Conflicts of interest, intra-group financing and procedural coordination of group insolvencies

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Abstract

Modern insolvency law instruments recognise the specificity of enterprise group insolvencies, premised on the existence of close operational and financial links between group members. It is widely accepted that maximisation of insolvency estate value and procedural efficiency depend on coordination of insolvency proceedings opened with respect to group entities. Such coordination is prescribed in the European Insolvency Regulation (recast), the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Enterprise Group Insolvency and the recently reformed German insolvency law. Yet in insolvency, group members retain their own insolvency estates and pools of creditors. This is based on the traditional company law principle of entity shielding. Active communication and cooperation between insolvency practitioners and courts do not sit well with the separate (atomistic) nature of insolvency proceedings, as well as different and oftentimes conflicting interests of creditors in such proceedings. As a result, communication and cooperation may be restricted in a situation of conflicts of interest. This article explores how in the context of group distress the risks arising from conflicts of interest can be controlled and mitigated, while ensuring efficient
cross-border cooperation and communication to the maximum extent possible. It analyses three cutting-edge coordination mechanisms, namely (a) cross-border insolvency agreements or protocols, (b) special (group coordination and planning) proceedings and (c) the appointment of a single insolvency practitioner. It concludes that both the likelihood and significance of conflicts of interest correlate with the degree of procedural coordination. Therefore, conflict mitigation tools and strategies need to be tailor-made and targeted at a specific level and coordination mechanism.

1 | INTRODUCTION

No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. [Matthew 6:24].

This biblical warning remains topical today. It relates to a situation where a person acts for the benefit of two (or more) parties in a situation where these parties have different, even contrasting interests. This article addresses this situation and discusses the issue of conflicts of interest, but does so in the context that has not yet received much attention, namely procedural coordination of insolvency and restructuring proceedings opened with respect to members of a multinational enterprise group (MEG).

Whenever several members of a group of companies become financially distressed and enter insolvency or restructuring proceedings, conflicting situations between them (i.e., between insolvency estates and pools of creditors) become particularly pronounced. Different groups of creditors, debtors and even national (financial, regulatory and tax) authorities may “compete” with each other in achieving the most beneficial position. The high intensity of conflicts is manifested in intra-group financial relations. Execution of intra-group transactions (e.g., loan repayment, enforcement of a guarantee or collateral), avoidance of related-party transactions (e.g., challenge of a guarantee or collateral), as well as rescue financing extended by one group member to another are inherently conflict-driven.

In order to avoid such conflicts or even their appearance, whether actual or potential, purely atomistic (entity-by-entity) treatment of group entities can be embraced. As a result, contractual bonds and channels for communication and cooperation between enterprise group members may be interrupted. This solution, although based on the longstanding doctrine of corporate separateness, fails to take into account the intertwined economic and information links within the group. Most importantly, it does not contribute to the accomplishment of insolvency law goals. In particular, maximisation of the insolvency estate value and procedural efficiency depend on coordination of insolvency proceedings opened with respect to group entities.
Failure to achieve this leads to delays and additional costs (e.g., from litigation over intra-group claims). The experience of the recent decade, since the failure of Lehman Brothers and Nortel Networks, has shown that group-wide solutions based on communication and cooperation between insolvency practitioners and courts is key to orderly and efficient resolution of financial distress. In the absence of such coordination, optimal realisation of the debtor(s)' assets or successful restructuring are unlikely. In the last two decades a number of solutions have been proposed by legislators or have been worked out in practice to facilitate administration of insolvency estates in corporate groups and to ensure efficient group restructuring.

Despite the growing body of mechanisms and channels to exchange information and coordinate parallel insolvency or restructuring proceedings, important limitations to such activities remain. One of the major limitations relates to the avoidance of conflicts of interest. The European Insolvency Regulation (Recast EIR), the draft Guide to enactment of the UNCITRAL Model Law on Enterprise Group Insolvency, many national laws and soft law instruments mention such a limitation.

This article explores the concept of “conflict of interest” in the context of group insolvency, and intra-group financial arrangements, in particular. It investigates how the risks arising from conflicts of interest can be controlled and mitigated, while ensuring efficient cross-border cooperation and communication. It seeks to find the right balance in the application of general principles of procedural effectiveness and the more specific needs to ensure efficient and effective resolution of international (cross-border) insolvencies of enterprise groups.

The article starts with an introduction to group insolvencies and principles underlying their resolution (Section 2). Section 3 defines what a conflict of interest is and how it plays out in insolvency of MEGs. The following sections discuss three mechanisms or scenarios in which a clash between procedural efficiency and separate entity treatment (protection of separate pools of assets and creditors) may arise. These are:

1. communication and cooperation between courts and insolvency practitioners by way of cross-border protocols and agreements (Section 4);
2. coordination of parallel insolvency/restructuring proceedings with the opening of special proceedings (Section 5);
3. appointment of the same insolvency practitioner in separate insolvency proceedings of group members (Section 6).

Section 7 analyses possible responses to the problems created by potential or actual conflicts of interest in cross-border enterprise group insolvencies. Section 8 concludes.

In practice, crisis situations vary and have complex attributes. It is impossible to conceptualise every possible scenario and offer a one-size-fits all solution or strategy. Unlike rules and policies, principles attempt to establish broad standards of behaviour. For this reason, application of the principle-based approach to the study of conflicts of interest in international group insolvencies appears suitable and forward-looking.

It is also important to clarify that the below analysis primarily concentrates on the issue of conflict of interest to the extent that it arises from actions of insolvency practitioners (IPs), group coordinators and group representatives. Therefore, conflicts of interest related to courts (e.g., in a situation where one court oversees or directs insolvency of several group members), their impartiality and independence fall outside the article's scope. The author also accepts that conflicts of interest could be affected by special regulation, such as professional or ethical rules applicable to attorneys, or by the fact that there is no insolvency practitioner appointed and the
debtor stays in control (debtor in possession). These special considerations are left for future research.

2 | GROUP INSOLVENCIES AND PRINCIPLES OF INTERNATIONAL INSOLVENCY LAW

A condensed summary of major international insolvency law principles can be found in Principle 1.1. of the ALI-III Global Principles of Cooperation in International Insolvency Cases. It states that:

“[t]hese Global Principles embody the overriding objective of enabling courts and insolvency administrators to operate effectively and efficiently [...] with the goals of maximizing the value of the debtor’s global assets, preserving where appropriate the debtors’ business, and furthering the just administration of the proceeding.”

In a similar vein, and in application to group insolvencies, the EIR Recast stipulates that where insolvency proceedings relate to enterprise group members, insolvency practitioners should cooperate:

“to the extent that such cooperation is appropriate to facilitate the effective administration of those proceedings.”

Bork proposes a hierarchy of principles of cross-border insolvency law. Accordingly, the principle of communication and cooperation in international insolvency cases, while treated as a standalone principle, serves the principle of (procedural) efficiency. In other words, for insolvency proceedings to be efficient, it is necessary to ensure communication of relevant information and cooperation between insolvency practitioners and courts. However, procedural efficiency is not the goal in itself, but a necessary component and a requirement to secure optimal realisation of the insolvency estate(s) (asset value maximisation). The same logic is followed in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, which attributes failed rescue attempts and lack of fair and efficient administration of cross-border insolvency proceedings to uncoordinated approaches to international insolvencies.

The principles of procedural efficiency and asset value maximisation are equally applicable in the context of groups of companies. However, to uphold such principles, special rules might be necessary. Until fairly recently the problem of insolvency of corporate groups has not been widely recognised or addressed in regulation. Thus, both the UNCITRAL Model Law on Cross-Border Insolvency (1997) (MLCBI) and the original EIR (2000) lack provisions addressing enterprise group insolvency. Since then, important steps have been taken to fill this regulatory gap. Such steps include the adoption by UNCITRAL of Part III of the Legislative Guide on Insolvency Law (Treatment of enterprise groups in insolvency), the Recast EIR (in effect since 26 June 2017) and the UNCITRAL Model Law on Enterprise Group Insolvency of 2019 (MLG).

This new “generation” of legal texts recognises the need to adjust traditional approaches of insolvency law to the characteristics and business reality of corporate groups. For example, in closely integrated corporate groups, separate entities may be responsible for employment, attraction of funding on capital markets and further financing of other group members (i.e. special purpose financing vehicles), holding of valuable assets (e.g., land, intellectual property
rights) or contracts. In this context, an entity-by-entity (uncoordinated) liquidation leads to suboptimal results and returns to creditors. To the contrary, coordinated going concern sale of the enterprise as a whole, facilitated by proper communication and cooperation, maximises the estate value and may benefit creditors of each entity involved. Also in cases of rescue and restructuring, the interdependence of group entities may require group-wide solutions to prevent the domino-like collapse.

A well-known example where the lack of cooperation between separate proceedings has resulted in dismemberment of the debtor's business and loss of value is insolvency of KPN Qwest. KPN Qwest was a telecom group that owned and operated rings of fibre-optic cable around Europe and the United States. The parts of the cable belonged to different group entities (French part by the French subsidiary, the German part by the German subsidiary, etc.). When the Dutch holding company collapsed in 2002, its subsidiaries were forced into insolvency and their assets were sold on a separate country-by-country basis. This result was suboptimal as the value of the ring was much higher compared to the value of its isolated sections. The opposite outcome was reached in the insolvency of Nortel Networks, a global networking and telecommunications firm that went insolvent in 2009. As a result of cooperation between parallel proceedings running in Canada, the United States and Europe, and prompted by the entry into a cross-border insolvency protocol, the group’s assets (most important, its patent portfolio) were sold for USD 7.3 billion–USD 2.8 billion on account of business lines and USD 4.5 billion for intellectual property rights.

While it is commonly recognised that communication and cooperation in international insolvency cases facilitates efficiency, there are important limitations to it. The next section introduces one such constraint, namely the requirement to avoid conflicts of interest.

### 3 CONFLICTS OF INTEREST IN INTERNATIONAL INSOLVENCY CASES

Many instruments in the area of insolvency law mention “conflict of interest” and consider it to be a legitimate impediment to cross-border exchange of information and collaboration. The rationale comes from the need to ensure that an IP remains neutral and trustworthy, and is capable of safeguarding and enriching the insolvency estate of a particular entity.

The Recast EIR mandates insolvency practitioners and courts to cooperate to the extent that it does not entail any conflict of interest. While neither the MLCBI, nor the UNCITRAL Practice Guide directly address the issue at hand, the UNCITRAL’s Legislative Guide on Insolvency Law highlights the importance of ensuring independence of insolvency practitioners (Parts I and II) and pertinence of conflicts in situations where a single insolvency practitioner is appointed to administer several members of an enterprise group (Part III). As to other instruments promoting cooperation in international insolvency cases, some of them make reference to “conflict of interest,” while others are silent about it. One common feature of the instruments that do take into account “conflict of interest” as a term, is that they do not define what it is, either in a general or more specific way, and instead consider rather obvious, narrow cases or instances (e.g., appointment of the same insolvency practitioner or an intermediary).

This section first considers the definition of a conflict of interest, from a broad interdisciplinary perspective (3.1). It then discusses the situations where conflicts of interest may frequently arise, as applied to a scenario of cross-border enterprise group insolvency (3.2).
3.1 | Defining conflict of interest

The phenomenon of conflict of interest is, evidently, not peculiar to insolvency. Conflicts of interest occur in medical services, for example, when a doctor recommends medicine manufactured by a pharmaceutical company that supplies medical equipment to that doctor or pays for his or her vacation. In a corporate setting conflicts exist when directors or officers, in breach of their fiduciary duties, take an opportunity for themselves, instead of sharing it with the company they serve (i.e., corporate opportunity). In financial services, conflicts may arise from activities of investment banks simultaneously involved in advisory and underwriting services.

It is evident that the notion of “conflict of interest” transpires various industry segments and that a conflict of interest is distinct from the notion of a conflict. However, a clear and generally accepted definition of what it actually is, is difficult to find. Latham suggests that a person has a conflict of interest:

“when, in the presence of some duty to pursue the interests of another, she is motivated by self-interest to do something inconsistent with that duty.”

Clearly, this definition covers the instances of self-dealing and other situations in which a person gets direct or indirect benefit from his or her actions. Nevertheless, this definition is too narrow as it excludes cases with no personal interest or benefit. Carson offers a three-prong definition of a conflict of interest:

1. an individual has duties to a party in virtue of an office or a position;
2. this individual is impeded or compromised in performing such duties; and
3. the impediment follows from that person’s interest (broadly construed) that is incompatible or seemingly incompatible with fulfilling those duties.

This definition covers not only instances of self-interest, but also situations that make it problematic to perform official duties due to other reasons.

It is also worth emphasising that a conflict of interest appears whenever it becomes difficult to perform one’s official (fiduciary) functions, even though such performance remains theoretically or practically possible. The difficulty may be determined:

“in terms of what an ordinary person (a person of ordinary moral virtue) would find difficult.”

When applied to the context of insolvency and keeping in mind that an IP should be neutral, competent and trustworthy, such difficulty may be evaluated from the perspective of third parties, such as creditors, shareholders and even courts (third-party perspective). The definition proposed by Carson is used as a point of departure in this article.

3.2 | Conflicts of interest and intra-group relations in group insolvencies

Formation of corporate groups is frequently dictated by economic, administration, risk-allocating and financial considerations that all contribute to business synergies. These synergies
may result in highly integrated and centralised groups of companies, operating across national borders. As noted above, the characteristic feature of insolvency (and for that matter, company law) is strict adherence to a corporate form and separate treatment of group members. Various tools have been utilised to overcome or mitigate the emerging dichotomy between the economic and legal reality, from less far-reaching (e.g., exchange of certain information) to more intrusive (e.g., procedural and substantive consolidation).

This article analyses three scenarios or coordination mechanisms in which conflicts of interest are likely to arise:

- communication between separate insolvency proceedings with the help of cross-border insolvency protocols;
- procedural coordination of insolvency proceedings, including the opening of group coordination or planning proceedings; and
- appointment of the same IP in multiple insolvency proceedings.

This is a horizontal classification of tools used in group insolvencies to tackle the still prevailing separate entity approach. On a vertical level, thus relevant for each scenario described above are certain common themes or topics that could lead to or trigger conflicts of interest. These include:

1. enforcement of intra-group claims;
2. avoidance of intra-group (related party) transactions; and
3. postcommencement (rescue) financing within corporate groups.

In light of this taxonomy, the analysis that follows primarily concentrates on impersonal conflicts (i.e., conflicts not involving personal bias or self-interest) and intra-group financial transactions, as a common theme.

The main reason why conflicts between group members intensify in insolvency proceedings is legal (entity) separateness. Each group member has its own insolvency estate, whose value an IP appointed in the respective proceeding is tasked to safeguard and enhance. Also, each group member has its own pool of creditors, separate from the pool of creditors of other group entities. Thus, generally speaking, a conflict may arise from the impairment of the value of one group entity’s insolvency estate to the benefit of another group entity’s insolvency estate. As an example, Moss and Smith, commenting on Article 56 of the Recast EIR (“Cooperation and communication between insolvency practitioners”), note that whenever there is a disputed claim between two group entities, an obligation of IPs to cooperate may “need to be circumscribed accordingly.” This is due to the fact that such cooperation may result in the exchange of information that can prove instrumental in substantiating a claim of one group entity against the other, therefore potentially to the detriment of that other entity and its creditors. Procedural consolidation and the use of special coordination proceedings facilitate information exchange to a greater extent, further aggravating the risk of conflicts of interest.

Appointment of the same IP in proceedings of several group members essentially takes down most of the barriers on the way of sharing entity-specific information, making the problem of conflicts of interest particularly acute. This same IP has to enforce intra-group claims and challenge intra-groups transactions, while acting both as a representative of the claimant and of the respondent. It is obvious that the interests of these parties contradict each other, that is, the respondent is not interested in paying back the claimant or returning the proceeds of an
undervalue or a preferential transaction. The same logic applies to the extension of rescue financing—while benefiting the receiving party (recipient of funds, guarantee or collateral), such financing may pose significant risks to the providing party.

4 \ COMMUNICATION IN CROSS-BORDER INSOLVENCY CASES: PROTOCOLS

It is widely recognised that proper communication and cooperation in international insolvency cases is necessary to ensure efficient administration of insolvency proceedings and insolvency estates. Certain regional and national laws oblige courts and IPs to cooperate and exchange information with each other. As noted above, the Recast EIR requires that courts and IPs appointed in proceedings concerning a member of the group cooperate with each other.39 The MLCBI40 and most jurisdictions that have passed legislation on its basis41 mandate cooperation with foreign courts and foreign representatives. Duty of cooperation and communication can also be found in some non-Model-law based legal systems.42 To the extent that law establishes a duty on IPs and courts to communicate and cooperate, fulfilling such duty may serve one interest and work against another.

There are various tools that can be used to facilitate management of cross-border insolvencies and promote communication and cooperation between different actors. One of these tools is known as a cross-border insolvency agreement or a protocol.43 This section introduces cross-border insolvency protocols and explores to what extent their use can create, increase or mitigate the risk of conflicts of interest.

4.1 \ Cross-border insolvency protocols: Introduction

According to the Practice Guide, a cross-border insolvency agreement is:

“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.”44

While their exact nature is not entirely clear,45 protocols have evolved as a judicial innovation and as a response to the increasingly global businesses. They have been used in liquidation and restructuring proceedings, opened against a single entity or different members of an enterprise group. It has been argued that at the initial stage protocols served the purpose of information exchange, while later they have grown into an instrument to negotiate shared measures and solutions, mostly of procedural nature.46 Already in 2007, the CoCo Guidelines strongly endorsed conclusion of protocols concerning cooperation:

“as a means to codify coordination in decision making procedures related to two or more insolvency proceedings.”47

The possibility of entering into insolvency protocols and agreements is directly recognised in the Recast EIR and the MLCBI.48

The practice of cross-border insolvency protocols dates back long before the adoption of the above instruments. One notable and, on the global scale, probably the first example comes from
the Maxwell case. Maxwell Communication Corporation plc (Maxwell) was a UK-incorporated media holding company. The Maxwell group consisted of more than 400 subsidiaries worldwide and had assets located in Bulgaria, Israel, Germany, Canada, as well as a large U.S. presence with more than USD 700 million in value. Following the death of a media tycoon Robert Maxwell in 1991, Maxwell experienced a wave of instability and, unable to perform its obligations under the UK credit facilities, it filed a pre-emptive Chapter 11 petition in the United States on December 16, 1991. The very next day, Maxwell's directors also petitioned for an administration order in the United Kingdom. As a result, one company was placed into administration in England and a Chapter 11 proceeding in New York, since both the UK and U.S. courts had well founded jurisdictional basis under national insolvency law. Uncoordinated handling of two concurrent primary proceedings opened against Maxwell could have disturbed efficient administration of the insolvency estate. As a way to mitigate discrepancies between the proceedings and provide the basis for the “Plan of Reorganization” a protocol was negotiated. Under the protocol, the UK joint administrators and the U.S.-appointed examiner undertook to coordinate insolvency proceedings, inter alia, by requiring the consent of the examiner for certain actions performed by the administrators.

A similar practical approach was taken in insolvency of the Lehman Brothers group, the largest insolvency in history with over USD 600 billion in liabilities, over 75 separate proceedings and more than 16 official representatives. According to the U.S. court documents:

“[t]he chaos that ensued was unprecedented and presented the potential for highly fractious proceedings permeated by years of extended, complex and expensive litigation among competing interests and entities.”

In order to coordinate multiple insolvency proceedings opened against Lehman Brothers Holdings Inc. and its affiliates worldwide, the protocol was signed by most of the official representatives of companies belonging to the Lehman Brothers group. This protocol served the purpose of ensuring proper notification, communication and data sharing between insolvency practitioners appointed in insolvency proceedings of the Lehman Brothers group of companies. This protocol will be examined in more detail in the following sections.

Despite the gradual rise of protocols, especially in the last decade of the 20th and the first decade of the 21st century, their systematic study and centralised collection is largely absent. This article aims to fill a small part of the existing gap by investigating a sample of 31 cross-border insolvency protocols dating from 1994 to 2019. Of particular interest are provisions of protocols concerning exchange of information between group members (i.e., IPs appointed in respective proceedings), treatment of intra-group financing transactions, claims relating to them (including transaction avoidance claims) and postcommencement (rescue) financing. From the outset, it is important to clarify that while the selection of protocols does not claim to be comprehensive or representative, it can serve as a starting point for discussing the approaches taken in these protocols to the problems examined herein.

4.2 Exchange of information under insolvency protocols: Limitations

A good start can be made by summarising some common elements and themes, characteristic of the majority of protocols analysed. The purpose and goals of protocols are usually formulated in broad terms of promoting the orderly and efficient administration of insolvency proceedings
to, among other things, maximize the insolvency estate value, reduce the costs associated with parallel and duplicated efforts, ensure cooperation and respect for comity among courts, debtors and insolvency practitioners. All the protocols specifically highlight the independence (independent jurisdiction) of courts involved in cross-border communication and cooperation. Other typical provisions relate to mutual recognition of stays, notifications, retention and compensation of professionals, procedure(s) for modification of protocols and resolving disputes related to them.

When it comes to arrangements concerning communication and cooperation, protocols aim at assisting courts and IPs in coordinating proceedings opened against group members in various jurisdictions. Interestingly, most of the protocols originating from the United States and Canada (which oftentimes follow the same template) contain the possibility of courts communicating with each other without the parties’ counsel being present. This communication is frequently limited to procedural matters. However, this is not always the case. Ex-parte (i.e., without counsel) communication may extend to a posthearing stage and pursue the goal of determining whether a consistent ruling can be made by both courts and what the terms of such a ruling should be.

The level of detail found in the protocols varies greatly. While some of them are rather short in length and general in phrasing, others contain detailed provisions on various aspects of cross-border cooperation and communication. This also concerns the issue of data exchange and resolution of intra-group claims. The majority of protocols do not prescribe the limitations as to the categories or the scope of information to be shared. Only a few of them restrict cooperation in cases where the interests of parties (i.e., group members and their creditors) diverge or where the information is confidential or otherwise privileged. The absence of specific provisions related to information exchange does not mean that sharing of information between insolvency proceedings is unlimited. It only means that such limitations are not agreed in the protocol but may instead be imposed by applicable national law.

4.3 Resolution of intra-group claims under insolvency protocols

In corporate group insolvency scenarios, intra-group claims can be a highly litigious subject. As explained by Dammann, on the one hand:

“intragroup transactions frequently serve legitimate purposes. On the other hand, the frequency, volume, and depth of such transactions can make them particularly difficult to police.”

A protocol will oftentimes contain provisions to manage disputes over intercompany claims. The analysis of the selected sample of protocols has revealed several approaches to the matter at issue, from less intrusive (e.g., no provisions pertinent to the resolution of intra-group claims) to more intrusive. In the latter category, the following arrangements should be highlighted:

- Arrangements entailing the agreement on a common set of financial accounting records that form the basis of intercompany claims. As explained in the Lehman Brothers protocol, “[o]ver many years [...] the relationships among the Debtors and Foreign Debtors have developed into a complex web of financial balances.” In light of this, the determination of the common accounting records pursues a pragmatic goal of avoiding protracted and unnecessary
intercompany litigation. This is in line with the principles of procedural efficiency and asset value maximization. The reliance on common standards should not by itself create conflicts of interest or cause disadvantage to particular group members and their creditors.

- Arrangements containing jurisdictional agreements—agreements detailing the chosen (exclusive) jurisdiction for resolution of (intercompany) claims, and sometimes, governing substantive law. For instance, parties may agree that all claims against Debtor 1 should be resolved by courts of Country 1, and claims against Debtor 2—by courts in Country 2. Such agreements, to the extent of their enforceability, may create legal certainty for creditors and debtors. They improve procedural efficiency and help avoid value-destructive duplication of proceedings and irreconcilable judgments. At the same time, the issue of international insolvency jurisdiction and applicable law can be conflict-ridden, as it may affect parties’ substantial and procedural rights (e.g., whether an inter-company claim can be avoided under the chosen law in the selected forum). Nevertheless, the degree of such conflicts is mitigated by the statutory limitations on contractual choice of an insolvency forum (forum concursus) and applicable insolvency law (lex concursus), as well as by the autonomy and independence of IPs, representing communicating parties.

- Arrangements creating or offering an opportunity to create a special mechanism for resolution of intercompany claims. For instance, the Lehman Brothers protocol authorises IPs to establish a committee to “resolve any differences in the accounting of intercompany claims.” The Bernard Madoff protocol stipulates that at the appropriate stage “the Representatives shall consider whether it is sensible to implement, subject to the approval of the Tribunals, a mechanism for resolution of intercompany claims.” The protocol in the Payless Holdings LLC case contemplates the adoption of a specific claims protocol “to address, among other things [...] the timing, process, jurisdiction and applicable governing law to be applied to the resolution of claims filed by the Debtors’ creditors (including intercompany claims).” The creation of such alternative mechanisms for resolution of inter-company disputes may contribute to efficiency and cost-saving, and is in line with the MLG. At the same time, the absence of clear rules and undefined status of these mechanisms can cause concerns over potential conflicts of interest. However, due to the voluntary nature of such mechanisms and their inherent flexibility, any potential conflict of interest may be easily avoided or contained.

To sum up, protocols undoubtedly serve or have in practice been seen to serve an important purpose of streamlining cooperative and coordinated resolution of group financial distress. The analysis of the selected protocols has not revealed any significant threats of conflicts of interest. Resolution of inter-company claims, being one of the most heated conflicting areas, is frequently addressed in protocols adopted for complex MEGs. For example, jurisdictional agreements and special arrangements for settling intercompany disputes, discussed above, seek to improve efficiency of insolvency proceedings. Nevertheless, they usually do not give rise to conflicts of interest, which in any case, can be conveniently controlled and mitigated. The reasons being:

1. significant limitations on contractual freedom in insolvency (e.g., in matters concerning insolvency jurisdiction and applicable law);
2. flexible character of protocols; and
3. separateness and impartiality of IPs.
5 | COORDINATION OF INSOLVENCY PROCEEDINGS: SPECIAL PROCEEDINGS

Coordination of parallel insolvency proceedings opened against group members can be achieved in different ways. In addition to cross-border insolvency protocols, group coordination is facilitated by the opening of special proceedings, coinciding or coexisting with “normal” insolvency proceedings. This section deals with such proceedings and assesses the gravity of the problem of conflicts of interest present in each of them. First, the regulatory framework for group coordination proceedings under the Recast EIR is discussed. Second, German insolvency law and its coordination proceedings are introduced. Third, the most recent development in the area of group insolvency law—the MLG and its planning proceedings—is analysed and compared with the Recast EIR and German law. The choice of these three legal regimes is explained by the fact that they are all relatively recent, fairly sophisticated and specialised, and cover three major geographical dimensions—local (Germany), regional (Recast EIR) and global (MLG).

5.1 | Group coordination proceedings under the recast EIR

“Group coordination proceedings” is an innovation of the Recast EIR. It has been introduced:

“[w]ith a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group.”

In essence, group coordination proceedings are separate from any other insolvency proceedings and are not themselves insolvency proceedings. They are voluntary in nature and lead to non-binding actions (recommendations) of a group coordinator and the proposal of a group coordination plan, which may or may not be adopted. Group coordination proceedings can be seen as a legal superstructure, imposed on (all or some) insolvency proceedings of corporate group members.

Coordinated treatment of insolvency proceedings in a group context should be achieved with the help of a “coordinator,” an independent person, whose main tasks consist of identifying and outlining “recommendations for the coordinated conduct of the insolvency proceedings” and of drafting a group coordination plan. The group coordination plan may contain measures to re-establish the economic performance and the financial soundness of the group or any part of it, such as the increase of equity capital, simplification of the financial structure of the group and the elimination of deficiencies in the intra-group cash pooling system. Measures might also aim to improve business performance, including through the reorganisation of the group structure, realignment and refocusing of business activities, replacement of management and personnel reduction. Notably, a group coordination plan cannot include recommendations as to any consolidation of proceedings or insolvency estates.

According to Article 71(1) of the Recast EIR, the coordinator:

“shall be a person eligible under the law of a Member State to act as an insolvency practitioner.”
At the same time, a coordinator cannot be one of the insolvency practitioners appointed in any of the group insolvency proceedings (Article 71[2] of the Recast EIR). It is further clarified that a coordinator shall have no conflict of interest in respect of the group members, their creditors and insolvency practitioners. This strict rule seeks to guarantee independence and impartiality of a group coordinator—prerequisites for establishing trust between him/her and other stakeholders in enterprise group insolvency. The role of a group coordinator can be compared to that of a mediator, who assists parties in reconciling divergent positions in order to achieve the best possible (agreeable) solution. For this to work, the environment of trust, neutrality and openness must be established and maintained.

5.2 Coordination proceedings under German insolvency law

Recent reforms of German insolvency law have led to the establishment of domestic rules on group coordination, in force since 21 April 2018 and similar to those of the Recast EIR. As explained by the commentators, the amended law did not pursue the goal of group consolidation, but instead was a result of endeavours to promote the spirit of coordination efforts.

Group coordination proceeding (Koordinationsverfahren) and the appointment of a proceedings coordinator (Verfahrenskoordinator) enable synchronization of parallel insolvency proceedings opened with regard to group members, for the better achievement of insolvency goals (i.e., asset value maximization, procedural efficiency, etc.). German group coordination proceedings cover only group members having their centre of main interest (COMI) in Germany, and may coexist with coordination proceedings pending under the Recast EIR. A proceedings coordinator must be independent of the group debtors and their creditors. Besides, the coordinator should be independent of the insolvency administrators and of the supervisors appointed for the group. The commentaries note that the latter requirement is less strict and does not prevent an IP or a supervisor from being appointed as a proceedings coordinator, although in exceptional cases. This might be the case where the expertise and experience of an IP outweigh the risks created by a conflict of interest, provided however that such a conflict of interest is admissible and manageable. It could also be the case where the appointment of a neutral person leads to disproportionate costs or complexities.

The possibility of appointing an IP who represents a group member, to serve as a proceedings coordinator seems to conflict with a rigid approach adopted by the Recast EIR. The main task of an insolvency practitioner is to serve the interests of creditors of a particular debtor, and not necessarily to act for the benefit of other debtors and their creditors. It is therefore doubtful whether an IP can be seen as truly independent and impartial when performing the duties of a proceedings coordinator. It is also not clear how the conflict of interest, inherent in occupying these two roles, can be contained and managed. Conflicts of interest are not always obvious and may require a continuous third-party assessment and supervision—something that an insolvency practitioner simply cannot do. As a result, a sort of regulatory capture favouring the interests of a particular group member (naturally, a group member in whose proceedings an IP has been appointed and remunerated) to the detriment of other group members, could arise.
5.3 Group planning proceedings under the UNCITRAL group insolvency model law

The MLCBI does not consider a situation of group insolvency. This is because:

“[w]hen the text of what became the UNCITRAL Model Law on Cross-Border Insolvency [...] was debated, groups were regarded as ‘a stage too far’.”

The idea to create a new legal instrument, specifically addressing the issue of insolvency of multinational enterprise groups emerged in 2013. Since then the UNCITRAL Working Group V (Insolvency Law) has been working on the draft provisions, focusing on a few areas, including coordination and cooperation, mechanisms for development and approval of a group insolvency solution and the use of “synthetic” proceedings. It has soon become clear that insolvency of enterprise groups deserved a standalone model law, which, according to its drafters, should “accord more prominence to the text and facilitate its promotion.” Finally, in July 2019, UNCITRAL approved the MLG.

The purpose of the MLG is:

“to equip states with modern legislation addressing domestic and cross-border insolvency of enterprise groups.”

This is envisaged through the creation of tools to improve communication and cooperation between courts and to achieve a coordinated group insolvency solution. This solution can be reached with the help of a so called “planning proceeding” and special categories of relief prescribed by the MLG. The concept of a planning proceeding is similar to that of a group coordination proceeding, embraced by the Recast EIR. Nevertheless, there are several significant differences between the Recast EIR and the MLG that are worth of analysis.

The first major difference between the Recast EIR and MLG is that under the latter, a planning proceeding usually coincides with the main insolvency proceeding, whereas under the former, a group coordination proceeding is always a separate sui generis (noninsolvency) proceeding, which entails the appointment of a group coordinator who acts independently from IPs of enterprise group members. As noted in the comments on the draft MLG made by the European Law Institute (ELI) and the Conference of European Restructuring and Insolvency Law (CERIL), the MLG:

“is not clear when it comes to the nature of planning proceedings and their compatibility with group coordination proceedings, opened pursuant to the Recast EIR.”

The nature and scope of a planning proceeding have been heavily debated during the sessions of Working Group V. Ultimately, the definition of a “planning proceeding” was broadened to include a proceeding separate from main insolvency proceeding, but opened in the jurisdiction of the main insolvency proceeding (COMI jurisdiction). As a result, a group coordination proceeding could fall under the scope of the MLG, provided, however, that it is opened in the jurisdiction of main insolvency proceedings.

The second major difference concerns the position of a group coordinator. While the Recast EIR introduces the term “coordinator,” the MLG embraces the term “group representative.”
“Group representative” is a person or a body authorized to act as a representative of a planning proceeding, who should seek to develop and implement a group insolvency solution.\textsuperscript{89} Both a coordinator and a group representative may participate in insolvency proceedings of group members and request a stay of such proceedings.\textsuperscript{90} However, unlike the coordinator, who, as noted above, shall not be an IP in any of the group proceedings, a group representative may be the same person as an IP appointed on commencement of a main proceeding that has led to a planning proceeding.\textsuperscript{91} Commenting on the draft MLG, ELI/CERIL warned that combining roles of an insolvency practitioner and a group representative was not advisable, since it may:

“... undermine trust in such a figure by participating enterprise group members.”\textsuperscript{92}

To sum up, the MLG provides for coincidence or \textit{confusio} of insolvency proceedings with planning proceedings and insolvency practitioners with group representatives. On the one hand, this decreases the total number of proceedings and reduces the costs of having new proceedings and actors involved. On the other hand, it opens the doors for potential conflicts of interest, and could undermine the development and implementation of a group-wide solution.

The success of group planning and group coordination proceedings depends on voluntary cooperation of group members participating in such proceedings. This, in turn, depends on mutual trust and confidence. According to Finch and Milman:

“[w]ithout mutual confidence, even the best informed, most astute commercial judgments will come to nothing.”\textsuperscript{93}

Combining the roles of an insolvency practitioner (entity level) and a group representative (group level), with competing and sometimes conflicting interests or needs, even if cost-saving, exacerbates the “two-masters” problem and can hardly facilitate voluntary cooperation or lead to optimal results of procedural efficiency, protection and maximization of the insolvency estates. The appointment of the engaged IPs as group representatives should therefore be avoided. This approach is taken in the Recast EIR, but not in the MLG and German insolvency law.

6 | APPPOINTMENT OF THE SAME INSOLVENCY PRACTITIONER

One step further in bringing group insolvency proceedings under the same management is a regime of joint administration. This regime entails the appointment of the same IP in separate insolvency proceedings of group members. The benefits of having one insolvency practitioner have been recognised by numerous authors\textsuperscript{94} and standard setting organisations.\textsuperscript{95} Importantly, all three legal regimes, considered above, contain a possibility of appointing one IP in several insolvency proceedings. The Recast EIR mentions it in Recitals 50 and 53, adding that such an appointment should not be incompatible with rules applicable to the proceedings in question. German insolvency law stipulates that if an application for commencement of insolvency proceedings is lodged in relation to the assets of group debtors, the relevant court must decide whether it is in the interest of the creditors to appoint only one person as an insolvency administrator.\textsuperscript{96} It has been noted that even before this special regulation, courts had been frequently appointing a single administrator in group insolvency proceedings.\textsuperscript{97} The MLG also allows the
appointment of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the enterprise group.98

Appointment of the same person to handle separate insolvency proceedings greatly diminishes coordination problems, reduces transaction costs and may facilitate preparation and implementation of a group-wide (rescue) strategy, including the sale of the group business as a going concern.99 At the same time, having a single insolvency practitioner has its downsides, of which conflicts of interest is the most prominent one.

First, a single insolvency practitioner instantly acquires access to all information concerning the group members, in whose proceedings he or she has been appointed. This may include confidential information and other financially sensitive data that could influence the decision-making process, particularly when it comes to intra-group financial arrangements.100 Obtaining complete information, otherwise unavailable, might compel an IP to lodge a claim on behalf of one enterprise group member against another one, therefore making him/her represent both the claimant and the respondent. As in the majority of intra-group disputes, the interests of the parties are clearly in conflict. Another example is cross-guarantees and post commencement financing, which may benefit one entity (i.e., company, receiving financing or a guarantee) to the detriment of another entity (i.e., provider of financing, guarantee or collateral) and its creditors. Essentially, the IP has to negotiate with him/herself the appropriateness of these measures and their characteristics (e.g., amount, compensation, timeframe, security). This is the epitome of the “two masters” problem.

Second, insolvency law grants substantial powers to IPs. Compared to group coordinators and group representatives with their limited coordination-related tasks, insolvency practitioners actually administer insolvency estates, challenge preinsolvency transactions, encumber, transfer and dispose of assets, approve postcommencement financing, etc. Therefore, the consequences of conflicts of interest can be severe and may result in selective maximization of insolvency estate and harm to certain (pools of) creditors, benefiting one group entity at the expense and to the detriment of another. Taking into account the magnitude and prominence of conflicts of interest in a situation of one insolvency practitioner, Van Galen writes that:

“[i]t is remarkable that there are many domestic cases in which the same liquidator is appointed in the insolvency proceedings of more than one group company.”101

Appointment of the same IP in several insolvency proceedings can be a very efficient, if not the most efficient tool to resolve complex group insolvencies. It is also the most problematic one, bolstering conflicts of interest. To mitigate their occurrence and scope, a number of mechanisms can be implemented, ranging from a simple disclosure to an obligation of IPs to provide an undertaking or seek direction from the court.102 These and other regulatory strategies are discussed in the next section.

7 | CONFLICTS OF INTEREST IN GROUP INSOLVENCIES AND HOW TO DEAL WITH THEM

The previous sections have shown that both the situations where conflicts of interest arise and the degree of such conflicts vary. Analysis has been made of different mechanisms and tools which can increase procedural efficiency of insolvency proceedings opened with regard to enterprise group entities, thus facilitating coordinated crisis management. Whereas some of them (i.e., cross-border insolvency protocols) pose insignificant risks of conflicts of interest, others can be more challenging (i.e., when an IP is appointed to serve as a coordinator or a
group representative), yet the third category (i.e., appointment of a single IP) facilitates the occurrence of conflicts of interest and magnifies their consequences. Interestingly, the more efficient the tool is in terms of its coordination effect, the more likely it is to create a conflict of interest. Figure 1 depicts this correlation.

In light of the variety of types of conflicts of interest and the divergent degree of risk posed by them depending on a utilised insolvency coordination tool, there cannot be one-size-fits-all solution to the problem at issue. Instead, tailor-made and fact-sensitive responses are justified.

The adoption of cross-border insolvency protocols does not by itself give rise to a conflict of interest. Independent IPs appointed in separate proceedings negotiate an insolvency protocol on a voluntary (contractual or quasi-contractual) basis and can freely decide on the limits of communication and cooperation. For example, they could refuse to share information that might lead to additional intra-group litigation or otherwise disadvantage certain group members. The analysis of protocols has revealed three most typical forms of arrangements addressing inter-company financial relations. These include:

1. agreement on a common set of financial accounting records;
2. jurisdictional agreements, outlining the agreed (exclusive) jurisdiction for resolution of inter-company claims; and
3. a special inter-company claim resolution mechanism.

None of these arrangements create any noticeable or unavoidable risk of conflicts of interest. This is why one should be extra cautious in using a conflict-of-interest argument as a reason or an excuse for not communicating or cooperating under a cross-border insolvency protocol.

The recent developments of insolvency law have led to the emergence of new forms of proceedings aimed at improving coordination of parallel insolvency proceedings opened against enterprise group members. Such proceedings include group coordination proceedings (Recast EIR, InsO) and planning proceedings (MLG). They may coincide or coexist with regular insolvency proceedings and are generally limited in terms of their purpose and scope. As explained before, their narrow scope and coordination-focused functionality reduce the risks posed by conflicts of interest, especially when a person heading such proceedings is independent from

**FIGURE 1** Conflicts of interest and group insolvency coordination tools
### Table 1: List of protocols (in chronological order)

| Case reference | Year | Jurisdictions involved |
|----------------|------|------------------------|
| 1. Re Commodore Electronics Limited and Commodore International Limited, No. 473/1994 | 1994 | United States (NY), Bahamas |
| 2. Re Everfresh Beverages Inc, No. 32-077978, No. 95 B 45405 | 1995 | Canada (Ontario), United States (NY) |
| 3. Re AIOC Corporation and AIOC Resources AG., No. 96 B 41895, No. 96 B 41896 | 1998 | United States (NY), Switzerland (Zug) |
| 4. Re Solv-Ex Canada Limited and Re Solv-Ex Corporation, No. 9701-10022, No. 11-97-14362-MA | 1998 | Canada (Alberta), United States (New Mexico) |
| 5. Re Philip Services Corporation, No. 99-B-02385, No. 99-CL-3442 | 1999 | United States (Delaware), Canada (Ontario) |
| 6. Re Livent Inc, No. 98-B-48312, No. 98-CL-3162 | 1999 | United States (NY), Canada (Ontario) |
| 7. Re Loewen Group, No. 99-1244, No. 99-CL-3384 | 1999 | United States (Delaware), Canada (Ontario) |
| 8. Re Inverworld, Inc., No. SA99-C0822FB | 1999 | United States (Texas), United Kingdom, the Cayman Islands |
| 9. Re AgriBio Tech Inc., No. 31-OR-371448, No. 500-10534 LBR | 2000 | Canada (Ontario), United States (Nevada) |
| 10. Re Matlack Inc., No. 01-CL-4109 | 2001 | Canada (Ontario), United States (Delaware) |
| 11. Re Pioneer Companies, No. 5000-05-066677-012, No. 01-38259 | 2001 | Canada (Quebec), United States (Texas) |
| 12. PSINet Inc. et al., No. 01-CL-4155 | 2001 | Canada (Ontario), United States (NY) |
| 13. Re Federal-Mogul Global, No. 01-10578, No. 01-10578 | 2001 | United States (Delaware), United Kingdom |
| 14. Re Systech Retail Systems Corporation, No. 03-CL-4836, No. 03-00142-5-ATS | 2003 | Canada (Ontario), United States (North Carolina) |
| 15. Re Mosaic Group Inc., No. 02-81440 | 2003 | Canada (Ontario), United States (Texas) |
| 16. Re Refco Capital Markets, No. 2005:328 | 2006 | Bermuda, United States (NY) |
| 17. Re Sendo International Limited | 2006 | France, United Kingdom |
| 18. Re Pope & Talbot Ltd., No. SO77839 | 2007 | Canada (British Columbia), United States (Delaware) |
| 19. THL-PMPL Holding Corp. et al., No. CV-08-7590-00CL | 2008 | Canada (Ontario), United States (Delaware) |
| 20. Re Quebecor World Inc, No. 08-10152 | 2008 | Canada (Quebec), United States (NY) |
| 21. Re Smurfit-Stone Container Canada Inc., et al, No. CV-09-7966-00CL | 2009 | United States (Delaware), Canada (Ontario) |
| 22. Lehman Brothers Holdings Inc, et al., No. 08-13555 (JMP) | 2009 | United States (NY), Netherlands, Germany, Australia, Hong Kong, etc. |
| 23. Re Masonite International Inc., et al., No. 09-8075-00CL | 2009 | Canada (Ontario), United States (Delaware) |
| 24. Abitibibowater Inc et al., No. 500-11-036133-094 | 2009 | Canada (Quebec), United States (Delaware) |
creditors, debtors and their insolvency practitioners. However, whenever a group coordinator or a group representative simultaneously acts as an IP appointed in any of the respective insolvency proceedings (engaged IP), problems can appear. The noted special proceedings are essentially a mediation instrument, aimed at reconciling conflicts between separate proceedings and at stimulating the adoption of a coordinated group-level solution.103

Combining different roles may erode trust of group members and their creditors in the figure of a “mediator” (i.e., group coordinator or group representative) and jeopardise effectiveness of special proceedings. This is why the appointment of an engaged IP as a group coordinator or a group representative should be avoided.

Appointment of a single insolvency practitioner in separate insolvency proceedings concerning enterprise group members ensures the maximum level of procedural coordination. It also creates a fertile ground for conflicts of interest. Several responses have been suggested to address this risk, including disclosure, appointment of one or more additional liquidators and court/creditor approval of intra-group transactions (cross-guarantees, intra-group rescue financing, granting of security).104 In the opinion of the author, disclosure can hardly be an efficient response, since the selection of one person in parallel insolvency proceedings is disclosed ab initio and the most likely conflicts are of impersonal nature. This is why, for instance, replacing an IP does not eliminate the problem. However, if the conflict is of personal nature (e.g., an IP has established ties with a debtor or a creditor), its disclosure can add value, allowing affected parties to adopt the necessary measures and safeguards.

Another common solution involves the assistance by one or more additional IPs in administering the relevant enterprise group members in the event of a conflict of interest. For instance, joint administration with the appointment of the same insolvency trustee is common in the United States.105 However:

"[O]n a showing that creditors or equity security holders of the different estates will be prejudiced by conflicts of interest of a common trustee [...], the court shall order the selection of separate trustees for estates being jointly administered."106

| Case reference | Year | Jurisdictions involved |
|----------------|------|------------------------|
| 25. Re Nortel Networks Corporation, et al., No. 09-CV-7950 | 2009 | Canada (Ontario), United States (Delaware) |
| 26. Bernard L. Madoff Investment Securities LLC, et al., No. 08-1789 | 2009 | United States (NY), United Kingdom |
| 27. Graceway Canada Company, No. CV-11-9411CL | 2011 | Canada (Ontario), United States (Delaware) |
| 28. Montreal, Maine & Atlantic Railway Ltd, No. 13-10670 | 2013 | United States (Maine), Canada (Quebec) |
| 29. Aralez Pharmaceuticals Inc et al., No. VC-18-603054-00CL | 2018 | Canada (Ontario), United States (NY) |
| 30. Re Payless ShoeSource Canada Inc., Payless Holdings LLC, No. CV-19-00614629-00CL | 2019 | Canada (Ontario), United States (Missouri) |
| 31. In the matter of Jet Airways (India) Ltd. v. State Bank of India, No. 707 | 2019 | India, Netherlands |
This solution is also proposed in the Guide to MLG and has been adopted in Germany, both in law\textsuperscript{[107]} and in practice.\textsuperscript{[108]}

It has been noted that, under German law, an additional IP is in charge of a separate area or an issue and he does not assume responsibility for the whole insolvency proceeding.\textsuperscript{[109]} This is why where conflicts of interest are large-scale and structural, appointment of a special insolvency practitioner may lose its appeal.\textsuperscript{[110]} The introduction of additional practitioner(s) could mitigate conflicts of interest to the extent that it alleviates the two-masters problem. For example, a special insolvency practitioner may be tasked to deal with intra-group claims (including enforcement of intra-group loans and transaction avoidance claims) and intra-group rescue financing. The necessary sacrifice is the costs and complexity of having multiple insolvency practitioners (“regular” and “additional” ones) at the same time. Besides, in groups with a large number of intra-group disputes and a complex financial structure (e.g., Lehman Brothers), the practicability of having a single insolvency practitioner “assisted” by an army of special practitioners is questionable. Instead, a “traditional” one-debtor one-insolvency practitioner approach becomes preferable.

As to the third strategy of containing conflicts of interest, namely approval of certain intra-group transactions (e.g., rescue financing) by courts or creditors, the following should be said. The possibility of extending rescue financing by one financially distressed or insolvent group member to another is supported by standard-setting organisations.\textsuperscript{[111]} This is premised on the understanding that such financial assistance may be needed to ensure viability and operational continuity of an enterprise group as a whole and to prevent its disintegration. At the same time, extension of a loan or security by one company to another could harm the interests of the former, as it acquires new liabilities, while the prospects for debt repayment remain unclear. For this reason, involvement of creditors and/or courts on both sides may be fully justified. Creditors’ approval and court confirmation can:

1. guarantee reasonableness and fairness of rescue financing;
2. ensure its protection from transaction avoidance claims\textsuperscript{[112]};
3. shield an IP from potential liability;
4. protect creditors’ interests; and
5. as a result, eliminate the two-masters problem.

Shortcomings of this strategy, including additional time, costs and complexity, are clearly overridden by its benefits. The majority of legal instruments considered in this article do not directly provide for the type of approval described herein. As a matter of fact, cross-border insolvency protocols, while regulating certain aspects of intra-group claims, barely touch upon the issue of rescue financing.\textsuperscript{[113]} German insolvency law does not provide for an ex-ante approval of rescue finance transactions.\textsuperscript{[114]}

The MLG goes much further. Among the relief available to a planning proceeding, it mentions approval of arrangements concerning funding of a group member and authorisation of the provision of financing pursuant to such arrangements.\textsuperscript{[115]} This relief may be afforded in the jurisdiction of a planning proceeding,\textsuperscript{[116]} upon the application for recognition of a foreign planning proceeding,\textsuperscript{[117]} or after such recognition.\textsuperscript{[118]} The importance of this regime should not be underestimated. First, the MLG allows approval and granting of postcommencement finance between related parties (i.e., group members). Second, these parties may be both financially distressed or insolvent at the time when the group financial support is afforded. Third, the regime established by the MLG is flexible and the relief may be provided by and to the group entity in
the MLG jurisdiction and at different periods of time, including as an interim measure, before the actual recognition of a foreign planning proceeding.

8 | CONCLUSION

Whenever dealing with insolvency of an integrated enterprise group, the starting point should always be communication and cooperation to the maximum extent possible. This comes from the understanding that close cooperation between parallel insolvency or restructuring proceedings opened with respect to members of a corporate group can reduce transaction costs from duplication of efforts and protracted inter-company litigation. Equally important is the fact that such cooperation could promote the adoption of measures, maximizing the value of the insolvency estate, by supporting business continuity and guaranteeing the top price in case of a sale as a going concern. Thus, procedural coordination and consolidation pursue the goals of efficient administration and optimal realisation of assets.

At the same time, due to legal separability of companies comprising an enterprise group, there are certain limits imposed on communication and cooperation. The requirement to avoid conflicts of interest is one of them and exists alongside the requirements related to protection of confidential or private information, as well as personal data protection. A conflict of interest characterises a situation where personal or institutional interests interfere with the ability of a person to act for the benefit of a party, in whose interests he or she is obliged to act. Whenever a multinational enterprise group becomes distressed, conflicts of interest are bound to arise. For example, sharing of information between two group entities, enforcing intra-group claims, challenging intra-group (related party) transactions or providing intra-group financial assistance may benefit one of them, but harm another. In light of the generally positive effects of close cooperation in the context of group insolvency, the need for a balanced approach is clear.

This article has analysed three modern strategies or mechanisms, which can be used to facilitate the coordinated handling of insolvency proceedings of enterprise group members. These include cross-border insolvency protocols, special proceedings and appointment of a single insolvency practitioner. It was determined that the likelihood and gravity of conflicts of interest differ from one strategy to another. The general conclusion is that the risk of conflicts of interest correlates with the degree of procedural coordination.

Thus, voluntary and flexible cooperation under insolvency protocols poses low and manageable risk of conflicts of interest. Protocols frequently deal with the issue of intra-group relations, cementing agreements on appropriate accounting standards, defining the agreed jurisdiction for resolution of intra-group claims or prescribing a special claim resolution mechanism. At the same time, usually protocols do not mandate the exchange of specific information or performance of a particular action, granting sufficient leeway for communicating parties to avoid conflicts of interest. The adoption of special proceedings, such as coordination proceedings under the Recast EIR and German law, or planning proceedings under the MLG ensures higher level of procedural coordination. Here the central issue is independence and impartiality of a group coordinator/representative. Lastly, the appointment of a single insolvency practitioner in group insolvency proceedings fosters seamless exchange of information with minimal transaction costs and a strong potential for implementing a group-wide crisis solution. The other side of the coin is the alarmingly high risk of conflicts of interest.

Due to the diversity of strategies described above and the varying probability and the degree of conflicts of interest they pose, a balanced approach cannot be one-size-fits-all. Instead, different
solutions to each strategy are proposed, from no action or minimal response in the case of cross-border insolvency protocols, to the appointment of an independent and impartial coordinator in special proceedings. Finally, when it comes to joint administration of group insolvency proceedings, one may consider relying on additional IPs to selectively resolve conflicting situations, such as filing intra-group claims, challenging related-party transactions or approving and extending intra-group rescue financing. This can also be done with the ex-ante involvement of creditors and/or courts—a scheme proposed by the EU Directive on preventive restructuring frameworks.

When resorting to procedural coordination and consolidation strategies or applying conflict mitigation tools, it is important to keep in mind that communication and cooperation to the maximum extent possible is the rule, while restrictions based on the risk of conflicts of interest is an exception. This is why conflict-of-interest-based limitations should be strictly and narrowly interpreted, well justified and rarely and cautiously used.

ACKNOWLEDGEMENTS
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ENDNOTES
1Robert van Galen, *Insolvent Groups of Companies in Cross Border Cases and Rescue Plans* (NACIL Report 2012) 10.
2For example, in the Lehman Brothers case, it was noted that the group members “continuously worked together and shared information in unison. This information was spread across 2,700 different software applications and dispersed throughout ledger accounts” of nearly 4,000 different subsidiaries across the globe. See Notice of debtors’ motion pursuant to Sections 105 and 363 of the Bankruptcy Code for approval of a cross-border insolvency protocol, In re Lehman Brothers Holdings, Inc., Case 08-13555 (Bankr. SDNY 2006).
3Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
4UNCITRAL, *Enterprise group insolvency: draft guide to enactment* (20 March 2019).
5Pottow uses the concept of “meta-norms,” which captures the abstract and overarching nature of legal principles and allows for finding common solutions across national (insolvency law) borders. See John Pottow, “Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to ‘Local Interests’” (2006) 104 *Mich. L. Rev.* 1899, 1930.
6On the use of principle-based approach in legal research see Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia 2017).
7ALI-III Global Principles for Cooperation in International Insolvency Cases 2012, reprinted and reissued by the International Insolvency Institute in August 2017.
8Article 56(1), Recast EIR.
9Bork (above note 6) 82.
10Ibid 78, where Bork defines procedural efficiency by stating that “proceedings must be shaped in such a way as to ensure that the legal protection which the procedure seeks to provide can be granted as quickly and as comprehensively as possible.”
11Ibid 129–130, where the observation is made that optimal realization of debtor’s assets entails quick and comprehensive (i.e., to the fullest extent possible) satisfaction of creditors’ claims. This means low costs, absence of delays, preservation and realization of the market value.
12The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) (Practice Guide).
13Wessels and Madaus point out that “national insolvency laws applicable in the EU as well as international proposals are based on the central principle of insolvency law, generally being the principle of the 5 one's: one
insolvent debtor, one estate, one insolvency proceeding, one court and one insolvency office holder.” See Bob Wessels and Stephan Madaus, *Rescue of Business in Insolvency Law, Instrument of the European Law Institute* (2017) 342.

14The MLCBI seeks to offer “effective mechanisms for dealing with cases of cross-border insolvency” and has so far been adopted in 49 jurisdictions.

15Council Regulation (EC) No. 1346/2000 on insolvency proceedings. The Virgos-Schmit Report (1996), supplementing the European Insolvency Convention (1995), the predecessor of the original EIR, directly stated that the “Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes).”

16The UNCITRAL Legislative Guide on Insolvency Law, Part III. The UNCITRAL Legislative Guide on Insolvency Law (Legislative Guide) was drafted to “foster and encourage the adoption of effective national corporate insolvency regimes.” Parts I and II (2004) lay down general recommendations central to an effective and efficient insolvency law regime. Part III (2012) is devoted to the treatment of enterprise groups in insolvency and Part IV (2013) addresses the issue of directors’ obligations in the period approaching insolvency.

17Report of Working Group V on the work of its 54th session (Vienna, 10–14 December 2018).

18Black’s Law Dictionary defines “going concern value” as the “value of a commercial enterprise’s assets or of the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or of its assets.” *Black’s Law Dictionary* (8th edn, Thomson Reuters 2004) 1587. This value is usually higher than the piecemeal liquidation value.

19Irit Mevorach, “Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge, Brooklyn Journal of Corporate” (2014) 9 *Brook. J. Corp. Fin. & Com. L* 226, 233.

20Neil Cooper, *Insolvency Proceedings in Case of Groups of Companies: Prospects of Harmonisation at EU Level, Note to European Parliament* (2011) 7.

21Rosalind Mason and John Martin, “Conflict and Consistency in Cross border Insolvency Judgments,” available at: <http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/46-MASON_and_MARTIN-Conflict_and_Consistency_in_Cross_border_Insolvency_Judgments.pdf>, citing Justice Newbould of the Ontario Superior Court of Justice, who noted that “Judge Gross in Wilmington and I have communicated with each other in accordance with the Protocol with a view to determining whether consistent rulings can be made by both Courts. We have come to the conclusion that a consistent ruling can and should be made by both Courts. [...] These insolvency proceedings have now lasted over six years at unimaginable expense and they should if at all possible come to a final resolution. It is in all of the parties’ interests for that to occur.”

22Ian Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) 1060–1067, highlighting practical significance of cross-border cooperation and praising judicial (and office holders’) innovativeness in adapting traditional tools to the needs of increasingly international trade.

23William McBryde, Axel Flessner and Sebastian Kortmann, *Principles of European Insolvency Law* (Kluwer Legal Publishers 2003) 31.

24Articles 56(1), 57(1) and 58, Recast EIR.

25The Practice Guide was prepared to promote the MLCBI. Its purpose is to “provide information for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases.”

26See Guideline 16.4, European Communication and Cooperation Guidelines for Cross-border Insolvency (CoCo Guidelines 2007); Principle 23, ALI-III Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases (ALI-III Principles 2012); Principle 17, EU Cross-Border Insolvency Court-to-Court Cooperation Principles (JudgeCo Principles and Guidelines 2014).

27For instance, Principles of Cooperation among the NAFTA Countries (ALI NAFTA Principles 2003); Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines 2016).

28On the doctrine of corporate opportunities see Martin Gelter and Geneviève Helleringer, “Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law” (2018) 15 *Berkeley Bus. L.J.* 92.
29Ron Michaeley and Kent Womack, “Conflict of Interest and the Credibility of Underwriter Analyst Recommendations” (1999) 12 Rev. Financial Stud. 653.

30Stephen Latham, “Conflict of interest in medical practice,” in Michael Davis and Andrew Stark (eds), Conflict of Interest in the Professions (OUP 2001) 283.

31Thomas Carson, “Conflicts of Interest and Self-Dealing in the Professions: A Review Essay” (2004) 14 BEQ 161, 165.

32Ibid 167.

33A similar test is applied in Australia, where an alleged conflict of interest or lack of impartiality (bias) is assessed from the perspective of a “fair-minded observer.” See ASIC v. Franklin (liquidator), in the matter of Walton Constructions Pty Ltd [2014] FCAFC 85. In further judgments, it was considered that such an observer should be aware of the functions and duties of an IP. See Ziziphus Pty Ltd v Pluton Resources Ltd (Receivers and Managers Appointed) (in liq) [2017] WASCA 193.

34For other definitions of a conflict of interest, see Robert Axelrod, “Conflict of Interest: An Axiomatic Approach” (1967) 11 J. Confl. Resolut. 87, proposing, rather vaguely, that “[c]onflict of interest is the state of incompatibility of goals of two or more actors.” Lars Bergström, “What is a Conflict of Interest?” (1970) 7 J. Peace Res. 197, 200, similarly notes that “there is a conflict of interest between two parties if, and only if, their interests are incompatible.”

35Irit Mevorach, The Future of Cross-Border Insolvency. Overcoming Biases and Closing Gaps (OUP 2018) 227.

36Procedural consolidation entails a joint administration of insolvency proceedings, for example, by allowing one court to open insolvency proceedings with respect to different group members. While in most EU Member States insolvency law does not provide for procedural consolidation, in practice consolidation of proceedings in one court is not infrequent. See Wessels and Madaus (above note 13) 347–348. Substantive consolidation leads to the elimination of intra-group claims and the creation of one combined insolvency estate for all group entities involved. The majority of European jurisdictions do not have a formal doctrine of substantive consolidation.

37Gabriel Moss and Tom Smith, “Commentary on Council Regulation 1346/2000 on Insolvency Proceedings and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast),” in Gabriel Moss, Ian Fletcher and Stuart Isaacs (eds), Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings (OUP 2016), paragraph 8.754. See also Irit Mevorach, “Transaction Avoidance in Bankruptcy of Corporate Groups” (2011) 8 ECFR 235, 254, noting that in the case of coordinated or centralised proceedings, “problems of conflict of interests should be tackled as the avoidance of transactions could benefit one member and be detrimental to another.”

38The same argument is made by Wessels, who notes that “a conflict may occur where disclosing information to a foreign court or a foreign insolvency practitioner would be beneficial to creditors in one proceeding, but prejudicial to creditors in any other proceeding.” See Bob Wessels, “Secondary Insolvency Proceedings,” in Reinhard Bork and Kristin van Zwieten (eds), Commentary on the European Insolvency Regulation (OUP 2016) 501.

39Articles 56–58, Recast EIR.

40Articles 25–27, MLCBI. The Guide to the Enactment and Interpretation of the MLCBI (2013) 95 emphasizes that the MLCBI mandates cross-border cooperation by providing that the court and the insolvency representative “shall cooperate to the maximum extent possible.” Note that the MLCBI does not deal with group insolvencies, but concerns single-entity insolvency. See also 99, clarifying that the MLCBI “applies to individual debtors whether corporate or natural.”

41See for example, 11 U.S. Code § 1525–1527; Chapter IV, Cross-Border Insolvency Regulations 2006 (UK SI 2006/1030). The latter, unlike the MLCBI (“shall cooperate”), provide that the court “may cooperate.”

42See for example, § 269a (cooperation between IPs) and § 269b (cooperation between courts), German Insolvency Act (InsO); Article 288, Italian crisis and insolvency code. For more on the recent reform of Italian insolvency law, concerning insolvency of groups of companies, see Lorenzo Benedetti, “Information Flows in the Insolvency of Enterprise Groups” (2019) 30 European Business Law Review 417.

43While the MLCBI mentions only “agreements,” the Recast EIR uses “agreements” and “protocols” interchangeably.
The possibility to enforce cross-border insolvency protocols is not obvious. For instance, the protocol in the Bernard Madoff case says “[t]his Protocol shall be binding on, and inure to the benefit of [...].” The binding nature of a protocol is also highlighted in protocols of Re AgriBio Tech Inc. (2000), Re Federal-Mogul Global Inc. (2001) and Inverworld (1999). In contrast, the protocol in Sendo International Ltd. (2006) clarifies that it is not “intended to create a binding precedent.” A similar clarification is given in the Lehman Brothers protocol (2009). The protocol in Jet Airways (2019) adopts a seemingly contradictory approach. On the one hand, it prescribes that “No Party may fully or partially rescind (ontbinden) this protocol” (indicating its binding nature). On the other hand, it recognises that the Protocol “represents statement of intentions and guidelines,” which “shall not impose [...] any duties or obligations.” For more on the phenomenon of cross-border insolvency agreements see Bob Wessels, “Cross-border insolvency agreements: what are they and are they here to stay?,” in Dennis Faber and Niels Vermunt (eds), Overeenkomst en insolventie (Kluwer 2012) 359–384.

Giulia Vallar, “Protocols as Means of Coordination of Insolvency Proceedings of Cross-Border Banking Groups,” in Loïc Cadiet, Burkhard Hess and Marta Requejo Isidro (eds), Procedural Science at the Crossroads of Different Generations (Nomos 2015) 323.

Paragraph 15, CoCo Guidelines.

Articles 56(1) and 57(3)(e), Recast EIR; Article 27(d), MLCBI.

Maxwell Communications Corp. [1992] B.C.L.C. 465; 170 B.R. 800 (Bankr. S.D.N.Y. 1994); Aff’d B.R. 807 (Bankr. S.D.N.Y. 1995); 593 F.3rd 1036 (2nd Cir., 1996). Writing on the Maxwell case, Westbrook called the adoption of a protocol “a remarkable arrangement” that “permitted the case to be administered efficiently and without jurisdictional litigation.” See Jay Westbrook, “Comment: A More Optimistic View of Cross-Border Insolvency” (1994) 72 Wash. U. L. Q. 947, 950.

Debtors’ Amended Response to Objections to Approval of Proposed Disclosure Statement, In re Lehman Bros. Holdings, No. 08-13555 (Bankr. SDNY 23 August 2011).

Notably absent was the UK. See Paul Davies, “Resolution of Cross-Border Groups,” in Matthias Haentjens and Bob Wessels (eds), Research Handbook on Crisis Management in the Bankruptcy Sector (Edward Elgar 2015), describing how the UK was driven by the desire to protect national interests.

According to the International Insolvency Institute (III), around 25 courts in almost a dozen of jurisdictions have adopted or approved cross-border insolvency protocols, including in cases from the Bahamas, the BVI, Canada, the Cayman Islands, France, Israel, Switzerland, the UK and the United States. The vast majority of cases involved Canada and the United States. See Bruce Leonard and Joseph Bellissimo, Prospective Model International Cross-Border Insolvency Protocol (III, 2009) 2.

The table of all protocols analysed in this article is provided in Table 1.

Cross-border insolvency protocols in Re Pape & Talbot Ltd. (2007), THL-PMPL Holding Corp. (2008), Abitibibowater Inc. (2009) and Re Masonite International Inc. (2009). Many of these protocols also incorporate the ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000). The protocols provide that where there is any discrepancy between the protocol and these Guidelines, the protocol shall prevail.

Cross-border insolvency protocols in Re Quebecor World Inc. (2008), THL-PMPL Holding Corp. (2008), Re Masonite International Inc. (2009), Abitibibowater Inc. (2009), Nortel Networks (2009) and Montreal, Maine & Atlantic Railway Ltd. (2013).

Cross-border insolvency protocols in Re Smurfit-Stone Container Canada Inc. (2009), Aralez Pharmaceuticals (2018) and Payless Holdings LLC (2019), which extend the scope of ex-parte communication to any procedural or substantive matter. Commenting on this, Moss noted that “[f]rom an English law point of view, the idea of the judges in the different courts chatting together without the presence of parties (at least by telephone or video-conference) would seem very strange, although this apparently occurs in North America.” See Gabriel Moss, “Are JIN Guidelines a tonic for cross-border insolvencies?” (2017) 30 Insolvency Intelligence 102.

Cross-border insolvency protocols in Philip Services Corp (1999), Matlack Inc. (2001) and Systech Retail Systems Corp (2003).
Cross-border insolvency protocols in Lehman Brothers Holdings Inc. (2009), introducing the background of the protocol and addressing unique pressing issues characteristic of this case. See also the Protocol in the case of Bernard L. Madoff Investment Securities LLC (2009), describing the arrangements related to cooperation provided to law enforcement and other agencies, and dictated by a substantial public interest in the investigation of the stock and securities fraud. See also the protocol in PSI\textit{N}et Inc. (2001) that lists seven matters, which require cooperation (e.g., the approval of a sale of all or a substantial part of the assets, the allowance, priority and valuation of inter-company claims).

Jens Dammann, “Related Party Transactions and Intragroup Transactions,” in Luca Enriques and Tobias Tröger (eds), \textit{The Law and Finance of Related Party Transactions} (CUP 2019) 218.

Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, \textit{In re Lehman Brothers Holdings Inc.} et al., Chapter 11 case No. 08-13555 (JMP).

Cross-border insolvency protocols in \textit{Re Solv-Ex Canada Limited and Re Solv-Ex Corporation} (1998), \textit{Re AIOC Corporation and AIOC Resources AG.} (1998), AgriBioTech Inc. (2000), Pioneer Companies Inc. (2001) and \textit{Re Quebecor World Inc.} (2008).

\textit{Lehman Brothers} protocol (above note 60).

Idem.

Cross-border insolvency protocol in \textit{Re Payless ShoeSource Canada Inc., Payless Holdings LLC} (2019). The protocol explained that “in recognition of the inherent complexities of the intercompany claims [...] the Debtors shall submit a specific claims protocol.”

The possibility of concluding and the utility of mechanisms for the treatment of intercompany claims in an enterprise group context has been acknowledged at UNCITRAL Practice Guide, 80. Article 10(h), MLG suggests the use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims.

Recital 54, Recast EIR.

The new set of rules on group coordination received a mixed reception in academic literature, with many authors expressing doubts as to their effectiveness and practical value. See Christoph Thole and Manuel Dueñas, “Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation” (2015) 24 \textit{Int. Insolv. Rev.} 314; Burkhard Hess et al. (eds), \textit{Implementation of the New Insolvency Regulation: Improving Cooperation and Mutual Trust} (Nomos/Hart 2018) 220.

Article 71, Recast EIR.

Ibid Article 72(1).

Bob Wessels and Ilya Kokorin, \textit{European Union Regulation on Insolvency Proceedings: An Introductory Analysis} (4th edn) (American Bankruptcy Institute 2018) 136–137.

Article 72(3), Recast EIR.

Ibid Article 71(2).

According to Wessels, to achieve this a “coordinator should have experience in coordinating larger, multi-jurisdictional group insolvencies, experience in conflict handling and mediation, certain language capabilities [...] preferably English.” See Bob Wessels, \textit{International Insolvency Law Part II. European Insolvency Law, Volume X} (Wolters Kluwer 2017) 10929a.

Alexander Fridgen, Arndt Geiwitz and Burkard Göpfert, \textit{Beck’scher Online-Kommentar InsO} (14th edn, CH Beck 2019).

Idem. Note that the Act implementing the Recast EIR in Germany clarifies that group coordination provisions of InsO do not apply as far as Article 57, Recast EIR (“Cooperation and communication between courts”) is applicable. See Article 102c § 22, EGInsO.

§ 269e, InsO.

Idem.
78Eberhard Braun (ed), *German Insolvency Code: Article-by-Article Commentary* (2nd edn) (CH Beck 2019) 717; Heribert Hirte and Heinz Vallender (eds), *Uhlenbruck Kommentar, Insolvenzordnung: InsO* (15th edn) (Verlag Franz Vahlen 2019); Fridgen et al. (above note 74).

79Article 71(2), Recast EIR.

80This originates from the doctrine of entity shielding. See Henry Hansmann, Reinier Kraakman and Richard Squire, “Law and the Rise of the Firm” (2006) 119 *Harv. L. Rev*. 1,333. Insolvency practitioners face the same problems as directors of enterprise group members, commonly bound to act solely in the interests of the company they direct. UNICITRAL has recognized this problem and proposed a more flexible and holistic approach. See UNICITRAL, *Draft text on obligations of directors of enterprise group companies in the period approaching insolvency* (A/CN.9/990, 30 January 2019).

81Regulatory capture is a form of bias that characterizes a situation in which an agent, tasked to act in the public interest, instead advances other interests, such as interests of a special group that dominates a certain industry or market. For a seminal article on regulatory capture see George Stigler, “The Theory of Economic Regulation” (1971) 2 *Bell J. Econ. Manage. Sci*. 3.

82UNCITRAL Working Group V, 38th session, *UNCITRAL Legislative Guide on Insolvency Law, Part III: Treatment of enterprise groups in insolvency* (11 February 2010) 3.

83UNCITRAL Working Group V, *Report on the work of its 53rd session* (18 May 2018) 9.

84UNCITRAL Working Group V, *Enterprise group insolvency: draft guide to enactment* (28–31 May 2019).

85“Group insolvency solution” is defined as “a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members.” Article 2(f), MLG.

86According to Article 2(g), “planning proceeding” means a *main proceeding* commenced in respect of an enterprise group member, provided some additional requirements are satisfied.

87UNCITRAL, *Compilation of comments on the draft model law on enterprise group insolvency as contained in an annex to the report of Working Group V on the work of its 54th session* (A/CN.9/966, 28 March 2019). The author of this article was involved in the preparation of the comments by ELI/CERIL as an Associate researcher, appointed as such by CERIL.

88Note, that in principle, group coordination proceedings under the Recast EIR can be opened in the jurisdiction of secondary insolvency proceedings. In this case, such coordination proceedings would fall outside the scope of the MLG.

89Article 19(1), MLG.

90Article 72(2)(e), Recast EIR; Article 20(1)(f), MLG.

91Paragraph 41, Guide to MLG.

92UNCITRAL (above note 87). Notably, the final version of the Guide to MLG acknowledges the risk created by combining the said roles and concludes that “[i]t may be desirable to separate the functions of insolvency representative and group representative in certain situations, in particular in order to avoid a possible conflict of interests.”

93Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017) 432.

94Thole and Dueñas (above note 67) 219, noting that appointment of the same insolvency practitioner keeps “the various proceedings closer together, consequently facilitating coordination and improving efficiency.” Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 208, noting that procedural centralisation leads to the reduction of expenses and time waste on obtaining information; Samuel Bufford, “Coordination of Insolvency Cases for International Enterprise Groups: A Proposal” (1-2014 Penn State L. Res. Paper) 52, highlighting that “[t]ransaction costs resulting from separate administrators for separate legal entities in an enterprise group can be astronomical.”
95See for example, The World Bank Principles for Effective Insolvency and Creditor/debtor Regimes (2015) 28; Legislative Guide, Part III, 76–77; INSOL Europe, Revision of the European Insolvency Regulation, Proposals by INSOL Europe (2012) 91.

96§ 56b, InsO.

97Dirk Andres and Rolf Leithaus, Insolvenzordnung (4th edn, CH Beck 2018), noting that “[d]ifferent persons were only appointed in practice in case of a conglomerate in which individual group companies were not operatively linked to one another and thus no increased coordination effort was required with regard to the operational continuation or the sale of the respective business units.”

98Article 17, MLG.

99Legislative Guide, Part III, 76; Draft Guide to MLG (20 March 2019), paragraph 99; Fridgen et al. (above note 74), noting that the “appointment of a single insolvency administrator for the group companies should help reduce the coordination effort and maintain the economic unity of the group and have a positive effect on the amount of the disbursements.”

100Draft Guide to MLG (20 March 2019), paragraph 103, signalling that conflicts of interest may arise “if the same insolvency representative is appointed in situations involving cross-guarantees, intra-group claims and debts, postcommencement finance, lodging and verification of claims or wrongdoing by one enterprise group member with respect to another enterprise group member.”

101Van Galen (above note 1).

102See Draft Guide to MLG (20 March 2019), paragraph 103.

103The UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation, 2019) defines mediation as “a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (‘the mediator’) lacking the authority to impose a solution upon the parties to the dispute.”

104Legislative Guide, Part III, 77.

105Rule 1015, Federal Rules of Bankruptcy Procedure.

106Ibid Rule 2009.

107§ 56b, InsO, prescribing that when deciding on the appointment of a single insolvency practitioner, it should be discussed “whether this person can administer all the proceedings with regard to group debtors with due independence and whether any conflicts of interest can be eliminated by appointing special liquidators.”

108BGH, Beschluss vom 18. Juni 2009—IX ZB 13/09.

109Fridgen et al. (above note 74); Jörg Nerlich and Volker Römermann (eds), Insolvenzordnung Kommentar (CH Beck 2019), noting that a special liquidator can typically resolve conflicts of interest arising from intra-group claims and intra-group resource allocation.

110BT-Drs. Entwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen 18/407, 31; Hirte and Vallender (above note 78), noting that “the involvement of a special insolvency administrator must not reach the level that overbalances the advantages of a single administrator.”

111For example, the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2015) stipulate that the insolvency system should “permit an enterprise group member subject to insolvency proceedings to provide or facilitate postcommencement finance or other kind of financial assistance to other enterprises in the group which are also subject to insolvency proceedings.” In a similar vein, Legislative Guide, Part III recommends that “[t]he insolvency law should permit an enterprise group member subject to insolvency proceedings to advance postcommencement finance to other enterprise group members subject to insolvency proceedings.”

112Transactions between related parties are particularly vulnerable to avoidance claims in insolvency. See Gerard McCormack et al., Study on a new approach to business failure and insolvency. Comparative legal analysis of the Member States’ relevant provisions and practices (2016) 142–143.

113For protocols with provisions on rescue financing (intra-group lending) see Quebecor World Inc. and Re Commodore Electronics Limited and Commodore International Limited (1994). The former protocol divided
jurisdiction over rescue financing (DIP financing) matters between Canadian and US courts, so that Canadian courts have jurisdiction over matters affecting Canadian debtors, and US courts should consider issues affecting US debtors. The second protocol authorised the liquidators, with consent of the creditors’ committee to “lend monies of the estates [...] to any of their subsidiaries, with or without security.”

114 This may change with the implementation of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks. This Directive encourages provision of rescue financing and for that reason mandates protection of new and interim financing, including by way of its ex ante approval (see Article 17).

115 The draft versions of the MLG instead of “approving” and “authorizing” used the less certain term (from an ex ante perspective)—“recognizing.” See UNCITRAL Working Group V, Facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions, Note by the Secretariat (March 2017).

116 Article 20(g), MLG.

117 Ibid. Article 22(g).

118 Ibid. Article 24(h).

119 The draft versions of the MLG considered adding the phrase “participating in the planning proceeding,” which would have limited the operation of group financing arrangements to such participating entities only. See UNCITRAL (above note 115). The final version of the MLG does not have such a requirement.

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