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“Transnational Protocols: A Cooperative Tool for Managing Cross-Border Insolvency – ToP” European research project

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Newsletter n.1*

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Foreword

We are pleased to present the first newsletter on the *Transnational Protocols: A Cooperative Tool for Managing Cross-Border Insolvency — ToP* European research project.

This edition of the newsletter has been expanded to present the project, its objectives, the research team and to communicate the latest updates on the project and more in general on cross-border insolvency law.

Research Team

The project is carried out by a partnership of several universities: Università degli Studi di Roma “La Sapienza” (Project Coordinator), Universidad Autónoma de Madrid (Partner), Martin Luther Universität Halle-Wittenberg (Partner), Università degli Studi di Verona (Partner), and is supported by the Italian *Ministero dello Sviluppo Economico*. The partnership benefits from previous working relationships among the key members of the staff. The research team from the Università degli Studi di Roma “La Sapienza” is consisting of Prof. Daniele Vattermoli (Coordinator), Prof. Giuseppina Capaldo, Prof. Eugenio Della Valle, Prof. Salvatore Orlando, Prof. Paola Ferrari and Prof. Claudia Tedeschi (Assistant researchers: Dr. Marianna Marini and Marco Conforto). The research team from Universidad Autónoma de Madrid is consisting of Prof. Andrés Recalde, Prof. Ignacio Tirado, Prof. Nuria Bermejo, Prof. Marta Flores, Prof. Enrique Gandía, Prof. Aurora Martínez, Prof. Magdalena Nogueira, Prof. Domingo Jiménez-Valladolid and Prof. Elisa Torralba. The research team from the Martin Luther Universität Halle-Wittenberg is consisting of Prof. Dr. Stephan Madaus. The research team from the Università degli Studi di

Verona is consisting of Prof. Federica Pasquariello and Prof. Marco Torsello (Assistant researcher: Dr. Chiara Zamboni).

Description of the Research Project

Front matter:

In cross-border insolvency cases, Protocols have become increasingly popular in recent years. They have already been used between the U.S.A., Canada and England, where the stipulation of protocols under the supervision of the courts has proven to be extraordinarily effective.

This practice – now regarded as a highly valuable method of cooperation – is in essence a way to structure procedures. However, experience with such protocols is almost exclusively limited to Anglo-American cases, and it is far from obvious how these could be integrated directly into foreign insolvency proceedings.

In cross-border insolvency cases, courts and insolvency representatives have mainly to grapple with two problems:

1. The difficulty in coordinating insolvency cases by all the courts concerned, from a procedural point of view;
2. Diverging substantive insolvency laws, which provide for inconsistent policy solutions in the different jurisdictions involved in cross border cases.

Insolvency protocols attempt to create a framework that facilitates cooperation and communication among the courts and parties in multiple concurrent insolvency proceedings in several jurisdictions.

In order to foster Transnational Protocols as tools for managing cross-border insolvency proceedings in civil law legal systems, the principle problems to be tackled are:

1. How civil law-countries can rely on the applicable legal framework (Regulation EU n.



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848/2015) through the insolvency protocol and its different clauses;

2. Making protocols compatible with the path of substantive harmonization that is currently underway within the EU (see the Directive Proposal on Preventive Restructuring and Second Chance (Nov 2016);

3. Qualifying all the interests (*i.e.* going concern value, rights of creditors, maximization of creditors' claim satisfaction, etc.) of the cross-border insolvency proceedings;

4. Whether an insolvency representative is able to effectively sign a protocol, which will have an impact on the rights of creditors in the cross-border insolvency proceedings.

Main Objectives:

This project main objective is to develop the European Model Protocol (EMP) and its guidelines in order to foster the use of protocols in cross-border insolvency proceedings and solve practical needs faced in complicated scenarios in cross-border cases.

In fact, it has a narrow scope which concerns § 49 of Regulation (EU) n. 2015/848 on insolvency proceedings (recast), namely possible protocols to be concluded to facilitate the insolvency proceedings.

In particular, the EMP aims to address the following needs:

1. to facilitate and support judicial cooperation in multiple cross-border insolvency proceedings by EMP;

2. immediate needs: (1) coordination between open procedures concerning the same debtor or members of the same group of companies; (2) minimizing costs and maximizing recoveries for all parties involved, and managing all individual cases effectively with consistent results; (3) maximizing the value of the debtor's estate, through coordinated negotiated procedures,

minimization of costs and duration of the procedures;

3. setting the possible content of the EMP, distinguishing between essential clauses, appropriate clauses, any clauses incompatible with national legislation.

Updates on activities and research (Nov '18- Jan '19)

On the **16th** and **17th** of **November** there has been a **kick-off meeting in Rome**. An introductory meeting for the organization of the different research activities needed for the start-up of the *Transnational Protocols: A Cooperative Tool for Managing Cross-Border Insolvency — ToP* European research project. This meeting has been attended by the Sapienza research team, representatives of Madrid, Halle and Verona partners. The meeting has set-up the target group for partner organizations; the appointment of Mr. Pasquale Stabile, Head of the Secretariat of the department of Law and Economics of Productive Activities (Faculty of Economics, Sapienza University of Rome), as Implementation Manager, in charge of constantly monitoring the advancement of the project and taking care of its accounting and administrative aspects; the appointment of an Oversight Committee, composed by professors Christoph Paulus, Riz Mokal and Alberto Mazzoni; the setting of working groups (tax, labor, contracts, corporate, etc.) and the appointment of a coordinator for each working group; it has also defined the timing of the “Dissemination & Training Plan” and the responsible Partners for its implementation.

The main activities which are currently underway are:

- The study of research materials such as:



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Soft and hard law: Study of soft law (for example, UNCITRAL Model Law on Cross-Border Insolvency) and hard law (for example, Regulation n. 848/2015) instruments governing insolvency protocols.

Bibliography: Study of international literature on Cross-Border Insolvency and Insolvency Protocols.

Case law: Study of case law in which insolvency protocols have been used (for instance, Lehman Brothers; Maxwell Communication; IWG Services Ltd.; AIOC Corporation).

- **Questionnaire to insolvency practitioners and courts:** Drafting and distribution of questionnaires to Italian, German and Spanish insolvency practitioners and courts. Target group: insolvency practitioners; judges. Printed format. English, Spanish & Italian language. Research groups are identifying, for each area of interest, which aspects are relevant for the professionals and the judges dealing with a cross-border insolvency. The questionnaires should also be open to suggestions for solving problems that arise in practice.
- **Database on insolvency legal system (one for each jurisdiction):** Data collection of relevant Italian, German and Spanish best practices and case law. Research activities to determine, amongst others: insolvency protocols' legal status, efficiency, effectiveness, short-term and long-term purposes. Target group: partners. Electronic format. English language.

- **Project website:** The creation of a project dedicated webpage is instrumental in spreading knowledge of the project, its participants and activities, as well as in the dissemination of the project's deliverables, reports and results. The project website will be functional at least 3 (three years) after the end of the project.

- **Law Review Articles:** processing magazine articles to be published in different languages and countries on the topic of cross-border law issues. For example, Prof. Daniele Vattermoli wrote an article on the subject of “Insolvent groups of companies and Protocols”, which will be soon published in the Italian Law Review “*Diritto della banca e del mercato finanziario*” and in the Spanish Law Review “*Anuario de derecho concursal*”.

Cross-border insolvency law

Hard law and soft law in international insolvency law:

Protocols stand alongside existing national and international regulations, principles and guidelines in the current cross-border insolvency cases. In particular, the following need to be taken into special consideration:

1. the Cross-border insolvency Concordat created by the International Bar Association (1995-1996);
2. UNCITRAL's Model Law on Cross-Border Insolvency (1997) and national legislations based on it;
3. UNCITRAL's Practice Guide of 2009.



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4. the ALI guidelines applicable to court-to-court communications in cross-border insolvency cases (2000-2001);

5. the EU Regulation n. 848/2015 (Recast Insolvency Regulation).

Naturally, the latter is the most relevant international text, which proper implementation requires an adequate system of pan-European protocols. As it is well known, the Recast Insolvency Regulation has kept the already existing dichotomy between main insolvency proceedings – in the Member State where the centre of the debtor's main interests is situated – and secondary/territorial proceedings – where there is an establishment – to handle cross-border insolvency proceedings. In addition, an enhanced framework to address insolvent groups of companies has been introduced; it is based on the principles of separation of legal personality, coordination and cooperation. As already mentioned, protocols must play a decisive role in the consistent management of these proceedings. Thus, the creation of the European Model Protocol (EMP) – which contains the minimum core set of common principles that should be used in the handling of transnational insolvency – represents an essential reference for developing an effective cross-border cooperation framework across the EU and with foreign jurisdictions.

Texts of Soft Law

1) UNCITRAL Model Law on Cross-Border Insolvency

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html

2) UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency

<https://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf>

3) UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html

4) Conference on European Restructuring and Insolvency Law Report;

<http://www.ceril.eu/uploads/files/20180604-ceril-report-2018-1-final-version.pdf>

5) American Law Institute Guidelines Applicable to Court-to-Court Communications (Principles of Cooperation Among The NAFTA Countries)

https://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf

6) American Law Institute Report (Global Principles for Cooperation in International Insolvency Cases)

https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf

7) Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (Conference: 10–11 October 2016)

<http://www.jin-global.org/jin-guidelines.html>

8) Judicial Insolvency Network Issuance Guidelines for Communication and



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Cooperation between Courts in Cross-Border Insolvency Matters

<http://www.iin-global.org/iin-guidelines.html>

- 9) EU Cross-Border Insolvency Court-to-Court Cooperation Principles
http://www.ejtn.eu/PageFiles/16467/EU_Cross-Border_Insolvency_Court-to-Court_Cooperation_Principles.pdf
- 10) International Bar Association Cross-Border Insolvency Concordat
<https://www.ibanet.org/Document/Default.aspx?DocumentUId=2D55E76F-CAB1-493D-B0A9-4B4B967B353F>

Texts of Hard Law

- 1) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848>
- 2) Directive 2001/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2001 on the reorganisation and winding-up of insurance undertakings
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0017&from=EN>
- 3) Directive 2001/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 April 2001 on the reorganisation and winding up of credit institutions
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0024&from=EN>

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