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# Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool

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Although harmonisation of insolvency laws has been a goal since the founding of the original European Community, and later the European Union (EU), insolvency laws among EU Member States continue to vary widely and European insolvency laws often differ dramatically from the US Bankruptcy Code.[1] As a result, a cross-border insolvency case can give rise to significant substantive and procedural complexities. Cross-border insolvency protocols, while an imperfect solution, can be an effective tool in addressing these complexities and attempting to harmonise concurrent insolvency proceedings taking place in different jurisdictions.

This article first provides a brief description of international protocols as a tool to coordinate cross-border insolvency proceedings. The second section discusses the broader, international insolvency context in which protocols have been developed, including the nature of international insolvency and the unique problems presented by cross-border cases. The third section discusses the substantive sources of international protocols and describes some typical provisions included in protocols. The final section offers some brief conclusions.

## Overview

First introduced nearly two decades ago, international insolvency protocols ('protocols') have become an important tool for providing a framework for

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1 11 United States Code § 101 et seq (the 'US Bankruptcy Code').

communication and cooperation among courts and parties in cross-border insolvencies. Protocols can provide an important jointly agreed-on and court-authorised framework for cooperation and coordination among participants in concurrent insolvency proceedings occurring in different jurisdictions.[2] Generally, protocols do not predetermine substantive legal disputes that may arise during the proceedings. Instead, they aim to harmonise management of the cases before conflicts arise. While once novel, they are now commonly employed by courts, particularly in common law jurisdictions, such as the United States, Canada and the United Kingdom, to resolve choice of law issues in advance and coordinate case administration.[3]

Courts have approved protocols in cases where there are concurrent plenary proceedings in multiple jurisdictions and where there is a plenary main proceeding in one or more jurisdictions accompanied by ancillary proceedings in one or more additional jurisdictions.[4] Once protocols proved effective, courts began to laud them as tools to harmonise proceedings and are increasingly encouraging their use in cross-border cases.[5]

**Nature of international insolvency**

Protocols are used in an attempt to provide a pragmatic solution to the problem of multiple competing jurisdictional interests, which are inherent in cross-border insolvency cases. The two most prominent models for addressing the unique issues that arise in cross-border insolvency proceedings are often described as 'universality' and 'territoriality'.[6] Under the universality approach, courts encourage

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2 Recent US bankruptcy cases in which protocols have been employed include: *In re Smurfit-Stone Container Corporation*, Case No 09-10235 (Bankr D Del 2009); *In re Nortel Networks Inc*, Case No 09-10138 (Bankr D Del 2009); *In re Lehman Brothers Holdings Inc*, Case No 08-13555 (Bankr SDNY 2008); *In re Quebecor World (USA) Inc*, Case No 08-10152 (Bankr SDNY 2008); *In re Calpine Corp*, Case No 05-60200 (Bankr SDNY 2007).

3 Judges in civil law jurisdictions may be unable or unwilling to approve protocols if not explicitly authorised by the civil code of their jurisdiction. However, in certain cases, civil law courts have given tacit approval to operating under a protocol not formally approved by the court.

4 See Samuel L Bufford et al, *International Insolvency* (Washington, DC: Federal Judicial Center, 2001), 93.

5 See, eg, *In re Stonington Partners, Inc v Lernout & Hauspie Speech Prods, NV*, 310 F 3d 188 (3d Cir 2002) ('We strongly recommend... that an actual dialog occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws').

6 See Jay Lawrence Westbrook, 'A Global Solution to International Default' (2000) 98 *Michigan Law Review* 2276; Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post Universalist Approach' (1999) 84 *Cornell Law Review* 669.

conduct in international insolvency proceedings that, to the greatest extent possible, treats the multiple insolvency proceedings as a single case. The case may be administered primarily in one central forum but, under this approach, foreign creditors have the same rights as their domestic counterparts. Under the territoriality approach, in the event of a cross-border insolvency, each nation conducts its own insolvency proceeding, holding paramount the rights of local creditors and other local parties in interest. Domestic insolvency regimes, private law principles and conceptions of due process remain generally unaffected by the cross-border nature of the proceeding.

The UN Commission on International Trade Law (UNCITRAL) Model Law (the 'Model Law'),[7] on which Chapter 15 of the US Bankruptcy Code is based, and the EU Insolvency Regulations (the 'EU Regulations')[8] both, in part, adopt what could be fairly characterised as modified universality, in that they encourage comity and authorise courts to recognise official representatives of foreign ancillary proceedings to permit them to participate, without discrimination, as parties in interest in a primary domestic 'main' plenary proceeding. Courts must determine, based on a determination of the debtor's 'centre of main interests' (COMI), which of the concurrent proceedings is the 'main proceeding'.[9] Once the court determines the main proceeding, actions taken in relation to the non-main proceedings are to

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7 The UN Commission on International Trade Law (UNCITRAL) adopted the Model Law on cross-border insolvency on 30 May 1997. It was an effort to encourage uniformity in international insolvency and its provisions have been adopted by many major trading nations.

8 The EU Insolvency Regulations came into effect on 30 May 2002. The EU Insolvency Regulations establish a common framework for insolvency proceedings in the European Union, with the exception of Denmark.

9 The COMI is not defined in the Model Law or the EU Regulations. In *Bondi v Bank of America, NA (In re Eurofood IFSC Ltd)*, Case C-341/04, 2006 WL 1142304 (ECJ 2 May 2006), the European Court of Justice found that the determination of a debtor's COMI must be made with criteria that are 'both objective and ascertainable by third parties'. *Eurofood*, 2006 WL 1142304 ¶ 33; see also Edward S Adams et al, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 *Columbia Journal of European Law* 43, 60:

> 'COMI is a universalist concept, but the challenge of answering where the COMI is located is answered by a territorialist presumptive rule. The Model Law provides: "In the absence of proof to the contrary, the debtor's registered office… is presumed to be the centre of the debtor's main interests." The EU Regulation has a similar provision. Recital 13 of the preamble to the EU Regulation provides that "[t]he centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."'

be made consistent with remedies granted in the main proceedings.[10] One difficulty of this approach under the Model Law and the EU Regulations is that for each legal entity the determination of the COMI is made separately. There has been considerable consternation among courts relating to reconciling COMI analysis with the debtor's relationship with cross-border affiliated entities when the debtor is a member of a cross-border group and other members of the group are also engaged in insolvency proceedings.[11] While by no means a perfect solution, protocols can provide the basis for dealing with some of these complexities.

An ideal protocol from the perspective of efficiency of case administration would be a universalist one, which treated a cross-border case as a single unified case. In practice, however, courts are reluctant to authorise a protocol that does not reserve appropriate discretion to local courts to protect local interests, and preserve the independence and sovereignty of local courts. Accordingly, protocols tend to be consistent with the modified, universalist approach of the EU Regulations and the Model Law. Instead of attempting to replicate a single unified case, protocols generally create a framework for communication and data sharing, asset preservation, claims reconciliation and to address inter-company claims.

**Issues in cross-border insolvency**

Cross-border insolvency cases can involve either a single case where the debtor's assets are located in multiple jurisdictions or the insolvency of multiple members of a cross-border group resulting in concurrent insolvency proceedings in multiple jurisdictions. In both scenarios, perhaps the main point of legal tension and complexity arises from the fact that fundamental principles of national sovereignty prevent a bankruptcy court in one

10 For example, under section 1529 of the US Bankruptcy Code (which follows the Model Law almost exactly), when a debtor is subject to both a foreign proceeding and a local proceeding several guidelines apply, including: (i) relief granted under Chapter 15 to a representative of a foreign non-main proceeding after a foreign main proceeding has been recognised must be consistent with the foreign main proceeding; (ii) if a foreign main proceeding is recognised after a foreign non-main proceeding has been filed or recognised, any relief granted under Chapter 15 in the case of the foreign non-main proceeding shall be reviewed and modified or terminated by the court if it conflicts with the foreign main proceeding; and (iii) if a foreign non-main proceeding is recognised after another foreign non-main proceeding, the court shall grant, terminate or modify any relief granted to facilitate coordination of the proceedings. See 11 USC § 1529.

11 See, eg, *Bondi v Bank of America, NA (In re Eurofood IFSC Ltd)*, Case C-341/04, 2006 WL 1142304 (ECJ 2 May 2006) (ruling that where a debtor is a subsidiary whose registered office is located in a different Member State of the EU than the debtor's parent, there is a presumption under the EU Insolvency Regulations whereby the centre of main interests of that subsidiary is located in the Member State where its registered office is located).

jurisdiction from compelling the application of its law in another jurisdiction. Consequently, courts must rely on international comity to give effect to their rulings that affect parties and assets outside their jurisdiction.[12] This need is particularly acute in jurisdictions such as the US where bankruptcy courts have universal in rem jurisdiction over all of a debtor's estate, but may not have personal jurisdiction over foreign creditors that may attempt to exercise their rights against the debtor's local assets.[13]

The wide variation among insolvency regimes is another significant challenge. These differences often reflect fundamental differences in the various jurisdictions' conceptions of public law and private law, which result in discrepancies in important concepts such as the requirements of due process, the treatment of foreign creditors and the authority of debtors to continue to operate their business and manage assets once insolvency proceedings have commenced.[14] Because of the limitations on the application of the law of one insolvency tribunal in the jurisdiction of another, protocols attempt to overcome these variations through a framework that facilitates cooperation and communication among the courts in multiple concurrent insolvency proceedings.[15]

An issue of particular concern is the dissimilarity among jurisdictions of how, and to what extent, a debtor can continue to operate its business once it enters an insolvency proceeding. In certain jurisdictions, such as the US, debtors generally remain authorised to continue to operate their business and manage their assets as a debtor-in-possession. In many others, including several European jurisdictions, some form of trustee or administrator is appointed and the debtor's business may be required to be liquidated within a short period of time.

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12 See Hannah L Buxbaum, 'Rethinking Insolvency: The Neglected Role of Choice of Law Rules and Theory' (2000) 36 *Stanford Journal of International Law* 23, 30.

13 28 United States Code § 1334(e) (granting US bankruptcy courts 'exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of [the] case, and of property of the estate').

14 See Ian F Fletcher, *Insolvency in Private International Law* (New York: Oxford, 2005), 4–5: 'Although it is possible to describe the factual attributes of insolvency in terms which may be universally recognized and understood, national attitudes towards the phenomenon of insolvency are extremely variable, as are the social and legal consequences for the debtors concerned. Since, by definition, insolvency impacts upon the entire patrimony of the debtor, the range of legal interests which are in some way affected is very extensive. This ensures that there is a profound and intimate correlation between insolvency – whether individual or corporate – and the very wellsprings of policy and social order from which national law ultimately draws its inspiration. For this reason, despite numerous general resemblances, national insolvency laws differ from one another almost infinitely in ways both great and small.'

15 Samuel L Bufford et al, *International Insolvency* (Washington, DC: Federal Judicial Center, 2001), 88.

Another regularly occurring issue is court access. In a case involving multiple cross-border proceedings, parties from one proceeding may find it difficult to gain access to the courts of another jurisdiction. For example, a foreign creditor may need to seek relief from a local court in order to protect certain assets from collection by local creditors that may also have a claim on those assets. This issue is complicated further by the fact that in order for a foreign representative to have access to a foreign court, that court must, in some fashion, recognise the legitimacy of the foreign insolvency proceeding, and the authority of the representative to act on its behalf.

As demonstrated recently by the Lehman Brothers bankruptcy, multinational corporate group insolvencies can present particularly vexing problems.[16] In multinational corporate groups, finances and operations are typically highly integrated. Yet, once an insolvency proceeding commences, the organisation becomes, to a large degree, legally disjointed and what is left are disconnected legal entities, each engaged in an insolvency proceeding in its own jurisdiction.[17] Coordination is critical if a corporate parent has subsidiaries in multiple jurisdictions that are important to the worldwide organisation, or conversely, if an insolvent subsidiary is heavily dependent on a parent or other insolvent members of the group. Of particular concern is a case where local law may mandate the quick liquidation of a vital member of the corporate group in order to satisfy domestic claims, thereby diminishing the going concern value of the entire corporate group.[18] In addition, corporate group members may have sizeable (and, in a case like Lehman Brothers, extremely complex) inter-company claims that must be addressed. Protocols can be an effective tool in resolving these complex issues.

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16 Prior to commencing insolvency proceedings, Lehman Brothers operated in over 40 countries through over 650 legal entities outside the US. Lehman Brothers' global operations included a cash management system, an organisational structure, product lines and operating platforms creating cross-border and cross-entity interdependencies. See Alvarez and Marsal, Lehman Brothers Holdings Inc: International Protocol Proposal, 11 February 2009, available at **www.lehmancreditors.com** (last visited 9 October 2009). Lehman Brothers was the largest and perhaps the most complex bankruptcy filing in history, and the Lehman Brothers protocol was the first attempt to coordinate proceedings in more than three jurisdictions (the Lehman Brothers filing resulted in more than 75 separate proceedings). See Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, *In re Lehman Brothers Holdings Inc*, Case No 08-13555 (Bankr SDNY 12 May 2009).

17 See generally Bruce Leonard, 'The Development of Court-to-Court Communications in Cross-Border Cases' (1998) 17 *Journal of Bankruptcy Law and Practice* 5.

18 *Ibid.*

## Development of protocols

### *Maxwell case*

Cross-border insolvency protocols have their origin in the 1991 case of *In re Maxwell Communications Corp.*[19] Maxwell Communication Corporation plc ('Maxwell') was a UK-based media holding company that was parent to a group of approximately 400 subsidiaries in the UK, the US and Canada. Although international in scope, the 'crown jewels' of the Maxwell corporate group were two US-based subsidiaries that together comprised 80 per cent of Maxwell's total assets.[20] Facing default on their UK credit facilities, Maxwell's management filed a pre-emptive Chapter 11 petition in the US Bankruptcy Court in the Southern District of New York. The next day, Maxwell presented an insolvency petition to the High Court of Justice for an administrative order under the UK Insolvency Act, with the aim of protecting the Maxwell operating management from possible liability under UK law and insulating Maxwell's non-US assets from collection efforts by UK creditors.

Once Maxwell commenced the UK proceeding, tribunals in the two jurisdictions faced the challenge of coordinating the proceedings without undermining their respective sovereign authority. In an effort to harmonise the UK and US proceedings, the English court appointed three joint administrators and the US court appointed an examiner. The US court order appointing the examiner required the examiner to, among other things, investigate Maxwell's financial condition, mediate among various parties and 'act to harmonize, for the benefit of all of [Maxwell's] creditors and stockholders and other parties in interest, [Maxwell's] United States chapter 11 case and [Maxwell's] United Kingdom administration case so as to maximize [the] prospects for rehabilitation and reorganization'.[21]

A protocol was negotiated and agreed on to harmonise the two proceedings. The protocol was guided by the goal of preserving the value of the estate, particularly by minimising the costs and conflicts associated with coordinating multiple insolvency proceedings.[22] Pursuant to the *Maxwell* protocol, UK joint administrators and the US examiner had similar authority

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19 *In re Maxwell Communications Corporation plc*, 170 BR 802, 802 (Bankr SDNY 1994). The protocol was filed with the court. See Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re Maxwell Communications Corp*, Case No 91-15741 (Bankr SDNY 15 January 1992).

20 *Maxwell*, 170 BR at 802; see Evan D Flaschen and Ronald J Silverman, 'Cross-Border Insolvency Cooperation Protocols' (1998) 33 *Texas International Law Journal* 587, 590.

21 *Maxwell Commun Corp PLC by Homan v Société Generale (In re Maxwell Commun Corp PLC)*, 93 F 3d 1036, 1042 (2d Cir 1996).

22 Evan D Flaschen and Ronald J Silverman, 'Cross-Border Insolvency Cooperation Protocols' (1998) 33 *Texas International Law Journal* 587, 591.

and each was made subject to the jurisdiction of the other court.[23] The protocol installed the joint administrators as monitors of the 'corporate governance' of Maxwell; however, certain important actions, such as the disposal of assets and the incurrence of further debt, required prior consent of the US examiner or the US bankruptcy court. In January 1993, the joint administrators and the US examiner filed the plan of reorganisation in the US and the scheme of arrangement in the UK.[24] While distinct documents, the plan of reorganisation and the scheme of arrangement were mutually dependent, reflecting a single collaborative arrangement consistent with the insolvency regimes of both countries.[25]

In December 1993, both the plan of reorganisation and the scheme of arrangement were overwhelmingly approved without a major conflict between the two jurisdictions that required judicial resolution. The result was a Maxwell entity that was partially reorganised and partially liquidated. The case was an important milestone in international insolvency and introduced protocols as important tools in cross-border cases.[26]

*Model Law*

The adoption of the Model Law was a critical step in the coordination of cross-border insolvency proceedings. Among other things, it encouraged innovation among courts and practitioners as they developed methods to coordinate multiple concurrent insolvency proceedings. Drafted following the *Maxwell* case, protocols have emerged as an example of the advancements promoted by the Model Law.

The Model Law is model legislation adopted by the jurisdictions of many of the major economies, including the United States. Owing to its widespread adoption, the Model Law has emerged as a common point of reference in international insolvency. Central common law insolvency concepts such as 'foreign main proceeding', 'non-main proceeding' and 'centre of main interests' are codified by the Model Law.

The adoption of the Model Law has been vital to the proliferation of protocols, in part because jurisdictions that have adopted the Model Law are expressly authorised to employ cross-border protocols. Articles 25, 26 and 27 specifically authorise courts to cooperate and communicate with

23 *Maxwell*, 170 BR at 802.

24 *Ibid.*

25 *Ibid.*

26 The case has been described as 'the first worldwide plan of orderly liquidation ever achieved'. Jay Lawrence Westbrook, 'The Lessons of Maxwell Communications' (1996) 64 *Fordham Law Review* 2531, 2534.

foreign courts and official representatives of foreign proceedings. Article 25 directs that 'the court shall cooperate, to the maximum extent possible with foreign courts and foreign representatives, either directly or through a person or representative of the court, as the case may be'. Article 26 provides courts with similar authority, but the directive is directed at official representatives. Article 27 enumerates a non-exhaustive list of forms of cooperation, including:

1. appointment of a person or body to act at the direction of the court;
2. communication of information by any means considered appropriate by the court;
3. coordination of the administration and supervision of the debtor's assets and affairs;
4. approval or implementation of agreements concerning the coordination of proceedings; and
5. coordination of concurrent proceedings regarding the same debtor.

**Sources of protocol provisions**

To address the unique challenges presented by cross-border insolvencies, courts and practitioners have continued to develop and codify best practices in cross-border protocols. While each protocol is tailored to the particular needs of an individual case, parties draw on, in addition to precedent protocols, certain collections of best practices in developing protocols. Below is a discussion of some of the most influential sources.

*Concordat*

The Insolvency Committee (then called 'Committee J') of the International Bar Association introduced the Cross-Border Insolvency Concordat in 1995. The Concordat lays out ten principles that do not have the force of law, but nonetheless provide guidance to lawyers and courts in harmonising cross-border insolvency proceedings. The Concordat's principles were developed to be applied in a wide range of proceedings ranging from a single coordinated proceeding to several concurrent proceedings.[27] The Concordat provides a recommended framework for cross-border insolvency protocols where there is no single 'main proceeding'.[28]

27 Anne Nielsen et al, 'The Cross-Border Insolvency Concordat: Principles to Facilitate Resolution of International Insolvencies' (1996) 70 *American Bankruptcy Law Journal* 533, 558.

28 *Ibid* at 535.

Implementation of the Concordat principles requires judges to endorse the agreed-on protocol, and in some cases affirmatively adopt the protocol through court order.[29]

Not all of the principles are necessarily applicable for all jurisdictions; nonetheless, they are sufficiently broad as to be applicable in most cases. The Concordat principles are derived primarily from principles of private international law, reflecting a view that insolvency proceedings, and the related rights of parties in interest, are issues appropriately resolved by agreement among the parties.[30]

*ALI Guidelines*

In 2000, the American Law Institute (ALI) built further on the principles codified in the Concordat by drafting the 'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases' (the 'Guidelines'). In the US, the Guidelines are very influential and are routinely incorporated by reference, whole or in part, into protocols, with relevant provisions filed with the court as exhibits to the approved protocol.[31]

The ALI suggests that courts employ the 17 Guidelines in whole or in part, with or without modification, as principles to aid in increasing court-to-court communication.[32] The Guidelines were not intended to be static

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29 Several of the Concordat principles are particularly relevant to the formation of protocols. Principle 3 suggests practical steps to encourage cooperation. Principle 4 provides that when there is more than one plenary proceeding and no main forum: (a) each forum should coordinate with the others, subject to a governance protocol; (b) each forum should administer assets within its own jurisdiction, subject to agreed-to distribution rules; (c) a claim should only be filed in one plenary forum, but if it is filed in multiple forums, then recovery should not exceed what would have been recovered if only one proof of claim had been filed (ie claims are not to be 'double counted'); (d) each forum should apply its own rules of priority; (e) classification of unsecured claims should be coordinated, so as to achieve pro rata distribution; (f) there should be weighted pro rata distribution of claims among the forums; and (g) specialised insolvency regimes, such as for broker-dealers, should be given special consideration.

30 Anne Nielsen et al, 'The Cross-Border Insolvency Concordat: Principles to Facilitate Resolution of Int'l Insolvencies' (1996) 70 *American Bankruptcy Law Journal* 533, 538; see, eg, *In re Everfresh Beverages, Inc*, Case No 32-077978 (Ont Gen Div 1995) and Case No 95-45405 (Bankr SDNY 1995) (applying for the first time the Concordat principles in a cross-border insolvency protocol).

31 Recent examples of cases where US courts have adopted or substantially incorporated the ALI Guidelines into court approved protocols include: *In re Smurfit-Stone Container Corporation*, Case No 09-10235 (Bankr D Del 2009); *In re Nortel Networks Inc*, Case No 09-10138 (Bankr D Del 2009).

32 American Law Institute, 'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases', 16 May 2000, available at **www.ali.org/doc/Guidelines.pdf** (last visited 6 October 2009).

but to be modified as courts felt necessary.[33] The ALI recommends that the Guidelines be adopted by each court in a case, usually in the form of a protocol, in substantially similar form, so as to ensure that parties in each relevant jurisdiction are subject to the same provisions.[34] The ALI recommends explicitly that the Guidelines be adopted following similar notice, under local rules, to that which would apply to any important procedural decision.

*European Communication and Cooperation Guidelines*

The European Communication and Cooperation Guidelines for Cross-border Insolvency (the 'CoCo Guidelines') are one of the newest substantive sources that inform insolvency protocols provisions. Drafted by Professor Bob Wessels of Leiden University in the Netherlands and Professor Miguel Virgós of Universidad Autónoma de Madrid in Spain, the CoCo Guidelines codify best practices and suggest non-binding provisions for protocols, particularly in respect of insolvency proceedings where the EU Insolvency Regulations are the applicable law. The CoCo Guidelines are an important supplement to the EU Insolvency Regulations, as the EU Insolvency Regulations do not provide guidance on implementing a protocol in a case where there are concurrent insolvency proceedings and there is no main proceeding.

The 18 CoCo Guidelines provide a model framework for communication and cooperation in cross-border proceedings. Appendix I of the CoCo Guidelines is a 'Checklist Protocol', which enumerates and describes certain basic requirements and specific provisions to be addressed in cross-border insolvency protocols.

While drafted against the backdrop of the EU Insolvency Regulations, the CoCo Guidelines reflect best practices both inside and outside Europe. The CoCo Guidelines have been incorporated into recent successful protocols in the US, Canada and the UK, and have become an important substantive source for protocols, including the recent protocol in the Lehman Brothers bankruptcy proceedings.[35]

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33 *Ibid.*

34 *Ibid.*

35 See Proposed Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, nn 1–3, 16, 10 February 2009, available at **www.lehmancreditors.com** (last visited 9 October 2009); see also speech by Bob Wessels, 'Judicial Cooperation in Cross-Border Cases', University of Leiden Law School, 6 June 2008.

**Common protocol terms**

The terms of protocols are as varied as the insolvency proceedings that employ them. Indeed, they are effective precisely because protocols provide a flexible approach that can be adapted to fit particular circumstances of a case and the particular issues related to the insolvency regimes involved. Nonetheless, there are some common themes that emerge among recently developed protocols.

- *Purpose and aims*. Protocols typically state explicitly their purposes and aims. More than a preamble, these sections make clear that while protocols aim to facilitate cooperation and coordination, they also rely on an understanding among the parties that the protocol will respect the distinct rights of the parties of interest in each proceeding. This section may describe some general tools for facilitating cooperation, including cooperation and direct communication among tribunals, information and data sharing, asset preservation, comity and inter-company claim reconciliation.[36]
- *Right to appear*. Protocols provide a framework for creditors and official representatives of foreign proceedings to be recognised by and appear before the courts party to a protocol. These provisions also address the personal jurisdiction consequences of an official representative of a foreign proceeding appearing before the court, usually restricting the local court's personal jurisdiction to the particular insolvency proceeding.[37]
- *Communication and cooperation*. Facilitation of communication and cooperation among courts and official representatives is a central purpose for protocols. These provisions make explicit the methods courts and representatives should employ to harmonise the proceedings and provide a detailed framework in which communication is to take place.[38] These provisions often include agreements to share certain non-public information among courts and official representatives and to conduct joint hearings on matters of direct relevance to multiple jurisdictions.[39]

36 See, eg, Cross-border Insolvency Protocol, *In re Smurfit-Stone Container Corporation*, Case No 09-10235 (Bankr D Del 12 March 2009) and Case No 09-7966-00CL (Ont Sup Ct 12 March 2009).

37 See, eg, Order Approving Cross-border Insolvency Protocol, *Everfresh Beverages, Inc*, Case No 95-45405 (Bankr SDNY 20 December 1995) and Case No 32-077979 (Ont Sup Ct 20 December 1995).

38 See, eg, Cross-border Insolvency Protocol for Nortel Networks Inc and its Affiliates, *In re Nortel Networks Inc*, Case No 09-10138 (Bankr D Del 15 June 2009) and Case No 09-CL-7950 (Ont Sup Ct 14 June 2009); Cross-border Insolvency Protocol for Loewen Group Inc and its Affiliates, *In re Loewen Group Inc*, Case No 99-1244 (Bankr D Del 30 June 1999) and Case No 99-CL-3384 (Ont Sup Ct 1 June 1999).

39 See, eg, Cross-border Insolvency Protocols for Nortel Networks Inc and its Affiliates, *In re Nortel Networks Corp*, and Case No 09-CL-7950 (Ont Sup Ct 14 January 2009) and Case No 09-10138 (Bankr D Del 15 January 2009).

- *Asset preservation and recognition of stay proceedings.* While each forum administers assets within its jurisdiction, all of the tribunals are typically instructed to consider the rights of all beneficial interests, even those outside their territorial jurisdictions.[40] Official representatives are usually required to communicate to each other the known interests in property held by parties outside the jurisdiction where the assets are located in order to ensure that those assets are not depleted by local creditors. In addition, a stay proceeding barring creditor action in one jurisdiction is to be recognised as valid and effective in each other relevant jurisdiction. In the case of a multinational corporate group, these provisions are vital to ensuring that foreign creditors' rights are not undermined by the exercise of remedies by local creditors.
- *Inter-company claims.* These provisions establish terms for settlement of inter-company claims. Inter-company claims may be a particularly big concern in the case of the insolvency of a multinational corporate group.[41] Official representatives are usually directed to identify inter-company claims and make a good faith effort to resolve them. Inter-company claims provisions may also require that a particular accounting methodology be agreed on and used to quantify inter-company claims, in an effort to minimise the time and expense associated with disputes among members of the corporate group.

These provisions are by no means an exhaustive list of the provisions found within protocols, but they are generally representative of the main thrust of most protocols.

## Conclusion

Practitioners in international insolvency proceedings have wisely taken advantage of the harmonising effects of protocols, particularly in cases of multinational corporate group insolvencies. Not only are protocols likely to remain an important part of international insolvency practice, but they will almost certainly evolve and increase in both importance and complexity as international proceedings themselves become more complex. Because a multinational insolvency regime is unlikely ever to come into effect, protocols are likely to continue to be an important tool to address the difficult and ever-changing substantive and procedural complexities presented by cross-border insolvency cases.

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40 See, eg, Cross-border Insolvency Protocol, *In re Smurfit-Stone Container Corporation*, Case No 09-10235 (Bankr D Del 12 March 2009) and Case No 09-7966-00CL (Ont Sup Ct 12 March 2009); see also Principle 4B of the Concordat ('Each forum should administer the assets within its jurisdiction').

41 See, eg, Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, *In re Lehman Brothers Holdings Inc*, Case No 08-13555 (Bankr SDNY 12 May 2009); Cross-border Insolvency Protocol for Calpine Corporation and its Affiliates, *In re Calpine Corp*, Case No 05-60200 (Bankr SDNY 9 April 2007) and Case No 0501-17864 (ABQB 7 April 2007).