Cross-border Insolvency Agreements – Protocols from a Swedish Perspective

GÖRAN MILLQVIST

1. Introduction

In the middle of May 1997 Michael Bogdan published his book *Sveriges och EU:s internationella insolvensrätt*[1], and a few weeks later, UNCITRAL published "The Model Law on Cross-Border Insolvency".[2] These are two events in the area of insolvency law with lasting effect, admittedly with somewhat different magnitude and importance, but still important from a Swedish perspective. They both meant that major steps were taken in the development of an international insolvency regulation. Michael's book is still relevant in many parts as an accurate statement and discussion of the position of Swedish law in the area of cross-border bankruptcy and insolvency cases, especially regarding questions of Swedish jurisdiction over debtor assets abroad and the effects of foreign insolvency proceedings in Sweden.

The EU finalised its Insolvency Regulation (EIR)[3] in 2000, thereby unifying the positions of the Member States on at least some insolvency questions, although this has also produced other, new problems. Still, apart from this initiative, not much has happened in this area of the law from a Swedish perspective, at least on the surface and after just a cursory look. The Swedish legislation is reticent when it comes to international insolvency questions, apart from the EIR and legislation in relation to the other Nordic countries (see below).

The UNCITRAL Model Law, on the other hand, has achieved acceptance and has been established as national legislation in several parts of the

1 Michael Bogdan, *Sveriges och EU:s internationella insolvensrätt*, Norstedts Juridik, Stockholm 1997 (Sweden's and the EU's international insolvency regime).

2 Available at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.

3 Council Regulation (EC) No 1346/2000 of May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.

world. As of spring 2013, some 20 countries have enacted legislation based on the Model Law, among them Australia, Canada, Greece, Poland, Great Britain and the USA.[4] To a large extent the common law world has adopted the Model law as a suitable model for handling cross-border insolvency cases. In late spring 2012 INSOL Europe suggested that the Model Law should be adopted on an EU level and implemented in all Member States as national law.[5] However, this proposal has been criticised by some. An important future question, therefore, is whether the Model Law is a suitable model for other legal families than common law.

My aim for this short essay is not to make any thorough investigation into the intricacies of international insolvency law, but rather to give an overview and a short discussion from a Swedish perspective of a rather new phenomenon in this area of the law, the so-called *Protocols concerning cross-border insolvency agreements*. A *protocol* is a method developed under the auspices of the Model Law and also independently, to deal with the often very difficult procedural and material matters in large insolvency cases, especially when it comes to international company and enterprise groups. It is an agreement or a contract established by two or more parties involved in a specific insolvency proceeding which has cross-border implications.[6] In a way, it is a "second-best solution" to the problem of coordination of cross-border legal proceedings. The lack of truly supra-state insolvency legislation makes it necessary for the involved parties to simply agree by contract to such a regime for their specific case. Courts, insolvency administrators/trustees/receivers, creditors and debtors may often all in fact agree, at least to some extent, on major issues of insolvency proceeding in the acute situation and may therefore be willing to formalise it into a contract. The ultimate aim is of course to preserve value for all involved through a faster and more efficient procedure, be

4 Other countries are the British Virgin Islands, Columbia, Eritrea, Japan, Mauritius, Mexico, Montenegro, New Zealand, South Korea, Romania, Serbia, Slovenia, South Africa and Uganda. See http://www.uncitral.org-/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

5 Revision of the European Insolvency Regulation. Proposal by INSOL Europe, May 2012. Drafting Committee: Robert van Galen (chairman), Marc André, Daniel Fritz, Vincent Gladel, Frans van Koppen, David Marks QC, and Nora Wouters.

6 The UNCITRAL definition is: "'Cross-border insolvency agreement': an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest." *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, UN, New York 2011, p 2.

it a reorganisation, liquidation proceeding or both in an enterprise group setting.

The notion of a bargained-for agreement in the area of international insolvency law is not completely new, however. In his 1997 book, Michael Bogdan proposed a method for Swedish courts to grant authority to foreign bankruptcy administrators to dispose over the debtor's property situated in Sweden, despite the lack of formal legal authority. He described the idea as "a sort of agreement where the Swedish court dictates certain conditions and the foreign bankruptcy administrator declares his ability and determination to adhere to these [conditions]".[7]

Below I will first present the settings for these protocols and what they may consist of, and thereafter discuss them from a Swedish point of departure. As far as I know no Swedish entities have been directly involved in a protocol of this kind, and the overarching question is whether it at all would be possible.[8]

2. The setting

2.1 The EU Insolvency Regulation

From a national perspective, the EIR may be viewed as an instrument covering many of the questions otherwise dealt with in a protocol. The basic structure in the EIR for allocating an insolvency proceeding to a specific place within the EU is in itself such a question. A main insolvency proceeding may be commenced at the place (within the Union) where the debtor has his/her/its centre of main interest (COMI), Art. 3.1, with recognition and binding effect for the proceeding throughout the Union, Arts. 16 and 17, and if need be, secondary proceedings in other places within the Union, Art. 3.2. Likewise, the authority of the administrator or other representative of the debtor estate, when acting in other countries, Art. 18, is such a question. Another example is the regulation of the choice-of-law rules, e.g. Art 4. These are all instances that have to be addressed in a cross-border proceeding in order to achieve results.

[7] Bogdan, *Sveriges och EU:s internationella insolvensrätt*, p. 110. (My translation.)

[8] During autumn 2012, I asked the Chief Judges of the Bankruptcy Departments of the District Court of Stockholm and Gothenburg, Tore Gissin and Kerstin Ekstedt, and also the Chief Judge of the District Court of Gotland, Mikael Mellqvist, but none of them had any personal experience of taking part in a protocol.

However, the EIR does not deal with enterprise or company groups, at least not yet. It is difficult in many cases to establish the COMI of such a group as a whole based on the actual organisation of the group, when the EIR recognises only single legal and natural persons. The presumption rule in Art. 3.1 in favour of the place of incorporation (the seat) of a single company makes it difficult to handle situations where the company is perhaps only a small part of a larger whole. Conducting multiple main proceedings in several countries is a real problem as long as enterprise group insolvency is not dealt with within the EIR.[9]

As a response to the resolution mentioned in Note 8 of this article, the Commission has produced *a report* on the functioning of the EIR, *a proposal* for its amendment and *a communication* on a new European approach to business failure and insolvency.[10] It is proposed that hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons should be covered by the EIR. A complemented and refined definition of COMI is proposed, which include natural persons and, through a new recital, clarifies the circumstances in which the presumption that the COMI of a legal person is located at the place of its registered office can be rebutted.[11] Another proposal is to require Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register interconnected with other national insolvency registers, and also to introduce standardised forms for lodging claims. Lastly, a new Chapter IV A in the EIR is proposed, to coordinate insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and the courts involved in different

9 Cf. the statement of the European Parliament in its Resolution 17 October 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), "whereas groups of companies are a common phenomenon but their insolvency has not yet been addressed at Union level; whereas 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 reorganised as a whole and it may have to be broken up into its constituent parts, with consequent losses for the creditors, shareholders and employees;" http://www.europarl.europa.eu-/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&format=XML&language=EN.

10 12.12.2012, Com(2012) 742, 743, 744 final, http://ec.europa.eu/justice/newsroom/civil/news/-121212_en.htm.

11 The language of the new recital is taken from the "Interedil" decision of the Court of Justice of the EU, Case C – 396/09, judgment of 20.10.2011.

main proceedings to cooperate and communicate with each other; in addition, this legislation would give the liquidators involved in such proceedings the power to request a stay of other proceedings and to propose a rescue plan for the whole group.

In order to enhance cross-border proceedings, the proposed new EIR makes reference in several instances to cooperation through the use of protocols. In the proposed new wording of Art. 31, concerning cooperation and communication between liquidators, it is stated that such cooperation "*may take the form of agreements or protocols*". And in new Art. 31a, concerning cooperation and communication between courts, it is stated that the recommended cooperation may be implemented by any appropriate means, "*including coordination in the approval of protocols*". This recommendation is also relevant for the cooperation and communication between liquidators and courts, Art. 31b. In addition, in the new chapter IV A (Art. 42a – 42d) on group-of-companies insolvencies, protocols are recommended for the necessary cooperation between liquidators and courts in joint proceedings.

2.2 The UNCITRAL Model Law

The UNCITRAL Model Law, according to Art. 1, paragraph 1, is designed to apply where assistance is sought in an enacting State by a foreign court or a foreign representative in connection with a foreign insolvency proceeding; or assistance is sought in the foreign State in connection with a specified insolvency proceeding under the laws of that State; or a foreign proceeding and an insolvency proceeding under specified laws of the enacting State are taking place concurrently, in respect of the same debtor; or, lastly, creditors or other interested persons have an interest in requesting the commencement of, or participation in, insolvency proceedings under specified laws of the enacting State.

The Model Law is said to be built on four distinct principles. The first is *the access principle*, which establishes the circumstances in which a "foreign representative" has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought. The second is *the recognition principle*; the receiving court may make an order recognising the foreign proceeding, as either a foreign "main" or "non-main" proceeding. The third principle is *the relief principle*, which refers to three distinct situations. In cases where an application for recognition is pending, interim relief may be granted to protect assets within the jurisdiction of the receiving

court. If a proceeding is recognised as a "main" proceeding, automatic relief follows. Additional discretionary relief is available in respect of "main" proceedings, and relief of the same character may be given in respect of a proceeding that is recognised as "non-main". The fourth principle is *the cooperation and coordination principle*, which places obligations on both courts and insolvency administrators in different States to communicate and cooperate to the greatest extent possible.[12]

The public policy objectives behind these principles have been formulated by UNCITRAL:

> "(a) The need for greater legal certainty for trade and investment; (b) The need for fair and efficient management of international insolvency proceedings, in the interests of all creditors and other interested persons, including the debtor; (c) Protection and maximization of the value of the debtor's assets for distribution to creditors, whether by reorganization or liquidation; (d) The desirability and need for courts and other competent authorities to communicate and cooperate when dealing with insolvency proceedings in multiple States; and (e) The facilitation of the rescue of financially troubled businesses, with the aim of protecting investment and preserving employment."[13]

In Chapter IV (Art. 25–27) of the Model law, the basic principle of cooperation is formulated, both between courts of different countries and between administrators/liquidators. The simple rule is that all involved parties to a cross-border insolvency proceeding should cooperate to the extent necessary to facilitate the proceedings and in Art. 27 (d); concerning forms of cooperation, one possibility is the approval or implementation by courts of *agreements concerning the coordination of proceedings*.

2.3 The content and application of protocols

A protocol is an agreement or a contract concerning the administration of an insolvent debtor who is or has been established in several different jurisdictions, and who is the target of parallel proceedings in these jurisdictions. The agreement in the form of a protocol is in essence a tool by which the proceedings may be organised in an efficient way and choice-of-law rules may be established, as well as rules regarding material matters such as consolidation

[12] *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, UN, New York 2011, p. 5.

[13] *Ibid.*

of assets and priority rights among creditors. However, the protocol is first and foremost a tool for information and communication between the affected parties.

Over the last couple of years, several guidelines or best practices for determining the content of protocols have been published. An early example is *the Cross-Border Insolvency Concordat 1995*, published by The Insolvency Committee of the International Bar Association (former Committee J). This document lays out ten principles to provide guidance to courts and other concerned parties, and focuses mainly on coordination of proceedings and principles of private international law.[14] In the United States the American Law Institute (ALI) published the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* in 2000, and this has been used in several protocols over the years.[15] This document has developed over time, and as of 2003 it was transformed into *Principles of Cooperation among the member-states of the North American Free Trade Association*. These principles in turn were the basis for a further initiative in 2006 by the ALI/III to adjust them for global use. A 2012 report published by Ian F. Fletcher and Bob Wessels, *Global Principles for Cooperation in International Insolvency Cases*, contains principles for cooperation and guidelines for court-to-court communications adjusted for global use.[16] Already in 2007, and together with Miguel Virgós, Bob Wessels published *the European Communication and Cooperation Guidelines for Cross-border Insolvency* (the Co-Co Guidelines).[17] These are non-binding provisions for protocols, particularly in respect of insolvency proceedings where the EIR is the applicable law. However, to a large extent, these principles are consumed by the recently-mentioned global principles and the proposed amendments to the EIR.

An advantage with protocols is the possibility to adapt and change the content to what the situation requires. Depending on the facts of a specific insolvency setting, the protocol may be limited to a few crucial matters, or extended to cover major issues of the procedure for liquidation and/or recon-

[14] Paul H. Zumbro, Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool, 11 Business Law International 157 (165) 2010.

[15] *Ibid.* at 166 foot note 31 for case references. The publication is available at www.ali.org/doc/Guidelines.pdf In 2001 the International Insolvency Institute (III) adopted and endorsed the Guidelines and recommended them for use.

[16] The materials are available at www.iiiglobal.org/component/jdownloads/viewcategory/36.html.

[17] Available at http://bobwessels.nl/wordpress/?s=2007-09-doc+1.

struction. An example of the latter – although not entirely successful – is the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, an eleven-page contract intended to encompass the whole of the Lehman Group and incorporating the full text of the ALI/III Guidelines. Despite these potential variations, it is possible to point out some issues which are more frequent and recommended in protocols.[18]

Not surprisingly, many protocols start with a *Purpose and aims* clause, stating the need for a specific regulation in the case at hand and pointing out the importance of cooperation and communication, as well as stating that the Protocol will respect the rights of the parties in question. A preamble of this kind may also point to the need for information and data sharing, asset preservation, comity and inter-company claim reconciliation.

Another common feature is a *Right to appear* and be heard for creditors and representatives before the relevant courts. This may also include questions of jurisdiction for these courts.

One of the main areas for regulation is of course *Communication and cooperation*. These provisions can make explicit the methods courts and representatives of the debtor estate should use to coordinate the proceedings and create a framework for means of communication, as well as how and when this communication shall take place. The provisions may include agreements to share non-public information and to conduct joint hearings on matters of importance and relevance to the multiple proceedings.

Questions of *asset preservation* and the closely connected *recognition of stay proceedings* are often of a more controversial nature. In a cross-border proceeding, each separate proceeding is still a national proceeding, and for various reasons taking account of and respecting the interests of foreign creditors and debtor estates may be difficult. There may be a need for reciprocity and trust (comity) in order to ensure that assets are not depleted as a result of separate actions by local creditors in other countries. In the case of a multinational enterprise group, these provisions may be crucial in order to ensure

[18] See Paul H. Zumbro, "Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool", 11 Business Law International 157(167) 2010, and Anthony 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 Journal of International Law 811(829) (2012). The principals of Lehman Brothers International Europe and Lehman Brothers Japan refused to sign the protocol because of unacceptable limitations on possible avoidance actions and intra-company claims; see Sexton at p. 168.

that foreign creditors' rights are not undermined by the exercise of remedies by local creditors, and vice versa. Lastly, *inter-company claims* are an important area of regulation in protocols. Terms for recognition and settlement may be a particularly significant concern in the case of insolvency of a multinational enterprise group. Provisions for methods of identifying and resolving inter-company claims may be crucial, and often include requirements for agreed-upon methods of accounting for quantifying purposes.

These different provisions are just a short list of examples of matters that may be regulated in a protocol, but they may be viewed as representative for the content of several protocols in actual use.[19]

3. Swedish insolvency law in an international setting

3.1 Some general observations

Swedish insolvency law with domestic application consists primarily of the Bankruptcy Act 1987 (BA), and the Reorganisation of Enterprises Act 1996 (REA).[20] Cross-border insolvency issues are dealt with in the EIR, in the Act on Bankruptcies Covering Property in Other Nordic Countries 1981 and in the Act on the Effects of Bankruptcies in Other Nordic Countries 1981.[21] Cross-border insolvencies involving parties from countries other than those in Scandinavia and the EU are not regulated in Swedish law. The forum rules of the Code of Procedure 1942, Chapter 10, are utilised to establish jurisdiction in Sweden in an international case.[22] Conflict-of-law matters are dealt

[19] Zumbro, *ibid.*, Cf. *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, UN, New York 2010, p. 36 et sec. for a more extensive list of common provisions.

[20] Konkurslag (Swedish Statutes 1987:672) and Lagen om företagsrekonstruktion (Swedish Statutes 1996:764). The Enforcement Code (Utsökningsbalken, Swedish Statutes 1981:774) and the Reorganisation of Personal Debt Act (Skuldsaneringslagen, Swedish Statutes 2006:548), are not dealt with here.

[21] Lag om konkurs som omfattar egendom i annat nordiskt land (Swedish Statutes 1981:6) and Lag om verkan av konkurs som inträffat i annat nordiskt land (Swedish Statutes 1981:7), based on Konvention den 7 november 1933 mellan Sverige, Danmark, Finland, Island och Norge angående konkurs (nordiska konkurskonventionen (Convention of 7 November 1933 between Sweden, Denmark, Finland, Iceland and Norway concerning bankruptcy (the Nordic bankruptcy convention)), available in Swedish in Government proposition 1980/81:35 p 33.

[22] In a recent case, NJA 2010 p. 734, the Supreme Court established jurisdiction in Sweden based on Ch. 10, sec. 3 of the Code of Procedure 1942, in a case where the bankruptcy estate of a franchisee demanded avoidance of a settlement agreement made between the franchisor and the franchisee. See also the judgements of the Supreme court in NJA 2013

with according to unwritten principles of choice of law. Sweden has not adopted the UNCITRAL Model Law or any similar rules to handle cross-border insolvencies globally.

The Swedish BA is based on the assumption of a level playing field for the creditors when their common debtor has become insolvent. This basic endeavour is primarily visible in the prohibition against separate actions, i.e. through foreclosure, Ch. 3, sec. 7 and 8 BA, after bankruptcy has been declared, and the rules on avoidance of transactions, Ch. 4, sec. 5–13 BA. The bankruptcy creditors should be treated on an equal basis. However, in the Swedish system, this is a responsibility primarily for the bankruptcy administrator (Sw. *konkursförvaltare*), not the courts. A court cannot order the administrator to take account of a single creditor's or class of creditors' interests in an on-going bankruptcy proceeding. The liability question that may be involved has to be dealt with as a separate question on the initiative of the concerned creditor or creditors.

Would it be possible for a Swedish bankruptcy administrator to agree to a protocol that would affect the Swedish debtor estate? And would it be possible for the relevant Swedish bankruptcy court to be a party to the protocol in order to facilitate faster and cheaper proceedings? It is of course not possible to answer "yes" or "no" to these questions without reservations. The interesting question is rather how much room there is in the Swedish insolvency system for protocols as a means to enhance the administration of the proceedings and to preserve value for the creditors.

A bankruptcy administrator is under the obligation to try to preserve as much value as possible of the debtor estate, according to Ch. 7 sec. 8 BA, and if this goal can be better achieved through a protocol, maybe one should be used.[23] However, it must be stressed that the Swedish legal system does not recognise much independent active participation by the courts when it comes to the administration of bankruptcy and reconstruction schemes, and the administrator is bound by the rules in the BA concerning administration

p. 22 and NJA 2013 p. 31, concerning jurisdiction for Swedish courts in avoidance cases with defendants domiciled in Norway and St. Kitts and Nevis, respectively. In both cases the Supreme Court founded jurisdiction for Swedish courts on an extended analogy to the EIR and Ch. 10 of the Code of Procedure 1942.

23 Cf. the statement by *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, UN, New York 2010, p. 34, "Some commentators take the view that the insolvency representative's responsibility to the insolvency estate could constitute a duty to enter into such an agreement."

and winding up of the estate. However, if the proposed changes and amendments of the EIR are made, Sweden will have to adapt to the new rules, including the references to the use of protocols.

A fairly safe and, generally speaking, probably uncontroversial observation is that if a protocol makes it easier to apply and uphold the rules that in any case would be applicable, there is authority for both the administrator and the courts to take part in such an agreement with binding effect on the relevant party. As long as it only is a question of best application and procedure under the relevant legal rules, there should be no objections, especially if in the end it produces a better preservation of value of the debtor estate.

3.2 General contract law and insolvency

The basic principle of freedom of contract extends into insolvency law. Bankruptcy does not in itself mean that on-going contractual relations between the debtor and third parties are rescinded or *ipso facto* invalid. However, the bankruptcy of a party changes the scene for all involved, and new considerations must be made. The winding up of the estate will mean that losses will be realised, and the questions are who will bear these losses and in what amounts. The bankruptcy administrator supersedes the debtor completely as representative of the estate and is thereby vested with the authority to take any action the debtor could have taken, including to take on liabilities towards the existing creditors and other third parties, with a binding effect for the estate. There should not be any general obstacles according to Swedish law to participation by the administrator to a protocol concerning e.g. a coordination of proceedings in a company group bankruptcy.

As a rule, creditor agreements concerning priority and subordination among creditors are valid among the contracting parties according to Swedish law. However, this does not extend to include the debtor or the bankruptcy estate (the administrator) of the debtor, unless the debtor has been a direct party to the agreement or the administrator enters into the agreement on behalf of the estate. But if that is the case, a subordination of a claim is valid and binding, both in bankruptcy and in composition in connection with reorganisation.[24] Such agreements must not be discriminatory towards creditors who are not party to the agreement. It is not possible to deteriorate

[24] Cf. sec. 18 of the Rights of Priority Act (Swedish Statutes 1970:979).

the value of another creditor's claim through a contract to which that creditor is not a party.

A bankruptcy administrator has the authority to take all steps necessary to liquidate the estate, Ch. 8 sec. 1 BA. He or she is under an obligation to try to obtain as good a price as possible, be it through a sale of a business as a going concern or through an auction (a fire sale) of the assets. This means that the administrator can take whatever steps are necessary to meet this goal, as long as he or she complies with the demands of the BA concerning communication with the creditors and reporting on the progress of the proceeding to the supervision authority, Ch. 7 sec. 10 BA.[25] In terms of business decisions the administrator has a rather independent position, and his or her responsibility to achieve any specific quantitative results is limited, but he or she is under a strict rule of compliance with the formalities of the BA. As long as a protocol regulates the commercial, business aspects of the proceedings, there should be ample room for the administrator to take part with binding effect for the estate. On the other hand, it would be controversial for the administrator and/or the court to adjust the formal administration rules of the BA through a protocol. The protocol would not take priority over the BA.

3.3 Conflict of interest?

One aspect to observe and address when it comes to participating in a protocol is the possibility of conflict of interest and the position of the administrator. The use of protocols may increase the competition between individual creditors and groups of creditors of different classes and different countries. There is a risk that a protocol – perhaps contrary to its intention – could be viewed as a vehicle for the promotion of certain creditors at the expense of others. A creditor or a group/class of creditors may consider themselves to be in a worse position than would have been the case without the protocol, especially in cases where they are referred to a foreign proceeding or the courts of another country to prove their claims. However, if the Protocol is a genuine attempt to further a cross-border proceeding to the benefit of *all* creditors, this problem is often one of information and perhaps education. In most

[25] Cf. The Supreme Court cases NJA 2001 p. 99 and NJA 2005 p. 443, where administrators were held personally liable for creditor losses due to a lack of communication (information) concerning actions taken or not taken by the administrator.

cases it is perhaps more expensive to have these matters resolved by litigation than by a coordinated proceeding involving all concerned parties.

4. Summary

Protocols may be a tool of efficiency in the administration of cross-border insolvency proceedings, but it should be recognised that they represent a second-best solution to the problems of such proceedings. A truly international legal regime, with functional rules for cross-border issues, would certainly be better. However, such a regime is not foreseeable in the near future, not even in Europe and notwithstanding the EIR. So, as an often necessary complement to the legal infrastructure of insolvency law, the protocol should be welcomed in national law and given sufficient room to function as the facilitating tool it is meant to be.