common for the different phases of a productive activity to be assigned to the different subsidiaries that make up the group (see 1). However, since the opening of insolvency proceedings is linked to the existence of separate estates, as many proceedings will be opened as there are insolvent companies in the group. As we know, *this fragments the treatment of the insolvency of the business project developed by the companies in the group.*<sup>81</sup> Moreover, unlike in the case of the insolvency of a single debtor, *there are no secondary proceedings subordinated to main proceedings.*<sup>82</sup> Indeed, it is clear from a reading of EIR 2015/848 that *all insolvency proceedings concerning group companies are considered main proceedings.*<sup>83</sup> This situation considerably limits the scope for joint exploitation of the various insolvent estates. On the one hand, *it prevents the imposition of a common plan on all of the insolvent companies of the group* allowing their restructuring where their assets are worth more in aggregate than in dis-aggregated form and, on the other hand, *it restricts the possibilities of intervention in these proceedings by the insolvency practitioners of other proceedings* - e.g. to be heard in other proceedings to submit comments or allegations on certain decisions; to request the stay of the realization of assets which forms part of the estate of another group company, but which could jeopardize the proper implementation of the plan, or to apply for the opening of group coordination proceedings (Article 60 EIR 2015/848). Unlike in the case of the insolvency of a single debtor in secondary proceedings (Article 47 EIR 2015/848), the insolvency practitioner of one of the companies in the group - e.g. the parent company, which directly or indirectly centralizes

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<sup>81</sup> D. Vattermoli, Los protocolos concursales en las operaciones de reestructuración de grupos de sociedades en crisis, in N. Bermejo, A. Martínez Flórez & A. Recalde (eds), Las reestructuraciones de las sociedades de capital en crisis, 688, 691-694 (Thomson-Reuters Civitas, 2019).

<sup>82</sup> Regarding the relationship of hierarchy that exists between the main and secondary proceedings, see Flores, in this book, section 1. However, the fact that there is subordination of the secondary proceedings to the main proceedings does not mean that sacrifices can be imposed on the secondary proceedings in the interests of the main proceedings. Thus, Torralba, in this book, section 2.

<sup>83</sup> This does not, however, prevent the insolvency of a particular group member from giving rise to both main and secondary proceedings.

the ownership of all the assets of the group and where the value of the group is concentrated -, cannot in principle submit a proposal for a restructuring plan in the various insolvency proceedings concerning the subsidiaries. Leaving aside the coordination procedure (Articles 61 to 77 EIR 2015/848), the Regulation merely offers the possibility for the various insolvency practitioners of the insolvent companies to coordinate “on the proposal and negotiation of a coordinated restructuring plan”, applicable to all or some of them (Article 56(2)(c) EIR 2015/848). As regards the possibility of intervening in the proceedings opened in respect of other companies of the group, this is limited to the cases identified by the legislator and is conditional upon the need to facilitate “the effective administration of the proceedings” (Article 60(1) EIR 2015/848). Moreover, in the case of the stay of the realisation of the assets necessary to implement the restructuring plan - e.g. the disposal of individual assets, a branch of activity or the whole of the company - is subject to the *need for the measure* and a *prospective assessment of the plan’s chances of success*, which must also be to the benefit of the creditors affected by the stay (Article 60(1)(b)(i)-(iii) EIR 2015/848).<sup>84</sup> All this is subject to the assessment of the insolvency judge and the eventual adoption of any appropriate measure, in accordance with national law, to protect the interest of the creditors affected by the stay - for example, the payment of interest for the time the stay prevents them from realising the asset; the provision of a guarantee, etc. (Article 60(2) EIR 2015/848).<sup>85</sup> This is in contrast to the case of the single debtor, in respect of secondary proceedings (Article 46 EIR 2015/848), where the stay of realisation of assets requested by the insolvency practitioner in the main proceedings is ordered almost automatically, unless it is clearly not in the interests of the creditors in the main proceedings. In this case, the judge of secondary proceedings may, however, request the adoption of any appropriate measure to guarantee the interests of the creditors in these proceedings. This limited possibility of intervention, which has a markedly *ex post* character, may, moreover, prove to be insufficient to respond to the problems of opportunism that may arise amongst the insolvent companies of the group with regard to

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<sup>84</sup> Schmidt, *supra* n. 10, at 597 RdN 56.28; *id.* *Commentary to Article 60 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation*, 608, 610-611 RdN 60.06-60.08 (OUP 2016), and *id.* *Commentary to Article 60 EUInsVO*, in P. Mankowski et al (eds), *EUInsVO 2017*, RdN 8-14 (Beck 2016).

<sup>85</sup> Schmidt, *supra* n. 10, at 612 RdN 60.17. For the payment of interest to creditors enjoying a right *in rem* under German law, see in detail, C. Jensen, *Der Konzern in der Krise. Aktuelle Rechtsfragen im Kontext deutscher und europäisch-grenzüberschreitender Konzerninsolvenzen*, 247 (De Gruyter 2018). However, S. Reinhart, *Commentary to Article 60 EUInsVO*, in *Münchener Komm InsO*, vol. 4, RdN 10-11 (3d. ed., Beck 2016), expresses doubts as to whether, as the rule provides, it is the insolvency practitioner requesting the stay - and not the one in the proceedings in which he is requesting it - who should adopt the measures under the applicable national law to ensure the interests of the creditors in the proceedings.



the assets needed for restructuring (see 3.1.2). Nor does it seem enough to preserve other elements which may be as important for the group restructuring as those assets whose realisation is stayed – for example, certain contracts (see 3.1.2).

It is noteworthy that in this case the Union legislator requires that the restructuring plan “be to the benefit of the creditors in the proceedings for which the stay is requested”, whereas in other cases, in order to comply with the objective of enabling effective management of parallel insolvency proceedings, it is sufficient that some creditors are better off and others no worse off. In this case, the aim is to allow the creditors on whom such a sacrifice is imposed to benefit *ex ante*, in a prospective judgment, from the surplus generated by the plan the implementation of which determines the stay of the realisation of assets.<sup>86</sup> This is a way of responding to the problem, identified in some international texts, of “equal treatment of creditors in each jurisdiction and the need to ensure that some do not receive less favourable treatment than others”.<sup>87</sup>

The need to adopt measures that allow the restructuring of the group to be organised in a concerted manner can be met through protocols concluded between insolvency practitioners – within the limits of EIR 2015/848 and national law -or, where appropriate, debtors in possession. In fact, this was done in what is considered to be the first protocol signed, namely that relating to the *Maxwell* case. In this respect, the words of Judge T. Brozman, who heard the case in the United States, are particularly illustrative.

“In February, 1993, building on what the Protocol had created, the joint administrators, with the concurrence of the examiner, filed their plan of reorganization (plan) and scheme of arrangement (scheme). Although separate plan and scheme documents exist, the plan and scheme are mutually dependent and, in their effect, constitute a single mechanism, consistent with the laws of both countries, for reorganizing MCC through the sale of assets as going concerns and for distributing assets to creditors... Rather than carving up the assets for distribution by the two courts to different groups of creditors, the plan and scheme set up a single “pot” for distribution to all creditors. In keeping with the single distribution mechanism, creditors were permitted to submit a claim in either jurisdiction which would suffice for participation under both the plan and scheme”.<sup>88</sup>

In view of the above, there are basically three issues arising from the restructuring of cross-border groups that it is interesting to address in protocols in order to reach a solution that maximizes the value of the insolvent companies in the interest of the creditors. Firstly, there is the question of *designing and implementing a common plan for the different companies of the group that are* affected by a situation of financial difficulties or insolvency (see 3); secondly, there is the *question of the distribution among*

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<sup>86</sup> Schmidt, *supra* n. 10, at 611, RdN 60.09. However, Reinhart, *supra* n. 85, RdN 4-5, considers that it is an equivalent provision to the ‘Liquidationsgarantie’ of German Insolvency law (§§ 245.1.1 and 251.1.1 InsO), that is, to guarantee these creditors the value they would obtain in the absence of a plan.

<sup>87</sup> UNCITRAL *Practice Guide*, at 83, para. 116.

<sup>88</sup> The quote is taken from J.L Westbrook’s work, *The Lessons of Maxwell Communication*, 64 Fordham L.Rev., 2531, 2535 (1996).

*creditors of the value obtained in the restructuring* (see 4); and thirdly, there is the question of the *treatment of claims existing between the different companies of the group* as a result of the relationships between them (see 5).

### **3. A common plan for dealing with the insolvency of group companies**

As we have just seen, the coordinated treatment of insolvency affecting companies in a group that are developing a common business project is essential to achieve a solution that maximizes the value of the various insolvent estates in the interest of creditors. This involves, in many cases, the restructuring of these estates, either in the hands of their current owners or in the hands of a third party, e.g. by transferring all or some of the assets of the insolvent companies to a third party. In order to make such restructurings possible, it is necessary to determine the needs which exist both with regard to the design of a common plan for the various companies of the group (see 3.1) and to its implementation (see 3.2), and how they can be met through the provisions to be included in a protocol.

#### **3.1. Designing a common plan for the group's insolvent companies**

In the restructuring of the insolvent companies in a group, it is essential to draw up a common plan applicable to the various companies or containing at least the essential elements for restructuring, which must then be specified in the plans approved in each of the procedures opened for them.<sup>89</sup>

The design of such a common plan requires addressing a *prior issue*, which is that of the *perimeter of the plan*. The scope of the plan is, in principle, determined by the *insolvent companies of the group*. For them, restructuring makes sense. Doubts arise, however, when the *possibility is raised of including in the plan those group companies which remain solvent*. The inclusion of such companies may be of interest in cases where the response to insolvency requires a comprehensive restructuring of the group, which also includes such companies. However, in these circumstances, the solution for extending the restructuring plan to these companies is not to open insolvency proceedings

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<sup>89</sup> Schmidt, *supra* n. 19, at 45-46.

in respect of them. This is a costly solution, which may destroy a large part of the value in these companies - e.g. opening insolvency proceedings generates considerable reputational damage to the company; reduces the possibilities of obtaining financing; can lead to the loss of business opportunities; has significant administration costs, etc. Moreover, this solution could encounter great difficulties in all cases where national law requires proof of the existence of an insolvency situation in order to open insolvency proceedings - think, for example, of the provisions of Spanish law regarding insolvency proceedings (Article 2(1) of the Consolidated Text of Spanish Insolvency Act), or regarding collective refinancing arrangements (Article 597 of the Consolidated Text of Spanish Insolvency Act). In these circumstances, in order to extend the restructuring plan to solvent group companies, the most reasonable approach would be to use the general mechanisms available outside insolvency law. Thus, their involvement in the plan will depend on the consent of the company itself - e.g., depending on the specific content of the restructuring measure provided for in the plan, through a decision of the administrative body or, where appropriate, a resolution of the shareholders in general meeting.<sup>90</sup> In this case, the protocol may be useful to reflect the commitment or willingness of the insolvency practitioners - or, where appropriate, of the debtors in possession-, to negotiate with the solvent company their participation in the plan on the terms set out therein. The protocol may also be useful to include the commitment of solvent companies to take part in the negotiation of the plan or to submit it to the approval of the competent body.

A different issue is that actions brought by creditors of insolvent companies against solvent companies of the group - for example, as a result of the guarantees provided - may drag them into insolvency. In such cases, in the absence of any alternative solution which may avoid this result, the commencement of the insolvency proceedings will, inter alia, allow the extension of the plan to the solvent companies on the terms to be discussed below (see 3.1.2 and 3.1.3).

That being clear, when addressing the need for concerted efforts to design a common plan, it could be thought, after a first reading of EIR 2015/848, that the latter

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<sup>90</sup> See *UNCITRAL Legislative Guide*, at 25-26, paras. 13-15. See also the recommendation by Wessels, Madaus & Boon, *supra* n. 31, at 35, with respect to the participation of solvent group members in coordination proceedings: “Solvent members of a group should be allowed to formally participate in group coordination proceedings without such participation implying a submission to the jurisdiction of a court or to the applicability of its insolvency laws” (Recommendation 9.09). S. Rodríguez Sánchez, *Los protocolos concursales en las reestructuraciones de grupos de sociedades mediante operaciones de fusión transfronteriza*, ADCo, sections 2 and 4.1 (2021), highlights the interest of linking solvent group subsidiaries to restructuring, requiring their consent.

already provides for the instruments to achieve such concerted action. However, the truth is that this is not the case. EIR 2015/848 contains a few provisions which are certainly useful for this purpose, but these are not sufficient, by themselves, to answer all the questions which arise when designing a common plan to be adopted by the various companies in the group. EIR 2015/848 merely provides, as a specification of the obligations of cooperation placed on insolvency practitioners - or, as the case may be, of the debtors in possession - that they may agree “with regard to the proposal and negotiation of a coordinated restructuring plan” applicable to all or some of the companies in the group (Article 56(2)(c) EIR 2015/848).<sup>91</sup> It also provides that, where a restructuring plan has been proposed and has a reasonable chance of success *ex ante*, the insolvency practitioner - or, where appropriate, the debtor in possession - may appear in the proceedings concerning another member of the group to request a stay of those measures that might affect the implementation of the plan - for example, enforcement of a security interest over assets that are nevertheless necessary for the restructuring; disposal of the business, etc. (Article 60 EIR 2015/848).<sup>92</sup> In contrast, there is no provision for establishing whose initiative it will be to draw up such a common plan to coordinate the restructuring of the group, how it will be discussed or negotiated, or how it will be adopted in the various companies making up the group. Furthermore, the abovementioned provisions are not applicable when the case falls outside the scope of the Regulation. Protocols may therefore be very useful in providing an answer to all these questions. Thus, they may include clauses which, in the first place, favour the coordination of initiatives and efforts between insolvency practitioners - or, where appropriate, the debtors in possession – in order to study the situation of the insolvent companies of the group and design a common plan (see 3.1.1). Secondly, protocols may contribute to preventing opportunistic behaviour by certain insolvency practitioners from undermining such a plan (see 3.1.2), and thirdly, make it possible to adopt the common plan in the insolvency proceedings opened in the different Member States (see 3.1.3). We will now examine each of these.

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<sup>91</sup> Certainly, a protocol could include a provision such as the one referred to in the text, which is already incorporated in EIR 2015/848. However, in this case, the protocol would be limited to reiterating or giving greater visibility to the specifics of the duty of cooperation already included by the legislator. See Martínez Flórez, in this book, section 2.2.2.

<sup>92</sup> As regards the provisions of EIR 2015/848 in which the debtor in possession may replace the insolvency practitioner, see Schmidt, *supra* n. 36, RdN 6.

### 3.1.1. Coordinating initiatives and efforts to design a common plan

The first point of interest in the design of a common plan to deal with insolvency affecting different companies in a group is to arrange, through the protocol, a structure that allows the insolvency practitioners to *work together or coordinate the preparation of such a plan*.<sup>93</sup> This is precisely what the insolvency practitioners did in the Maxwell case, mentioned above, and which explains why corresponding clauses are generally included in protocols to make this possible. In order to achieve this, it is essential for the parties to promptly analyse the prospects for restructuring the companies which make up the group.<sup>94</sup> The aim is to find out whether the business project being developed by the various insolvent companies is still valuable and therefore it makes sense to keep all or, at least part, of the assets of the various insolvent companies together, with the rest being disposed of. This is emphasised by EIR 2015/848 which requires insolvency practitioners - or, where appropriate, debtors in possession - to consider whether the companies in the insolvent group could be restructured, and, if so, to coordinate on the proposal and negotiation of a restructuring plan (Article 56(2)(c) EIR 2015/848).

However, in a scenario where different insolvency proceedings are opened in parallel and where there is no hierarchical relationship between them, it is not evident who will take the initiative to assess whether the business project has more value as an aggregate set of assets distributed among different subsidiaries or in an unbundled manner, or who will propose and elaborate a restructuring proposal based on such assessment. In a framework in which insolvency practitioners - or, where appropriate, the debtors in possession - must try to coordinate “with regard to the proposal and negotiation of a coordinated restructuring plan”, it may then be of interest to *assign an “initiative” or “leadership” role* to one of them with regard to the design of the restructuring strategy and the drafting of the plan.<sup>95</sup> An examination of the protocols used in practice shows that this problem is sometimes solved *by appointing the same insolvency practitioner for the proceedings*.<sup>96</sup> This solution removes any doubts as to who should play this role. As we have already indicated, this is a possibility already provided for in EIR 2015/848 which

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<sup>93</sup> *UNCITRAL Practice Guide*, at 82, para. 114.

<sup>94</sup> Kübler, *supra* n. 47, at 296.

<sup>95</sup> This possibility is noted in the *UNCITRAL Practice Guide*, at 85, para. 121.

<sup>96</sup> For example, the protocol in the *Everfresh* case (1995), at 4, shows that the *Chapter 11* judge in the United States appointed, at the request of the interested parties, the same insolvency practitioner who had been appointed in the proceedings in Canada.

allows judges hearing various insolvency proceedings concerning group companies to coordinate the appointment of insolvency practitioners (Article 57(3)(a) EIR 2015/848). By contrast, where these judges do not make use of the power to coordinate the appointment of insolvency practitioners provided for in EIR 2015/848, the assignment of that role of initiative or leadership may be made by including a *provision in the protocol assigning it to one of the appointed insolvency practitioners* - or, where appropriate, to debtors in possession. EIR 2015/848 allows for the inclusion of a clause such as this in a protocol, by expressly providing for the possibility that additional powers may be assigned to one of the insolvency practitioners or, where appropriate, debtors in possession, so that they may design and negotiate a coordinated restructuring plan. Equally, protocols may provide that certain functions may be delegated to one of the insolvency practitioners appointed in proceedings opened in respect of group companies for the same purpose, provided that the national rules applicable to such proceedings so permit (Article 56(2) EIR 2015/848).<sup>97</sup> It is therefore ultimately the national law applicable to the various proceedings involved that determines the extent to which such assignment of additional powers or delegation of functions may be given. However, in no case may it involve a “blank” delegation to another insolvency practitioner of the powers to dispose of and administer the debtor’s assets.<sup>98</sup>

In Spanish law, this solution can be structured through the possibility envisaged in Article 75 of the Consolidated Text of Spanish Insolvency Act, which provides, in the case of complex insolvency proceedings, that the insolvency judge can be asked to appoint assistants to whom delegate certain functions, including those relating to the continuation of the debtor’s business activity.<sup>99</sup> We understand that these “assistants” referred to in this rule may be the insolvency practitioners in other proceedings.

In this way, there is no obstacle to *leaving in a protocol the design of the plan in the hands of one of the insolvency practitioners* - or, where appropriate, *one of the debtors in possession*. Certainly, it will depend on each specific case to whom this role should be assigned. However, a reasonable option may be to assign it to the insolvency practitioner

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<sup>97</sup> In favor of granting one of the insolvency practitioners certain powers or assigning him certain tasks, Mevorach, *supra* n. 1, at 296. With regard to the provisions of EIR 2015/848, Schmidt, *supra* n. 10, RdN 56.29, which would allow him to make purchases or sales between the companies of the group, consult the trade unions or hire and dismiss workers.

<sup>98</sup> Reinhart, *supra* n. 49, at RdN 6.

<sup>99</sup> N. Gómez Bernardo, however, considers that such a delegation or distribution of powers is not provided for in Spanish law, *Los protocolos concursales en el Reglamento 2015/848 del Parlamento europeo y del Consejo sobre procedimientos de insolvencia*, 32 RCP 1, 5 (2020) (Smarteca version). She considers, however, that the court may authorise such a delegation.

of the parent company or, even, to the parent company itself when it can be considered a debtor in possession (Article 76 EIR 2015/848).<sup>100</sup> Ultimately, it is in the parent company where the value of the group is concentrated and, from there, it is possible to have a general perspective of the group and its financial position. For the reasons explained above, there should also be no difficulty in leaving the design of the plan in the hands of a third party - for example, a subject specialising in the valuation and restructuring of insolvent companies. However, in all cases, the plan should be submitted for approval in the insolvency proceedings concerning each group member in accordance with the rules of national law (see 3.1.3).

We are aware that, under Spanish law, the power to propose the composition within insolvency proceedings lies with the debtor or the creditors (Article 315(1) of the Consolidated Text of Spanish Insolvency Act). When the debtor is only subject to intervention, it must be understood that the duty to cooperate with regard to the design of the common plan will fall on the administrative body of the insolvent company (Article 76 EIR 2015/848). In such a case, as we have indicated, it will be the latter who will participate in the conclusion of protocols for this purpose and who will assume the commitments corresponding to the presentation of the plan as a proposal for a composition within the insolvency proceedings opened in Spain. By contrast, in the event of transfer of the rights and duties to administer debtor's assets to an insolvency practitioner, the duties of cooperation will correspond to him. However, it will be formally the administrative body of the debtor company that will present to the creditors, in accordance with the rules governing the proceedings, a proposal for a composition that includes the content of the plan (Article 56(2)(c) EIR 2015/848). In the absence of provisions in Spanish law that entitle the insolvency practitioner to present, in such cases, the proposal for a composition, the protocol can be a useful tool both for involving the insolvent company in the drafting and negotiation of the common plan and for obtaining its collaboration in presenting a proposal for a composition that is in line with the content of the plan in the insolvency proceedings that have been opened.<sup>101</sup>

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<sup>100</sup> *UNCITRAL Practice Guide*, at 83, para. 117.

<sup>101</sup> Martínez Flórez warns of the problem, in this book, section 2.1, note n. 27. On the possibility of the debtor itself participating in these agreements, *UNCITRAL Practice Guide*, at 35, paras. 15-16, where the protocol adopted in the *Smurfit* case is given as an example. Also, on the possibility that the insolvency practitioners can “direct the procedure towards a certain end and encourage the acceptance of the viability, reorganization or liquidation plan”, see A. Espiniella, *Los protocolos concursales*, 10 ADCo, 165, 178 (2007). The possibility could be considered that, in these circumstances, the duty of collaboration of the debtor being defined in Spanish law as an obligation to “collaborate and inform in all that is necessary or convenient for the benefit of the insolvency proceedings” (Article 135 of the Consolidated Text of Spanish Insolvency Act), the submission of a composition proposal that does not comply with the plan could lead to a breach of the duty of collaboration with the insolvency practitioner and the consequent qualification of the insolvency as at-fault (Article 444(2) of the Consolidated Text of Spanish Insolvency Act). However, this solution faces a major difficulty, that is, the proposal of a composition is a power that, in Spanish law, lies with the debtor and is, therefore, excluded from the duty to collaborate. In this sense, see A. Martínez Flórez, *Comentario del artículo 42 LC*, in A. Rojo & E. Beltrán (eds), *Comentario de la Ley concursal*, vol. 1, 868, 871 (Thomson-Civitas, 2004).

In order to promote consultation “with regard to the proposal and negotiation of a coordinated restructuring plan”, the protocol may also provide that the insolvency practitioner in charge of drawing up the proposal for a joint plan *must inform* the insolvency practitioners of the other companies in the group - or debtors in possession - *of the progress of his work*. Provision may also be made for the other insolvency practitioners - or debtors in possession - to be *able to comment on and discuss the proposal before adoption of a final version of the plan*.<sup>102</sup> This may be of particular interest in order to ensure the participation of all of them in the negotiation of the plan, as well as to obtain the maximum consensus regarding it.

The plan resulting from this process may be either a single plan for all the companies in the group or - as is more usual in practice - a framework plan, setting out the main lines of the restructuring, which must then be translated in each of the opened proceedings into a proposal for a composition to be drawn up and processed in accordance with national law (see 3.1.3).<sup>103</sup>

### **3.1.2. Avoiding opportunistic behaviour**

The second relevant aspect in the design of a common plan to deal with insolvency affecting different companies in a group is to reduce the opportunistic behaviour that may be shown by insolvency practitioners - or, where appropriate, by debtors in possession. In this respect, it should be noted that, in many cases, the assets contained in the estates of the various companies in a group are co-specific assets, i.e. assets whose highest value is reached jointly.<sup>104</sup> These assets appear as a result of maintaining the long-term business relationships that the groups promote.<sup>105</sup> The existence of these co-specific assets, together with the fact that the situation of insolvency is often perceived by operators as the “end of the game”, are circumstances which foster the development of opportunistic behaviour by group members. In this particular case, such behaviour is manifested *in the development of strategies that allow one of the insolvent companies in the group to appropriate the value concentrated in its assets to the detriment of the others* - e.g. by

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<sup>102</sup> UNCITRAL Practice Guide, at 83, para. 117.

<sup>103</sup> UNCITRAL Practice Guide, at 81, para. 115, which gives as an example of a single plan for the restructuring of all companies in the group the one adopted in the *Mansonite* case. In scholarly writings, see Vattermoli, *supra* n. 81, 703 and Martínez Flórez, in this book, section 2.3.2 and footnote n. 44.

<sup>104</sup> Milgron & Roberts, *supra* n. 45, at. 161-162.

<sup>105</sup> C. Paz-Ares, *¿Derecho común o Derecho especial de grupos? Esa es la cuestión*, 86-88 (Thomson Reuters-Civitas 2019).



individually realising its valuable assets in order to reserve for itself the entire value, when, however, the value of the assets of the other companies of the group depends on them.<sup>106</sup> It is also to be expected that the higher the value they can appropriate, the greater the risk of such behaviour. Such behaviour is particularly dangerous as it may frustrate a restructuring which maximizes the aggregate value of the insolvent estates in the interest of the creditors of the various group companies, thereby leading to an inefficient outcome.

In order to avoid this type of behaviour, the particular interest of a given insolvent company in appropriating the value corresponding to the valuable assets in its estate in the interest of its creditors must be aligned with the collective interest in carrying out a restructuring that maximizes the joint value of the insolvent entities in the interest of all its creditors. To this end, it should be ensured that, for the duration of the design of the plan, neither the insolvency practitioners, -nor the debtors in possession (where appropriate,)- engage in behaviour which could frustrate the initiative. This is the purpose of clauses that may be included in a protocol, under which the insolvency practitioners of the various insolvency proceedings - or, where appropriate, the debtors in possession - undertake to *stay the presentation of any other restructuring measure in the proceedings in which they are acting*. The aim is to prevent them from negotiating, behind the backs of the other members of the group, a particular solution for the insolvent company - for example, the sale to a third party of the business activity it carries out, which is particularly valuable in the production process -, which would allow it to appropriate all the surplus generated by the operation and which, however, could spoil a joint restructuring that maximizes the value of all the creditors of the insolvent companies.

The same purpose is served by clauses which stipulate that insolvency practitioners and, where appropriate, debtors in possession *undertake not to dispose of those assets which are in the company's estate and which are or may be necessary to carry out a joint restructuring*.<sup>107</sup> In the same vein, EIR 2015/848 provides that insolvency practitioners and, where appropriate, debtors in possession, in each of the insolvency proceedings opened in respect of the insolvent companies of the group may ensure the effectiveness of this common plan by requesting a temporary stay - for three months, extendable to a maximum of six - of any measure aimed at realising the assets

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<sup>106</sup> Milgron & Roberts, *supra* n. 45, at 162-163.

<sup>107</sup> In this sense, Espiniella, *supra* n. 101, at 178.

included in the estates of the latter –for example, the disposal of specific assets, of a branch of activity or of the company as a whole (Article 60(1)(b) EIR 2015/848). This prevents the ordering of measures that could deprive the provisions of the restructuring plan of its effects, which in a prospective analysis may be considered by the insolvency judge as being of value to the creditors (see *above* 2). However, a rule such as this is limited to neutralising *ex post* any measure that might affect the proper implementation of the restructuring plan. In contrast, the abovementioned clause operates *ex ante*, defining the behaviour that can be expected from the insolvency practitioners or the debtors in possession with respect to those assets that are considered in principle necessary for the restructuring and that, moreover, can be defined in the protocol. Hence the interest in being able to incorporate clauses such as those described, which go beyond the provisions of EIR 2015/848 in terms of cooperation.

Moreover, as is well known, the existence of *information asymmetries* plays a major role in the emergence of opportunistic behaviour: the insolvency practitioners of an insolvent group company cannot easily observe the decisions taken in the insolvency proceedings of other group companies with regard to their activities or assets. Since interests are not aligned, information asymmetry favours the development of opportunistic behaviour as we have already established.<sup>108</sup> Therefore, in order to minimise such behaviour, this asymmetry should be reduced. This explains why the clauses mentioned above are usually accompanied by others which grant *the right to receive information on what is happening in other insolvency proceedings opened in respect of group companies* not only to insolvency practitioners, but also to other interested parties, such as creditors, the debtor company itself, the parent company, etc. These clauses, which appear under the heading of *Notice* or *Notice Procedures*, are usually worded with a fairly general scope. By assigning such a right, they enable their holders to know what procedures are being followed in the proceedings opened in respect of other companies in the group, in particular where they may have an impact on the restructuring. For example, in the event that an insolvency practitioner in one of the proceedings requests authorization from the competent judge, either to obtain additional financing or to provide guarantees for the other subsidiary to obtain financing. The same

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<sup>108</sup> Milgron & Roberts, *supra* n. 45, at 199-201.

is true in the case where authorisation is requested for the sale of an asset.<sup>109</sup> This provision can be reinforced by imposing a *specific duty on insolvency practitioners to inform the other practitioners of their actions and decisions (Communication and Information Sharing)* - for example, in all matters relating to asset disposals or even in respect of the bringing of actions for the avoidance of transactions.<sup>110</sup> This clarifies and reinforces the obligation imposed by EIR 2015/848 to communicate “any other information which may be relevant to the other proceedings” (Article 56(2)(a) EIR 2015/848).<sup>111</sup>

The fact that the rest of the insolvency practitioners - or, if applicable, the debtors in possession - can obtain information, either on the conduct of the other proceedings in progress or on the actions of the other insolvency practitioners in relation to the estates of the other companies in the group, is essential to enable them to react against any action that could put the implementation of the restructuring plan at risk. Precisely in order to be able to react against such behaviour, clauses are incorporated that grant *a right to appear in other proceedings (Right to Appear and to be Heard)*. This right may be limited to the insolvency practitioners or to debtors in possession - as provided for in EIR 2015/848 [Articles 60(1)(a) and 76 EIR 2015/848]<sup>112</sup> - or may also be extended to creditors and any other party with a legitimate interest.<sup>113</sup> This right allows for allegations and observations to be made, but does not in any way give them the right to vote. It is usually accompanied by a caveat, by virtue of which the exercise of that right does not subject the holder to the jurisdiction before which he appears. These rights must be granted to the same extent as the local equivalent.

### 3.1.3. Approving a common plan in the various insolvency proceedings

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<sup>109</sup> Thus observed in the protocol in *360Networks Inc and Affiliated Companies* (2001), Section 21b.i. Notice: “Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings and notice of any related hearings or other proceedings mandated by applicable law in connection with the Insolvency Proceedings or the Protocol shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following [...]”.

<sup>110</sup> Protocol in *Bernard Madoff Group of Companies* (2009), section 4. Communication and Information Sharing.

<sup>111</sup> On the need to do so, see Wouters & Raykin, *supra* n. 67, at 9 (electronic version).

<sup>112</sup> Protocol in *Bernard Madoff Group of Companies* (2009), Section 3. Right of Representatives to Appear. Protocol in *360Networks Inc and its Affiliated Companies* (2001), Section 12. Right to Appear and to be Heard.

<sup>113</sup> *Barzel* Protocol (2009), Section 26.

The third relevant aspect in the organisation of a common plan for the treatment of the insolvency of group companies is that the *insolvency practitioners - or, where appropriate, the debtors in possession - undertake*, once the solution has been managed, *to present it for approval in the different proceedings opened*. Thus, although the common plan must be adapted in each of the proceedings to the requirements of national law - e.g. a restructuring plan in compliance with *Chapter 11* in the United States and a scheme of arrangement in the United Kingdom;<sup>114</sup> a Proposal in Canada and a reorganization plan in the United States<sup>115</sup>, etc. -the content of the agreements presented in each of these will correspond to the provisions of the plan, since they are intended to contain, for each specific proceedings, the provisions which make this general solution possible. Thus, where the solution provided for in the plan is uniform for all the companies in the group affected by the insolvency, the protocol may provide that the *agreements to be adopted in each of the proceedings should be substantially similar*. However, this will not be the case where the plan provides for specific measures for each company. Likewise, it may also provide that the *presentation of these agreements in the different proceedings should be coordinated* - depending on the interests involved, for example, first in one company and then in another; in all simultaneously, etc.<sup>116</sup> And since these agreements are pieces of a common solution, it can even be envisaged that approval of the plan in one of the proceedings be made *conditional* on approval in the others.<sup>117</sup> By way of example,

*“To the extent permitted by the laws of [Country 1] and [Country A], and to the extent practicable, the Debtors shall submit plans of reorganization [or insert other equivalent term as desired] in [Country 1] and [Country A] that are substantially similar to each other.*

*The Debtors shall to the extent practicable co-ordinate all procedures in connection therewith, including, without limitation, all solicitation proceedings relating thereto, and all procedures regarding voting, the treatment of creditors, classification of claims, and the like, and to the extent not provided for in this Protocol all such procedures will either*

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<sup>114</sup> As in *Maxwell* (see 2).

<sup>115</sup> Protocol in *Everfresh* (1995), at 10, para. 13: “To the extent permitted by the laws of the respective jurisdictions and to the extent practicable, the Interim Receiver and the Debtors shall endeavor to submit a proposal in Canada and a plan of reorganization in the United States substantially similar to each other and the Debtors, the Interim Receiver and the Trustee shall endeavor to coordinate all procedures in connection therewith, including, without limitation, all solicitation proceedings relating thereto, and all procedures regarding voting, the treatment of creditors, classification of claims, and the like, will either be established by the Debtors after consultation with the Trustee of the Proposal or be dealt with pursuant to a further order of the Bankruptcy Court and or the Canadian Court”.

<sup>116</sup> Vattermoli, *supra* n. 81, at 704.

<sup>117</sup> *UNCITRAL Practice Guide*, at 82, para. 114. In Spanish law, on the usefulness of the conditional proposal to coordinate the approval of compositions in insolvency proceedings affecting group companies (Article 319(2) of the Consolidated Text of Spanish Insolvency Act), see Flores, *supra* n. 26, at 249-250.

*be established by applicable law or further orders of both the [Country 1] Court and the [Country A] Court”.*<sup>118</sup>

Obviously, when submitting the plan in each of the insolvency proceedings opened, the insolvency practitioners - or, where appropriate, the debtors in possession - must comply with the relevant national rules - for example, with regard to the standing to submit the plan. They must also have regard to the time limits which may be envisaged for the submission of a restructuring plan to creditors (in Spanish law, see Articles 337 and 339 of the Consolidated Text of Spanish Insolvency Act). Nevertheless, in order to ensure that the plan can be submitted at the same time, a clause may be included in the protocol allowing the insolvency practitioner to request an extension of the deadline for submitting the proposal, where this is possible under national law. Thus,

*“In order to coordinate the contemporaneous filing of the Proposal and the plan of reorganization, the Debtors shall take the actions necessary to seek extensions from time-to-time of the date for the filing of the Proposal, and the Debtors shall take the actions necessary from time-to-time to seek extensions of the exclusive time period during which only the Debtors may file a plan of reorganization pursuant to Section 1121 of the Bankruptcy Code”.*<sup>119</sup>

### **3.2. Implementation of the common plan**

The agreement or protocol may also contain clauses ensuring the implementation of the joint restructuring plan as conceived. Some of these clauses mentioned in the previous section may serve to this purpose, but there are others that may also be considered.

It is clear that the implementation of restructuring that maximizes the value of the insolvent estates depends, to a large extent, on the identification and preservation of the assets that are necessary for this restructuring. It is therefore not surprising that protocols include *clauses whereby the insolvency practitioners - or, where appropriate, the debtors in possession - undertake to cooperate without delay in all matters relating to the identification, preservation and realisation of those assets* in which the value of the different companies in the group is concentrated. This involves, for example, identifying

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<sup>118</sup> In this regard, v. International Insolvency Institute, *Model Cross-Border Protocol* (2009), clause 8.5 Insolvency Protocol. This clause is inspired by another clause in the protocol in *AgriBioTech Canada, Inc.* (2000), a company wholly owned by *AgriBioTech, Inc.*

<sup>119</sup> Protocol in the *Everfresh* case (1995), at 10, para. 13. See also the protocol in *AgriBioTech Canada, Inc.* (2000), Section 5.02 (Co-ordination).

the assets that have been “moved” between the different companies in the group and determining who owns those assets<sup>120</sup>, specifying the conditions for the use and disposal of the assets and rights, establishing a consultation obligation before any act of disposal of assets of one of the insolvent companies which may be of interest for the operation of another and, ultimately, for the restructuring, and also, establishing consultation obligations before taking decisions affecting the employees managing those assets. Note that the termination of a large number of employment contracts of a production plant may render that plant inoperative -, etc.<sup>121</sup> By way of example,

“If, in the course of a Proceeding, an Official Representative learns or believes that another Debtor could have a material interest in a particular asset whose value and/or recovery is at risk, such Official Representative may notify the Official Representative of the Debtor whose estate includes such asset and, where practicable and consistent with the duties of such Official Representative under applicable laws, the Official Representative of the Debtor whose estate includes such asset should consult with the Official Representative of the Debtor that may have such material interest prior to: (i) the sale, abandonment, or any disposition of such asset; (ii) the termination, suspension, or other transition of any employees managing such asset; or (iii) the commencement of any judicial, or non-judicial, proceeding affecting such asset”.<sup>122</sup>

It may even be possible for *companies interested in the preservation of certain assets*, in order to make this common restructuring possible, *to provide the company which owns them with the resources necessary for their preservation and to avoid their depreciation*<sup>123</sup>. Thus,

“Official Representatives should, to the extent permitted under applicable law and where appropriate, cooperate to maximize the realizable value of assets for which multiple Debtors have an interest. Official Representatives also recognize that in certain cases such as where a Debtor (the “Funding Estate”) has an existing interest in an asset which forms part of another Debtor's estate (the “Funded Estate”), the Official Representative of the Funding Estate may wish to provide funding towards the asset held by the Funded Estate in order to preserve and maximize its realizable value. In such event, the Official Representative of the Funded Estate may, subject to applicable laws, allow such funding to be provided on mutually acceptable bilateral terms.”<sup>124</sup>

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<sup>120</sup> Protocol in *Bernard Madoff Group of Companies* (2009), Section 6.

<sup>121</sup> Gargantini & Koutsokou, *supra* n. 56, at 177. Also, *UNCITRAL Practice Guide*, at 85, para. 121. For a discussion of the issues raised in the employment field by cooperation through protocols, see the work of M. Nogueira Guastavino, *European Cross-Border Insolvency Regulation (EU) No 2015/848 and conflict rules in employment matters: Are international insolvency protocols useful as mechanisms for cooperation and coordination in the field of employment?*, in this book.

<sup>122</sup> Protocol in *Lehman Brothers Groups of Companies* (2009), Section 7.2.

<sup>123</sup> *UNCITRAL Practice Guide*, at 85, for 120.

<sup>124</sup> Protocol in *Lehman Brothers Groups of Companies* (2009), Section 7.4.

In this vein, in restructuring operations involving groups of companies, it is not uncommon to find court decisions, probably linked to the prior adoption of a protocol, ordering the continued provision of liquidity services between group companies through a *cash management system* in exchange for consideration - for example, the payment of a certain interest - and even the provision of guarantees.<sup>125</sup> This is explained by the fact that such systems are often vital assets either to enable restructuring or to preserve the value of the group and enable it to be sold to a third party for as much value as possible.<sup>126</sup>

A different issue will be the treatment of the credits resulting from such operations. There is no lack of examples in US practice where the agreement or protocol assigns these claims the status of administrative expenses when they arise after the commencement of the insolvency proceedings.<sup>127</sup> In respect of those arising before, there is a risk of subordination, for example if under-capitalisation can be demonstrated.<sup>128</sup> In the framework of EIR 2015/848, their classification will depend on the provisions of the *lex concursus* with regard to the classification to be applied to these credits, which in many legal systems is mandatory (in Spanish law, see Article 318.1.2 of the Consolidated Text of Spanish Insolvency Act).

The same applies to other contracts that may be established between the companies of the group, which ensure the provision of supplies to subsidiaries, the use of intellectual property rights centralised in one of the group's subsidiaries, etc.<sup>129</sup> In this

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<sup>125</sup> Order of the Court of Ontario in the *Nortel* case (2009). *Intercompany Loans*, para. 34.

<sup>126</sup> See the request for interim relief in the insolvency proceedings opened in respect of *Bumble Bee Inc.* (2019), para 50: "As described above, the Debtors enter into certain Intercompany Transactions with their Debtor and Non-Debtor Affiliates in the ordinary course of business. The Intercompany Transactions reduce the Debtors' cash needs from external sources and the administrative costs incurred by the Debtors, and these transactions are essential to the operations of the Debtors' businesses. If the Intercompany Transactions were to be discontinued, the Debtors' operations and Cash Management System and related administrative controls would be disrupted causing irreparable harm to the Debtors. It is particularly imperative that the Debtors maintain the ability to make transfers between the Debtors and the Foreign Affiliates in order to ensure that Anova Food's business operations continue in the ordinary course and that the Debtors maintain the benefits of the net liquidity anticipated to be provided by Connors Bros. under the ABL DIP Facility". Also, see paras. 51-54. With respect to the possibility of including provisions on the loan of funds among the companies of the group, Espiniella, *supra* n. 101, at 178. With respect to the possibility of including provisions on the loan of funds among the companies of the group, see Espiniella, *supra* n. 100, at 178. By contrast, Gómez Bernardo has considered that, in principle, certain complex contracts such as 'financing by means of cash pooling or lines of credit, or the provision of guarantees for the benefit of joint financing' cannot form part of a protocol. See Gómez Bernardo, *supra* n. 99, at 6. However, in principle, it does not seem problematic that insolvency practitioners can coordinate their actions to maintain such form of financing, asking in return for the corresponding guarantees. A different matter is that, due to the characteristics of some of these acts of disposition, they may require judicial authorization (in Spanish law, see Article 205 of Consolidated Text of Spanish Insolvency Act).

<sup>127</sup> Application for interim relief in the insolvency proceedings opened in respect of *Bumble Bee Inc.* (2019), para. 16.

<sup>128</sup> B. Erens, S. Friedman & K. Mayerfeld, *Bankrupt Subsidiary: The Challenges to the Parent of Legal Separation*, 25 Emory Bank.Dev.J. 65, 84 (2008).

<sup>129</sup> In that regard, see the application for interim relief in the insolvency proceedings initiated against *Bumble Bee Inc.* (2019), paras. 15-26 and 52-53. This is also the understanding of Martínez Flórez, in this book, section 2.3.2 and note n. 45.

sense, it should not be forgotten that groups favour the formation and maintenance of long-term commercial relationships, which in turn promote investment in specific assets and allow companies to exploit productive and transactional efficiencies.<sup>130</sup> Protocols permit insolvency practitioners of insolvent group companies to coordinate their actions and decisions regarding these contracts, in order to avoid terminating them when they can be valuable for restructuring the group.

A special mention should be made here of the clauses allowing the *extension to a State of the stay adopted in the insolvency proceedings opened in another State regarding the assets of the insolvent company existing in the first State*. These clauses ensure that valuable assets for the restructuring of a group company will not be realised when they are located in the territory of another State.<sup>131</sup> Such clauses are of interest in situations where there is no regulatory framework providing for automatic recognition of insolvency proceedings opened in different States, nor of their effects, - for example, in relation to the stay of enforcements.<sup>132</sup> However, as is well known, under EIR 2015/848 recognition is automatic, so that the judge of one Member State (F2), where there are assets of a group company domiciled in another Member State (F1), must recognise the stay of enforcements adopted in the insolvency proceedings opened on that company and extend it to those assets (see Article 20 EIR 2015/848) with the exception of the rights in rem of third parties ex Article 8 EIR 2015/848. Moreover, when secondary proceedings have

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<sup>130</sup> Paz-Ares, *supra* n. 105, at 86-88. In this way, he understands that groups reduce transaction costs by replacing the external market with the internal market. In the economic literature, R. Fisman & T. Khanna, *Facilitating Development, The Role of Business Groups*, Harvard Business School Working Paper, n. 98-076, 14, 16-17 and 21-22 (1998), in the light of the Indian experience, show the value of the group structure in ensuring the self-supply of subsidiaries, as well as in obtaining financing - in particular for the benefit of lesser-known subsidiaries - at a lower cost. In these pages, these authors remind us of the origins of the Indian Godrej group, which was founded in 1897 as a manufacturer of locks and safes, and it is precisely the lack of tool suppliers on the Indian market that led them to integrate machinery, moulds and steel into their production. In this sense, they qualify the groups as *quasi venture capitalists* T. Khanna & Y. Jafeth, *Business Groups in Emerging Markets: Paragons or Parasites?*, ECGI Finance Working Paper, n. 92, 39-41 (2005), since they favour the development of projects which otherwise could not obtain financing, due to the lack of specialised markets, using the case of the “Tata” group in India as a model for study. In Europe, M. Deloof & M. Jegers, *Trade Credit, Corporate Groups, and the Financing of Belgian Firms*, 8 Journal of Business, Finance & Accounting 945, 946, 949-950 (1999), point out that corporate groups play the role of substitutes for the limited Belgian capital market.

<sup>131</sup> Protocol in *360Networks Inc. and its Affiliated Companies* (2001), Section 22: “In recognition of the importance of the Canadian Stay affecting creditors of the 360 Canada Group, their directors and others, and to the extent appropriate, the U.S. Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is applicable in Canada) to prevent adverse actions against the 360 Canada Group, their directors and the assets, rights and holdings of the 360 Canada Group in the United States”.

<sup>132</sup> UNCITRAL Practice Guide, at 73, paras. 94-95.



been opened in Member State (F2), the judge must stay the realisation of assets upon the request of insolvency practitioner of the main insolvency proceedings, “[...] unless it is manifestly of no interest to the creditors in the main insolvency proceedings” (Article 46 EIR 2015/848). Therefore, when EIR 2015/848 applies it is not normally necessary to include in a protocol a provision of that type.

These clauses must be distinguished from those which seek to extend the stay to the realisation of assets of group companies which are solvent and, in principle, unaffected by the insolvency proceedings opened on the others. Such clauses began to be incorporated following the *Babcock & Wilcox Canada* case, which allowed assets in Canada, which were held by solvent group companies, to be realised by virtue of liability incurred by other group companies as a result of asbestosis. The problem in this case was that these assets were necessary for the restructuring of the insolvent US companies and their realisation could impede it.<sup>133</sup> Some international texts propose tentatively the use of injunctions to obtain the stay also in the case of solvent group companies that have secured the debts of the insolvent companies.<sup>134</sup> However, this solution requires a normative provision which foresees this possibility (see, for instance, the reference to national law of Article 2.1.4 of Directive (EU) 2019/1023, on restructuring and insolvency). As explained elsewhere, in addition, in such situations there is a significant risk that actions taken by creditors of the insolvent companies against the assets of the solvent company will drag the latter into insolvency.<sup>135</sup> There are solutions that can be included in a restructuring plan to reduce this risk and avoid the destruction of value that insolvency may cause (e.g., third party release). Nevertheless, in the absence of all that, the opening of insolvency proceedings against such a company will make it possible to adopt measures such as the stay of individual enforcement of claims, to organise the realization of its assets. Once insolvency proceedings are opened against the company, it will be possible to integrate it into the restructuring of the group – if a protocol exists, it may be necessary to modify it - and adopt the necessary measures to protect those resources that may be vital to it.

In addition to those mentioned, there are some other clauses that deserve some consideration here. Once the restructuring plan has been approved by the creditors of the various insolvent companies, in the form provided for by national law, provision can be made for it to have *effect on any creditor who intends to realise his claim in any Member State over the estate of one of the companies in respect of which insolvency proceedings have been opened, even if he has not lodged his claim in the proceedings opened in another Member State*. This provision covers cases in which creditors appear in the proceedings once the plan has been adopted in accordance with the rules of national law. This is a matter which is usually provided for in the national insolvency laws of the States

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<sup>133</sup> E. Moustaria, *International Insolvency Law. National Law and International Texts*, 129-130 (Springer 2019). For a description of these situation, see also Bermejo, *supra* n. 3, at 678-679.

<sup>134</sup> *UNCITRAL Legislative Guide*, at 38-39, paras. 39-44.

<sup>135</sup> Bermejo, *supra* n. 3, at. 647-649. On the value of third party release to reduce this risk, *id.*, 679-682.

in which insolvency proceedings are opened, to which EIR 2015/848 refers for these purposes (see Article 7(2)(j) and (k) EIR 2015/848; in Spanish law, see Article 396(1) of the Consolidated Text of Spanish Insolvency Act). However, this provision also covers cases in which the creditor who entered into the insolvency proceedings late could have lodged his claim in the insolvency proceedings opened on another insolvent company in the group - which, for example, was the main debtor. This clause cannot be validly incorporated into a protocol in cases where national law is opposed to this solution - for example, because it provides that such claims cannot be realised because they were not lodged in the proceedings in the prescribed time and manner. It must also be applied in accordance with national law where it provides for specific rules on late lodgements, for example where it provides for the subordination of the claim as a result of that the late lodgement (see Articles 281(1) and 396 of the Consolidated Text of Spanish Insolvency Act).

#### **4. Distribution of value among creditors of the group's insolvent companies**

Once the solution designed in the plan has been implemented, the value obtained must be distributed among the creditors of the various insolvent companies that make up the group. EIR 2015/848 provides that the distribution of the value obtained in the insolvency proceedings must be carried out in accordance with the provisions of the national law of the opening State (Article 7(2)(i) EIR 2015/848). This solution may, however, prove insufficient where a common solution to the insolvency of the various companies in the group has been reached through a restructuring plan. The rules laid down by national law are designed to distribute the value obtained in the context of insolvency proceedings among the creditors participating in them in accordance with certain priority rules. However, they do not allow decisions to be taken on how to distribute it among the various insolvent companies involved in the restructuring. Literature studying the problems of restructuring of cross-border groups has highlighted this as one of the most contentious issues.<sup>136</sup>

It is therefore necessary to establish the criteria according to which the value obtained as a result of the restructuring can be distributed among the creditors of the various insolvent companies in the group. Here again, protocols are presented as a useful

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<sup>136</sup> Wouters & Raykin, *supra* n. 67, at 8 (electronic version), referring to the *Nortel* case.

tool for establishing the rules under which such a distribution is to take place. Within each insolvent company, the distribution is then to be made in accordance with the priority rules provided for in each of the proceedings [Article 7(2)(i) EIR 2015/848]. In her commentary, Justice Bozman referred to the possibility of establishing, through such coordinated plans, a *single “pot” for distribution to all creditors* (see 2). This is the case, for example, where, following the transfer of the group’s business to a third party, the proceeds of sale are deposited in an escrow account for subsequent payment of the creditors of the various companies in respect of which insolvency proceedings have been opened. The solution is certainly flawless from the point of view of coordination. However, it raises some doubts, insofar as it is close to substantive consolidation, which, as we have already indicated, has no place in EIR 2015/848 (see 1).

In order to avoid the problem of consolidation, it is sufficient to limit the joint treatment to the solution to be given to the insolvency of group companies, with the purpose to proceed immediately to separate the payment of creditors, which must be made on the estates of the insolvent companies so as to respect the existing separation between them (see 1). However, in order to do this, each entity will have to receive a share in the value of this joint project which, for the insolvent companies in the group, the restructuring represents. The protocol may determine *ex ante* the share corresponding to each entity in the common project in proportion to the value that each one contributes to it (for example, in Spanish law, see Article 214(1)(1) of the Consolidated Text of Spanish Insolvency Act, regarding the sale of productive units, but also see Article 1689 of the Civil Code).<sup>137</sup> Once restructuring operations have been carried out, the value obtained must be distributed among the various estates involved in the restructuring, and the value of each estate must then be distributed among its creditors in accordance with the rules on priority and distribution applicable under national law. The separation of estates and the preference which the creditors of each company in the group have over the value of the estate of that company can thus be reconciled with a joint exploitation of the various insolvent estates which benefits all the creditors of the group.

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<sup>137</sup> Judgment of the Spanish Supreme Court 21-XI-2017 (STS 4095/2017 - ECLI: EN:TS:2017:4095), first point of law. This judgment examines a case in which, as part of a liquidation plan, a productive unit is disposed of and the price obtained is allocated on the basis of the value of the assets and rights which formed part of it. Thus, for example, creditors with security interests in the assets forming part of that productive unit were allocated 47% of the amount of the sale.

For the purposes of the distribution, insolvency practitioners must take into consideration the list of claims lodged in each of the proceedings. However, if several insolvency proceedings are conducted in parallel, there is a risk that creditors who have lodged their claims in several of the proceedings opened may be paid twice over. In order to counteract this risk, it is important that insolvency practitioners are able to *communicate information about the payments made*.<sup>138</sup> Although this possibility is provided for in a general way in EIR 2015/848 (Article 56(2)(a) EIR 2015/848), it would not be superfluous to take the opportunity to set out more specifically in the protocol what this exchange of information should consist of and on what terms. Nevertheless, it would not be necessary to include in the protocol a rule ensuring equal treatment between creditors of the same company where main and secondary insolvency proceedings have been opened over an insolvent member of the group. Article 23(2) EIR 2015/848 will prevent creditors of the same debtor who have already received value from one insolvency proceedings from obtaining more value from other insolvency proceedings until creditors of the same rank in the second proceedings have obtained an equivalent dividend. Once again, the protocol may be used to specify the terms under which the insolvency practitioners will exchange the relevant information for the purposes of applying this rule.

## **5. Intercompany claims**

Inter-company claims also need to be examined in this context. This comes up in relation to existing claims between different companies of the group (e.g. arising from reimbursement rights which have arisen as a result of another company of the group having paid the amount of the claim as a guarantor). Those issues do not arise where the estates of the various insolvent companies in the group are aggregated into a single estate. However, since the assets are kept separate, it is necessary to establish how those obligations are met in the insolvency proceedings.

However, issues related to the internal responsibility of companies within the group do not form part of the issues to be addressed through cooperation mechanisms such as protocols. These issues must be resolved through company law.<sup>139</sup> Likewise, the classification of these claims - particularly relevant when subordination mechanisms may come into play - will be determined by national law.

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<sup>138</sup> *UNCITRAL Practice Guide*, at 92, para. 141.

<sup>139</sup> Reinhart, *supra* n. 34, RdN 15.

The issue is by no means a trivial one. The management of these claims in insolvency proceedings is very costly and can lead to significant losses in value, as it consumes a considerable amount of resources - in terms of time, effort, money, etc. - in lodging these claims in the corresponding insolvency proceedings. This is in particular the case where there are numerous insolvent subsidiaries to be asked for payment, and claims need to be established and quantified. Hence the interest in incorporating certain provisions into protocols that can reduce the costs caused by these claims. Since the issue can be very complex, it is not surprising that some protocols simply provide for the possibility of concluding a new agreement to arrange the realization of such claims. In contrast, others refer to a specific agreement containing such provisions.<sup>140</sup> The purpose of these provisions is twofold. On the one hand, it is a question of simplifying the procedure for lodging these claims, for instance, admitting claims lodged in one insolvency proceeding in the proceedings opened on other members of the group in the same jurisdiction.<sup>141</sup> On the other hand, they seek to facilitate the identification, and quantification of these claims, which, as we have already said, can give rise to intense disputes among insolvent companies and be extremely costly.<sup>142</sup> In order to avoid wasting the resources of insolvent companies in determining the existence of such claims, one option is for claims resulting from a common set of financial documents to agree to consider them valid *prima facie*. Provisions may also be included for the consensual settlement of disputes concerning the determination of such claims - for example, by a committee whose members are appointed by insolvency practitioners.<sup>143</sup> Alternatively, these provisions may be limited to establishing a duty to cooperate and negotiate in good faith on the determination of such claims.<sup>144</sup> All this would be done within the limits of

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<sup>140</sup> Protocol in *Calpine Corporations and its Affiliates* (2007), Section 18. *Intercompany Claims*. In this case, it is envisaged that they will be liquidated in accordance with a Memorandum of Understanding (MOU) which was submitted when the opening of the insolvency proceedings were requested and which is incorporated as an annex to the protocol. The previous section simply states that “Nothing herein shall otherwise restrict or limit the US Debtors or Canadian Debtors from participating as creditors in the others' estates, or having access to information and the ability to comment on or vote on any Plan proposed with respect of the others states”. Note that Memoranda of Understanding are usually nothing more than protocols or agreements. *UNCITRAL Practice Guide*, at 30, para. 5.

<sup>141</sup> Protocol in *Calpine Corporations and its Affiliates* (2007); Memorandum of Understanding, para. 2.

<sup>142</sup> Protocol in *Lehman Brothers Group of Companies* (2009), Section 9.1.

<sup>143</sup> Protocol in *Lehman Brothers Group of Companies* (2009), Sections 9.1 and 9.2. Also, Protocol in *Calpine Corporations and its Affiliates* (2007); Memorandum of Understanding, para. 5.

<sup>144</sup> Protocol in *Bernard Madoff Group of Companies* (2009), Section 7.1. *Intercompany Claims*: “The Representatives shall cooperate and negotiate in good faith regarding any potential claims by either Debtor against the other Debtor. At the appropriate stage, the Representatives shall consider whether it is sensible to implement, subject to the approval of the Tribunals, a mechanism for the resolution of intercompany claims”.

EIR 2015/848 and national law and in the interests of a more efficient management of the insolvency proceedings of group companies, with the purpose of maximising the value of the insolvent estates in the interests of all creditors concerned.

## 6. Final considerations

This paper has demonstrated the value of protocols in addressing the problems of fragmented insolvency proceedings involving group members in different States. Compared to other strategies, protocols address the problems that are most frequently encountered in cross-border insolvencies involving corporate groups and provide a solution that makes the players involved in the different insolvency proceedings act as the “sole owner” of those assets. In this way, protocols, in their very different and varied configurations, are presented as a valuable and flexible alternative to other mechanisms available - for example, the coordination procedure - for ordering the restructuring of groups affected by insolvency, respecting the existing separation of estates between the different companies of the group and adjusting, in each case, to the specific needs that may exist.

## 7. References

- Becker, M. (2012), *Kooperationspflichten in der Konzerninsolvenz* (RWS Verlag).
- Barteld, L. (2012), *Cross-Border Bankruptcy and the Cooperative Solution*, 9 *International Law & Management Rev.*, 27.
- Bermejo, N. (2019), *Separación de activos, garantías intragrupo e insolvencia*, in N. Bermejo, A. Martínez Flórez & A. Recalde (eds), *Las reestructuraciones de las sociedades de capital en crisis*, 627 (Thomson Reuters - Civitas).
- Braun, H. (2016), *Commentary to Article 76 EIR, Insolvenzordnung* (8th. ed, Beck).
- Conaway, D. (2019), *Cross-Border insolvency: English High Court ruling impacts Delaware Chapter 11 Case*, *Eurofenix*, 36.
- Deloof, M. & Jegers, M. (1999), *Trade Credit, Corporate Groups, and the Financing of Belgian Firms*, 8 *Journal of Business, Finance & Accounting*, 945.
- Eidenmüller, H. (2001), *Der nationale und der internationale Insolvenzverwaltungsvertrag*, 114 *ZZP* 3.

- Erens, B., Friedman S. & Mayerfeld, K. (2008), *Bankrupt Subsidiary: The Challenges to the Parent of Legal Separation*, 25 Emory Bank.Dev.J., 65.
- Espiniella, A. (2018), *Los concursos transfronterizos*, in A.B. Campuzano & E. Sanjuán (eds), *El Derecho de la Insolvencia*, 1129 (3d. ed., Tirant lo Blanch).
- Espiniella, A. (2007), *Los protocolos concursales*, 10 ADCo, 165.
- Fisman, R. & Khanna, T. (1998), *Facilitating Development, The Role of Business Groups*, Harvard Business School Working Paper, n. 98-076.
- Flaschen, E. & Silverman, R. (1998), *Cross-Border Insolvency Cooperation Protocols*, 33 Texas International Law J., 587.
- Fletcher, I. & Wessels, B. (2013), *Global Principles for Cooperation in International Insolvency Cases*, 2 IILR, 1 (electronic version).
- Flores, M. (2014), *Los concursos conexos* (Thomson Reuters - Civitas).
- Flores, M. (2020), *Content and limits of insolvency protocols in the insolvency proceedings of a single debtor*, in this book.
- Garcimartín, F. *¿Qué sentido tiene subordinar los créditos de la filial en el concurso de la matriz?* <https://almacenederecho.org/sentido-subordinar-los-creditos-la-filial-concurso-la-matriz/> (accessed 20 Oct. 2020).
- Garcimartín, F. (2017), *El nuevo Reglamento europeo sobre procedimientos de insolvencia: cuestiones seleccionadas*, 26 RcP (Smarteca version).
- Gargantini, M. & Koutsokou, G. (2017), *Protocols*, in B. Hess et al, *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, 157 (Nomos).
- Gómez Bernardo, N. (2020), *Los protocolos concursales en el Reglamento 2015/848 del Parlamento europeo y del Consejo sobre procedimientos de insolvencia*, 32 RcP (Smarteca version).
- Hansmann, H. & Kraakman, R. (2000), *The Essential Role of Organizational Law*, 110 Yale L.Rev., 387.
- Hortig, M. (2008), *Kooperation von Insolvenzverwaltern* (Nomos).
- Jackson, T.H. (1986), *The Logic and Limits of Bankruptcy Law* (Harvard University Press).
- Jensen, C. (2018), *Der Konzern in der Krise. Aktuelle Rechtsfragen im Kontext deutscher und europäisch-grenzüberschreitender Konzerinsolvenzen* (De Gruyter).

Khanna, T. & Jafeth, Y. (2005), *Business Groups in Emerging Markets: Paragons or Parasites?*, ECGI Finance Working Paper, n. 92.

Kübler, B.M. (2015), *Inhalt und Grenzen der Kooperationspflichten der Insolvenzverwalter in der Konzerninsolvenz*, in *Festschrift für H. Vallender*, 291 (RWS Verlag).

Leonard, B. (2001), *Co-ordinating Cross-Border Insolvency Cases*, [https://www.iiiglobal.org/sites/default/files/media/Coordinating\\_Cross\\_Border\\_Insolvency\\_Leonard.pdf](https://www.iiiglobal.org/sites/default/files/media/Coordinating_Cross_Border_Insolvency_Leonard.pdf) (accessed 20 Oct. 2020).

León, F. (2004), *Comentario del artículo 72 LC*, in A. Rojo & E. Beltrán (eds), *Comentario de la Ley concursal*, vol. 1, 1322 (Thomson-Civitas).

Madaus, S. (2020), *The Topic of Protocols: An Empirical Study*, in this book.

Maltese, M., *Court-to-Court Protocols in Cross-Border Bankruptcy Proceedings: Differing Approaches Between Civil Law and Common Law Legal Systems*, [https://www.iiiglobal.org/sites/default/files/media/maltese\\_michele%20submission.pdf](https://www.iiiglobal.org/sites/default/files/media/maltese_michele%20submission.pdf) (accessed 20 Oct. 2020).

Mangano, R. (2017), *From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases*, 26 Int. Insolv.Rev., 314.

Martínez Flórez, A. (2020), *Meaning, function and nature of the protocols or agreements among insolvency practitioners*, in this book.

Martínez Flórez, A. & Flores, M. (2019), *La confusión de patrimonios en los procedimientos de insolvencia: consolidación sustantiva y mecanismos alternativos*, in N. Bermejo, A. Martínez Flórez & A. Recalde (eds), *Las reestructuraciones de las sociedades de capital en crisis*, 571 (Thomson-Reuters Civitas).

Martínez Flórez, A. (2004), *Comentario del artículo 42 LC*, in A. Rojo & E. Beltrán (eds), *Comentario de la Ley concursal*, vol. 1, 868 (Thomson-Civitas).

Mevorach, I. (2017), "Insolvency of corporate groups under the recast Insolvency Regulation: progress or reason for concern?", B. Hess et al. (eds), *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, 290 (Nomos).

Milgron, P. & Roberts, J. (1993), *Economía, organización y gestión de la empresa*, (Ariel).

Moustaria, E. (2019), *International Insolvency Law. National Law and International Texts* (Springer).

Nogueira Guastavino, M. (2020), *European Cross-Border Insolvency Regulation (EU) No 2015/848 and conflict rules in employment matters: Are international insolvency protocols useful as mechanisms for cooperation and coordination in the field of employment?*, in this book.



Orlando, S. & Capaldo, G. (2020), *The Legal Nature of the Insolvency Protocols between Insolvency Practitioners under the EIR Recast and the “Comply or Explain Rule”*, in this book.

Paz-Ares, C. (2019), *¿Derecho común o Derecho especial de grupos? Esa es la cuestión* (Thomson Reuters-Civitas).

Paz-Ares, C. (2006), *Uniones temporales de empresas y grupos de sociedades*, in R. Uría & A. Menéndez (eds), *Curso de Derecho Mercantil*, vol. 1, 1469 (2nd ed., Civitas).

Ramesh, K., *Cross-Border Insolvencies: A New Paradigm*, [https://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech\\_Ramesh%20JC\\_delivered.pdf](https://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_Ramesh%20JC_delivered.pdf) (accessed 20 Oct. 2020).

Recalde, A. & Martínez Flórez, A. (2020), *Conclusion of and (non-)compliance with agreements and protocols between insolvency practitioners*, in this book.

Reinhart, S. (2016), *Vor Artikle 56 EUInsVO*, in *Münchener Kommentar zur Insolvenzordnung*, vol. 4 (3rd ed., Beck).

Reinhart, S. (2016), *Commentary to Article 56 EUInsVO*, in *Münchener Kommentar zur Insolvenzordnung*, vol. 4 (3d. ed., Beck).

Reinhart, S. (2016), *Commentary to Article 60 EUInsVO*, in *Münchener Kommentar zur Insolvenzordnung*, vol. 4 (3d. ed., Beck).

Reinhart, S. (2016), *Commentary to Article 76 EUInsVO*, in *Münchener Kommentar zur Insolvenzordnung*, vol. 4 (3d. ed., Beck).

Requejo, M. (2017), *Cooperation, Communication, Coordination*, in B. Hess et al. (eds.), *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust* (Nomos).

Rodríguez Sánchez, S. (2021), *Los protocolos concursales en las reestructuraciones de grupos de sociedades mediante operaciones de fusión transfronteriza*, ADCo (in press).

Schmidt, J. (2016), *Commentary to Article 56 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation* (OUP).

Schmidt, J. (2016), *Commentary to Article 57 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation* (OUP).

Schmidt, J. (2016), *Commentary to Article 60 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation* (OUP).

Schmidt, J. (2016), *Commentary to Article 56 EIR*, in P. Mankowski et al. (eds), *EUInsVO 2017* (Beck).

Schmidt, J. (2016), *Commentary to Article 60 EUInsVO*, in P. Mankowski et al (eds), *EUInsVO 2017* (Beck).

Schmidt, J. (2016), *Commentary to Article 76 EIR*, in P. Mankowski et al (eds), *EUInsVO 2017* (Beck).

Schmidt, J. (2015), *Das Prinzip “eine Person, ein Vermögen, eine Insolvenz” und seine Durchbrechungen vor dem Hintergrund der aktuellen Reformen im europäischen und deutschen Recht*, 1 KTS 19.

Sexton, A. (2012), *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation*, 12 Chicago J. International L., 811.

Thole, C. (2014), *Das neue Konzerninsolvenzrecht in Deutschland und Europa*, 4 KTS 351.

Torrallba, E. (2020), “The Role of Courts Confronted with an Insolvency Protocol in the Fame of the EIR Recast”, in this book.

Torrallba, E. (2016), *El nuevo reglamento en materia de procedimientos de insolvencia*, in M. Jimeno Bulnes (ed), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, 85 (Bosch).

Torrallba, E., *Concurso FAGOR. El centro de los intereses principales de una sociedad domiciliada en Polonia puede estar en Mondragón a efectos concursales: ventajas e inconvenientes de desvirtuar la presunción a favor del domicilio social*, <https://www.gap.com/wp-content/uploads/2018/03/concurso-fagor.pdf> (accessed 20 Oct. 2020).

Undritz, S.H. (2018), *Internationales Konzerninsolvenzrecht*, in L.F. Flöther (ed), *Konzerninsolvenzrecht Handbuch*, § 8 (2nd. ed., Beck).

Vattermoli, D. (2019), *Los protocolos concursales en las operaciones de reestructuración de grupos de sociedades en crisis*, in N. Bermejo, A. Martínez Flórez & A. Recalde (eds), *Las reestructuraciones de las sociedades de capital en crisis*, 688 (Thomson-Reuters Civitas).

Virgós, M. & Garcimartín, F. (2003), *Comentario al Reglamento Europeo de Insolvencia*, (Thomson-Civitas).

Wessels, B. (2016), *Commentary to Article 42 EIR*, in R. Bork & K. Van Zwieten (eds), *Commentary of the European Insolvency Regulation* (OUP).

Wessels, B., Madaus, S. & Boon, G.J. (2017) *Rescue of Business Insolvency Law*, (European Law Institute), available at [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/Instrument\\_INSOLVENCY.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf) (accessed 20 Oct. 2020).

Westbrook, J.L. (2018), *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court*, 96 Texas Law Rev., 1473.

Westbrook, J.L. (1996), *The Lessons of Maxwell Communication*, 64 Fordham L.Rev., 2531.