

Towards Legal Certainty:
European Cross-Border Insolvency Law and Multinational Corporate Groups

Thesis submitted for the degree of Doctor of Philosophy

at the University of Leicester

by

Bader Juma Almaskari

School of law

University of Leicester

September 2016

Bader Juma Almaskari

**Towards Legal Certainty: European Cross-Border Insolvency Law and Multinational
Corporate Groups**

Abstract

The proliferation of multinational company groups in global trade brings new challenges to cross-border insolvency and subjects creditors to an excessive amount of legal uncertainty, which may put them at a disadvantage. This Thesis examines the extent to which European insolvency regulations, namely, the European Insolvency Regulation 2000 (EIR 2000) and the Recast European Insolvency Regulation 2015 (New Recast EIR 2015) enhance legal certainty and reduce the opportunity for abusive forum shopping, to the benefit of creditors in cross-border insolvency cases of multinational company groups. This Thesis provides an original approach to analysing this problem by first examining the issue from a company law perspective and a conflict of laws perspective. The Thesis then critically examines the EIR 2000 and demonstrates that the notion of the Centre of Main Interest (COMI) on its own is not capable of providing a satisfactory solution to the problem of the lack of legal certainty, especially as the regulation and the jurisprudence of the courts do not greatly help in adding more certainty to the meaning of the COMI. This is followed by examining proposals for enhancing legal certainty outside the EIR 2000, before critically examining the New Recast EIR 2015 by analysing the new provisions on secondary proceedings, the clarifications of the notion of the COMI, and the new chapter on groups. The Thesis concludes by acknowledging that the New Recast EIR 2015 has filled many of the gaps of the EIR 2000 and contributed to enhancing legal certainty in the cross-border insolvency of Multinational Corporate Groups (MCGs) for the benefit of creditors, but there is still room for improvement, especially as many of the tools found in the New Recast EIR 2015 are voluntary in nature. The concluding chapter ends by identifying new areas of potential research in this field.

Acknowledgements

There are many people who stood by me and supported me throughout my PhD journey. I would like to start by expressing my gratitude to my supervisors: Dr Stellios Andreadakis and Dr Diana Sancho Villa. They guided me through this journey and provided me with insightful feedback that helped improve my work. I would not have been able to reach this far without them. I would also like to thank Dr Lorna Gillies who was my original supervisor and encouraged me to undertake a PhD at Leicester. I would also like to thank all the amazing people I had the privilege of meeting at Leicester and who were there for me throughout the years, such as the excellent staff at the University Of Leicester School Of Law as well as my PhD colleagues. Thanks also go to Sultan Qaboos University for funding my studies and providing me with the opportunity to pursue a PhD. I would also like to thank Riyadh Al Balushi for his support. Finally, I would like to thank my family, especially my wife, for her everlasting love and support.

Table of Contents

Acknowledgements	ii
Table of Contents	iii
List of Cases.....	vi
List of Legal Instruments	x
Introduction	1
1 Research Background	2
(A) Multinational Corporation Groups.....	2
(B) The Importance of Legal Certainty to MCG Insolvency Cases.....	8
(C) Abusive Forum Shopping.....	11
(D) Background on European Insolvency Regulations	14
2 Research Questions.....	21
3 Research Methodology.....	22
4 Structure of the Thesis	26
Chapter 1: Perspectives on Company Law and Conflict of Laws	30
1.1 Cross-border Insolvency of MCGs: The Company Law Perspective.....	32
(A) The Concepts of Limited Liability, Separate Legal Personality, and Lifting the Veil	33
(B) Corporate Groups in UK Case Law.....	38
(C) Post Adams Era and the Problems of the Company Law Approach.....	42
1.2 The Conflict of Laws Perspective: Theories and Implications	45
(A) Universalism Theory in Insolvency Proceedings	48
(B) Modified Universalism Theory in Insolvency Proceedings.....	53
(C) The Principle of Territoriality.....	55
(D) The Principle of Cooperative Territoriality.....	58
(E) The Principle of Contractualism.....	60
1.3 Conclusion	63
Chapter 2: Centre of Main Interests as a Mechanism to Enhance Legal Certainty.....	67
2.1 The Notion of the COMI under the EIR 2000	69

(A) Importance of the COMI	69
(B) The Notion of the COMI	71
(C) Registered Office Approach vs Real Seat Approach	74
2.2 The Jurisprudence of the CJEU and Selected National Courts on the COMI	77
(A) Analysis of the Case of Daisytek ISA Limited: The ‘Head Office Function’ Approach	81
(B) Analysis of the Eurofood Case: The Registered Office Approach	85
2.3 Forum Shopping and European Insolvency Regulation	94
(A) The Implications of Forum Shopping in the Insolvency Regulation	97
(B) Preventing Abusive Forum Shopping	102
2.4 Conclusion	106
Chapter 3: Other Mechanisms for Enhancing Legal Certainty	108
3.1 Substantive Consolidation	109
3.2 Coordination and Cooperation	119
(A) Procedural Coordination	119
(B) Enhanced Cooperation and Coordination	124
3.3 Harmonisation of Insolvency Laws within the EU	128
(A) Full Harmonisation	128
(B) Harmonisation of Selected Insolvency Topics	133
3.4 Party Autonomy	135
(A) International Protocols: An Effective Tool for Dealing with the Insolvency of MCGs	135
(B) Choice Model	142
3.5 Conclusion	145
Chapter 4: The New Recast EIR 2015: An Enhancement of Legal Certainty?	148
4.1 Overview of the EIR Recast	149
4.2 Legal Certainty-Enhancing Provisions of the EIR Recast	156
(A) Secondary Proceedings	156
(B) Clarification of the Notion of the COMI	162
(C) Chapter V on Insolvency Proceedings of a Member of a Group of Companies	169
4.3 Opportunities for Reform	178
4.4 Conclusion	181
Conclusion	186
1 Cross-Border Insolvency of MCGs	186
2 Original Contribution	191

3 Future Research	192
4 Final Remarks.....	194
Bibliography	195

List of Cases

American Cases

In re Augie/Restivo Baking Company Limited 860 F.2d 515 (2d Cir 1988)

Global Telesystems Inc v KPNQwest NV 151 F.Supp.2d 478 (SDNY 2001)

In re Maxwell Communication Corp Case No 91-15741 (Bankr SDNY 15 January 1992)

In re Owens Corning 419 F.3d 195 (3d Cir 2005)

Soviero v Franklin National Bank of Long Island 328 F.2d 446 (1964)

Canadian Cases

Re A & F Baillargeon Express Inc (1993) 27 CBR (3d) 36 (Que SC)

Ashley v Marlow Group Private Portfolio Management Inc (2006) 22 CBR (5th) 126 (Ont SC)

English Cases

Adams v Cape Industries Plc [1990] Ch 433

Beckett Investment Management Group Ltd v Hall [2007] EWCA Civ 613, [2007] ICR 1539

BCCI SA, Re [1992] BCLC 1490

Briggs v James Hardie & Co Pty Ltd [1989] 16 NSWLR 549

Bugle Press Ltd, Re [1961] Ch 270

Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holding PLC [2006] UKPC 26, [2006] 3 WLR 689

Cassidy v Ministry of Health [1951] 2 KB 343

Chandler v Cape Plc [2012] EWCA Civ 525, [2012] 1 WLR 311

Collins & Aikman Europe SA, Re [2005] EWHC 1754 (Ch), [2006] BCC 861

A Company, Re [1985] BCLC 94

Daisytek-ISA Ltd and Others, Re [2003] All ER (D) 312

DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 3 All ER 462

FG (Films) Ltd, Re [1953] 1 All ER 615

Gilford Motor Co Ltd v Horne [1933] Ch 935

Gramophone and Typewriter Ltd v Stanley [1908] 2 KB 89

Hans Brochier Holdings Ltd v Exner [2007] BCC 127

IRC v Sanson [1921] 2 KB 336

Lehman Brothers International Europe (In Administration), Re [2012] UKSC 6 [2012] 3 All ER 1

Magyar Telecom BV [2013] EWHC 3800 Ch, [2014] BCC 448

MG Rover Espana and other Subsidiaries [2005] BPIR 1162, [2006] BCC579

Nortel Networks & Ors, Re [2009] EWHC 206, [2009] BCC 343

Prest v Petrodel Resources Ltd [2013] UKSC 34, [2013] 3 WLR 1

Polly Peck International Plc (In Administration) (No 4), Re [1996] 2 All ER 433

Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1921] 2 AC 465

Salomon v Salomon & Co Ltd [1897] UKHL 1, [1897] AC 22

Samengo-Turner v J & H Marsh & McLennan (Services) Ltd, [2007] EWCA Civ 723, [2008] IRLR 237

Stanford International Bank Limited, Re [2009] EWHC 1441 (Ch), [2009] BPIR 1157

VTB Capital Plc v Nutritek International Corp [2013] UKSC 5, [2013] 2 WLR 398

Woolfson v Strathclyde Regional Council [1978] UKHL 5, [1979] 38 PCR 521

German Cases

BGHZ Case Number VIII ZR 51/95 (3 April 1996)

Italian Cases

Daisytek – Versailles 2003 WL 22936778

CJEU Cases

Case C-210/06 Cartesio Okatato es Szolgaltato bt [2008] ECR I-9641

Case C-212/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen [1999] ECR I-1459

Case C-341/04 Eurofood IFSC Ltd [2006] ECR I-3813

Case 314/85 Frost v Hauptzollamt Lubeck - Ost [1987] ECR 4199

Case C-396/09 Interedil Srl (In liquidation) v Fallimento Interedil Srl and another [2011] WLR 334

Case C-191/10 Mediasucre [2012] ECR 239

Case C-191 Rastelli Davide e C Snc v Hidoux [2012] EWIR 87

Case C- 208/00 Überseering BV v Nordic Construction Company Baumanagement [2002]
ECR I-9919

List of Legal Instruments

Convention on Insolvency Proceedings (signed 23 November 1995) CONV/INSOL/X

Insolvency Proceedings [2000] OJ L160/1

Insolvency Proceedings (recast) [2015] OJ L141/19

Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12/1

The Statute for a European Company (SE) [2001] OJ L 294/1

Insolvency Act of 1986 (United Kingdom)

Companies Act 2006 (United Kingdom)

Insolvency Act 1999 (Insolvenzordnung) (Germany)

UNCITRAL Model Law on Cross-Border Insolvency (1997)

Introduction

*'Forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, he will naturally choose the one in which he thinks his case most favourably be presented; this should be a matter neither for surprise nor for indignation.'*¹ Lord Simon

This Thesis examines the European Union insolvency rules, specifically, the European Insolvency Regulation (EIR 2000) and the Recast European Insolvency Regulation (New Recast EIR 2015), in order to determine whether such rules help enhance legal certainty in cross-border insolvency cases involving multinational corporate groups (MCGs). The objective therein is protecting creditor interests through the reduction of abusive forum shopping.

Many major companies now use complex structures that involve multiple levels of subsidiaries.² Such structures are used to achieve economic and administrative advantages.³ As noted by Hannigan, it may also 'make geographic sense depending on the nature of the company's business' for a multinational company to divide its activities through subsidiaries.⁴ The problem of cross-border insolvency with MCGs is a very timely one, especially in light of the global growth of international trade, the movement towards the economic integration of various regions around the world, such as the European Union, the

¹ *The Atlantic Star* [1974] AC 346, 471.

² Subsidiary company: a subsidiary company is a company that is owned or controlled, directly or indirectly, by a parent company. A subsidiary company may be wholly owned by a single parent company, or may partially owned by several parent companies. Subsidiary companies have a separate legal personality from their parent companies and consequently a parent company cannot be held liable for the debts of the subsidiary except in cases where the veil may be lifted. For more on subsidiaries, see Henry Ballantine, 'Separate Entity of Parent and Subsidiary Corporations' (1925)14 California Law Review 12.

³ Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009) 12-13.

⁴ Brenda Hannigan, *Company Law* (4th edn, Oxford University Press 2016) 18.

greater flow of capital, and the ease of global communications.⁵ Forum shopping refers to the practice of such a company seeking the most favourable jurisdiction for its insolvency proceedings. This practice is known as ‘abusive’ when it reaches the point that a particular interest group, in so doing, seeks to appropriate wealth that belongs to others.

The outline of this introductory chapter is as follows: Section 1 of this chapter starts by providing an overview of the research background by exploring the problems related to the insolvency of MCGs, the importance of legal certainty in such cases, the problem of forum shopping in relation to cross-border insolvency cases, and the role that the EIR 2000 and the New Recast EIR 2015 play in this regard. Section 2 presents the research questions and the contribution that this Thesis attempts to make, while Section 3 details the methodology adopted for the study. Lastly, Section 4 outlines the structure of the Thesis.

1 Research Background

In order to properly analyse the topic of this Thesis, it is necessary to provide some background information on MCGs, the concept of legal certainty in cross-border insolvency cases of MCGs, abusive forum shopping, in addition to some background information on the development of European insolvency rules.

(A) Multinational Corporation Groups

A MCG is an enterprise that operates internationally through the ownership or control of other entities in more than one country.⁶ MCGs are also known as multinational enterprises

⁵ John Dunning and Sarianna Lundan, *Multinational Enterprises and the Global Economy* (2nd edn, Edward Elgar 2008) 3-4.

⁶ Although with slight variations, other terminologies used to signify the concept of MCGs include; ‘international corporation’ ‘transnational corporation’ and ‘stateless corporation’. See Roy Voorhees, Emerson Seim and John Coppett, ‘Global Logistics and Stateless Corporations’ (1992) 59 *Transportation Practitioners Journal* 144; Michele Reumers, ‘Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR’ (2013)10 *European Company and Financial Law Review* 554, 576.

(MNEs) or multinational enterprise groups (MEGs).⁷ Businesses choose to operate under an MCG model in order to satisfy domestic business operation regulations or to manage their risk in a manner that limits their liability.

A problem arises when a multinational corporation goes into insolvency,⁸ because, as noted by Wouters and Raykin, such insolvency “raises the problems of any cross-border dispute: reciprocity, venue, choice of law,⁹ and cultural differences”.¹⁰ What makes insolvency a unique cross-border dispute is that there are no winners in such disputes. Insolvency occurs when the liabilities of the company exceed its assets,¹¹ which means that, by definition, the company will not be able to satisfy all its debts, and it is, therefore, likely that the shareholders will lose their investment,¹² employees will lose their jobs,¹³ and most creditors will receive less than they are owed.¹⁴ This makes domestic insolvency cases difficult on

⁷ It is acknowledged that the term multinational enterprise (MNE) is a commonly used term to describe a multinational company. This Thesis uses the term multinational corporate group (MCG) instead of MNE to highlight that we are referring to a group of companies with subsidiaries and not just a single company that operates across multiple jurisdictions without incorporating separate legal entities; Mevorach (n 3)10; Peter Muchlinski, *Multinational Enterprise and the Law* (2nd edn, Oxford University Press 2007) 6; DK Fieldhouse, ‘The Multinational: A Critique of a Concept’ in A Teichova et al (eds) *Multinational Enterprise in Historical Perspective* (Cambridge University Press 1986) 9-13.

⁸ The term ‘Insolvency’ is derived from the term ‘insolvent’. An insolvent person is a person that is unable to pay his or her debts. Thus, insolvency is the state of inability to pay money owed by an individual to another. The term ‘insolvency’ is commonly used interchangeably with the term ‘bankruptcy’. Corporate insolvency relates to a situation where a company is unable to pay its debts or where the outstanding liabilities of the company exceed its assets measurable value. For more on insolvency see: Richard Mann and Barry Roberts, *Business Law* (15th edn, Gengage Learning 2011) 792.

⁹ Irit Mevorach ‘Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge’ (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 226; Hannah Buxbaum, ‘Rethinking International Insolvency: The Neglected Role of Choice of Law Rules and Theory’ (2000) 36 Stanford Journal of International Law 23.

¹⁰ Nora Dunning and Alla Raykin, ‘Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal & Economic Developments’ (2013) 29 Emory Bankruptcy Developments Journal 387.

¹¹ Ian Fletcher, *Insolvency Law in Private International Law* (2nd, Oxford University Press 2005) 1-4; Philip Wood, *Principle of International Insolvency* (Sweet & Maxwell 2007) 6.

¹² Louise Gullifer and Jennifer Payne, *Corporate Finance Principles and Policy* (2nd Oxford Hart Publishing 2015)114 and 115.

¹³ Samuel Etukakpan, ‘The Lost Voice in Insolvency: Theories of Insolvency Law and Their Implications for the Employees’ (2014) 23 Nottingham Law Journal 34; Donald Korobkin, ‘Employees Interests in Bankruptcy’ (1996) 4 American Bankruptcy Law Review 5; Philip Smart, *Cross-Border Insolvency* (2nd edn, Butterworth 1998) 6.

¹⁴ Thomas Bachner, *Creditor Protection in Private Companies Anglo-German Perspectives for a European Legal Discourse* (Cambridge University Press 2009) 5; Fletcher (n 11)1-4.

their own,¹⁵ let alone cross-border ones, where the activities of the corporation, its assets, and its creditors are dispersed across different jurisdictions.

There are several objectives to insolvency proceedings.¹⁶ The first objective is to enhance the economic efficiency of the insolvent company and this can be achieved by maximising the value of the assets of the insolvent company and by reducing the costs and length of the insolvency proceedings. The second objective is to rescue the distressed company when, first, there is a chance to save it and second, when doing so could be beneficial for the parties involved, especially the creditors. The third objective is to achieve fairness through fair insolvency proceedings that ensure that all relevant parties are treated equally and that there is equal distribution of the assets.¹⁷

A great level of complexity arises when dealing with cross-border insolvency cases because assets and creditors are located in different jurisdictions.¹⁸ Cross-border insolvency is common in insolvency cases involving MCGs, but it is also possible for a single company to have cross-border insolvency if the assets or the creditors of this single company are located in more than one jurisdiction.¹⁹ Such cross-border insolvency is complicated because courts in more than one country may claim jurisdiction over the insolvency proceedings, which

¹⁵ Irit Mevorach, 'The Road to a Suitable and Comprehensive Global Approach to Insolvencies for Multinational Corporate Groups' (2006) 15 Norton Journal of Bankruptcy Law and Practice 5; Robert Miller, 'Economic Integration: An American Solution to the Multinational Enterprise Group Conundrum' (2012) 11 Richmond Journal of Global Law and Business 185.

¹⁶ Some of the most significant literature in this regard include Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009); Thomas Jackson, *The Logic and Limits of Bankruptcy* (Harvard University Press 1986); Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell 2009); Bruce Carruthers and Terence, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Clarendon Press 1998); David Milman, *Personal Insolvency Law, Regulation and Policy* (Ashgate 2005).

¹⁷ Allan Gropper, 'The Payment of Priority Claim in Cross-Border Insolvency Cases' (2011) 46 Texas International Law Journal 559; Francesco Denozza, 'Different Policies for Corporate Creditor Protection' (2006) 7 European Business Law Review 409.

¹⁸ Lucian Bebchuk and Andrew Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 Journal of Law and Economics 775.

¹⁹ Roman Tomasic, *Insolvency Law in East Asia* (Ashgate 2006) 536.

makes it difficult to determine the applicable insolvency law.²⁰ Furthermore, the extent to which foreign creditors will have an equal footing with local creditors is not always certain in such proceedings.²¹ Due to the lack of an international scheme for dealing with such insolvency cases and the justified exercise by states of their sovereignty, a court might not have access to foreign assets of the corporation.²² This can consequently result in multiple courts in different jurisdictions commencing insolvency proceedings to deal with the same insolvency case, which accordingly makes the process extremely expensive, inefficient, and uncertain.²³

Moreover, the elaborate structure of MCGs, described above, makes the insolvency case of any member of the group even more complicated than when an individual company goes through cross-border insolvency proceedings. This is because the principle of separate legal personality can restrict the ability of creditors to seek to recover their debts from the assets of the parent company,²⁴ even in cases where the parent company has total control over the subsidiary or in cases where the parent company has created the subsidiary as a vehicle to specifically limit its liability.²⁵ This complexity can be illustrated in the American case of

²⁰ Jona Israel, *European Cross-Border Insolvency Regulation a Study of Regulation 1346/2000 on insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005) 30.

²¹ Cronin Matthew, 'UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to Substantive Problem' (1999) 24 *Journal of Corporation Law* 709.

²² Lynn Lopucki, 'Cooperation International Bankruptcy: A Post Universalist Approach' (1999) 94 *Cornell Law Review* 696.

²³ Janis Sarra, 'Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings' (2009) 44 *Texas International Law Journal* 547; Sandeep Gopalan and Michael Guihot, 'Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap –Filling' (2015) 48 *Vanderbilt Journal of Transnational Law* 1225.

²⁴ A parent company is a company that owns or controls, directly or indirectly, one or more subsidiary companies. There are certain situations where a company may have control without having ownership, as it may have indirect influence over the actions of another company as a result of the appointment of the directors or as a result of another arrangement. A parent-subsidiary relationship can exist within the same jurisdiction and does not have to be multinational in nature. However, the relationship becomes more complicated in a multinational environment as will be explored in Chapter 1. For more on parent companies see: Andrew Hicks and S.H.Goo, *Cases and Materials on Company Law* (6th edn, Oxford University Press 2008) 500.

²⁵ Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform' (2010) 34 *Cambridge Journal of Economics* 915; Paul Davies, Sarah Worthington and Laurence Gower, *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008) 202.

Global Telesystems v KPNQwest.²⁶ In this case, all the infrastructure of the communications company, across several countries, was owned by a single member of the group, while the service was provided by separate subsidiaries in different countries. Consequently, the United States District Court was not able to treat the whole group as a single entity, and multiple insolvency proceedings were commenced and coordinated. This resulted in much lower proceeds than if the assets of the group had been sold as a whole.²⁷ There are also other cases that demonstrate the complexities of cross-border insolvency involving MCGs, such as the aforementioned *KPNQwest*, *Re Stanford International Bank Limited*,²⁸ *MG Rover*,²⁹ *Daisytek*,³⁰ and *Collins & Aikman*.³¹ Some of these cases will be discussed later.

The combination of (a) cross-border insolvency complexities and (b) complexities raised by corporate groups, when put together they greatly reduce the level of legal certainty in such insolvency cases to the detriment of creditors. Due to the fact that the assets, creditors, and business operations of multiple subsidiaries are located in different jurisdictions, it becomes difficult to determine what court has jurisdiction over the insolvency proceedings of any given subsidiary, and this consequently makes it difficult to determine the applicable insolvency law.³² The courts have struggled in dealing with such insolvency proceedings as can be seen in the case of *KPNQwest*.³³

²⁶ *Global Telesystems Inc v KPNQwest NV* 151 F.Supp.2d 478 (SDNY 2001).

²⁷ *Global Telesystems Inc v KPNQwest* (n 26) ; Robert Van Galen 'Insolvent Groups of Companies in Cross Border Cases and Rescue Plans Report to the Netherlands Association for Comparative and International Insolvency Law (Conference of 8 November 2012) <https://www.nautadutilh.com/Documents/Publications%20to%20profiles/Insolvent_Groups_of_Companies_in_Cross_Border_cases_and_rescue_plans.pdf> accessed 4 May 2016.

²⁸ *Global Telesystems, INC v KPNQwest*, NV, 151 F Supp.2d (2001); *Re Stanford International Bank Limited* [2009] EWHC 1441 (Ch), [2009] BPIR 1157.

²⁹ *MG Rover Espana and other Subsidiaries* [2005] BPIR 1162, [2006] BCC579.

³⁰ *Re Daisytek-ISA Ltd and Others* [2003] All ER (D) 312 (Jul) 16 May 2003.

³¹ *In Re Collins & Aikman Europe SA Re* [2005] EWHC 1754 (Ch), [2006] BCC 861.

³² Israel (n 20) 30.

³³ *Global Telesystems, INC v KPNQwest* (n 26).

The principle of legal certainty is a crucial element in international insolvency proceedings because the rights and obligations of all parties involved need to be clear, predictable, stable and precise.³⁴ As noted by Popelier, certainty requires ‘accessibility and predictability of the law so that those affected by the law can reasonably anticipate the consequences of their action’.³⁵ Thus, when legal certainty is not present, creditors, debtors and other parties cannot predict with sufficient certainty which court will have jurisdiction and which law will apply to insolvency proceedings, in order to avoid unexpected monetary expenses and liabilities.³⁶

The importance of legal certainty is discussed further in the subsequent subsection. Here, it is relevant to note that the lack thereof in insolvency proceedings involving MCGs has enabled the debtors and the directors of distressed entities to resort to abusive forum shopping, as the differences in insolvency laws amongst various jurisdictions provide a great incentive to select the most favourable legal regime for them,³⁷ which might not necessarily be the one most favourable to the creditors. For example, the directors of a company may move its offices to a certain jurisdiction to take advantage of rescue proceedings instead of being forced to liquidate the company. This ability to manipulate the jurisdiction of the insolvency proceedings can be extremely detrimental to creditors because, as noted by Mucciarelli, the payoff that creditors receive in the event of default is altered through forum shopping, which alters the risk they bear with respect to a specific debtor.³⁸

³⁴ Epp Aasaru, ‘The Desirability of Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law’ (2011) 22 *European Business Law Review* 349.

³⁵ Patricia Popelier, ‘Five Paradoxes on Legal Certainty and the Lawmaker’ (2007) 2 *Legisprudence* 47, 48.

³⁶ Judith Wade, ‘The Centre of Main Interests Connecting Factor Affords Creditors no Certainty under the Model Law Regime’ (2011) 22 *International Company and Commercial Law Review* 102.

³⁷ Marek Szydło, ‘Prevention of Forum Shopping in European Insolvency Law’ (2010) 11 *European Business Organization Law Review* 253.

³⁸ Federico Mucciarelli, ‘The Unavoidable Persistence of Forum Shopping in European Insolvency Law’ (CEFIN, 2013) Working Papers No 36 <http://www.cefin.unimore.it/?q=webfm_send/186> accessed 5 May 2016.

Over the years, concerns have been raised about whether forum shopping has a positive or detrimental effect. Whereas some argue that the practice is beneficial, others argue that it carries certain dangers, which must be guarded against.³⁹ This is especially so, because it can subject creditors to insolvency proceedings that are less favourable to them, more expensive, and riskier. More importantly, abusive forum shopping can make the insolvency proceedings unpredictable and uncertain to creditors because it could result in the proceedings taking place at a court they did not anticipate.⁴⁰

(B) The Importance of Legal Certainty to MCG Insolvency Cases

As briefly mentioned above, legal certainty is extremely significant in cross-border insolvency cases involving MCGs. In its general application to the law, certainty is very crucial for the proper operation of any legal framework.⁴¹ If the law is not certain enough, members of the public will not be able to ascertain their rights and obligations, business will not know what rules they are subject to, and the courts will not know what rules to apply or how to interpret the rules.⁴² For the law to be certain, the legislation must be definite, clear and precisely formulated.⁴³ As noted by Braithwaite, court decisions must also be made in

³⁹ Gerard McCormack, 'Jurisdiction Competition and Forum Shopping in Insolvency Proceedings' (2009) 68 *The Cambridge Law Journal* 169, 181.

⁴⁰ Irit Mevorach, 'Forum Shopping in Times of Crisis: A Director's Duties Perspective' (2013) 4 *European Company and Financial Law Review* 523, 546.

⁴¹ Irit Mevorach, 'Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap' (2015) 10 *Brooklyn Journal of Corporate, Financial and Commercial Law* 183; Pontain Okoli, 'In Pursuit of Substantial Justice: Navigating between Flexibility and Certainty in International Commercial Law' (2014) 7 *International Journal of Private Law* 376. In civil law jurisprudence legal certainty has been associated with simplification of litigation, reduction of transaction costs, enhanced efficiency and the development of international trade, see Emmanuel Laryea, 'International Legal Instruments to International Sale of Goods Transaction' (2011) 19 *African Journal of International and Comparative Law* 1, 4; Charles Calleros, 'Toward Harmonization and Certainty in Choice of Law Rules for International Contracts: Should the U.S Adopt the Equivalent of Rome 1?' (2011) 28 *Wisconsin International Law Journal* 639; Helmut Wagner, 'Economic Analysis of Cross-Border Legal Uncertainty: The Example of the European Union' in Jan Smits (eds), *The Need for a European Contract Law Empirical and Legal Perspectives* (Groningen Europe Law Publishing 2005) 39.

⁴² James Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy' (2006-2007) 15 *Tulane Journal of International and Comparative Law* 541, 549; Ken Kress, 'Legal Indeterminacy' (1989) 77 *California Law Review* 283; Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Routledge 2016); Humberto Avila, *Certainty in Law* (Springer 2016).

⁴³ Maxeiner (n 42) 549.

accordance with the framework of the existing legal system in which they operate and not arbitrarily.⁴⁴ This consequently should make the outcome of any dispute more predictable for all of the parties involved, such that they are able to foresee the consequences that a given action may entail.⁴⁵

Thus, this Thesis focuses on enhancing legal certainty from the point of view of creditors in cross-border insolvency cases involving MCGs. It is acknowledged that there are other stakeholders involved in cross-border insolvency whose interests are similarly worthy of consideration and protection, such as debtors, employees, and shareholders. However, all insolvency laws, such as the German Insolvency Act of 1999,⁴⁶ focus on the interests of creditors during insolvency as a priority, and this focus is justified because creditors, in many circumstances, are more vulnerable than some of the other stakeholders and might not have the same guarantees and protections.⁴⁷ This is especially so when we compare the creditors with the directors of the company, who usually take all the decisions that lead the company to go insolvent, unlike creditors, who are not involved in the decision making process, and may have low bargaining power. This problem is exacerbated by the tendency of some directors to take unjustified risks in order to make a profit, to the detriment of creditors.⁴⁸

There are many uncertainties in cross-border insolvency cases involving MCGs, which have been enumerated above in this section and in the preceding one. The most notable of these is that the assets and creditors of the company may be located in different jurisdictions, as a result of which more than one court may assume jurisdiction over the insolvency

⁴⁴ John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 48.

⁴⁵ Popelier (n 35) 321.

⁴⁶ Insolvency Act 1999 (Insolvenzordnung).

⁴⁷ Christof Schiller and Eberhard Braun, 'The New Insolvency Code' in Jonathan Reuvid and Roderick Millar (eds) *Doing Business with Germany* (Kogan Page 1999).

⁴⁸ Thomas Jackson and Anthony Kronman, 'Secured Financing and Priority Among Creditors' (1979) 88 *Yale Law Journal* 1143.

proceedings, each applying its own domestic insolvency law.⁴⁹ This makes it difficult for the creditors to be able to predict the court that has jurisdiction and consequently it is difficult for them to predict the outcome of such proceedings. This is unlike domestic insolvencies where it is clear that the domestic court will be responsible for the insolvency of the domestic company and will apply the national legislation.

Thus, cross-border insolvency constitutes both a litigation risk and a transaction risk. As noted by Fentiman, a litigation risk is ‘a venue risk, the risk to each party that any dispute will not be resolved in their preferred forum’,⁵⁰ whereas a transaction risk is ‘the risk that the parties’ expectations will be defeated by the application of law which does not give effect to the object of the transaction’.⁵¹ This uncertainty is exacerbated by the fact that creditors will not be certain about whether or not they will have to travel to another country, what language will be used in the proceedings, and whether or not a foreign expert will be needed.⁵² This can make the process very inefficient, expensive, and risky for the creditors. In comparison with local creditors, foreign creditors are in a worse situation because the domestic group of creditors will use their own language and will have lower administrative and legal costs.⁵³ It is possible for larger multinational creditors to overcome such financial challenges, but for

⁴⁹ Stephanie Warner, ‘Cross Border Insolvency: The COMI Issue in the Stanford Case’ (*Legal Houdini*, 15 June 2011) <http://www.legalhoudini.nl/images/upload/S%20Warner_Cross%20Border%20Insolvency.pdf> accessed 6 May 2016.

⁵⁰ Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) 4.

⁵¹ *ibid.*

⁵² Kurt Nadelmann, ‘Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?’ (1943) 91 *University of Pennsylvania Law Review* 601; Kurt Nadelmann, ‘Legal Treatment of Foreign and Domestic Creditors’ (1945-1946) 11 *Law and Contemporary Problems* 696.

⁵³ Nicholaes Tollenaar, ‘Dealing with the Insolvency of Multi-National Groups under the European Insolvency Regulation’ (2010) 23 *Insolvency Intelligence* 65.

the majority of smaller creditors, such costs may effectively preclude their participation in the proceedings.⁵⁴

For the interests of creditors to be sufficiently protected, creditors must be certain of two things: (1) there must be legal certainty as to what court will assume jurisdiction and consequently what insolvency law will apply; and (2) there must be legal certainty as to what the outcome of the insolvency proceedings will be. Improving legal certainty can also be in the interest of the State, as this may help promote the State as a destination for effective and efficient insolvency, which could help attract investment and support the local economy.⁵⁵

When discussing the concept of certainty in regard to the cross-border insolvency of MCGs, the Thesis focuses on the perspective of creditors and the extent to which their interests are affected. As acknowledged above, other parties in the dispute, such as the directors and debtors as well as the State, are also affected by the lack of certainty in such disputes. However, as their needs and priorities are different and as a result of time and space limitations of this Thesis, the analysis in this Thesis gives priority to certainty from the perspective of creditors.

(C) Abusive Forum Shopping

Due to the possibility of more than one court having jurisdiction over a certain dispute, some litigants may manipulate this to select the court that will be most favourable to their claim.⁵⁶

⁵⁴ Jennifer Dickfos, 'Corporate Groups: A Case for Protection of Unsecured Creditors Do Unsecured Creditors of Corporate Group Members Require Additional Contractual or Statutory Protection?' (2009) Griffith University Law Working Paper

<http://www.clta.edu.au/professional/papers/conference2009/DickfosCLTA09.pdf> accessed 23 July 2016; Andrew Keay, 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over – Protection of Creditors' (2003) 66 The Modern Law Review 665.

⁵⁵ Robert Rasmussen, 'The Ex Ante Effects of Bankruptcy Reform on Investment Incentives' (1994) 72 Washington University Law Review 1159.

⁵⁶ Gerard McCormack, 'Bankruptcy Forum Shopping: the UK and US as Venues of Choice for Foreign Companies' (2014) 63 International and Comparative Law Quarterly 815; Jean Maslin, 'The Effectiveness of

This concept is referred to as ‘forum shopping’. In the context of cross-border insolvency, the European Insolvency Regulation specifies that ‘transfer of assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position’ is to be considered a form of forum shopping.⁵⁷ Forum shopping can be beneficial to creditors and other parties when they move to a jurisdiction that provides them with greater advantages. However, in some cases, forum shopping can be detrimental to creditors when debtors and directors transfer the assets of a company to a specific jurisdiction that is more beneficial to them while being adverse to the creditors.

Insolvency laws in different jurisdictions may differ and they may give the parties involved in the insolvency proceedings incentives to choose one legal regime in favour of another, which could ultimately lead to forum shopping.⁵⁸ Different kinds of stakeholders (in particular, creditors, shareholders and employees) have an interest in selecting the insolvency law that serves their interests in the best possible way and provides them with high protection. For example, creditors might be interested in choosing an insolvency law that provides them with a high guarantee for their debts and ensures the quick realisation of their assets.

By one particular forum being more favourable to a certain party, it is possible for forum shopping to have an adverse effect on other parties. It is at this point that forum shopping is considered ‘abusive’. Zywicki defines abusive forum shopping as forum shopping that is ‘not

European Cross-Border Insolvency Regulation as a Tool Against Forum Shopping’ [Unpublished] (SSRN, 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539391> accessed 12 May 2016.

⁵⁷ EIR 2000 recital 4.

⁵⁸ Szydło (n 37) 256; see also case of German company (Schefenacker) where financial difficulties pushed a move of COMI to the UK in order to profit from English insolvency law; Laura Pineiro, ‘Towards the Reform of the European Insolvency Regulation: Codification rather than Modification’ (2014) 2 *Nederland Internationaal Privaatrecht* 209. In the more recent case *Magyar Telecom* which involved a COMI immigration by a Dutch firm to England for the same aim. *Magyar Telecom BV* [2013] EWHC 3800 (Ch), [2014] BCC 448; Horst Eidenmüller and Kristin Zwieten, ‘Restructuring the European Business Enterprise: the EU Commission Recommendation on a New Approach to Business Failure and Insolvency’ (2015) *Oxford Legal Studies Research Paper* 52/2015, 17 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662213> accessed 4 May 2016.

driven by consent and efficiency concerns, but rather by rent-seeking opportunities for some interests groups to redistribute wealth to themselves from others'.⁵⁹ This Thesis is concerned with abusive forum shopping that is detrimental to the interests of creditors in cross-border insolvency cases involving MCGs.

Forum shopping harms the insolvency proceedings in numerous ways, all of which reduce the legal certainty of the proceedings on account of the chance that the applicable law might be changed.⁶⁰ The uncertain possibility of the change in applicable law not only affects the ability of creditors to predict the rules that will apply, the priority their claims will be given (which depends on the insolvency law applicable to the case),⁶¹ and the extent to which claims in tort could be relevant to the insolvency,⁶² but this uncertainty also has direct financial consequences for creditors. This is because they do not know if they will have to hire foreign experts, travel to another location, or conduct the proceedings in another language.⁶³ Forum shopping could also be seen as abusive when debtors put the creditors at a great procedural disadvantage or when directors take advantage of it to select a jurisdiction that enables them to avoid personal liability or delay the proceedings.⁶⁴ Abusive forum shopping could also result in a jurisdiction where the law provides creditors with less protection than other stakeholders.⁶⁵ Finally, abusive forum shopping could place extra

⁵⁹ Todd Zywicki, 'Is Forum Shopping Corrupting America's Bankruptcy Courts?' (2006) 94 *Georgetown Law Journal* 1141; Richard Maloy, 'Forum Shopping? What's Wrong with That' (2005) 24 *Quinnipiac Law Review* 25

⁶⁰ John Pottow, 'The Myth (and Realities) of Forum Shopping in Transitional Insolvency' (2007) 32 *Brooklyn Journal of International Law* 785; C Granger, 'The Conflict of Laws and forum Shopping: Some Recent Decisions on Jurisdictions and Free Enterprise in Litigation' (1973-1974) 6 *Ottawa Law Review* 416.

⁶¹ McCormack (n 56) 815.

⁶² Joseph McCahery, 'Creditor Protection in a Cross-Border Context' (2006) 7 *European Business Organization Law Review* 455,458.

⁶³ Amy Cobum, 'The Growth of Bankruptcy Tourism in the United Kingdom' (2012) 25 *Insolvency Intelligence* 8.

⁶⁴ Szydlo (n 37) 256.

⁶⁵ Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003) 24, 25.

burdens on the courts of certain jurisdictions that appear to be more favourable to the debtors or directors of a company.⁶⁶

Therefore, enhancing legal certainty is important in cross-border insolvency cases involving MCGS in order to reduce or prevent the possibility of abusive forum shopping, especially because forum shopping could be extremely detrimental to the interests of creditors. It is also worth noting that reducing forum shopping is one of the objectives of the EIR 2000 and the New Recast EIR 2015.⁶⁷ The subject of forum shopping will be explored in more depth in Section 2.3 of Chapter 2.

(D) Background on European Insolvency Regulations

As the main focus of the Thesis is to examine the extent to which certainty can be enhanced in cross-border insolvency cases involving MCGs, it is necessary to provide a brief background of the European Insolvency Regulation (EIR 2000) and the Recast European Insolvency Regulation (New Recast EIR 2015), which both constitute the primary pieces of legislation in Europe on the regulation of cross-border insolvency proceedings, with the EIR 2000 remaining in force until 2017, when the New Recast EIR 2015 becomes effective. The analysis of these two instruments is especially important because providing legal certainty to cross-border insolvency cases is actually one of the aims of the EIR 2000 and the New Recast EIR 2015.⁶⁸ Therefore, this section will provide a brief historical background to the development of both the EIR 2000 and the New Recast EIR 2015.

⁶⁶ Cobum (n 63)11.

⁶⁷ EIR 2000 recital 13, New Recast EIR 2015 recital 5 and 29.

⁶⁸ The general objective of the EIR 2000 is to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of improving the functioning of the internal market and its resilience in economic crises. In addition, there are some specific aims such as increasing legal certainty for creditors, thereby encouraging cross-border trade and investment as well as to improve the efficient administration of the insolvency of members of a multi-national group of companies, thereby maximising the value of their assets and facilitating rescue. See European Commission, *Commission of the Staff Working Document – Executive Summary of the Impact Assessment* (SWD (2012) 417 Final) 7.

The rules of insolvency disputes within the European Community (now Union) have taken almost forty years of studying and negotiation between the Member States. In this regard, the process leading up to the EIR 2000 can be divided into three crucial phases. The first phase of discussion over the need to have European Union rules on insolvency took place between 1957 and 1980. This period was influenced by the traditional territoriality-universality dichotomy, and several drafts were produced during that time as will be explored in depth in Chapter 1. The second phase of the development of European Union insolvency rules was from 1980 to 1990. In this phase, the Community did not succeed in passing any formal rules in this regard. In the third phase, from 1990 to 1995, the Community effort succeeded in finding a balance between the interests underlying the territoriality and universality approaches, as a result of which the final draft of the European Convention on Insolvency Proceedings was completed in 1995. However, this draft of the Convention was not adopted because the United Kingdom failed to sign it within the designated time limit.⁶⁹ The decision specifically regarding multinational groups of companies was postponed to a later date for political reasons.⁷⁰ Moreover, the Convention reflected the thinking of the 1980s and 1990s, when MCGs were not very widely known and most insolvency laws of the Member States of the European Union did not incorporate the idea of the rescue of companies as a prevailing concept.⁷¹ It is important to bear in mind that the European Insolvency Convention 1995 was,

⁶⁹ Bob Wessels, 'European Union Regulation On Insolvency Proceedings An Introductory Analysis' (*INSOL International*, 2006) <<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Union%20Regulation%20on%20Insolvency%20Proceedings%20An%20Introductory%20analysis,%20Bob%20Wessels.pdf>> accessed 9 May 2016.

⁷⁰ This due to political controversies with regards to the distorted relations between the UK and other Member States because of the 'mad cow disease'.

⁷¹ Gabriela Fierbinteanu, 'Amending Regulation (EC) NO.1346/2000 on Insolvency Proceedings –Solving Deficiencies or Attempt to Rescue Companies in Difficulty?' (2013) 20 *Scientia International Journal* 7; Maria Brouwer, 'Reorganization in US and European Bankruptcy Law' (2006) 22 *European Journal of Law and Economics* 5.

to a large extent, the basis upon which the European Insolvency Regulation (EIR) was developed.⁷²

The EIR 2000, which was issued in 2000, came into force in 2002 in all Member States, except Denmark, after a long, difficult and complex process which lasted, in all, more than 40 years. There is no doubt that the circumstances were much different than today. For example, complex company structures and complex enterprise group structures were not common. Also, when a company encountered financial difficulties, liquidation was the only option available to this company, unlike today when the possibility of a rescue plan for the company exists. Furthermore, the world has significantly advanced technologically, commercially and legally.⁷³

One of the main goals of the EIR 2000 is to provide a stable framework for the treatment of cross-border insolvency in Europe. Hence, it contains provisions regarding jurisdiction rules for insolvency, the applicable law, and the recognition of foreign proceedings. In particular, the EIR 2000 attempts to resolve the issues of cross-border insolvency within the EU by establishing a mechanism to identify the court to assume jurisdiction over insolvency proceedings within the EU,⁷⁴ and subsequently to identify the applicable law.^{75,76} The EIR

⁷² The 'Virgos – Schmit Report' is the definitive interpretive text on the EIR 2000 and can be utilised to clarify any ambiguity in the Regulation. See Miguel Virgos & Etienne Schmit, 'Report on the Convention on Insolvency Proceedings' was the principal report on the Convention on Insolvency Proceedings, which was converted into Regulation. The Report does not have an official status but Commission official today still refer to the report for assistance with its interpretation (European Union – The Council 3 May 1996) <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf> 14 May 2016.

⁷³ Alan Stomel, 'Answering the Call of the European Court of Justice in Eurofoods: A proposed Package of Due Process Rights with a View Toward the 2012 Revision of European Insolvency Regulation' (Institute of *European Studies*, 2011) <<http://www.ies.be/working-paper/answering-call-european-court-justice-eurofoods>> accessed 14 May 2016.

⁷⁴ Council Regulation (EC) No 1346/2000 on Insolvency Proceedings [2000] OJ L 160, art 3; Bob Wessels, *International Insolvency Law* (Kluwer 2012) 365.

⁷⁵ EIR 2000 art 4; Jay Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law Choice of Forum' (1991) 65 *American Bankruptcy Law Journal* 457.

⁷⁶ EIR 2000 art 3; Virgos & Schmit (n 72) para 87. According to Virgos-Schmit Report the reference to applicable law means the internal law of the Member States and not private international rules.

2000 also provides a number of exceptions to the main rule relating to the applicable law and contains a provision for the automatic recognition of foreign insolvency proceedings.⁷⁷ A key attribute of the EIR 2000 is that it puts great emphasis on the uniform application of its rules across the EU, and this has been facilitated by the Court of Justice of the European Union (CJEU).⁷⁸ The decisions of the CJEU have helped in interpreting the EIR 2000 in a uniform manner that is independent of domestic legislation.⁷⁹

The EIR 2000 acknowledges that there will always be multiple proceedings in different countries due to the fact that creditors and assets are dispersed across multiple jurisdictions.⁸⁰ To enable an effective resolution mechanism for such cases, the EIR 2000 creates a distinction between what it calls ‘main insolvency proceedings’ and ‘secondary insolvency proceedings’.⁸¹ In dealing with the main insolvency proceedings, the EIR 2000 adopts a universalist approach that seeks to involve all of the creditors and all of the assets of the debtors,⁸² wherever they might be located.⁸³ The primary legal consequences of the main proceedings are the automatic recognition of judgments in all Member States;⁸⁴ the application of the law of where the main insolvency proceedings have taken place to all assets and creditors involved in the main insolvency proceedings;⁸⁵ the designation of full power to the administrator of the main proceedings to administer and control the entire estates in every European Union State and to take all necessary steps to reduce the cost of the

⁷⁷ EIR 2000 art 16; Wessels (n 74) 657.

⁷⁸ Ian Fletcher, ‘The European Union Convention on Insolvency Proceedings: Choice of Law Provisions’ (1998) 33 *Texas International Law Journal* 119.

⁷⁹ Case C- 341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813.

⁸⁰ John Pottow, ‘Procedural Incrementalism: A Model for International Bankruptcy’ (2005) 45 *Virginia Journal of International Law* 935.

⁸¹ EIR 2000 art 3 and 4; Geert Van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016) 297, 312.

⁸² See Chapter 1 Section 1.2 (A).

⁸³ Gerard McCormack, ‘Reconciling European Conflict and Insolvency Law’ (2014) 15 *European Business Organization Law Review* 309, 320.

⁸⁴ EIR 2000 art 16.

⁸⁵ EIR 2000 art 4.

insolvency proceedings; and finally, the possibility of rescue of the business can only take place in the main insolvency proceedings, as secondary proceedings are only allowed to be winding-up proceedings.⁸⁶

Secondary proceedings, on the other hand, adopt a territorial approach and are restricted to places where a debtor has an establishment.⁸⁷ Such proceedings can only be winding-up proceedings.⁸⁸ The opening of secondary proceedings, in most cases, will impede the efficient administration of the debtor's assets, since the sale of assets of the debtor will be done separately.⁸⁹ However, the opening of secondary proceedings can still be useful in complex situations where the main proceedings are not given access to assets in foreign jurisdictions due to legal restrictions.⁹⁰ Also, the opening of secondary proceedings has some advantages for local creditors under the *lex fori* (i.e. the laws of the jurisdiction) because it allows local creditors to file claims in a local forum under domestic law in their own language.⁹¹ The existence of two separate insolvency proceedings indicate that the EIR 2000 is in favour of a modified universalist approach,⁹² which reflects the differences in substantive insolvency laws between Member States and allows for more effective protection of the interests of local creditors.⁹³

⁸⁶ Dario Latella, 'The "COMI" Concept in the Revision of the European Insolvency Regulation' (2015) 11 European Company Law and Financial Law Review 497.

⁸⁷ See Chapter 1 Section 1.2 (C).

⁸⁸ EIR 2000 art 3.2 and 3.3.

⁸⁹ Jona Israel, 'European Cross-Border Insolvency Regulation: A Critical Appraisal of Council Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitatus Europaea' (PhD Thesis, University of Florence 2004) 305.

⁹⁰ John Pottow, 'A New Role for Secondary Proceedings in International Bankruptcies' (2011) 46 Texas International Law Journal 579.

⁹¹ *ibid.*

⁹² Bob Wessels, 'The Changing Landscape of Cross-Border Insolvency Law in Europe' (2007) 12 *Juridica international* 116; Bob Wessels, 'Current Developments Towards International Insolvency in Europe' (2004) 13 *International Insolvency Review* 43.

⁹³ Mevorach (n 3) 92.

A report adopted by the European Commission in December 2012 concluded that the EIR 2000 was functioning well, but it would be desirable to improve the application of some of its provisions with the objective of enhancing its effective administration. This led to a number of proposals for amendments, which in turn led to the creation of the New Recast EIR 2015. The Commission originally proposed in its review of the EIR 2000 an amendment to the existing Regulation. The original proposal went as far as introducing amending instruments that the European Parliament voted on in its first reading,⁹⁴ but the changes recommended by the European Council were too difficult to be implemented through an amendment. This realisation led to the Recast proposal. The Recast was intended to incorporate into a single text both substantive amendments as well as some unchanged provisions of the original Regulation.⁹⁵

The New Recast EIR 2015 is the result of an ‘insolvency package’⁹⁶ which was adopted by the European Commission in December 2012.⁹⁷ The package is comprised of the proposal to revise Regulation 1346/2000 as well as the Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer European Insolvency Law Report on the application of that Regulation.⁹⁸ It also includes an impact assessment,⁹⁹ a Communication on a new European approach to business

⁹⁴ European Parliament, the Council and the Commission, *The Joint Practical Guide for Persons Involved in the Drafting of European Union Legislation* (The EU Publication Office 2013) guidelines 18 & 19.

⁹⁵ European Parliament Council Commission Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal 2002/C77/01 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002Q0328&from=EN>> accessed 30 April 2016.

⁹⁶ Geert van Calster, ‘COMIng, and here to Stay. The Review of the European Insolvency Regulation’ [Unpublished] (SSRN 2016) <<http://ssrn.com/abstract=2637003>> accessed 30 April 2016.

⁹⁷ European Commission Press Release, ‘Giving Honest Businesses a Second Chance: Commission Proposes Modern Insolvency Rules’ IP/12/1354 (*European Commission Press Release*, 12 December 2012) <http://europa.eu/rapid/press-release_IP-12-1354_en.htm> accessed 30 April 2016.

⁹⁸ Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer, *European Insolvency Regulation Heidelberg-Luxembourg-Vienna Report* (Hart Publishing 2014).

⁹⁹ European Commission, ‘Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings’ SWD (2012) 417 final Strasbourg 12 December 2012 <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf> accessed 30 April 2016.

failure and insolvency,¹⁰⁰ guidelines for the facilitation of negotiations about business restructuring, and a summary proposal from the European Commission to amend the insolvency rule.¹⁰¹ The summary proposal to amend the Insolvency Regulation encompassed five broad areas, namely: (1) the extension of the scope of the EIR 2000 to proceedings aimed at giving the debtor a ‘second chance’; (2) strengthening the current jurisdictional framework in terms of certainty and clarity; (3) improving coordination among insolvency proceedings opened in respect of the same debtor and striking a balance between efficient insolvency administration and the protection of local creditors; (4) reinforcement of the publicity of the proceedings by compelling Member States to provide for insolvency registers and by providing for the interconnection of national registers; and (5) the management of multiple insolvency proceedings relating to groups of companies.¹⁰²

The New Recast EIR 2015 is made up of seven chapters, four annexes, and 92 articles. In comparison, the EIR 2000 comprises five chapters, three annexes, and 47 articles.¹⁰³ The New Recast EIR 2015 also has 89 recitals, while the EIR 2000 has 33 recitals. This increase in the volume of the Regulation is an indication of the wider scope of its application and the serious intention of the EU to fill in all of the gaps that were identified in the EIR 2000. Some of the provisions of the New Recast EIR 2015 are explored in depth in Chapter 4.

¹⁰⁰ European Commission, ‘Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency’ C (2014) 1500 final Brussels 12 March 2014 <http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf> accessed 30 April 2016; Roisin Murphy, ‘Reformation of the European Insolvency Regulation to Act As a Legislative Tool to Assist in Europe’s Agenda’ (2015) 26 European Business Law Review 283.

¹⁰¹ *ibid.*

¹⁰² Antonio Leandro, ‘The New European Insolvency Regulation’ (*Conflict of Laws net*, 28 May 2015) <<http://conflictflaws.net/2015/the-new-european-insolvency-regulation/>> accessed 30 April 2016; Van Calster (n 19) 4.

¹⁰³ Francisco Garcimarin, ‘The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction’ [Unpublished] (SSRN 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412> accessed 27 April 2016.

2 Research Questions

The objective of this Thesis is to examine the extent to which the European Union insolvency rules can help improve legal certainty in the insolvency proceedings of MCGs. In order for this objective to be achieved, the topic will have to be examined from multiple perspectives. A proper foundation for this examination requires looking at the principles of separate legal personality and limited liability, and how these principles contribute to enhancing legal certainty in insolvency cases involving MCGs. Another foundational examination requires us to look at the theories of conflict of laws, such as universalism, territorialism, modified universalism, cooperative territorialism, and contractualism.

The EIR 2000 and the New Recast EIR 2015 both adopt the notion of the Centre of Main Interests (COMI) as a mechanism to determine which court has jurisdiction over cross-border insolvency proceedings. Thus, this Thesis examines the extent to which the notion of the COMI can be used to enhance legal certainty in cross-border insolvency cases involving MCGs, and the extent to which the notion of COMI succeeds or fails in preventing abusive forum shopping to the detriment of creditors.

The EIR 2000 and the New Recast EIR 2015 are not the only tools available to enhance legal certainty in cross-border insolvency cases involving MCGs, and it is essential to examine other mechanisms that can help provide a solution to such insolvency cases, such as the substantive consolidation approach, the coordination and cooperation approach, the harmonisation approach, and the party autonomy approach.

The New Recast EIR 2015 contains specific provisions on corporate groups, and therefore it is necessary to evaluate the extent to which such provisions contribute to resolving the shortcomings of the current European Insolvency Regulation (i.e. EIR 2000) and enhancing

legal certainty in the cases of interest to this Thesis., that is cross-border insolvency cases involving MCGs.¹⁰⁴

The original contribution of this Thesis lies in the extent to which European insolvency rules help reduce legal uncertainty in cross-border insolvency for the benefit of creditors. Furthermore, this Thesis provides an assessment of the extent to which the New Recast EIR 2015 succeeds in resolving the shortcomings of the notion of the COMI under the EIR 2000 in terms of enhancing legal certainty in MCG insolvency proceedings. The Thesis also makes recommendations for filling some of the gaps that the New Recast EIR 2015 has failed to eliminate, such as the ambiguity of the notion of COMI and the non-binding nature of the coordination and cooperation provisions in the Regulation.

The insolvency of domestic corporations and individuals is not within the scope of this Thesis. Similarly, insurance corporations, investment undertakings and banking institutions are excluded from the analysis due to their exclusion from the EIR 2000, stated in Article 1, as well as their special status and specific policy issues. Nevertheless, in some areas, reference will be made to specific insolvency statutes or rules that are applicable to all sorts of companies (national and international) and in some occasions to individuals as well. In those cases, only the impact of such instruments on MCGs is taken into consideration. Finally, this Thesis is limited to jurisdictions to which the EU Insolvency Regulation applies.

3 Research Methodology

This study takes a doctrinal and theoretical approach. The doctrinal approach, or black-letter law approach, is based on extensively utilising court judgments and statutes to provide a clearer explanation and a more comprehensive understanding of the law.¹⁰⁵ McConville and

¹⁰⁴ Regulation (EU) 2015/848 of the European Parliament of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L141.

¹⁰⁵ Mike McConville and Wing Chui, *Research Methods for Law* (Edinburgh University Press 2007) 3.

Wing classified legal research as either doctrinal or non-doctrinal. Whereas non-doctrinal research can adopt a qualitative or quantitative methodology, doctrinal research is normally qualitative.¹⁰⁶ Specifically, doctrinal research focuses primarily on analysis of a legal doctrine and how it has been developed and applied. Such studies, also known as pure theoretical research, are often used to examine a legal doctrine and the underlying theory behind it.¹⁰⁷ It consists of either a simple study directed at finding a specific statement of the law, or a more complex and in-depth analysis of legal reasoning.¹⁰⁸

The black letter approach explains the law as it is, clarifies ambiguities within its rules, and places those rules within a logical and coherent structure.¹⁰⁹ Therefore, this approach is adopted in the present Thesis in order to systematise, clarify and evaluate legal rules to ascertain the best solution to the problem under investigation through careful analysis of authoritative texts that consist of both primary and secondary sources.¹¹⁰ Using a black letter approach means that the Thesis is not restricted solely to explaining and clarifying the EIR 2000 and the New Recast EIR 2015, but also discusses critiques and suggestions for reform of the law essential to address the research question.¹¹¹ In other words, a doctrinal approach encompasses different elements including, for example, interpretation of legal rules and thorough examination and evaluation of the views and arguments of other legal scholars.¹¹² In keeping with the objectives of the Thesis, a comparative approach is also adopted to look at the similarities and differences between the EIR 2000 and the New Recast EIR 2015 in order

¹⁰⁶ McConville and Chui (n 105) 3.

¹⁰⁷ W. Bradley Wendel, 'Essay Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Legal Analysis' (2010-2011) 96 Cornell Law Review 1035.

¹⁰⁸ Kenneth Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions' (1984) 72 California Law Review 369.

¹⁰⁹ Paul Chynoweth, 'Legal Research' in Andrew Knight and Leslie Ruddock (eds), *Advanced research methods in the built environment* (Wiley-Blackwell 2008) 29.

¹¹⁰ McConville and Chui (n 105) 5.

¹¹¹ Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011) 31.

¹¹² Stella Cottrell, *Critical Thinking Skills: Developing Effective Analysis and Argument* (2nd edn, Palgrave Macmillan 2011) 2.

to evaluate the extent to the latter improves and enhances legal certainty in cross-border insolvency cases involving MCGs.

The EIR 2000 and the New Recast EIR 2015 are the primary legal instruments that regulate insolvency proceedings in the European Union.¹¹³ These instruments have been selected as the main instruments for analysis in this Thesis because they are legally binding instruments on all Member States of the European Union and consequently, all domestic insolvency laws must comply with them. It is acknowledged that the New Recast EIR 2015 has been issued, but as the EIR 2000 is still in force at the time of writing, the Thesis examines both by looking at the notion of COMI under the EIR 2000 and then considers the extent to which the New Recast EIR 2015 helps resolve the shortcomings of the EIR 2000.

An effective examination of the operation of the EIR 2000 requires looking into how the Court of Justice of the European Union and domestic courts in the EU have implemented the notion of the COMI in dealing with insolvency cases of MCGs. This will help in understanding how the law operates in practice and the extent to which the courts have been able to use this notion to enhance legal certainty in such cases.

In addition to the primary sources mentioned above, the Thesis examines secondary material, including academic literature such as journal articles and books, official reports from the European Commission, and other industry reports, such as those prepared by INSOL Europe.¹¹⁴ These resources are used to assess the extent to which the notion of COMI as well as other mechanisms of managing insolvency proceedings succeed in enhancing legal certainty in MCG insolvency proceedings.

¹¹³ Council Regulation (EC) No 1346/2000 on Insolvency Proceedings [2000] OJ L 160.

¹¹⁴ INSOL, 'Revision of the European Insolvency Regulation' (INSOL EUROPE, 2012)

<[https://www.nautadutilh.com/Documents/Publications%20to%20profiles/Revision of the European Insolvency Regulation.pdf](https://www.nautadutilh.com/Documents/Publications%20to%20profiles/Revision_of_the_European_Insolvency_Regulation.pdf)>accessed 10 May 2016.

The Thesis acknowledges that there are numerous initiatives around the world that aim at finding a practical solution to the difficulties presented by the cross-border insolvency of MCGs. Specifically, these initiatives have been championed by leading international institutions, which have developed legislative guides, principles and good practice standards with regard to various aspects of insolvency law.¹¹⁵ Such initiatives include the United Nations Commission on International Trade Law Legislative Guide on Insolvency Law 2004,¹¹⁶ the World Bank's 'Principles and Guidelines for Building Effective Insolvency Systems and Debtor-Creditor Regimes' of 2001,¹¹⁷ the revised World Bank-UNCITRAL Principles of 2005,¹¹⁸ the European Principles and Best Practices for Insolvency Office Holders,¹¹⁹ the European Bank for Reconstruction and Development Core Principles for an Insolvency Law Regime (EBRD) in 2004,¹²⁰ the Core Principles for an Insolvency Law Regime,¹²¹ and the Principles of European Insolvency Law of 2003.¹²² Although the Thesis focuses primarily on the EIR 2000 and the New Recast EIR 2015, and not on the aforementioned non-binding instruments, they are nevertheless sometimes referred to in

¹¹⁵ Irit Mevorach, 'Is the Future Bright for Enterprise Groups in Insolvency? Analysis of UNCITRAL's New Recommendations on the Domestic Aspects' in Paul Omar (ed) *International Insolvency Law Reforms and Challenge* (Ashgate 2013) 363.

¹¹⁶ UNCITRAL (ed), *Legislative Guide on Insolvency Law* (United Nations Publication 2005) <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> accessed 26 May 2016.

¹¹⁷ World Bank, 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' (*World Bank*, April 2001) <http://www.worldbank.org/ifa/ipg_eng.pdf> accessed 2 August 2015.

¹¹⁸ World Bank, 'Principles for Effective Insolvency and Creditor Rights Systems (Revised)' (*World Bank*, 2005) <<http://www.worldbank.org/ifa/FINAL-ICRPrinciples-March2009.pdf>> accessed 2 August 2015.

¹¹⁹ Iris Wuisman, 'Jan Adriannse and Bernard Santen, 'European Principles and Best Practices for Insolvency Office Holders' (Universiteit Leiden, 19 September 2013) <http://www.tri-leiden.eu/uploads/files/IOH_project_-_Report_I.pdf> accessed 11 May 2016.

¹²⁰ Ronald Harmer and Neil Cooper, 'Report on the Results of the Assessment of the Insolvency Laws of Countries in Transition' (*European Bank for Reconstruction and Development*, June 2003) <http://www.ebrd.com/downloads/legal/insolvency/report_ia.pdf> accessed 11 May 2016.

¹²¹ European Bank for Reconstruction and Development, 'Core Principles for an Insolvency Regime' (*European Bank for Reconstruction and Development*, 2006) <<http://www.ebrd.com/downloads/legal/insolvency/principle.pdf>> accessed 14 May 2016.

¹²² William W McBryde, Axel Flessner, and Sebastianus Kortmann (eds), *Principles of European Insolvency Law* (Kluwer Legal Publishers 2003).

highlighting and identifying solutions for dealing with the problem of cross-border insolvency involving MCGs.

4 Structure of the Thesis

This Thesis comprises an introduction, four substantive chapters, and a conclusion. The upcoming Chapter 1 provides an overview of the perspectives on company law and conflict of laws in regard to the cross-border insolvency cases of MCGs and how they contribute in enhancing legal certainty in such insolvency cases. In the area of company law, this is carried out by examining the principles of separate legal personality, limited liability, and ‘lifting the veil’ through case law. The examined cases show that the tests formulated by the courts, particularly the cases of *Adams* and *Chandler*,¹²³ do not provide clear and certain criteria for precisely predicting those instances in which the court will ‘lift the veil’ to make a parent company responsible for the debts of its subsidiary. From the perspective of conflict of laws, the chapter examines the universalism theory, the modified universalism theory, the territoriality theory, the cooperative territoriality theory, and the contractualism theory, and the extent to which they help in enhancing legal certainty in cross-border insolvency cases involving MCGs. The analysis shows that all of these theories have been applied to insolvency cases at different times, but there is still an absence of clear-cut rules to apply to all cases of cross-border insolvency involving MCGs and, as will be demonstrated, each theory has its strengths and weaknesses.

Chapter 2 examines the EIR 2000, focusing in particular on the notion of the COMI, the Centre of Main Interests. This notion is provided by the EIR 2000 as a mechanism for determining which court has jurisdiction to carry out the main insolvency proceedings in cross-border insolvency cases in the EU, and as a mechanism for reducing abusive forum

¹²³ *Adams v Cape Industries Plc* [1990] Ch 433; *Chandler v Cape Plc* [2012] EWCA Civ 525, [2012] 1 WLR 311.

shopping, which is detrimental to creditors. According to Recital 13 of the Preamble of the EIR 2000, the COMI is ‘the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’.¹²⁴ Article 3(1) of the EIR 2000 makes a presumption that the COMI of a company is located at the place of its registered office unless there is proof to the contrary.¹²⁵ The effectiveness of this notion is evaluated through an examination of the cases of *Eurofood* and *Daisytek*.¹²⁶ The chapter argues that the notion of COMI has not completely succeeded in solving the issue of lack of legal certainty in MCG insolvency cases due to its ambiguous nature and its lack of precision. The chapter also explores forum shopping and distinguishes between positive and negative forum shopping. It concludes with some suggestions on how to combat abusive forum shopping in light of the failure of the notion of COMI in this respect.

Chapter 3 goes beyond the EIR 2000 and looks for solutions other than the notion of the COMI for enhancing legal certainty in the cross-border insolvency of MCGs, in order to reduce the opportunities for abusive forum shopping. This chapter looks at a number of solutions, namely the substantive consolidation approach, which combines the assets and liabilities of several or all entities belonging to the same group in a single insolvency proceeding; the coordination and cooperation approach, which respects the legal personality of each member of the group; the harmonisation approach, which harmonises substantive insolvency laws and could make forum shopping redundant, as all the laws would be the same in all Member States; and the party autonomy approach, where the parties agree on the jurisdiction and the applicable law. The chapter concludes that each of these mechanisms has

¹²⁴ EIR 2000 recital 13; Miguel Virgos & Francisco Garcimartin, *The European Insolvency Regulation: Law and Practice* (Kluwer Law 2004) 37.

¹²⁵ Gabriel Moss, ‘Group Insolvency Forum - EC Regulation and Model Law under the Influence of English Pragmatism’ (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 250.

¹²⁶ Case C- 341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813; *Re Daisytek-ISA Ltd and Others* [2003] All ER (D) 312 (Jul) 16 May 2003.

advantages and disadvantages when it comes to enhancing legal certainty in cross-border insolvency cases involving MCGs, and even though these mechanisms are not independent and some can be used collectively or at different stages of the insolvency proceedings, they do not provide a complete solution to the problem of legal certainty in such insolvency cases.

Chapter 4 examines the New Recast EIR 2015 and the extent to which it succeeds in addressing the shortcomings of the EIR 2000 and enhances legal certainty in the cases of interest to this study, namely the cross-border insolvency of MCGs. The focus is on the new provisions relating to secondary proceedings, which are no longer limited to winding up proceedings, and which the new Regulation allows the insolvency practitioner of the main proceedings to request the stay of the secondary proceedings; the notion of the COMI, which has been clarified through the codification of a number of court decisions, such as *Interdil*;¹²⁷ and the chapter on corporate groups, which attempts to improve certainty in cross-border insolvencies through cooperation and communication as well as coordination. The chapter argues that the New Recast EIR 2015 is a step towards the right direction, as it helps in enhancing legal certainty, but there is still room for further improvement, especially as all the clarifications of the notion of the COMI in the New Recast EIR are merely codifications of related CJEU judgments. The chapter concludes by highlighting some opportunities for reform with the objective of enhancing legal certainty for the benefit of creditors.

Finally, the Thesis concludes by summarising the most important points of the discussion by highlighting the main themes relating to legal certainty in cross-border insolvency cases involving MCGs and the way in which this could help reduce abusive forum shopping, which would benefit creditors. In light of the foregoing discussion, it is argued that the New Recast EIR is not a perfect solution to all of the problems of cross-border insolvency of MCGs in the

¹²⁷ Case C-396/09 *Interdil Srl (In liquidation) v Fallimento Interdil Srl and another* [2011] WLR 334.

EU. However, it definitely constitutes a positive step and reflects the European approach of implementing incremental and pragmatic policy solutions. Towards the end, the conclusion highlights the contribution of the Thesis and enumerates potential areas for future research.

Chapter 1:

Perspectives on Company Law and Conflict of Laws

Multinational corporate groups (MCGs) present numerous legal challenges when they go into cross-border insolvency due to the fact that the assets of the company, its credits, and its activities are spread among different legal jurisdictions.¹ Foreign creditors may be in a more vulnerable position compared to local ones, and the costs of the insolvency proceedings may be significant if multiple proceedings are commenced.² The most significant challenge related to the cross-border insolvency of MCGs is the lack of legal certainty in regard to whether or not to hold the group liable for the insolvency of one of its members, and in regard to determining which court has jurisdiction and which law is applicable.³ Legal certainty is essential because the rights and the duties of the parties in the event of cross-border insolvency need to be predictable, clear, stable and precise in order to avoid unexpected monetary expenses and liabilities.⁴ Legal certainty from the point of view of creditors is crucial, as it enables them to calculate the legal and economic risks that they may face in the

¹ Jona Israel, *European Cross-Border Insolvency Regulation* (Hart Publishing 2005) 11; Irit Mevorach, *Insolvency of Multinational Enterprise Groups* (Oxford University Press 2000) 12; Philip Blumberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press 1993); Robert Rasmussen, 'Resolving Transnational Insolvency Through Private Ordering' (2000) 98 Michigan Law Review 2252; Klaus Siemon and Frank Frind, 'Groups of Companies in Insolvency: A German Perspective Overcoming the Domino Effect in an International Group Insolvency' (2013) 22 International Insolvency Review 61.

² Jay Westbrook, 'A Global Solution to Multinational Default' (1999-2000) 98 Michigan Law Review 2276, 2309.

³ Epp Aasaru, 'The Desirability of 'Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law' (2011) 22 European Law Review 349; Nicholaes Tollenaar, 'Dealing with the Insolvency of Multi-national Group European Insolvency Regulation' (2010) 23 Insolvency Intelligence 65; Sandeep Gopalan and Michael Guihot, 'Cross-Border Insolvency Law and Multinational Enterprise Groups : Judicial Innovation as An International Solution' (2016) 48 George Washington International Law Review 549.

⁴ Aasaru (n 3) 351.

event of insolvency.⁵ Lack of legal certainty may also lead to the abuse of forum shopping, which could adversely affect the protection of creditors.⁶ Promoting greater legal certainty in cross-border insolvency and minimising the opportunities for abusive forum shopping are two of the primary objectives of both the European Insolvency Regulation (EIR 2000) and the new Recast Regulation on insolvency proceedings (the New Recast EIR 2015).⁷

This chapter examines the problem of the lack of legal certainty in the cross-border insolvency of MCGs through two perspectives: a company law perspective and a conflict of laws perspective. Even though they are very unique in nature, MCGs are nevertheless formed of “companies”, and the general principles of company law,⁸ such as the concept of limited liability,⁹ the concept of separate legal personality,¹⁰ and the concept of lifting the veil, can provide more certainty to such insolvency cases.¹¹ Similarly, as cross-border insolvencies by

⁵ Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (Archive of European Integration, 1996)

< http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf> accessed 15 May 2016, 52 was the principal report on the Convention on Insolvency Proceedings, which was converted into Regulation. The Report does not have an official status but Commission officials today still refer to the report for assistance with its interpretation.

⁶ David Skeel ‘European Implication of Bankruptcy Venue Shopping in the U.S’ (2006) 54 Buffalo Law Review 459. Forum shopping is the practice of parties seeking a particular court to hear their case in order to benefit from the laws and judgments which they anticipated would be in their favour. This concept is discussed further in Chapter 2.

⁷ Recital (4) in the preamble of the EIR 2000 and in the new Recast EIR recital (5) and (29).

⁸ Lorraine Talbot, *Critical Company Law* (Taylor and Francis 2015) 70.

⁹ Kevin Forbes, ‘Limited Liability and the Development of the Business Corporation’ (1986) 2 Journal of Law, Economic and Organisation 163; Robert Hillman, ‘Limited Liability in Historic Perspective’ (1997) 54 Washington & Lee Law Review 615; Harvey Gelb, ‘Limited Liability Policy and Veil Piercing’ (2009) 9 Wyoming Law Review 551.

¹⁰ There is an extensive writing on separate Legal Personality concept see for example, Frederic Maitland, *Introduction to Gierke’s Political Theories of the Middle Age* (Cambridge University Press 1900); Arthur Machen, ‘Corporate Personality’ (1911) 24 Harvard Law Review 253; Harold Laski, ‘The Personality of Associations’ (1916) 29 Harvard Law Review 404; Gunther Teubner, ‘Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person’ (1988) 36 American Journal of Comparative Law 130; Katsuhito Iwai, ‘Person Thing and Corporations: The Corporate Personality and Comparative Corporate Governance’ (1999) 47 American Journal of Comparative Law 583.

¹¹ S Ottolenghi, ‘From Peeping Behind the Corporate Veil, to Ignoring Completely’ (1990) 53 The Modern Law Review 338; Rebecca Huss, ‘Revamping Veil Piercing for all Limited Liability Entities: Forcing the Common Doctrine into the Statutory Age’ (2001) 70 University of Cincinnati Law Review 95; Kurt Strasser, ‘Piercing the Veil in Corporate Groups’ (2005) 37 Connecticut Law Review 637; Christopher Nicholls, ‘Piercing the Corporate Veil and ‘Pure Form’ of the Corporation as Financial Innovation’ (2008) 46 Canadian Business Law Journal 233; Thomas Cheng, ‘The Corporate Veil Doctrine Revisited: A Comparative Study of the English and

definition involve the jurisdiction of more than one state, the principles related to conflict of laws can provide another solution to this problem. Each of these perspectives is examined separately in this chapter.

The first section of this chapter examines the company law perspective on the problem of cross-border insolvency of MCGs. It looks at the questions of whether an MCG may be treated as a single entity, whereby the liability of the subsidiary can be extended to the parent company, and whether the group may be considered as single entity. This section also examines whether or not it is possible to stop an MCG from exploiting the company law concept of separate legal personality to detach its liability from that of its shareholders.¹²

The second section of this chapter examines the conflict of laws perspective on the problem of cross-border insolvency of MCGs. This section analyses the principles of universalism, modified universalism, territorialism, cooperative territoriality, and contractualism, and how they can apply to dealing with the cross-border insolvency of MCGs.

1.1 Cross-border Insolvency of MCGs: The Company Law

Perspective

This section discusses the problem of cross-border insolvency of MCGs from a company law perspective. It analyses, at the first instance, the general principles of company law, namely, the principle of limited liability, the principle of separate legal personality, and the principle of lifting the veil. This is followed by an examination of how these principles apply at the domestic level, specifically in the United Kingdom, because courts in the United Kingdom

the U.S Corporate Veil Doctrines' (2011) 34 Boston College International and Comparative Law Review 329; Edwin Mujih, 'Piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching Towards Abolition?' (2016) 37 Company Lawyer 39.

¹² Mevorach (n 1) 10.

have had a number of cases that looked at this issue. The analysis of company law in the United Kingdom is divided to show the difference in treatment prior to and after *Adams*.¹³

(A) The Concepts of Limited Liability, Separate Legal Personality, and Lifting the Veil

This section examines the principles of limited liability, separate legal personality and lifting the veil as well as their legal justifications and their application to groups of companies. These principles are the foundational concepts of company law, but they may not be easy to apply to cases of cross-border insolvency of MCGs, because they have been established from situations relating to individual companies.¹⁴ Although limited liability is the logical result of the existence of separate legal personality, these two concepts are not the same.¹⁵ The principle of corporate personality connotes that each company is a separate legal personality distinct from its members or shareholders. Accordingly, a company has its own rights and duties, which are different from its members, and it is empowered to sue and to be sued in its name.¹⁶ The property of the company is not the property of its shareholders.¹⁷ Thus, individual companies in an MCG are deemed to have a separate legal personality different from those of other companies of the same group.¹⁸

¹³ *Adams v Cape Industries Plc* [1990] Ch 433.

¹⁴ I M Ramsay, 'Models of Corporate Regulation: The Mandatory Enabling Debate' in R Grantham and C. Rickett (eds), *Corporate Personality in the 20th Century* (Hart Publishing 1998) 215, 253.

¹⁵ Alan Dignam and John Lowry, *Company Law* (8th edn, Oxford University Press 2014) 151.

¹⁶ *Salomon v Salomon & Co* [1897] UKHL 1, [1897] AC 22; *Foss v Harbottle* [1843] 67 ER 189.

¹⁷ Damien Murphy, 'Holding Company Liability for Debts of Its Subsidiaries: Corporate Governance Implications' (1998) 10 Bond Law Review 241; Dario Milo, 'The Liability of A Holding Company for the Debts of Its Subsidiary: Is Salomon Still Alive and Well?' (1998) 115 The South African Law Journal 318.

¹⁸ José Engrácia Antunes, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German, and EEC Law: An International and Comparative Perspective* (Kluwer Law and Taxation Publishers 1994) 2; Hector Miguens, 'The Insolvent Subsidiary and Liability of the Parent Corporation in the USA, Argentina and UNCITRAL' (2010) 19 International Insolvency Review 239.

The principle of limited liability connotes that if the debts of a company exceed its assets, the shareholders are not responsible for the losses and debts of the company.¹⁹ Similarly, with MCGs, each company in the group is distinct and the assets of the entire group are not available to cover the liability incurred by one of its subsidiaries.²⁰ Hence, if the assets of one member of the group are insufficient to pay its debts, some of its creditors may be left unsatisfied.²¹

Regarding corporate groups, the general principle is that the parent company is not liable for the debts of its subsidiaries, even when the assets of the subsidiary are insufficient to cover its debts.²² The primary purpose of the principle of limited liability is to achieve a balance between maximising the wealth of the shareholders and protecting creditors adversely affected by the activities of the corporation.²³ Limited liability also helps reduce transaction costs because it saves the company the process of negotiating and inserting terms and conditions into each of its contracts, as the shareholders know in advance that their liability is limited to the amount they invest in the company.²⁴ Other purposes include the decrease in the need to monitor the management of the company, which further reduces the agency costs, as the risk of losses is limited to the money that the shareholders have invested.²⁵

¹⁹ Helen Anderson, 'Challenging the Limited Liability of Parent Companies: A Reform Agenda for Piercing the Corporate Veil' (2012) 22 *Australian Accounting Review* 129.

²⁰ Robert Thompson, 'Piercing the Veil: Is the Common Law the Problem' (2005) 37 *Connecticut Law Review* 619, 621; Brenda Hannigan, *Company Law* (3rd edn, Oxford University Press 2012) 64.

²¹ Angualia Daniel, 'Goals of a Multinational Corporation and the Role of a Financial Manager' [Unpublished] (SSRN, 31 July 2010). <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651469> accessed 27 May 2016.

²² Mevorach (n 1) 33.

²³ Anderson (n 19) 130.

²⁴ Michael Whincop, 'Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law' (1999) 19 *Oxford Journal of Legal Studies* 19.

²⁵ Frank Easterbrook and Daniel Fischel, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89, 94; Andrew Keay, 'Wrongful Trading and the Liability of Company Directors: a Theoretical Perspective' (2005) 25 *Legal Studies* 431, 449.

The above reveals that the concept of limited liability applies primarily and in principle to individual companies and not to MCGs. Having analysed the concept of limited liability, it is also important to examine the concept of separate legal personality to determine whether it can be applied to MCGs' situations. In the context of corporate groups, avoidance of responsibility can be achieved by interposing a separate legal entity between the victim and ultimate controller of the group, be it a parent-company or its controlling shareholders. However, there is a debate as to whether the principle of separate legal personality should be retained or ignored.²⁶ The answer to this question is not straightforward because some of the justifications for having separate personality for individual companies are absent in the context of MCGs. For instance, the reduction of the monitoring costs and the promotion of risk diversification may not be considered strong justifications in the case of MCGs.²⁷ In this regard, Farrar points out that the strict application of corporate personality principle in the case of MCGs may lead to two limited liabilities, i.e. 'limited within limited liability', and that company law does not support this approach.²⁸ In line with this assertion, it is argued that there is no such concept as 'double' limited liability in the case of MCGs because each company in the group is separate with its own liability.²⁹

Furthermore, Griffin contends that separate legal personality should be abolished in the case of subsidiary companies.³⁰ This is because it leads the parent company to exploit the

²⁶ See for example Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 *Cambridge Journal of Economics* 915-928; John Farrar, *Corporate Governance in Australia and New Zealand* (Oxford University Press 2001); Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press 1993); Kevin Wardman, 'The Search for Virtual Reality in Corporate Relations' (1994) 6 *Company Lawyer* 179; Phillip Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporation Law* 578; Philip Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37 *Connecticut Law Review* 605.

²⁷ Murphy (n 17) 241.

²⁸ Farrar (n 26) 229.

²⁹ Blumberg (n 26) 59; Nicole Stolowy, 'The Concepts of the Group of Companies: The Specificity of the French Model' (2014) 8 *Journal of Business Law* 640.

³⁰ Steve Griffin, 'Limited Liability - A Necessary Revolution' (2004) 25 *Company Lawyer* 99.

subsidiaries in order ‘to wash their hands from all financial responsibility of the subsidiary failure’.³¹ Nevertheless, it is argued that the parent company will not leave its subsidiaries to face substantial losses without any intervention, as this would have a direct impact on the entire group.³² Another point is that Griffin’s argument does not provide clear criteria to demonstrate when the parent company can exploit its subsidiaries so that the courts can hold the parent company responsible for such acts. In recognition of the foregoing argument, Blumberg notes that the principle of separate legal personality was created before MCGs even existed.³³ Thus, from Blumberg’s point of view the principle was established to provide more protection to public investors, not the enterprise itself. Therefore, it is proposed that the principle should not be abolished but should apply to MCGs, because to treat individual companies in an MCG as one single entity is not desirable.

Indeed, treating all of the companies within the same group as a single entity may lead to undesirable results because it is against the expectations of the minority shareholders and creditors and does not serve their interests.³⁴ Furthermore, Muscat and Ramsay argued that the principle of separate legal personality in the context of MCGs is weak and merits critical re-examination.³⁵ Thus, in the United Kingdom, the courts developed the principle of separate legal personality in the seminal case of *Salomon v Salomon*³⁶, and almost a century later in

³¹ Griffin (n 30) 100.

³² Brad Erens, Scott Friedman and Kelly Mayerfeld, ‘Bankrupt Subsidiaries: The Challenges to the Parent of Legal Separation’ (2008) 25 Emory Bankruptcy Development Journal 65.

³³ Blumberg (n 26) 59; Karl Hofstetter, ‘Parent Responsibility for Subsidiary Corporations: Evaluating European Trends’ (1990) 39 International and Comparative Law Quarterly 576.

³⁴ Peter Muchlinski, *Multinational Enterprises and the Law* (Blackwell 2005) 327; Joseph Sommer, ‘The Subsidiary: Doctrine Without A Cause?’ (1990) 59 Fordham Law Review 227.

³⁵ Andrew Muscat, *The Liability of the Holding Company for the Debts of Its Insolvency Subsidiaries* (Dartmouth 1996) 39; see also I M Ramsay, ‘Models of Corporate Regulation: The Mandatory Enabling Debate’ in R Grantham and C. Rickett (eds), *Corporate Personality in the 20th Century* (Hart Publishing 1998) 215 and 253.

³⁶ *Salomon v Salomon & Co Ltd*. [1897] UKHL 1, [1897] AC 22.

Adams v Cape Industries,³⁷ the Court of Appeal reaffirmed the intention to treat individual companies in a corporate group as separate legal entities. However, in *Beckett*³⁸, Maurice Key LJ rejected what he called a ‘purist interpretation’ of corporate personality and went on to support Lord Denning’s view of single economic entity.³⁹ Similarly, in *Samengo Turner*⁴⁰ the Court of Appeal treated a group of companies as a single legal entity on the basis of their single economic interest. The difference in outcome between these cases shows that even though this was a period of activism in the courts of the United Kingdom, there was no consensus among the judiciary regarding the circumstances that require adoption of the ‘single economic unit’ instead of respecting the principle of separate legal personality.

However, it soon became clear that there was not enough support to deviate from the sacrosanct *Salomon* principle. As a result, in the *Prest* case,⁴¹ the Court referred back to the *Salomon* principle, noting that MCGs should not be treated as single economic entities. From the foregoing, it is apparent that the principle of corporate legal personality applies to individual companies. However, its application to the context of MCGs seems to be fraught with irregularities, as it is not clear what factors are taken into consideration in the decision to treat MCGs as single economic entities or to apply the corporate personality principle to individual companies within the MCG. The next subsection examines some of the cases in detail to determine what factors the courts consider in determining whether to treat an MCG

³⁷ *Adams v Cape Industries Plc* [1990] Ch 433 (hereinafter ‘*Adams*’ case’)

³⁸ *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] ICR 1539; *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 3 All ER 462.

³⁹ *ibid*, *DHN Food Distributors* 467, ‘single economic entity’ found its originality in the dictum of Lord Reid in the case of *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1995] 1 WLR 352, 367, where he said ‘...My Lords, in my judgment...the appellant company owned the whole share capital of British Textile Manufacturing Co Ltd...the appellants could control the internal management of their subsidiary companies...’

⁴⁰ *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd*, [2007] EWCA Civ 723, [2008] IRLR 237.

⁴¹ *Prest v Petrodel Recourses Ltd* [2013] UKSC 34, [2013] 3 WLR 1. See also *VTB Capital Plc v Nutritek international Corp* [2013] UKSC 5, [2013] 2 WLR 398; Nigel Shepherd, ‘*Petrodel v Prest*: Charter or Legal Consistency’ (2013) 1 Private Client Business 40.

as a single economic entity or to attribute separate personality principle to individual companies within an MCG.

(B) Corporate Groups in UK Case Law

In the previous section, the concepts of limited liability and separate legal personality were analysed in order to determine the extent to which these principles can be applied in the context of MCGs. In light of the Court of Appeal's decision in *Adams v Cape Industries Plc*,⁴² this section examines the relationship between a parent company and its subsidiaries. *Adams* involved the liability within a group of companies where the claimant, Adams, sought to ignore the separate legal personality of a parent (Cape) and its subsidiary company and to hold the parent liable for the obligations of the subsidiary. The Court held that, for a group of companies, the essential principle is that each company within the group is a separate legal entity. However, in certain circumstances, the courts can disregard this principle and treat several companies as a single entity. These circumstances include where there is agency agreement, where there is evidence of single economic unit and where there is fraud.⁴³

Prior to *Adams*, there was an attempt to move away from the *Salomon* principle towards a more pragmatic approach in the treatment of MCGs. In this regard, Gower posited that 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic reality of the whole group'.⁴⁴ Supporting this view, Lord Denning noted in the *DHN Food Distributors*⁴⁵ case that this is especially common when a parent company owns all of the shares of the subsidiaries, to the extent that

⁴² *Adams* (n 37).

⁴³ *Adams* (n 37) ; Muzaffer Eroglu, *Multinational Enterprises and Tort Liabilities An Interdisciplinary and Comparative Examination* (Edward Elgar 2008) 148, 153.

⁴⁴ L.C.B Gower, *Modern Company Law* (3ed, K. W. Wedderburn, O. Weaver and A.E.W Park 1969) 29.

⁴⁵ *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852.

it controls every activity of the subsidiaries.⁴⁶ Thus, Lord Denning MR noted further that ‘these subsidiaries are bound hand and foot to the parent company and must do just what the parent company says...’⁴⁷

However, Gower's view is not very clear because what constitutes the ‘economic unit’ of the entire group is not well defined. This is because the courts have often considered a number of factors, such as whether the companies’ directors are the same, whether the companies have a common account and whether the substantial decisions are made by the parent company.⁴⁸ Therefore, it is proposed that the courts should look at other factors in order to determine when an MCG could be considered a single entity through application of the economic entity notion.

A careful examination of Lord Denning's views reveals that all the companies in an MCG could be treated as one economic entity provided that the parent company owns all of the shares of the subsidiaries.⁴⁹ Moreover, Lord Denning pointed out that for accounting and tax purposes, the law sometimes treats the companies of the same group as one economic entity.⁵⁰ However, a major challenge is that the proposition assumes that when a parent company owns all of the shares of its subsidiaries then it controls the subsidiaries. This assumption is not absolutely accurate because sometimes a parent company owns all of the

⁴⁶ *ibid* para 860 per Lord Denning.

⁴⁷ *ibid*, Courts have used various metaphors to lifting the veil and make the parent liable for the debts of its subsidiary, for instance, the subsidiary was a device a mask a puppet a nominee a sham a façade and little hut of the parent, e.g. Lord Denning in *Wallersteiner v Moir* [1974] 1 WLR 991: ‘I will assume too that they were distinct legal entities. Even so, I am quite clear that they were just puppets of Dr .Wallersteiner. He controlled their every behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures for those doings he should be, and is responsible for’.

⁴⁸ *Woolfson v Strathclyde Regional Council* [1978] UKH 5; [1979] 38 PCR 521, *Wallersteiner v Moir*; *DHN Foods Distribution* (n 46).

⁴⁹ *DHN Foods Distribution* (n 45) 860.

⁵⁰ *ibid*; see also Daniel Prentice, ‘Some Aspects of the Law Relating to Corporate Groups in the United Kingdom’ (1999) 13 Connecticut Journal of International Law 305.

shares of the subsidiaries but the subsidiaries may still be independent, as there may be no direct influence from the parent company.

Furthermore, it is unclear how much control is sufficient to infer that the parent company actually influences its subsidiaries to a degree that should make it liable for their debts.⁵¹

However, *Adams* and the subsequent case law removed all doubts and reaffirmed the applicability of the *Salomon* principle for individual companies as well as group structures. In this case, the Court of Appeal, in reaching their decision on whether to lift the veil or not, revisited the three exceptions to the *Salomon* principle.⁵² Specifically, these three exceptions are that it must be established that there was fraud between the parent company and the subsidiary,⁵³ that the subsidiary was acting as the agent of the parent company,⁵⁴ or that there is a statutory or contractual relationship which makes the parent company liable for the debt of its subsidiary. All three exceptions were examined, but the Court of Appeal concluded that none of the exceptions provided convincing evidence, in this case, that allowed the court to lift the veil and extend liability to Cape.

The importance of reaffirming the *Salomon* principle in *Adams* is that, as regards MCGs, the principle remains that individual companies within a group are treated as separate legal entities.⁵⁵ Thus, members of a company limited by shares who are part of an MCG are not liable for any of the company's debts or the debts of other subsidiaries within the group other

⁵¹ David Milman, *Groups of Companies: the Path Towards Discrete Regulation in Civil and Commercial Law Review* (Law Press 2002) 231; Peter Muchlinski, 'Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review' (2002) 23 *Company Lawyer* 168.

⁵² Harry Rajak, 'Corporate Groups and Cross-Border Bankruptcy' (2009) 44 *Texas International Law Journal* 526.

⁵³ For cases in this regard based on 'fraud' see *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *re FG (Films) Ltd* (1953) 1 All ER 615; *Re Bugle Press Ltd* (1961) Ch 270.

⁵⁴ For cases of disregard based on 'agency' see *Gramophone and Typewriter Ltd v Stanley* [1908] 3 K B 89; *IRC v Sanson* [1921] 2 KB 492; *Rainham Chemical Works Ltd v Blevedere Fish Guano Co* [1921] 2 AC 465.

⁵⁵ Arpad Karasz, 'Corporate World Today: Courts Respond to Limited Liability and Board's Decision Making – A Fight for a Justice or Rather Prosperity at Stake?' (2009/2010) *The Common Law Review* 24-29.

than the amount (if any) on any unpaid shares.⁵⁶ This is a great incentive for investors, as it guarantees the safety of their investments regardless of the indebtedness of the company in which they own shares.⁵⁷ Thus, *Adams* overruled the former decision of the Court of Appeal in *Re a Company*⁵⁸ when it noted that:

...save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd*⁵⁹ merely because it considers that justice so requires.⁶⁰

However, it needs to be highlighted that the Court did not reject the idea of lifting the veil if one of the three exceptions (agreement, agency, or fraud)⁶¹ was fulfilled. Nevertheless, the court established in the *Re Polly Peck*⁶² case that the veil of incorporation is not to be lifted simply because justice so demands. Consequently, there is still no clear-cut principle dictating when the courts should lift the corporate veil. Thus, in the *Briggs*⁶³ case, the court held that:

...there is no common unifying principle, which underlines the occasional decision of courts to lift the corporate veil, although an ad hoc explanation may be offered by the court which so decides, there is no principled approach to be derived from the authorities.⁶⁴

⁵⁶ See s74(2) Insolvency Act 1986.

⁵⁷ *Karasz* (n 55) 24.

⁵⁸ *Re a Company* [1985] BCLC 94, CA at 337-338 per Cumming-Bruce LJ.

⁵⁹ *Salomon* (n 36) at 51 per Lord McNaghten

⁶⁰ *Adams* (n 37) at 513.

⁶¹ *Adams* (n 37).

⁶² *Re Polly Peck International Plc* (No. 3) [1996] 1 BCLC 428.

⁶³ *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549.

⁶⁴ *ibid* 567.

The next section will examine the post-*Adams* era to demonstrate whether the courts are still faithful to the *Salomon* principle or whether there are any signs of activism, as there were in the time of Lord Denning.

(C) Post Adams Era and the Problems of the Company Law Approach

Since *Adams*, there have been a number of cases where the courts seem to suggest a more realistic approach to group liability, which bears resemblance to Lord Denning's views on the original notion of single economic entity.⁶⁵ For example, the decision in *Chandler v Cape Plc*⁶⁶ revealed that there has been some development in the area of group tortious liability. In this case, the Court of Appeal applied a new test to extend the parent company's liability to cover a personal injury which occurred at the subsidiary level.⁶⁷ In this judgment, the Court adopted a test of control, fairness and reliance, which required all three conditions to be fulfilled in order to extend liability from the subsidiary to the parent company.⁶⁸

However, the test raises other issues. First, the notion of control is ambiguous, as in some cases the degree of control may vary from one corporation to another. Moreover, the court did not elucidate the amount of control that may be considered relevant.⁶⁹ The court did not clarify which type of evidence and what factors are sufficient to prove that the parent company controls the subsidiaries. It is thus a matter of speculation for the courts as to what factors it would consider in order to hold a parent company liable for the debt of its

⁶⁵ *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852.

⁶⁶ *Chandler v Cape Plc* [2012] EWCA Civ 525, [2012] 1 WLR 311.

⁶⁷ Martin Petrin, 'Assumption of Responsibility in Corporate Groups: *Chandler v Cape Plc*' (2013) 76 *Modern Law Review* 589, 611; Paul Eccles, 'Liability of Parent Companies and the Actions of Their Subsidiaries' (*Shoosmiths*, 4 May 2012) <<http://www.shoosmiths.co.uk/client-resources/legal-updates/Liability-of-parent-companies-and-the-actions-of-their-subsidiaries-1498.aspx>> accessed 4 August 2015; Derek French, Christopher Mayson and Christopher Ryan, *Mayson, French & Ryan Company Law* (31st edn, Oxford University Press 2014-2015) 144.

⁶⁸ Ewan Gaughey, '*Donoghue v Salomon* in the High Court' (2011) 4 *Journal of Personal Injury Law* 249.

⁶⁹ *Chandler v Cape Plc* [2011] EWHC 951 (QB) at 49; Duygu Damar, 'Negligence and the Corporate Veil: Parent Companies Duty of Care to Their Subsidiaries Employees' (2014) *Lloyd's Maritime and Commercial Law Quarterly* 454.

subsidiary. This implies that there is lack of certainty as to when the court will hold a parent company liable for the debts of its subsidiary, thereby posing a challenge to the relationship between the parent and subsidiary companies.⁷⁰ Similarly, it is difficult for interested parties such as creditors to demonstrate that a parent company exercises complete control over the subsidiaries because creditors are not usually involved in the day-to-day operations of the company, and they may not have sufficient information to prove such control.⁷¹

The second condition is fairness, which requires that the court ensure that it is fair to hold a parent company liable for the mistakes of its subsidiaries. However, the concept of fairness is broad and vague and can be subject to various interpretations by the courts. Justice, as a legal basis for lifting the veil in company law, has been refused in the past for being a vague and broad concept.⁷² Therefore, it is not persuasive to introduce the notion of fairness as legal grounds to extend the liability of a subsidiary to its parent company.⁷³

The last condition is reliance, whereby the interested party is expected to demonstrate reasonable reliance on the parent company. Under this condition, the assumption is that there is no connection between the parent company and its subsidiaries, and the interested parties must demonstrate to the court that the latter rely on the parent company, for instance, by showing that the parent company has a general practice of intervening in its subsidiaries' operations.⁷⁴ This is not only difficult to prove but will also produce different outcomes depending on the evidence that the interested parties bring before the court in each case.

⁷⁰ Petrin (n 67) 615.

⁷¹ *Cassidy v Ministry of Health* [1951] 2 KB 343 at 360; David Milman, 'Groups of Companies: the Path Towards Discrete Regulation' in David Milman, *Regulating Enterprise Law and Business Organisations in the UK* (Hart Publishing 1999) 222 point out, there are various tests that can be used to show that company is controlled by other companies, the first test is the control of a majority of voting rights or control of a majority of the board, or the fact of a dominant influence exercised by virtue of provisions in the constitution or by contract.

⁷² *VTB Capital Plc v Nutrithek International Corp* [2013] UKSC 5, [2013] 2 WLR 398.

⁷³ Petrin (n 67) 616; David Kershaw, *Company Law in Context* (2ndedn, Oxford University Press 2012) 46-77.

⁷⁴ *Chandler v Cape Plc* (n 69) 80.

Consequently, in *Chandler* there was an indication of a slight change from the propositions of *Adams*, but this movement is still slow and uncertain; thus, the *Salomon* principle still prevails.

To conclude, the analysis demonstrates that the limited liability and corporate legal personality principles, initially designed for individual companies, also apply to MCGs. As it was revealed, even in the case of MCGs, each company is treated separately and not as a single economic unit. Although the separate legal personality principle applies to MCGs, there is no unifying standard to determine when the corporate veil will be lifted and what factors to consider in lifting the veil of MCGs in order to extend the liability of a subsidiary to its parent company. This is because the courts will always consider each case on its merits to ascertain whether the facts of the case justify the lifting of the corporate veil, and how much weight a particular piece of evidence bears in the final outcome would depend on the views of the judges.⁷⁵ Also, the criteria that the courts have applied on whether to treat an MCG as one entity, such as justice, agency and other criteria, are uncertain and ambiguous. Therefore, it is difficult to anticipate when and in which circumstances the court will disregard the separate legal personality of the insolvent corporate group and what factors the courts will consider. Invariably, this results in legal uncertainty, particularly in relation to the cross-border insolvency of MCGs, because, as demonstrated in the cases above, the court will determine the issue of lifting the veil on a case by case basis.

In the next part, a critical review of the conflict of laws perspectives is provided. This is because the foregoing analysis revealed that company law principles are not very useful in addressing the problems involved in the insolvency of MCGs, particularly with regard to promoting legal certainty. Therefore, it is likely that these problems can be addressed through

⁷⁵ Karasz (n 55) 25.

the application of the conflict of laws mechanism. This is especially so because the conflict of laws mirrors the substantive laws of the various domestic legal systems involved in any particular case. In the situation of the cross-border insolvency of MCGs, the difficulties and arguments relating to the treatment of a group of companies as a single entity have affected the way the principle of conflict of laws deals with such insolvency cases. The proposed alternative solution available under conflict of laws affords the opportunity to evaluate legal certainty in relation to MCG insolvency cases. It is argued that legal certainty is essential because the rights and obligations of the parties involved in cross-border insolvency cases of MCGs need to be predictable, clear, stable and precise in order to avoid unexpected monetary expenses to all parties involved in the insolvency proceedings.

1.2 The Conflict of Laws Perspective: Theories and Implications

The previous section showed that the principles of company law do not enhance legal certainty in cases of cross-border insolvency of MCGs. This section attempts to examine the problem of the lack of certainty by exploring the theories of conflict of laws for allocating jurisdiction in cross-border insolvency cases of individual companies and assessing the extent to which they can be usefully applied to the cross-border insolvency of MCGs. The examination of such theories is fundamental to the topic of MCGs because these groups of companies are ‘multinational’, i.e. based in more than one legal jurisdiction, and such theories help allocate jurisdiction when one of the members of the group is experiencing financial difficulties. This is especially relevant today as a result of the increasing number of international business failures in both advanced and emerging economies.⁷⁶

⁷⁶ Rosalind Mason, ‘Cross-Border Insolvency Law: Where Private International Law and Insolvency Meet’ in Omar, Paul (eds), *International Insolvency Law: Themes and Perspectives* (Ashgate 2008) 27.

Indeed, the complex problems and difficulties associated with cross-border insolvency cases relate to the allocation of jurisdiction and applicable law for both the debtors and creditors.⁷⁷

The problem of allocating jurisdiction arises when an insolvent company has assets or interests in property and the creditors of the insolvent company are located in more than one countries. This makes it difficult to determine the jurisdiction and the applicable law because debtors, as long as they establish the connection, will always prefer jurisdiction in their own countries in order to maximise their interests. On the other hand, creditors and other parties may seek other jurisdictions from which they may benefit. These jurisdictional conflicts usually give rise to forum shopping, which can sometimes be abusive.⁷⁸

Over the years, five theories have been developed within the cross-border insolvency arena: universalism, modified universalism, territoriality, cooperative territoriality and contractualism.⁷⁹ These theories aim at answering the question of whether cross-border insolvency cases should be administered in one single court or in various courts, as the determination of the forum will invariably determine the applicable law. The applicable law will help the court determine the priority of the credits, the mechanism for distributing the assets, and the range of assets that can be liquidated. This is because in international insolvency, the choice of a forum and choice of law are intertwined. For example, in the EIR, the law of the place in which the main insolvency proceedings are initiated has to apply.⁸⁰

⁷⁷ Ian Fletcher, 'International Insolvency: A Case for Study and Treatment' (1993) 27 *The International Lawyer* 429.

⁷⁸ See also Chapter 2 where abusive forum shopping is discussed in detail.

⁷⁹ Westbrook (n 2) 2303; Robert Rasmussen, 'A New Approach to Transnational Insolvencies' (1997-1998) 19 *Michigan Journal of International Law* 1; Rasmussen (n 1) 2252; Ian Fletcher, *Insolvency in Private International Law* (Oxford University Press 2005) 15; Edward Adams and Jason Fincke, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 *Columbia Journal of European Law* 43; Jay Westbrook, 'A Comment on Universal Proceduralism' (2010) 48 *Columbia Journal of Transnational Law* 503.

⁸⁰ EIR 2000 art (4), see also Hannah Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice of Law Rules and Theory' (2000) 36 *Stanford Journal of International Law* 30; Edward Janger, 'Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcy' (2014) 9 *Brooklyn journal of Corporate, Financial and Commercial Law* 85, 90.

These theories were originally formulated to deal with the cross-border insolvency of individual companies, but they also extend to the cross-border insolvency of MCGs.

It is also important to review the cross-border insolvency theories. This review will help to ascertain whether one or a combination of theories would better address the problem of the insolvency of MCGs, taking into account their growing operations. In conflict of laws, the universalism and territorialism theories are central to cross-border insolvency and how to protect vulnerable third parties in insolvency cases. The question is which one of these theories can provide legal certainty in cases of the cross-border insolvency of MCGs. It is important to bear in mind that the universalism and territoriality theories focus mainly on individual companies, although they can also be extended to MCGs.⁸¹

These theories have employed different mechanisms in dealing with the cross-border insolvency of MCGs. For example, advocates of territorialism claim that the separation between entities and assets in each country is the only solution to cross-border insolvency cases.⁸² On the other hand, proponents of universalism assert that in order to cope with cross-border insolvency cases, which usually involve diverse laws from different jurisdictions, insolvency proceedings should be centralised in one country, even if entities or assets are in multiple countries.⁸³

Other approaches that have emanated from the territorialism and universalism theories are the cooperative territorialism and modified universalism approaches. These are also examined in

⁸¹ Lynn Lopucki, 'Cooperation International Bankruptcy: A Post Universalist Approach' (1999) 94 Cornell Law Review 696, 716; Samuel Bufford, 'Global Venue Controls Are Coming: A Reply to Professor Lopucki' (2005) 79 American Bankruptcy Law Journal 105, 135; Lynn Lopucki, 'Universalism Unravels' (2005) 79 American Bankruptcy Law Journal 143, 152.

⁸² Lopucki, 'Universalism Unravels' (n 81) 143.

⁸³ Jay Westbrook, 'Multinational Enterprises in General Default: Chapter 15, the ALI principles, and the EU Insolvency Regulation' (2002) 76 American Bankruptcy Law Journal 5; Jay Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 American Bankruptcy Law Journal 457.

order to determine whether one or a combination of the theories can work to achieve legal certainty in the cross-border insolvency of MCGs.⁸⁴ It is argued that modified universalism may offer the best solution for MCGs because it encourages a single proceeding regardless of whether the parties have assets in other jurisdictions. Additionally, it provides foreign creditors with the right to participate in the main insolvency proceedings and it protects the local creditors by providing them with the right to open secondary insolvency proceedings.

(A) Universalism Theory in Insolvency Proceedings

Universalism is derived from the theory of market equilibrium, which requires a legal system to be symmetrical with the market, covering all or nearly all transactions and stakeholders with respect to the legal rights and duties embraced by those systems.⁸⁵ The theory requires insolvency law systems to reflect and meet the needs and demands of the global market as opposed to merely focussing on national markets.⁸⁶ Thus, universalism theory proposes a central administration for all cases of a given entity by one court even if the assets of this entity are located in different countries, and the court shall apply its own insolvency law. The decisions that are taken by the courts then affect assets wherever they are located.⁸⁷ Thus, universalism allows all assets located in various states to be managed by a single court and a single liquidator, and to be governed by the same law. This theory also does not discriminate between local and foreign creditors, as a result of which they all have an equal opportunity to participate in the insolvency proceedings.

⁸⁴ Edward Janger, 'Universal Proceduralism' (2006-2007) 32 Brooklyn Journal of International Law 819.

⁸⁵ Westbrook (n 2) 2276.

⁸⁶ *ibid* 2308.

⁸⁷ Liza Perkins, 'A Defence of Pure Universalism in Cross-Border Corporate Insolvencies' (1999-2000) 32 New York University Journal of international Law and Politics 787; Ronald Silverman, 'Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency' (2000) 6 Journal of International and Comparative Law 265.

According to Westbrook, applying the same law of the same forum may assist in reducing the litigation costs by avoiding double proceedings as well as in enhancing the legal predictability for the interests of both creditors and stakeholders.⁸⁸ To illustrate this point, the parties do not spend money acquiring expertise about foreign laws, as the court will apply the same law. Westbrook further elucidates that the universal approach can lead to a unified distribution of the assets amongst all creditors,⁸⁹ and this can be achieved through sending all of the assets to a single court, which has the same distribution plan for all creditors.⁹⁰ The court that administers all of the assets of the insolvent company will use the same distribution scheme because it will apply its own insolvency law.⁹¹

The universalism theory also reduces high administrative costs and expedites proceedings, since there is only one court handling the insolvency proceedings, and as a result, creditors can save time and money as they need to file their claims only once.⁹² Furthermore, the universalism approach helps to identify ‘home jurisdiction’, which is the place where the courts have jurisdiction, by applying criteria that would be difficult and costly for the debtors or managers to change. These criteria include the main location of company’s activities or assets, which may reduce the possibility of forum shopping.⁹³ Thus, one way to halt the problem of abusive forum shopping is to apply the universalism theory.

⁸⁸ Jay Westbrook, ‘Universalism and Choice of Law’ (2004-2005) 23 Penn State Law Review 625

⁸⁹ Westbrook (n 88)625.

⁹⁰ *ibid* 626-627.

⁹¹ Jay Westbrook, ‘Locating the Eye of the Financial Storm’ (2006- 2007) 32 Brooklyn Journal of International Law 1019.

⁹² Andrew Guzman, ‘International Bankruptcy: In Defence of Universalism’ (2000) 98 Michigan Law Review 2177.

⁹³ Robert Rasmussen, ‘A New Approach to Transnational Insolvencies’ (1997-1998) 19 Michigan Journal of International Law 1; Guzman (n 92) 2214.

Proponents of universalism argue that it could rescue the company or the whole MCG from going into liquidation, which may negatively affect third parties, including creditors.⁹⁴ In addition, universalism allows the business to work at an international level instead of at local level.⁹⁵ Thus, when business is operated globally, in case of any financial stress, cross-border insolvency will be administered in one place. Similarly, the liquidation value will be high because the application of this approach coordinates the sale of a company's assets, located in various countries, at a good price, which will be beneficial to creditors, stakeholders, and debtors alike.⁹⁶ Furthermore, the universal theory simplifies insolvency procedures, duties and the rights of all parties, including creditors, debtors and other relevant parties, because the proceedings take place in a single country that applies its own law.⁹⁷

There are a number of criticisms of the universalism theory.⁹⁸ First, the approach lacks clear plans as well as rules and guidelines for allocating and determining where cross-border insolvency proceedings should take place. Indeed, even proponents of the approach concede the difficulty caused by the lack of a clear and precise rule for allocating the 'debtors' home country', as this criterion always leaves room for various interpretations, which reduces certainty.⁹⁹ The selection of the debtors' home country is based on various criteria.¹⁰⁰ While some courts' choice is based on where the company is incorporated, as in the *Eurofood*¹⁰¹ case, others are influenced by the location where the debtors operate their business or where

⁹⁴ Jay Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 *American Bankruptcy Law Journal* 457.

⁹⁵ Mevorach (n 1) 67.

⁹⁶ Simona Sano, 'The Third Road to Deal with Insolvency of Multinational Enterprise' (2011) 21 *Journal of International Banking Law & Regulation* 23.

⁹⁷ Guzman (n 92) 2214.

⁹⁸ Lopucki (n 81) 713.

⁹⁹ *ibid.*

¹⁰⁰ Buxbaum (n 80) 23.

¹⁰¹ Case C- 341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813.

their corporate headquarters are located, as in the *Daisytek* case.¹⁰² These cases are examined in more detail in chapter two.

The second problem is that even though the place of insolvency proceedings is identified, there is a possibility that the local court may not agree to apply foreign laws or enforce foreign orders. This could be for a number of reasons, such as the perception of the court that this might affect the country's sovereignty,¹⁰³ or the perception of the court that the foreign law is not fair or does not provide adequate protections. In addition, from the point of view of local creditors, the universalism approach is not in their interest because local creditors expect that insolvency-related problems will be resolved in the same locality and governed by the same law.¹⁰⁴ As a result, the universalism approach in some circumstances does not serve the local creditors' interests, as the result may sometimes be against their expectations.¹⁰⁵ Thus, Member States may be unwilling to 'sacrifice' their local interests unless reciprocity is guaranteed from the other member states.¹⁰⁶ Nevertheless, the losses suffered by some local creditors would be balanced by the gains of other creditors, and the results of applying the universalism theory will be to increase predictability and reduce transaction costs, which will be beneficial for all creditors.¹⁰⁷ Another argument against universalism is that it seems difficult in cross-border insolvency cases to cope with the debtors' properties, particularly

¹⁰² *Re Daisytek-ISA Ltd & Ors* [2003] All ER (D) 312; Gerard McCormack, 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10 *Journal of Private International Law* 49.

¹⁰³ Lynn Lopucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (1999-2000) 98 *Michigan Law Review* 2216; Harry Rajak 'The Harmonisation of Insolvency Proceedings in the European Union' (2000) *Company Financial and Insolvency Law Review* 180, 181.

¹⁰⁴ Mevorach (n 1) 68.

¹⁰⁵ Jay Westbrook, 'Multinational Enterprises in General Default: Chapter 15, the ALI principles, and the EU Insolvency Regulation' (2002) 76 *American Bankruptcy Law Journal* 5.

¹⁰⁶ Miguel Virgos and Francisco Garcimartin, *The European Insolvency Regulation: Law and Practice* (Kluwer Law 2004) 15.

¹⁰⁷ Donald Trautman, Jay Westbrook, and Emmanuel Gaillard, 'Four Models for International Bankruptcy' (1993) 3 *American Journal of Comparative Law* 576.

when the properties are located in different countries that are far away from the court where the cross-border insolvency proceedings occur.¹⁰⁸

Lopucki also criticised universalism as unworkable in cross-border insolvency cases because it allows a foreign court and law to interfere with domestic procedures.¹⁰⁹ Specifically, he argued that sovereignty may be infringed upon and the interests of local creditors may be affected.¹¹⁰ Moreover, the definition of ‘debtor’s home country’ in the case of multinational enterprises is transitory, and this may lead to an unpredictable outcome.¹¹¹ However, it may be argued that there is no intervention from foreign courts in the domestic sphere; instead, it is only an application of the rules of conflict of laws. As a consequence, Lopucki observed that ‘one court plays the tune, and everyone else dances’.¹¹²

Be that as it may, universalism represents a useful approach in cross-border insolvency law when the activities of both the parent company and its subsidiaries are fully integrated. Therefore, the application of the universalism approach can be valuable, but if corporate groups are organised in such a way that each company in the group is separate, then the universalism approach will not produce predictable outcomes.¹¹³ The universalism theory is also very useful for applying to the concept of the centre of main interests (COMI), which is used in the EIR and which is discussed in detail in Chapter 2. It is fair to say that theoretically, the universalism approach is ideal in addressing the problems of cross-border insolvencies; however, it has not received support within cross-border insolvency

¹⁰⁸ Fletcher (n 79) 15.

¹⁰⁹ Lopucki (n 103) 2216.

¹¹⁰ Lopucki (n 103) 2216.

¹¹¹ Lopucki (n 81) 713, 718, 720, 723; Lore Unt, ‘International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue’ (1996-1997) 28 *Law and Policy in International Business* 1040.

¹¹² Lopucki (n 103) 2218.

¹¹³ Sefa Franken, ‘Three Principles of Transnational Corporate Bankruptcy Law: A Review’ (2005) 11 *European Law Journal* 241.

community.¹¹⁴ This in turn suggests that it has not succeeded in providing an appropriate solution to the problem of MCG insolvency. Consequently, attention has shifted to modified universalism, and hence, the next section explains why modified universalism is a better approach for dealing with the issue of cross-border insolvency of corporate groups in the EIR.

(B) Modified Universalism Theory in Insolvency Proceedings

Modified universalism theory is an alternative and interim solution to the problems posed by the universalism approach. Westbrook proposed this theory, which reflects recent developments in the cross-border insolvency framework.¹¹⁵ Modified universalism shares the same premise as the universalism approach. However, it is ‘modified’ because it stipulates that, so far as possible, there should be a single insolvency proceeding in the jurisdiction where the debtor is based. Without piercing the corporate veil, modified universalism strives to administer the estate of insolvent companies in a single proceeding, rather than in a series of piecemeal and unconnected proceedings in different countries.¹¹⁶ Thus, modified universalism strives to find a balance between purely territorial bankruptcy systems and a wholly universal bankruptcy system. Another feature of modified universalism theory is that it reserves some discretionary power for local courts to protect certain local interests.¹¹⁷ This is necessary in order, first, to give local courts the right to assess the fairness of the home

¹¹⁴ Jilly Pae, ‘The EU Regulation on Insolvency Proceedings: The Need for a Modified Universal Approach’ (2003-2004) 27 *Hastings International and Comparative Law Review* 556.

¹¹⁵ Westbrook (n 2) 2276; Kent Anderson, ‘The Cross-Border Insolvency Paradigm: A Defence of the Modified Universal Approach Considering the Japanese Experience’ (2000) 21 *University of Pennsylvania Journal of International Law* 679.

¹¹⁶ John Townsend, ‘International Co-operation in Cross- Border Insolvency: HIN *Insurance* (2008) 71 *Modern Law Review* 801, 821.

¹¹⁷ Ulrik Bang-Pedersen, ‘Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests’ (1999) 73 *American Bankruptcy Law Journal* 386.

country's main proceedings, and second, protect the interests of local creditors as well as the interests of the state itself.¹¹⁸

Advocates of modified universalism claim that this approach constitutes a short term solution and is a further step towards achieving the objectives of universalism theory.¹¹⁹ The theory also gives local courts some power to protect the assets and the interests of local creditors and allows a small room for public policy exceptions.¹²⁰ Nevertheless, modified universalism has been criticised for these same reasons, as the discretion given to the national courts can cause serious problems. First, each local court may commence its own proceedings, which might lead to a multiplicity of proceedings in each country rather than a single insolvency proceeding, a problem that advocates of universalism theory argued could cause litigation delays and expenses.¹²¹ Second, in their attempt to protect the interests of local creditors, local courts may abuse their discretionary power to refuse to recognise foreign judgements, and they might be unwilling to cooperate with main insolvency proceedings because the corporation has a negative impact on the interests of local creditors.¹²² Local courts will not usually cooperate with representatives of main insolvency proceedings unless the courts ensure that the distribution of assets will be in the interests of their local creditors.¹²³

¹¹⁸ *ibid*; John Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests' (2006) 104 Michigan Law Review 1899; Samuel Bufford, *United States International Insolvency Law 2008-2009* (Oxford University Press 2009) 23.

¹¹⁹ Westbrook (n 2) 2302; Edward Janger, 'Universal Proceduralism' (2006-2007) 32 Brooklyn Journal of International Law 819.

¹²⁰ Mevorach (n 1) 69.

¹²¹ *ibid*.

¹²² Lopucki (n 81) 728.

¹²³ *ibid* 727; *Cambridge Gas Transport Corporation v Official Committee of Unsecured Committee of Unsecured Creditors of Navigator Holding PLC* [2006] UKPC 26, [2006] 3 WLR 689.

Despite the above limitations, a modified universalism approach appears to be adopted in the EIR as a solution to the problem of the cross-border insolvency of MCGs.¹²⁴ This is because the modified universalism approach recognises states' sovereignty and encourages states to cooperate with one another. Indeed, such cooperation between the courts of the Member States has important implications for addressing the insolvency of MCGs, especially because most relevant parties will benefit from this cooperation.

(C) The Principle of Territoriality

This section discusses the territoriality principle in cross-border insolvency and explains its significance and drawbacks. It also examines whether the territoriality approach provides the best solution for the cross-border insolvency cases of MCGs currently and in the foreseeable future. Territoriality is the most commonly used term in the field of cross-border insolvency, and it 'refers to a system in which each country administers the assets within the country's own territory and recognises other countries' rights to do the same'.¹²⁵ Therefore, the territoriality principle accepts that two or more proceedings can be initiated in different jurisdictions for the same debtor. Implicitly, initiating separate insolvency proceedings and the appointment of separate liquidators will result in substantial loss of value of the assets of the companies.¹²⁶ The rationale behind the territoriality approach is the concept of sovereignty, which means that the judgment made in a country is recognised and enforced in

¹²⁴ Bob Wessels, 'The Place of the Registered Office of a Company: A Cornerstone in the Application of the Insolvency Regulation' (2006) 3 European Company Law 183.

¹²⁵ Lopucki (n 81) 742.

¹²⁶ Fletcher (n 79) 13.

that country.¹²⁷ In other words, a sovereign state has the power to control and supervise the assets located within the country's territory.¹²⁸

Another underlying factor for territorialism, which derives from sovereignty, is the desire of a sovereign state to defend its local interests through the application of its own insolvency law, which often reflects the country's policies, values and interests.¹²⁹ The territoriality principle connotes that where, for example, a company is faced with financial difficulties and it has assets in Italy and Spain, the company can commence proceedings in both countries and the courts will appoint representatives in the respective countries. While the court in Italy is free to apply Italian law to distribute the assets, the Spanish court will apply Spanish laws.

There are several advantages to this approach. First, territorialism respects each country's sovereignty, and it reduces the possibility of any intervention from a foreign court in domestic law and policies.¹³⁰ Second, territorialism seeks to eradicate the difficulty regarding identifying the home country of multinational debtors. As mentioned previously, this problem is considered to be a prominent weakness of the universalism approach because there will be separate insolvency proceedings for each insolvency case.¹³¹ Third, Lopucki argued that multinational enterprises could be structured and operated through various subsidiaries in different countries, but each subsidiary is operated and organised separately, which makes this approach more suitable.¹³²

¹²⁷ Sandile Khumalo, 'International Response to the UNCITRAL Model Law on Cross-Border Insolvency' (2004) International Insolvency Institute 6.

¹²⁸ Bob Wessels, Bruce Markell and Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford University Press 2009) 5, 6.

¹²⁹ John Chung, 'The New Chapter 15 of the Bankruptcy Code: A Step Towards Erosion of National Sovereignty' (2006-2007) 27 North western Journal of International Law & Business 89; Franken (n 113) 233.

¹³⁰ Frederick Tung, 'Is International Bankruptcy Possible?' (2001) 23 Michigan Journal of International Law 31.

¹³¹ Lopucki (n 81) 701.

¹³² *ibid.*

Fourth, from the perspective of local creditors, the territorialism approach is more beneficial, as it saves them travel expenses and foreign litigation costs, since the insolvency proceedings are carried out in their home country, which can effectively serve the local creditors' expectations.¹³³ Fifth, although the territoriality approach gives rise to a multiplicity of proceedings in various states, the costs of such proceedings are limited because each state's court deals only with local assets and applies domestic laws.¹³⁴ Finally, territorialism provides protection to local interests through the application of domestic laws which reflect local policies with regard to security rights and the distribution of assets according to the priorities of creditors. By implication, territorialism leads to favouritism towards local creditors to the detriment of foreign creditors.

Notwithstanding these advantages, territorialism has been criticised by Westbrook for not being efficient in dealing with cross-border insolvency cases. For example, territorialism theory makes the reorganisation of a corporation virtually impossible, and in the event of the liquidation, the value of the assets of the company will be reduced because most of the assets will be sold separately.¹³⁵ Additionally, it may lead to the unfair distribution of assets because it is based on the available amount of assets in each jurisdiction. Therefore, if the company has financial difficulties and the assets are distributed in different countries, the amount of assets could be more in one country and less in another. As a result, the chances are that some creditors would get more money than other creditors in a different country. Similarly, Sara notes that 'territorialism theory has a problem concerning multiple proceedings because there

¹³³ Lucian Bebchuk and Andrew Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 *Journal of Law and Economics* 775.

¹³⁴ Alexander Kipnis, 'Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency' (2008) 36 *Denver Journal of International Law and Policy* 168.

¹³⁵ Westbrook (n 2) 2309; Sara Isham, 'UNCITRAL's Model Law Cross-Border Insolvency: A Workable Protection for Transnational Investment at Last' (2001) 3 *Brooklyn Journal of International Law* 1181.

is lack of cooperation and coordination among courts, trustees and creditors in the international community'.¹³⁶

Another argument against this principle is that the phenomenon of a corporate group assumes that each subsidiary is treated separately. Hence, the theory does not take into account that the assets and debts of one entity are sometimes mixed with the assets and debts of another entity of the same group.¹³⁷ Thus, the territoriality principle raises several issues. First, is the principle capable of making cross-border insolvency work as effectively as domestic insolvency? Second, can it be relied upon as a better approach to deal with cross-border insolvency than the universalism approach? Granted that the territoriality principle has some merit; it is, however, disadvantageous, especially with the globalisation of businesses and the integration between countries, which makes it unworkable in cross-border insolvency cases. As a result, the cooperative territoriality approach that emerged from the territoriality approach is examined in the next section in order to ascertain whether it ameliorates the limitations of the territoriality theory.

(D) The Principle of Cooperative Territoriality

The principle of cooperative territoriality is a modified version of the territoriality approach to international insolvency. Lopucki contends that the vision of cooperative territoriality offers the best solution to the problem of international insolvency.¹³⁸ He proposed that each country should be responsible for administering and managing the assets within its national borders, but admits that in some matters, there is the possibility of cooperation with other countries through international convention.¹³⁹ Clearly, if a debtor has assets in various

¹³⁶ Isham (n 135) 1183.

¹³⁷ Guzman (n 92) 2177.

¹³⁸ Lopucki (n 103) 2216.

¹³⁹ Mevorach (n 1) 73.

countries, the outcomes will be several bankruptcy cases in these countries.¹⁴⁰ As a result, the idea of the main proceedings and secondary proceedings will not be in favour of the debtor and therefore it may be prudent to cooperate and consolidate in some cases.

As a matter of fact, this principle shares similar advantages with the territoriality principle, but it adds one fundamental point, which is the possibility of cooperation between courts and representatives in each country through international treaty. This cooperation can include, for example, the sharing of a creditors' list or selling the assets in the same process.¹⁴¹ Nevertheless, most of the drawbacks of the territoriality principle apply to the cooperative approach, and besides, the cooperation between countries that this approach advocates is rare.¹⁴²

As a consequence, the principle of cooperative territoriality is similar to the territoriality approach, and it does not offer a better solution than territorialism. The idea of cooperation among courts in different countries is hard to achieve in reality because there are communication barriers and no clear rules to guide the process. There is yet another approach, the 'contractualism' approach, which has emerged as an alternative solution to the other theories already discussed. Therefore, the next section examines this approach to determine whether it provides an optimal solution for dealing with the insolvency of MCGs.

¹⁴⁰ Bufford (n 116)143.

¹⁴¹ *ibid.*

¹⁴² Westbook (n 2) 2309; Bufford (n 81) comments "He optimistically believes that negotiating treaties of this sort would not be difficult; however, I would be very surprised to see such a treaty anywhere in the world in my lifetime".

(E) The Principle of Contractualism

The norm of freedom of choice of law was the main factor behind the proposition of the principle of contractualism as a workable approach for handling cross-border insolvencies.¹⁴³ Generally, parties have an option in conflict of laws to select the court and the applicable law in private contracts with a few limitations. Under Rasmussen's proposed 'bankruptcy menu', the party autonomy principle should be adopted and extended at the cross-border insolvency level by giving the parties concerned the right to select a particular country's courts and the applicable law that serves the best interests of the companies and the creditors.¹⁴⁴ Thus, providing businesses with the authority to determine the workable way for managing their interests implies that there will be no interventions or imposition of any mandatory system.¹⁴⁵ Moreover, creditors and investors have the right to insert the selected court and the applicable law in lending contracts to prevent debtors from changing the designated court unless they obtain approval from all creditors.¹⁴⁶

To clarify the proposal of Rasmussen, assuming that England is the home country of a debtor, but most of its essential operations are carried out in Italy and Germany, the debtor will have the option to select the appropriate regimes and add this to the article of association of the firm. Besides, they will choose the appropriate law from one of the places where the operations are carried out. With this arrangement in place, any cross-border insolvency problem will be filed in either a German or an Italian court, and the law of one of those

¹⁴³ Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1997, 1998) 107 Yale Law Journal 1807.

¹⁴⁴ Robert Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 Texas Law Review 51; Lucian Bebchuk 'A New Approach to Corporate Reorganizations' (1998) 101 Harvard Law Review 775.

¹⁴⁵ Rasmussen (n 79) 2, Robert Rasmussen, 'Where are All the Transnational Bankruptcies? The Puzzling Case for Universalism' (2007) 32 Brooklyn Journal of International Law 983.

¹⁴⁶ Barry Adler, 'Financial and Political Theories of American Corporate Bankruptcy' (1993) 45 Stanford Law Review 311.

countries will be applied. When the designated court administers the assets, the other court provides all necessary assistance unless the debtor's option is 'unreasonable and unjust'.¹⁴⁷

The justification of contractualism is that it offers the debtors the option of selecting the most efficient insolvency law. This option will boost the value of the company when it operates, as well as in the case of liquidation, and distribution rules will be beneficial for the company's creditors and investors.¹⁴⁸ Additionally, proponents of the contractualism approach argue that Rasmussen's proposal would assist in mitigating the problem of abusive forum shopping.¹⁴⁹ He emphasised the need to identify the court in the corporate charter of a company at the beginning of the company's operation in order to settle any bankruptcy problem that could be encountered in the future.¹⁵⁰ As a result of this, debtors and creditors would be aware in advance of the court that will resolve their cases and there will be no way to change it unless there is consent from all creditors.¹⁵¹ Another justification for the contractualism approach is that the freedom of choice of court and bankruptcy law may encourage some countries to develop their insolvency laws to suit many companies, so that the companies would select their legal systems in the event of bankruptcy. For example, debtors will have an incentive to select laws in a forum that reduce the cost of credit for them.¹⁵²

Plausible as the contractualism approach appears, it presents certain difficulties which prevent it from being fully appreciated, especially in the case of MCGs. From a practical point of view, one obstacle is that reaching a written agreement between all parties may be difficult because the number of creditors for a single firm in some cases is numerous, and

¹⁴⁷ Rasmussen (n 116) 2.

¹⁴⁸ Lopucki (n 81) 701.

¹⁴⁹ Mevorach (n 1) 77.

¹⁵⁰ Rasmussen (n 116) 51.

¹⁵¹ *ibid.*

¹⁵² Rasmussen (n 1) 2252.

some creditors have more privileges than others. Thus, it may be problematic to reach an agreement that would be acceptable to everyone. In addition, the cost of written contracts is very high because the process is carried out by professional lawyers, and the cost of negotiations is also high.¹⁵³ Schwartz has demonstrated the potential problems in debtors' circumstances, which may change from the time of establishing the company to the time when it files for bankruptcy. If the initial choice was efficient at the beginning, it may not be efficient and could be expensive after a while.¹⁵⁴

Another possible obstacle is that some firms may choose a jurisdiction that is absolutely inconvenient and may constitute harm for involuntary creditors, such as tort creditors.¹⁵⁵ However, this argument conflicts with the proposal of Rasmussen, who concedes the absence of protection for involuntary creditors in his approach. Thus, those involuntary creditors should receive such protection through mandatory rules.¹⁵⁶ Furthermore, with contractualism, parties may select the forum and the applicable law with no real link to cross-border insolvency cases. Nevertheless, this argument may be significantly flawed in view of Rasmussen's suggestion, which requires this sort of connection. Moreover, as Blumberg pointed out, not all contractors can bargain freely, most notably small suppliers, employees and consumers, all of whom may not have equal bargaining power.¹⁵⁷ Finally, empirical

¹⁵³ Schwartz (n 143) 1807; Barry Adler and Ian Ayres, 'A Dilution Mechanism for Valuing Corporation in Bankruptcy' (2001-2002) 111 Yale Law Journal 83.

¹⁵⁴ Schwartz (n 143) 1807.

¹⁵⁵ It is possible to make a distinction between 'voluntary creditors' and 'involuntary creditors'. Voluntary creditors are those who choose to deal with the company. Members of this group of creditors vary, and they include financial institutions which, in most cases, investigate the financial situation of the company prior to any transaction and hence require some security for the loan. Other voluntary creditors are trade creditors, such as suppliers of services and goods, who are less likely to do such investigation and who, therefore, will generally be unsecured. Involuntary creditors, on the other hand, include creditors such as people with personal injury claims against the company.

¹⁵⁶ Lopucki (n 81) 701.

¹⁵⁷ Blumberg (n 26) 137.

studies have indicated that a large numbers of insolvency cases were not governed through the contractualism approach but rather by a mandatory rule.¹⁵⁸

Taken together, the above analysis has revealed some advantages and disadvantages of the contractualism approach as an appropriate and effective method for handling cross-border insolvency cases from both the theoretical and practical points of view. It appears that the contractualism approach is hard or almost impossible to adopt or accept in reality because of the aforementioned obstacles. Moreover, it requires amendments in different areas of law despite all of its apparent advantages.

1.3 Conclusion

This chapter has examined the principles of company law and the theories of conflict of laws in relation to the cross-border insolvency of MCGs. The concepts of separate legal personality and limited liability are at the backbone of company law. These concepts also apply to MCGs, and as analysed above, especially in the post *Adams* era, individual companies in MCGs do enjoy the separate legal personality principle enunciated in *Salomon*. Therefore, although the courts have developed circumstances in which the corporate veil of a number of subsidiaries within an MCG may be lifted, there is no consistent way of knowing how and when those rules may apply. For example, the court formulated the ‘control, fairness and reliance’ test in *Chandler*. However, as analysed, these are imprecise and subjective rules that could be subject to the vagaries of interpretation by courts.

The notion of control is not clear, as the degree of control is not specified and could vary from one MCG to another. Moreover, the courts did not clarify which type of evidence and factors are sufficient to prove that a parent company controls its subsidiaries. It is thus a

¹⁵⁸ Elizabeth Warren and Jay Westbrook, ‘Contracting out of Bankruptcy: An Empirical Intervention’ (2005) 118 Harvard Law Review 1197.

matter of speculation for the courts as to what factors it would consider in order to hold the parent company liable for the debt of its subsidiary. The condition of fairness is also vague, as it requires that the court ensure fairness in holding a parent company liable for the mistakes of its subsidiaries. Like the concept of 'justice', which was considered imprecise and was consequently rejected by the court, 'fairness' is also broad and vague and can be subject to varied interpretations. Also, the degree of 'reliance' to prove that a subsidiary relies on the parent is subject to different interpretations. All of this makes it unclear when a court will hold a parent company liable for the debts of its subsidiary.

Consequently, it is argued that MCGs should continue to enjoy the separate legal personality principle because to treat them as one single entity with one legal personality does not serve the interests of creditors. The group structure, which operates to treat MCGs as a single economic unit, functions to promote the interests of the group as a whole. As discussed above, although the single economic entity approach focuses on the economic integration of MCGs, and could be applied in specific circumstances, such as for tax purposes, as illustrated by Lord Denning, separate legal personality still results in treating individual companies within a group distinctly. The underlying premise is that each company within the group of companies has separate legal personality. Thus, although the separate legal personality principle applies to MCGs, there is no unifying principle to determine when the corporate veil will be lifted and what factors to consider in lifting the veil of MCGs in order to extend the liability of a subsidiary to its parent company. This is because the courts will always consider each case on its merits to determine whether the facts of the case justify the lifting of the corporate veil of MCGs.

Conflict of laws theories discussed in relation to the cross-border insolvency of both individual companies and MCGs include universalism, modified universalism, territoriality,

cooperative territoriality and the theory of contractualism. An important consideration in terms of the differences between these theories is that they make separate assumptions regarding the problems and solutions of international insolvencies. According to universalism theory, centralising insolvency proceedings in one country, even if assets are in different countries, is a solution for international insolvency. Significantly, the theory assumes that applying the same law of the same forum may assist in reducing litigation costs by avoiding multiple proceedings, whilst also enhancing the legal predictability in the interests of both creditors and stakeholders. However, the absence of clear plans, rules and guidelines for allocating and determining where cross-border insolvency proceedings should take place raises questions as to whether the theory can promote legal certainty. Indeed, as De Vette argued, legal certainty might be at stake in certain cases, particularly when it is unclear where the operational headquarters lie.¹⁵⁹

According to the territoriality theory, the separation between entities and assets in each country is the only means to solve cross-border insolvency cases. In other words, the assets of the insolvent debtor in a particular jurisdiction are administered based on the applicable law of the country where they are located. By implication, it appears that the territoriality theory seeks to promote legal certainty in that the identity of the court that will deal with a particular asset as well as the applicable law are known based on the location of the asset.

However, both theories have been modified with the aim of finding the best possible solution to deal with the problems of international insolvencies. For instance, modified universalism recognises states' sovereignty and encourages states to cooperate with one another. Indeed, such cooperation between the courts of the Member State would, to a great extent, help to address the insolvency of MCGs, especially if all or most relevant parties benefit from this

¹⁵⁹ Eva M F de Vette, 'Multinational Enterprise Groups in Insolvency: How Should the European Union Act?' (2011) 7 *Utrecht Law Review* 216.

cooperation. Furthermore, the theory gives discretionary power to national courts to protect local interests, particularly those of local creditors. The cooperative territoriality theory, on the other hand, promotes a degree of cooperation between courts and representatives in each country. This cooperation can include, for example, sharing a creditors' list or selling the assets in the same process.

Finally, the principles of contractualism emphasised the need for the parties to select the court, the country, and the applicable law that serves the best interests of both the companies and the creditors. From an *ex ante* perspective, this theory could be seen as promoting certainty and predictability because it emphasizes the need to identify the court in advance, which could potentially mitigate the problem of abusive forum shopping. Therefore, as Rasmussen suggested, debtors and creditors are aware in advance of the court that will resolve their cases and there will be no way to change it without the consent of all creditors.¹⁶⁰

While these theories have been applied at different times, there is still a lack of unambiguous rules to apply to cases of the cross-border insolvency of MCGs, and as demonstrated in this chapter, all of the theories have strengths and weaknesses. The next chapter examines a solution provided by the EIR to help enhance legal certainty and reduce abusive forum shopping, namely, the concept of the Centre of Main Interests (COMI). This concept states that jurisdiction for commencing main insolvency proceedings should correspond to the place where the debtor conducts the administration of his interests on a regular basis, making it ascertainable to third parties.¹⁶¹ The next chapter discusses the importance of this concept to determining jurisdiction in MCGs' cross-border insolvency proceedings.

¹⁶⁰ Rasmussen (n 1) 2252.

¹⁶¹ EIR 2000, recital 13.

Chapter 2:

Centre of Main Interests

as a Mechanism to Enhance Legal Certainty

The previous chapter has illustrated the complexities arising from cross-border insolvency cases of multinational corporate groups (MCGs) from the perspective of company law principles and the perspective of conflict of laws theories. Achieving legal certainty in such insolvency cases becomes very difficult due to the application of the principles of separate legal personality, limited liability, and lifting the veil. Conflict of laws theories, such as universalism and territorialism, provide different approaches to addressing the insolvency of MCGs in a way that enhances legal certainty.

This chapter explores the notion of the centre of main interests (COMI) as a legal mechanism provided in the European Insolvency Regulation (EIR 2000) for determining the jurisdiction and the applicable law in cross-border insolvency cases in the EU.¹² The EIR 2000 stipulates that insolvency proceedings for individual companies must commence in the COMI of the debtor, which is defined as the place where the debtor conducts the administration of his interests on a regular basis, and which is therefore ascertainable by third parties.³ This notion appears to be designed with individual companies in mind and has been applied to numerous

¹ Regulation (EU) No 1346/2000 of 29 May 2000 on Insolvency Proceedings [2000] OJ L160/1 (EIR 2000).

² EIR 2000 art 3 (1).

³ EIR 2000 recital 13.

such cases. This chapter examines the notion of COMI and the extent to which it may be used to allocate jurisdiction in cases of the cross-border insolvency of MCGs.⁴

The European Parliament and the Council issued Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings (the New Recast EIR 2015)⁵ - following extensive discussions between the European Parliament, the European Commission and the Council - as a replacement for the EIR 2000.⁶ This Thesis examines both the EIR 2000 and the New Recast EIR. This chapter, however, considers only the EIR 2000, as the New Recast EIR 2015 was issued in the Official Journal on 5 June 2015 and take effect as a replacement of Regulation 1346/2000 on 26 June 2017. The implications of the reform as far as enhancing legal certainty in allocating jurisdiction in the insolvency cases of MCGs is examined in depth in Chapter 4.

This chapter is divided into three sections. The first section undertakes a black letter analysis to examine the notion of COMI under the EIR 2000 to achieve a proper understanding of the operation of the Regulation. The second section examines the jurisprudence of the Court of Justice of the European Union (CJEU) and the Court in the United Kingdom in cases relating to the cross-border insolvency of MCGs to evaluate the ability of the Court to apply the notion of COMI to MCGs in cross-border insolvency cases. The third section examines the extent to which the inconsistency in the application of the notion of the COMI by the Courts

⁴ Michael Weiss, 'Bridge over Troubled Water: The Revised Insolvency Regulation' (2015) 24 *International Insolvency Review* 192; Stephan Madaus, 'Insolvency Proceedings for Corporate Groups under the New Insolvency Regulation' (2015) *International Insolvency Law Review* 235; Dario Latella, 'The "COMI" Concept in the Revision of the European Insolvency Regulation' (2015) 11 *European Company and Financial Law Review* 479; Michael Schillig, 'Corporate Insolvency Law in the Twenty-First Century: State Imposed or Market Based?' (2014) 14 *Journal of Corporate Law Studies* 1; Ragan Alexandra, 'COMI Strikes a Discordant Note: Why U.S Courts are not in Complete Harmony Despite Chapter 15 Directives' (2010) 27 *Emory Bankruptcy Development Journal* 117; Adam Gallagher, 'Centre of Main Interest: The EU Insolvency Regulation and Chapter 15' (2009) 28 *American Bankruptcy Institute Journal* 44, 79-80; Manfred Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70 *American Bankruptcy Law Journal* 485.

⁵ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings [2015] OJ L141/19 (the New Recast Regulation).

⁶ EIR 2000 art 46.

may reduce legal certainty in allocating jurisdiction in cases of cross-border insolvency, which may consequently lead to abusive forum shopping, a matter that the EIR 2000 is supposed to deal with.

2.1 The Notion of the COMI under the EIR 2000

This section examines the notion of the COMI under the EIR 2000. The first part discusses the importance of this notion in regard to cross-border insolvency in general, the second part undertakes a black letter analysis of the meaning of the notion of the COMI, and the third part takes a deeper look at the competing approaches for determining the COMI, namely, the registered office approach and the real seat approach.

(A) Importance of the COMI

The notion of the COMI is advantageous to insolvency proceedings in a number of ways. The COMI is the mechanism provided in the EIR 2000 to enable the court to determine jurisdiction. According to this notion, the main insolvency proceedings must take place at the COMI of the debtor. Allocating jurisdiction based on the notion of COMI consequently determines the applicable law, because according to the EIR 2000, “the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are open,”⁷ subject to a few exceptions.⁸

Furthermore, the notion of the COMI enables the EIR 2000 to create a priority ranking for insolvency proceedings by which only one main proceeding is opened and any subsequent proceedings are considered secondary.⁹ According to this system, both local and foreign

⁷ EIR 2000 art 4(1).

⁸ EIR 2000 art 5, 6, 7, 8, 9, 10, 12; Irit Mevorach, ‘Cross-Border Insolvency of Enterprise Groups: the Choice of Law Challenge’ (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 107.

⁹ EIR 2000 art 3.

creditors can participate in the main and secondary proceedings.¹⁰ The main proceedings may be company rescue proceedings or winding up proceedings, while the secondary proceedings, under the EIR 2000, can primarily be winding up proceedings, and in some exceptional cases can be rescue proceedings.¹¹ There can only be one set of main proceedings for each insolvency case, whereas there can be several sets of secondary proceedings. Moreover, the main insolvency proceedings are universal in scope and aim to encompass all of the debtor's assets, whereas secondary proceedings are limited to the assets located in the state.¹² Once the main insolvency proceedings are commenced, its legal effects must be recognised in all other Member States.¹³ The primary tool for distinguishing main proceedings from secondary proceedings is the notion of the COMI. Main proceedings are to be commenced in the jurisdiction of the COMI, whereas secondary proceedings may be commenced in the jurisdiction in which the establishment is situated.¹⁴ The main proceedings must be recognised by all Member States, and secondary proceedings are permitted to commence simultaneously in other jurisdictions.

The primary function of the main proceedings is to take responsibility for undertaking the insolvency proceedings in regard to all of the assets of the company irrespective of where they are located. Another function of the main proceedings is to impose a duty to cooperate and communicate with other insolvency proceedings. Also, the liquidator at the place where the main insolvency proceedings are opened may request the opening of secondary

¹⁰ EIR 2000 art 27, Jay Westbrook, 'Multinational Enterprises in General Default: Chapter 15, the ALI principles, and the EU Insolvency Regulation' (2002) 76 American Bankruptcy Law Journal 11.

¹¹ EIR art 3(3); Robert Arts, 'Main and Secondary Proceedings in the Recast of the European Insolvency the only Good Secondary Proceeding is a Synthetic Proceeding' (*Max Planck Institute Luxembourg*, 2015)

<<http://www.iiiglobal.org/sites/default/files/media/Arts%20-%20Main%20and%20Secondary%20Proceedings.pdf>>accessed 30 May 2016.

¹² EIR 2000 recital 12.

¹³ EIR 2000 art 17(1).

¹⁴ EIR 2000 art 3(4) b; John Pottow, 'A New Role for Secondary Proceedings in International Bankruptcies' (2011) 46 Texas International Law Journal 579.

proceedings or the stay of the process of the realisation of assets in secondary proceedings. Furthermore, the court or the liquidator of the main proceedings can propose a rescue plan for all of the proceedings related to the insolvency of the company. The opening of the secondary proceedings has two essential functions, namely, the protective function and the assistance function. The protective function allows the local court to protect the local creditors and assets, while the assistance function essentially facilitates the primary or main insolvency proceedings.¹⁵ According to Balz, the option of opening secondary proceedings to protect local creditors and their assets should be considered one of the main reasons why Member States have been willing to adopt the EIR 2000.¹⁶

(B) The Notion of the COMI

A clear definition of COMI is important to allocate jurisdiction in order to achieve the aim of the legislators, which is to prevent abusive forum shopping in international insolvency cases.¹⁷ The EIR 2000 does not contain a comprehensive definition of COMI. However, recital 13 of the EIR 2000 provides some useful guidance as to what may constitute the COMI. It states that ‘the centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’.¹⁸ This definition has three main components that must be explored in order to fully understand the notion of the COMI. First of all, what is meant by the ‘place where the debtor conducts the administration of his interests’? Secondly, what does

¹⁵ Bob Wessels, ‘Contracting out of Secondary Proceedings: the Main Liquidator’s Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation’ (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 63.

¹⁶ Balz (n 4) 520.

¹⁷ EIR 2000 recital 4; Luminita Tuleasca, ‘The Harmonization of the European Laws on Insolvency’ (2011) 18 Lex ET Scientia International Journal 144, 155; Marek Szydło, ‘The Notion of COMI in European Insolvency Law’ (2009) 20 European Business Law Review 747, 752.

¹⁸ EIR 2000 recital 13; Gerard McCormack, ‘Jurisdiction Competition and Forum Shopping in Insolvency Proceedings’ (2009) 68 Cambridge Law Journal 169; Samir Parikh, ‘Modern Forum Shopping in Bankruptcy’ (2013) 46 Connecticut Law Review 159; Jennifer Payne, ‘Cross –Border Schemes of Arrangement and Forum Shopping’ (2013) 14 European Business Organization Law Review 563.

‘regular basis’ mean? Thirdly, who are the ‘third parties’ to which this place must be ascertainable?

The meaning of these elements has been explored and discussed by the courts and various insolvency scholars in the EU. Firstly, it appears that the term ‘place where the debtor conducts the administration of his interests’ is a wide concept that can encompass a variety of activities relating to the business, such as the place where the business actually operates, the place where the board of directors of the company meets and the place in which the strategic decisions of the company are made.¹⁹ However, court decisions in this regard demonstrate that none of these are definitive factors and they all may be rebutted. It is therefore necessary to consider all the facts surrounding the case.²⁰ Secondly, the term ‘regular basis’ is understood to mean that a degree of continuity is required. In order for the administration of a business to be believed to be held at a place on regular basis, the duration and continuity of the conduct, both past and future, will be relevant.²¹ However, there is no specific minimum time stipulated as necessary (for example, three or six months) to satisfy the requirement for ‘regular basis’. Thirdly, the term ‘ascertainable by third parties’ is understood to mean that the place of administration and the continuity aspect of it must be assessed from the perspective of an external observer.²² Wessels notes that the requirement for ‘regular basis’ serves as bridge between the activities of the debtor and what makes such activities

¹⁹ Patrick Wautelet, ‘Some Considerations on the Center of Main Interests as Jurisdictional Test Under the European Insolvency Regulation’ in Georges Affaki (ed), *Cross –Border Insolvency and Conflict of Jurisdictions :A US-EU Experience* (Bruylant 2007)73, 76.

²⁰ Case C- 341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813.

²¹ Miguel Virgos and Francisco, *The European Insolvency Regulation: Law and Practice* (Kluwer 2004) 41

²² *ibid.*

observable to third parties.²³ The identity of this observer is not clear, but case law indicates that ‘creditors’ are a significant third party observer for the purpose of this element.²⁴

Notwithstanding the complex elements included in the definition of the COMI, Article 3(1) of the EIR 2000 states that the COMI of a company is the place of the debtor’s registered office unless there is proof to the contrary. It remains unclear which factors can be regarded as sufficient to rebut the presumption, as no further indication is given as to the nature or degree of proof required to do so.²⁵ Similarly, McCormack asserts that there are many problems associated with COMI, one of which is that the notion is based on presumption.²⁶ However, it is still unclear how the presumption can be disproved, because the EIR 2000 does not stipulate whether substantial or only a small amount of evidence is required. However, it appears that the CJEU in the *Eurofood*²⁷ case has determined that the factors must be objective and ascertainable to third parties, as stated in Recital 13.²⁸ Nevertheless, it is argued that the phrase ‘objective and ascertainable to third parties’ is still ambiguous and more clarification is needed from the CJEU in order to definitively determine what may constitute the COMI.²⁹ According to Belohlavek, the presumption in the definition of the COMI leads to a reduction of certainty.³⁰ In his view, it can be assumed that in most cases the COMI will correspond to its registered office, but this does not always have to be the case since existing practice shows that, in reality, the COMI does not usually correspond with the

²³ Bob Wessels, *International Insolvency Law* (3rd ed, Kluwer 2012) 456.

²⁴ *Eurofood* (n 20).

²⁵ Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* [2011] WLR (D) 334.

²⁶ McCormack (n 18) 188; John Armour, ‘Abuse of European Insolvency Law? A Discussion’ in Rita Faria and Stefan Vogenauer (eds) *Prohibition of Abuse of Law A New General Principle of Law* (Hart Publishing 2011) 157.

²⁷ *Re Eurofood* (n 20).

²⁸ Recital 13 of the Regulation only provides some guidance to the interpretation of the COMI, in fact the definition of COMI is left to the ECJ and national courts.

²⁹ Aaron M Kaufman, ‘The European Union Goes COMI –Tose: Hazards of Harmonising Corporate Insolvency Laws in the Global Economy’ (2007) 29 *Houston Journal of International Law* 625.

³⁰ Alexander Belohlavek, ‘Center of Main Interest (COMI) and Jurisdiction of National Courts in Insolvency Matters (Insolvency Status)’ (2008) 50 *International Journal of Law and Management* 53, 60.

registered office, especially when the companies and their financial, economic and general business interests are located abroad.³¹ Furthermore, the COMI would be affected by a situation where the statutory registered office is located in one country but the administration or real management of debtors' interest is carried out in a different country; the EIR 2000 does not rule out such a possibility.

(C) Registered Office Approach vs Real Seat Approach

There are two approaches for the interpretation of COMI, the registered office approach and the real seat approach.³² Article 3(1) states that the COMI is the registered office of the debtor. Based on this definition, it appears that the drafters of the EIR 2000 may have assumed that a company's registered office could be difficult to shift or transfer within Member States. Nevertheless, this presumption is not widely accepted since EU secondary legislation have provided tools that permit companies to shift their companies from one Member State to another. First, the SE Regulation affords companies the right to move their registered office from one Member State to another.³³ Second, Directive 2005/56 on Cross Border Mergers allows EU companies to merge with a company in another Member State, and through such mergers the companies can relocate their registered office.³⁴ Consequently, either by way of cross-border merger or by utilising other legal methods, the transfer of the

³¹ *ibid.*

³² Enrico Vaccaro, 'Transfer of Seat and Freedom of Establishment in European Company Law' (2005) 16 *European Business Law Review* 1348; Federico Mucciarelli, 'Company 'Emigration' and EC Freedom of Establishment: Daily Revisited' (2008) 9 *European Business Organisation Law Review* 281; Jan Wouters, 'Private International Law and Companies Freedom of Establishment' (2009) 2 *European Business Organization Law Review* 101; Dagmar Waltjen, 'German Conflict Rules and the Multinational Enterprise' (1976) 6 *Georgia Journal of International and Comparative Law* 99; Werner Ebke, 'The Real Seat Doctrine in the Conflict of Laws' (2002) 36 *The International Lawyer* 1015.

³³ Council Regulation 2157/2001/CE of 8 October 2001 on Statute of the European Company [2001] OF L 294/1 ("SE Regulation") art 2 and 8, ECJ 9 March 1999; Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459; Case C- 208/00 *Überseering BV v Nordic Construction Company Baumanagement* [2002] ECR I-9919; Marie Lennarts, 'Company Mobility within the EU, Fifty Years on from a Non-Issue to a Hot Topic' (2008) 4 *Utrecht Law Review* 1; Case C-210/06 *Cartesio Okatato es Szolgaltato bt* [2008] ECR I-9641.

³⁴ Council Directive 2005/56/CE of 26 October 26 2005 on Cross-Border Mergers of Limited Liability Companies [2005] L 301/1 ("Cross-Border Merger Directive").

registered office of the company occurs, and is capable of occurring, often. For this reason, the real seat approach can also be useful in determining the COMI of the debtor.

The argument for the real seat approach, which is also referred to as the mind of management approach or the head office or operation of the company approach,³⁵ is that the place of actual control or management reflects the reality of the location of the company because most of the assets of the company are located in that country. Also, it is easier for the creditors to identify and assume that the company is located in the country where it carries out its actual business activities. However, there is the possibility that the company has two separate countries of operation, which makes the country in which the main insolvency proceedings should commence debatable. Furthermore, in some cases it will be difficult for the creditors to ascertain in which country exactly the actual control of the company lies,³⁶ and as Eidenmuller argues, the command and control test could be regarded as an infringement of the ascertainability element of the definition of the COMI.³⁷

Where the registered office and the real seat of the company are located in the same country, there is usually no problem with determining the COMI. However, where these offices are located in two separate countries, then the question becomes, which of them will constitute the COMI? The registered office is where the office is registered, while the real seat of the company is where the company carries out its day-to-day activities. It is also where the functions related to the management, finances, planning and strategies of the company are carried out. Thus, the centrally controlled affiliation of companies, generally known as ‘mind of management’, is found at the headquarters of the group, which is the registered office of

³⁵ Bob Wessel, ‘Cross-Border Insolvency Law in Europe: Present Status and Future Prospects’ (2008) 11 Potchefstroom Electronic Law Journal 68; Seth Chertok, ‘Jurisdictional Competition in the European Community’ (2006) 27 University of Pennsylvania Journal of International Economic Law 465.

³⁶ Stephan Rammeloo, *Corporation in Private International Law* (Oxford University Press 2001) 11.

³⁷ Horst Eidenmuller, ‘Abuse of Law in the Context of European Insolvency Law’ (2009) 6 European Company and Financial Law Review 1, 24.

the parent company.³⁸ This results in a unified group jurisdiction at the centre of interests of the parent company. However, this place is not usually readily ascertainable to creditors. Rather, it is a matter of internal organisational structure.³⁹

The definition of the notion of the COMI in the EIR 2000 is a result of a clash between these two approaches. It was hard for legislators to select the best criterion to determine international jurisdiction for the commencement of insolvency proceedings and to decide which values and interests should be protected; the interests of the creditor or those of the debtor.⁴⁰ It is also possible to argue that another reason for the ambiguity of the COMI is that the notion was a product of political compromise among the Member States. To illustrate this point, both creditors and debtors have interests in and derive benefits from commencing insolvency proceedings in their home country, such as saving on travel expenses, dealing with laws that they are familiar with and, sometimes, avoiding language and communication difficulties.⁴¹ In addition, it seems hard to strike a balance between the interests of creditors and debtors. However, Marek argues that the legislator should focus more on protecting the interests of the creditors as a primary aim of insolvency proceedings.⁴² There are certainly other stakeholders whose interests should be protected, such as debtors and workers.⁴³ Whilst not ignoring the need to protect the interests of these other stakeholders, this Thesis focuses primarily on the protection of the interests of creditors.

³⁸ Klaus Pannen (eds), *European Insolvency Regulation* (De Gruyter 2007) 106; Gerard McCormack, 'COMI and Comity in UK and US Insolvency Law' (2012) 128 *Law Quarterly Review* 140.

³⁹ *ibid* 107.

⁴⁰ Szydlo (n 17) 756.

⁴¹ *ibid*.

⁴² *ibid* 748.

⁴³ Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 *European Business Organization Law Review* 579, 620; Philip Wood, *Principle of International Insolvency* (2nd, Sweet & Maxwell 2007) 4; Pascal de Vareilles, *Forum Shopping in the Judicial Area* (Oxford Hart Publishing 2007).

This section illustrated that the notion of the COMI is not as straightforward as it would seem at first glance. The EIR 2000 has not provided sufficient guidance to define the exact meaning of this notion, and therefore it does not always produce a predictable outcome. The next section looks in more detail at the way in which the courts of different Member States have interpreted and applied this notion in cross-border insolvency cases.

The lack of a comprehensive definition of COMI in the EIR 2000 has opened the door for various interpretations, and this leads to the possibility of abusive forum shopping. Thus, although the COMI is intended to be one of the criteria to help the court in determining and allocating jurisdiction, the inadequate definition has resulted in considerable uncertainty, and it is now considered one of the most controversial features of the EIR 2000. This ambiguity has led courts in various Member States to offer different interpretations, especially when the place of incorporation and the place of the ‘mind of management’⁴⁴ of the company are different. However, Van Calster plausibly pointed out that the lack of a detailed definition of COMI in the EIR 2000 may be unfortunate on the one hand, but on the other, it provides the courts with a degree of flexibility in handling some situations which arise in practice, and which any form of abstract definition or criteria cannot capture.⁴⁵

2.2 The Jurisprudence of the CJEU and Selected National Courts on the COMI

The jurisdiction for insolvency proceedings, as provided by Article 3 of the EIR 2000, is the court of the Member State where the debtor's centre of main interest (COMI) is located. This provision is still the same under the New Recast EIR 2015. The only slight variation in the

⁴⁴ The mind of management of the company refers to the headquarters of the group, which is the registered office of the parent company; Pannen (n 38)106.

⁴⁵ Geert van Calster, *European Private International Law* (Oxford University Press 2013) 193.

New Recast EIR is that where the COMI has shifted in the three months preceding the commencement of insolvency proceedings, then the rebuttable presumption that the COMI is the registered office will not apply.⁴⁶ This is to prevent abusive forum shopping; more details and analysis are provided in Chapter 4.

In *Case AU7353*, decided by the District Court Dordrecht in The Netherlands,⁴⁷ a creditor filed for insolvency proceedings against a debtor on 13 September 2005. The request was dealt with by the court on 23 November 2005, but the debtor failed to appear, despite being appropriately summoned. Records indicated that on 4 May 2005, prior to the date of filing, the debtor had left for Belgium. Therefore, according to the court, Belgium was the debtor's COMI unless it was proved that the COMI was the Netherlands. It was also shown that the debtor's business registration in the Trade Register was cancelled on 11 October 2005, *ex officio*, by the keeper of the register. It could not be established that the debtor still continued to carry on business, and the fact that he still had several debts was insufficient to assume that his COMI was in the Netherlands. Therefore, the Dutch courts did not have jurisdiction to open main insolvency proceedings. It appears that with the New Recast EIR 2015, this decision would still be valid because the cut-off point applies where there has been a shift in the COMI within the three months prior to the commencement of insolvency proceedings. Since the debtor in this case moved to Belgium four months before the commencement of the proceedings, his COMI can no longer be the Netherlands. Rather, it is the courts in Belgium, where his COMI is located, that would have jurisdiction.

According to the EIR 2000, the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by

⁴⁶ EIR 2000 recital 31, art 3.

⁴⁷ The case decided by the District Court Dordrecht in The Netherlands on 23 November 2005 (LJN: AU7353), cited by Bob Wessel, 'Cross-Border Insolvency Law in Europe: Present Status and Future Prospects' (n 35) 78.

third parties.⁴⁸ In most cases before either national courts or the CJEU, the determination of COMI is the principal point of legal conflict, with highly contested cases like those of *Daisytek*⁴⁹ (which involved 16 subsidiaries in the UK, Germany, France, Italy, Ireland, the Netherlands, and Luxembourg). This section examines the cases of *Daisytek*, *Eurofood* and *Interdil* to determine how the CJEU resolved the question of where the COMI is located. It will be shown that these decisions are based on the individual facts and circumstances of each case, as no uniform rule could be applied to all of them.

It is important to note that since the EIR 2000 does not provide a comprehensive definition for determining the COMI, various courts in Member States of the EU as well as the CJEU have adopted the registered office approach, which is the place where the company is registered. On the other hand, the ‘mind of management’ or the ‘head office function’ approach, which implies that the COMI should correspond to the place where the debtor carries out their day-to-day business activities and where they can be ascertained by third parties, has been adopted by a few courts in England, the Netherlands and Belgium.⁵⁰

The ‘mind of management’ approach (sometimes called the ‘head office functions’, or ‘parental control’ approach) was followed in *Re Collins & Aikman Europe SA* in the United Kingdom,⁵¹ where an application for administration orders was made concerning 24 companies in the Collins & Aikman Corporation Group. These companies were incorporated in Austria, Belgium, the Czech Republic, England, Germany, Luxembourg, Italy, the Netherlands, Spain, and Sweden. The Collins & Aikman Group, a leading global supplier of automotive component systems and modules to vehicle manufacturers, including Daimler,

⁴⁸ EIR 2000 recital 13.

⁴⁹ *Re Daisytek-ISA Ltd and Others* [2003] All ER (D) 312 (Jul) 16 May 2003.

⁵⁰ Bob Wessels, ‘Cross-Border Insolvency Law in Europe: Present Status and Future Prospects’ (n 35) 78-79.

⁵¹ *In re Collins & Aikman Europe SA* [2005] EWCH 1754 (Ch) High Court of Justice (Chancery Division Companies Court) 15 July 2005.

Ford, General Motors, Honda, Nissan, Porsche, Renault, Toyota, and Volkswagen, had its headquarters in Michigan, USA and a combined workforce of about 23,000 staff in 17 countries. Its largest clients were Daimler, Daimler Chrysler, General Motors, and Ford. The group expanded considerably over the years, primarily through acquisitions, but it had got into financial difficulties as a result of liquidity issues. As a result, the US operations of the group became subjected to Chapter 11 proceedings in the United States in May 2005.⁵²

The High Court paid attention to Recital 13 and several English court decisions in ascertaining the COMI of the group.⁵³ The court found that the relevant place was the place of incorporation, but it was important to demonstrate that the ‘head office functions’ were carried out in a Member State other than the one in which the registered office was located.⁵⁴ The court assessed the evidence from the companies and considered the main administrative functions relating to the European operations and how they had been carried out since 17 May 2005.⁵⁵ It was held that the COMI of each of the non-English companies was not related to the location of their respective registered office.⁵⁶

Having discussed the uncertainties that the lack of a detailed definition of the COMI in the EIR 2000 poses, especially in determining the country where insolvency proceedings relating to multinational corporate groups (MCGs) may commence, this section analyses the emerging jurisprudence on the COMI by both the CJEU and the national courts of Member States. The analysis demonstrates that the little guidance provided in the EIR 2000 as to what may constitute the COMI has resulted in the courts attributing different definitions and interpretations to the concept. The next part examines two significant cases, namely the case

⁵² Bob Wessel, ‘Cross-Border Insolvency Law in Europe: Present Status and Future Prospects’ (n 35) 79.

⁵³ Including *BRAC Rent-A-Car International Inc* [2003] 1 WLR 40 1421, and *Re Daisytek-ISA Ltd* [2004] BPIR 30.

⁵⁴ High Court of Justice (Chancery Division Companies Court) 15 July 2005, [2005] EWHC 1754 (Ch).

⁵⁵ *Ibid.*

⁵⁶ Bob Wessel, ‘Cross-Border Insolvency Law in Europe: Present Status and Future Prospects’ (n 35).

of *Eurofood* from the CJEU and the *Daisytek* case from the Chancery Division of the High Court of England (Leeds District) to demonstrate how the ambiguity of the definition of COMI in Art 3(1) has led to different interpretation by the courts.⁵⁷

Whilst there are several cases in which the COMI has been interpreted, these two cases have been selected for discussion for two reasons. First, the *Eurofood* and the *Daisytek* cases are regarded as the *locus classicus* cases regarding the application of the COMI in MCG situations by both the CJEU and the courts in England.⁵⁸ Second, the two cases hold two opposing views on how the COMI should be interpreted and applied. While the CJEU in the *Eurofood* case adopted the registered office approach, the Leeds Court in England followed the ‘head office function’ approach in the *Daisytek* case. Furthermore, the treatment of insolvency for a group of companies differs in those two cases, as will be explained below.⁵⁹ The critical evaluation of the approaches adopted in both cases will help to determine which approach is more effective in achieving a consistent interpretation and application of the COMI in cases of MCGs.

(A) Analysis of the Case of Daisytek ISA Limited: The ‘Head Office Function’ Approach

One of the landmark cases related to the issue of determining the place of a company’s COMI as it concerns MCGs is the *Daisytek* case.⁶⁰ The Daisytek corporate group’s main function was to distribute computer supplies and professional tape products. There was a parent company in the USA, and it had several subsidiaries in Europe as resellers for those products. In early 2003, Daisytek the parent company defaulted on financial covenants, and this default

⁵⁷ See more cases regarding how the presumption in Article 3(1) has been interpreted for example *Stanford international Bank Ltd* case [2009] EWHC 1441 (Ch).

⁵⁸ Samuel Bufford, ‘International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies’ (2006) 12 Columbia Journal of European Law 429.

⁵⁹ The treatment of group of companies in company laws in Europe is controversial as to whether they should be recognised as one entity or not. This issue has a direct impact on how Private International law will treat corporate groups.

⁶⁰ *ReDaisytek-ISA Ltd* [2003] BCC 562.

caused financial problems for the subsidiaries in Europe. Consequently, insolvency proceedings were filed in the US,⁶¹ England,⁶² Germany,⁶³ and France.⁶⁴ Out of the sixteen European subsidiaries, one had been incorporated in France, three in Germany, and the rest in England. Accordingly, there was a dispute between the English and the French courts about where the main insolvency proceedings should be conducted for Daisytek – France or England - and the same dispute arose between the English and the German courts regarding two of the German subsidiaries.

In light of the case, the English court was satisfied that the COMI of each company in the group was situated in England, specifically in Bradford. The English High Court argued that the head office in Bradford was the coordinator and the performer of the European group, which included, for example, the negotiation of supply contracts.⁶⁵ In fact, there was no problem with the English Court opening the main proceedings for the Ten English Companies based on the presumption in Article 3(1) of the EIR 2000. However, the challenge for the English court was how to overcome the presumption in order to have the jurisdiction to open the main proceedings for the German and French companies.⁶⁶ The Court provided a detailed analysis of the evidences and factors which affected its final decision to adopt the head office function approach.⁶⁷ The English High Court was satisfied that the German and French subsidiaries conducted the administration of their businesses from the Bradford head

⁶¹ See *Daisytek –US*, 2004 WL 1698284.

⁶² See *Daisytek- Leeds* 2003 WL 21353254.

⁶³ *Re Daisytek – ISA Ltd.*, [2003] B.C.C. 562 (Ch).

⁶⁴ *Klempka v ISA Daisytek SAS*, 2004 WL 22936778, [2004] ILPr (C d/ A 2003) (France).

⁶⁵ See *Daisytek- Leeds* 2003 WL 21353254.

⁶⁶ Bufford (n 58) 456.

⁶⁷ Gabriel Moss, 'Head Office Functions as a Decisive Factor to Determine International Jurisdiction' (Honours Class 'Comparative and International Insolvency Law', Leiden, March-June 2009) <<http://www.iiiglobal.org/component/jdownloads/viewdownload/362/4009.html>> accessed 29 May 2016.

office.⁶⁸ The Court placed particular emphasis on the claim that the centre of the debtor's main interests was "ascertainable by third parties".⁶⁹

From the point of view of the English Court, the third parties are the creditors, so in the case of a trading company, these creditors are most likely to be its trade suppliers and its financiers.⁷⁰ The court found that most funding was provided through English financial institutions. Furthermore, the Court found that most of the factual evidence indicated that a head office in Bradford was managing and controlling all of the companies in the group. For instance, the Court found that the German subsidiary could not purchase goods worth more than 5000 Euros without the approval of the head office in England.⁷¹ Additionally, negotiations for 70% of the supply contracts took place in England.⁷² Thus, the Court in Leeds found sufficient evidence to rebut the presumption that both the German and French subsidiaries were located in the place of their registered office.⁷³

The French and German courts initially rejected this judgment in the *Daisytek* case because it was against the spirit of the Insolvency Regulation. For example, the Pontoise court in France found the opening of main insolvency proceedings by the court in Leeds to be contrary to the Regulation for two main reasons.⁷⁴ First, there is no provision in the EIR 2000 for corporate groups, so each of the group's companies has a separate legal personality and should be treated separately. The location of the establishment in England did not support the English court's decision to open main proceedings because under the EU Regulation, an establishment

⁶⁸ EIR 2000 recital 13.

⁶⁹ See *Daisytek*- Leeds, 2003 WL 21353254 para 2.

⁷⁰ *ibid*; Gabriel Moss, 'The Triumph of "Fraternite": ISA Daisytek SAS' (*International Insolvency Institute*, December 2002) <<http://www.iiiglobal.org/component/jdownloads/finish/104/798.html>> accessed 29 May 2016.

⁷¹ *Daisytek* (n 65).

⁷² *ibid*.

⁷³ Bufford (n 58) 458.

⁷⁴ *Klempka v ISA Daisytek SAS*, 2004 WL 22936778, [2004] ILPr (C d/ A 2003) (France).

gives a court the right only to open secondary proceedings not main proceedings.⁷⁵ However, this judgment was not recognised by the Versailles Court of Appeal in France on the grounds that all Member States should automatically recognise the judgment of the court where the main insolvency proceedings are opened without challenges or further investigation regarding the judgment, as stated in Art16 EIR 2000.⁷⁶

Following the important decision in the *Daisytek* case, the same principle was applied in the case *MG Rover*,⁷⁷ where the English court rebutted the presumption in Art 3(1) that COMI is where the registered office of the company is located, applying instead the head office function approach. In this case, the English court was satisfied that all factual evidence proved that the management and operation of the French subsidiary was in England.⁷⁸ Despite the relative solidity of the court's judgment, it is argued that the head office function approach might serve as an incentive for forum shopping when the group's management decides to move its place of control to a different location.⁷⁹ However, the New Recast EIR 2015 has, to some extent, ameliorated this potential difficulty by providing a cut-off period of three months prior to the commencement of insolvency proceedings.

Thus, from the above analysis of how the English courts have interpreted the COMI of individual companies and groups, the following conclusion can be drawn. In general, two different approaches have been applied: the registered office approach and the head office function approach. The registered office approach is more ascertainable for third parties,

⁷⁵ Bufford (n 58) 460; EIR 2000 art 3 (2).

⁷⁶ See *Daisytek – Versailles*, 2003 WL 22936778 paragraph Article 16 of the EIR also states that 'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the that time it becomes effective in the State of the opening of proceedings'. See also Recital 22.

⁷⁷ *MG Rover Espana and other Subsidiaries* [2005] BPIR 1162, [2006] BCC579.

⁷⁸ *MG Rover Espana* (n 77) para 116; Michael Haravon, 'Recent Developments in France under EU Regulation 1346/2000' (2005) *Insolvency Intelligence* 118.

⁷⁹ Wessels (n 23) 523.

especially creditors, and this was supported by the CJEU in the *Eurofood* and *Interedil* cases, as would be examined shortly. Also, the presumption in Article 3(1) can enhance legal certainty, especially when third parties have been relying on the location of the registered office, as indicated by the EIR 2000. At the same time, Article 3(1) provides a small degree of flexibility, which is important when implementing the EIR 2000 between Member States that have different domestic insolvency laws. However, the definition of the COMI needs to be interpreted precisely and consistently so that courts in all Member States can follow the CJEU interpretation.

(B) Analysis of the Eurofood Case: The Registered Office Approach

The literature is replete with debates concerning what may constitute the COMI.⁸⁰ While some argue that the criteria should correspond to place of the registered office of the company, others contend that it should be determined by reference to the mind of management of the company, i.e. the place where the decisions, management and actual control of the company emanate from. In the previous section, the analysis of the handling of the *Daisytek* case by the English courts revealed that national courts favour the head office function approach to rebut the presumption of the registered office approach. In this section the decision of the CJEU in the *Eurofood* case demonstrates a preference for the ‘registered office’ approach.

Eurofood is an Irish subsidiary company which was incorporated into the International Financial Services Centre in Dublin in order to benefit from Ireland's low tax rate. It was wholly owned by Parmalat Spa, an Italian corporation, whose sole function was to increase

⁸⁰ See for example Gabriel Moss, ‘Group Insolvency-Forum-EC Regulation and Model Law under the Influence of English Pragmatism Revisited’ (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 250; Mark Arnold, ‘Truth or Illusion? COMI Migration and Forum Shopping under the EU Insolvency Regulation’ (2013) 14 Business Law International 245; Jennifer Wheeler, ‘COMI Migration and UK and EU Corporate Tax’ (2013) 14 Business Law International 261; Jonathan Howell, ‘International Insolvency Law’ (2008) 42 The International Lawyer 113-151.

financial support for the Parmalat group. Moreover, Eurofood had no employees in Dublin, and its policy was determined by the administrative headquarters, which were located in Italy. Notably, Eurofood had only engaged in three financial transactions, two of which were guaranteed by Parmalat, the parent corporation.⁸¹ On 27 January 2004, Bank of America, which was a creditor of Eurofood, filed a petition in Dublin High Court seeking the involuntary winding-up of Eurofood. On 10 February 2004, Eurofood was placed under an Italian extraordinary administration, with Parmalat's administrator being appointed Eurofood's administrator in the Italian court in Parma to make a declaration that Eurofood, being a subsidiary of Parmalat SPA in Italy, was insolvent.

Thus, two sets of proceedings were opened simultaneously, in Dublin, Ireland and in Parma, Italy.⁸² The two parallel main proceedings were opened in Ireland and Italy because each court believed that Eurofood's COMI was located in their respective countries. The Dublin High Court found that Eurofood's COMI was located in Ireland because its registered office was located there and this was ascertainable to third parties. On the other hand, the Parma court found that Eurofood's COMI was located in Italy because its management and centre of control were with its Parmalat parent company, which was located there. The Irish Supreme Court clearly expressed its view that the COMI of Eurofood was located in Ireland, as it was registered in Dublin.⁸³ It is crucial to discuss the legal grounds of both the Irish court and the Italian court for their argument that the COMI was located in their respective home countries.

⁸¹ Gabriel Moss, 'Asking the Right Questions? Highs and Lows of the ECJ Judgment in Eurofood' (2006) 19 *Insolvency International* 97; Simon Beale, 'The Judgment in Eurofood: the European Court of Justice Gives Guidance on the EC Insolvency Regulation' (2006) 21 *Journal of International Law and Regulation* 487.

⁸² The decision by the Dublin Court is *In re Eurofood IFSC Ltd*, [2004] No. 33 Dublin H.C. The decision of the court in Parma, Italy is *re Eurofood IFSC Ltd*, Parma Civil & Criminal Ct, Feb. 19, 2004.

⁸³ Paul Torremans, 'Coming to Terms with the COMI Concept in the European Insolvency Regulation' in Paul J Omar (ed) *International Insolvency Law: Themes and Perspectives* (Ashgate 2008) 173-184.

On the one hand, the court in Parma defended its decision to have the right to open main insolvency proceedings because Italian law gives Italian courts permission to exercise jurisdiction over a foreign company if the administrative headquarters are located in Italy.⁸⁴ The court in Parma found that all of Eurofood's activities and management took place in Parma and it did not have an independent decision making function.⁸⁵ Furthermore, the court found that Eurofood was incorporated in Ireland only for economic and financial purposes to serve the Parmalat corporate group based in Parma.⁸⁶ In addition, the court in Parma claimed that creditors of Eurofood expected that the Italian court would assume jurisdiction over its insolvency proceedings because Eurofood was 'an empty box' and all transactions and decisions were controlled and run by the parent company in Italy.⁸⁷

Simultaneously, the Irish court rejected the arguments of the court in Parma and provided evidence in favour of the main proceedings being opened in Ireland. The Dublin High Court based its argument on the fact that Eurofood enjoyed the presumption in Art 3(1) EIR 2000 that it was located in Dublin because it was incorporated there.⁸⁸ A further consideration of this argument was that the evidence indicated that the actual creditors stated in their accounts that Eurofood had its COMI in Ireland and that this was more ascertainable for them.⁸⁹

By virtue of Article 3(1) EIR 2000, the COMI is the place where the debtor's registered office is located unless there is proof to the contrary. It appears that the COMI must correspond with the registered office and that presumption can only be rebutted in

⁸⁴ Bufford (n 58) 429.

⁸⁵ Moss (n 81) 97.

⁸⁶ Bufford (n 58) 430.

⁸⁷ Bufford (n 58) 443

⁸⁸ Samuel Bufford, 'Centre of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice' (2006-2007) 27 *Northwestern Journal of International Law & Business* 351, 371; Anil Hargovan, 'Centre of Main Interests Under the Australian Cross-Border Insolvency ACT 2008: Lessons From the United States' (2008) 3 *Journal of the Australasian Law Teachers Association* 11.

⁸⁹ Bufford (n 58) 445.

exceptional cases. Such rebuttals must be supported with evidence that should be objective and ascertainable by third parties.⁹⁰ The Irish court followed the registered office approach and ruled that since Eurofood was registered in Dublin, its COMI is undeniably located in Ireland. Dissatisfied with the position of the Italian court, which adopted the head office function approach, the Irish Supreme Court referred five questions to the ECJ for preliminary ruling. One of the five questions was the determination of the COMI of a subsidiary where the registered offices of the parent company and that of the subsidiary are located in different countries.⁹¹

Specifically, the question was: where the registered offices of a parent company and its subsidiary are situated in two different Member States, should the governing factors in determining the COMI be (1) the place where the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is located, or (2) should it be determined by reference to the position of the parent company, its power to appoint directors, and its control in fact of the policy of the subsidiary?⁹²

The CJEU rejected the argument that the fact that the parent company directed and controlled all the decisions of its subsidiary implied that the location of the subsidiary is the same as the location of the parent corporation.⁹³ The CJEU ruled that where a debtor is a subsidiary

⁹⁰ *ibid.*

⁹¹ Samuel Bufford, 'The Eurofood Decision of the European Court of Justice' (*American Bankruptcy Institute*, September 2006)

<http://www.abi.org/abi-journal/the-eurofood-decision-of-the-european-court-of-justice>.

⁹² *Eurofood* case ECJ; para 37 contains the specific answer to this question.

⁹³ Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813 para 36; Jasnica Garasic, 'What Is Right and What Is Wrong in the ECJ's Judgment on Eurofood IFSC' in Petar Sarcevic, Paul Volken and Andrea Bonomi (eds), *Yearbook of Private International Law* (Sellier 2005) 87; Georges Khairallah, 'The "Centre of Debtor's Main Interests": Comments on the Eurofood Judgment of the ECJ' in Wolf-Georg Ringe, Louise Gullifer and Philippe Th  ry (eds), *Current issues in European financial and insolvency law: perspectives from France and the UK* (Hart Publishing 2009) 123.

whose registered office and that of its parent company are located in two different Member States; the presumption laid down in the second sentence of Article 3(1) of the EIR 2000 would apply.⁹⁴ Thus, the presumption that the COMI of the subsidiary is situated in the Member State where its registered office is located can only be rebutted.⁹⁵

The CJEU further noted that where a company carries on its business in the territory of a Member State where its registered office is situated, the mere fact that its economic choices are situated or can be controlled by a parent company in another Member State is not sufficient to rebut the presumption laid down by Article 3(1) of the EIR 2000.⁹⁶ Therefore, in determining the proper location of the COMI of a subsidiary, the CJEU noted that it is necessary to examine two sets of factors.⁹⁷ The first set of factors is the location where the debtor regularly administered its own interests, as ascertainable by third parties, and the country in which it is incorporated.⁹⁸ The second set of factors is the location of the parent company, which, by virtue of the power to appoint directors and its ownership, is able to control the policy decisions of its subsidiary.⁹⁹ In the *Eurofood* case, these factors point towards different countries for the location of the COMI and therefore the courts must decide the relative weight to give to each factor.¹⁰⁰ Although the ECJ ruled that the registered office is the place of COMI and therefore Eurofood's COMI was located in Dublin and not Italy, there is a gap as to how to determine what weight to place on the evidence of the controlling effect and power of the parent company.

⁹⁴ *ibid Eurofood* para 37.

⁹⁵ Bufford (n 58) 445.

⁹⁶ *Eurofood* para 37.

⁹⁷ *ibid* para 27.

⁹⁸ *Eurofood* para 27.

⁹⁹ *ibid*; Bufford (n 91).

¹⁰⁰ Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell 2005) 591.

The CJEU's decision in the *Eurofood* case supported the presumption in Art 3(1) and represented a shift towards the registered office approach, as the court came to the conclusion that *Eurofood* had its COMI in Dublin.¹⁰¹ The registered office approach has been followed in subsequent cases. For example in the case of *Interdil*,¹⁰² the CJEU noted that for the purposes of determining a company's COMI, the second sentence of Article 3(1) had to be construed by attaching greater importance to the place of the company's central administration, as might be established by objective factors which were ascertainable by third parties.¹⁰³ Therefore, where the bodies responsible for the management and supervision of a company are in the same place as its registered office, and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision will not be rebutted.¹⁰⁴ Similarly, where the company's central administration is not in the same place as its registered office, the presence of the company's assets and the existence of contracts for the financial exploitation of those assets in another Member State will not be regarded as sufficient factors to rebut the presumption. Thus, in this case the CJEU followed the registered office approach.

Also, in the *Mediasucre* case, the CJEU rejected the proposition that a single COMI could automatically be inferred from the fact that the property of two companies had been intermixed.¹⁰⁵ The Court held that such intermixing could be organised from two management and supervision centres in two different Member States.¹⁰⁶ Thus, despite the

¹⁰¹ *ibid*; Irit Mevorach, 'Jurisdiction in Insolvency: A Study of European Courts Decisions' (2010) 6 *Journal of Private International Law* 327.

¹⁰² *Interdil Srl Case C-396/09*.

¹⁰³ *Interdil Srl Case* para 32.

¹⁰⁴ *ibid* para 65.

¹⁰⁵ *Case C-191/10 Mediasucre* [2012] ECR 239.

¹⁰⁶ *ibid*.

intermixing of the property of the parent and subsidiary companies, this case reflects the support for the registered office approach.

In the two cases above, the CJEU established the registered office approach as not just a presumption but as the strongest factor in determining the COMI. However, some scholars, for example Moss and Hess, argue that the *Interedil* case was a victory for the courts of those Member States which have applied the ‘head office function’ approach and created an opportunity to develop a practice taking gradual steps towards a group COMI approach.¹⁰⁷ Also, Moss claims that although the CJEU ruled in the *Eurofood* case that the COMI is the place of the registered office, this does not necessarily disagree with the ‘head office function’ approach. Rather, he noted that the CJEU required evidence or facts that are objective and ascertainable by third parties.¹⁰⁸ He argued further that the court may have refused to apply the head office function approach in the *Eurofood* case because it was irrelevant to the facts of the particular case, but it could be applied in other cases. Nevertheless, it is the argument of this Thesis that there has been a lack of clear rules applicable to MCGs in insolvency cases, and, as discussed in the previous chapter, neither the application of company law principles or theories of private international law provide consistent application to MCGs. Here again with the interpretation and application of the COMI there is also a divergence between the CJEU and courts of Member States of the EU.

In this regard, the debate seems to be on-going, as some scholars, such as Paulus, argue that the CJEU, in adopting the registered office approach, did not take into account the importance of developing international insolvency law, and especially setting rules for the

¹⁰⁷ Gabriel Moss, “‘Head Office Functions’ Test Triumphs in ECJ: *Interedil*” (2011) 24 *Insolvency International* 126; Burkhard Hess, Paul Oberhammer, Thomas Pfeiffer, *European Insolvency Law the Heidelberg-Luxembourg – Vienna Report on the Application of Regulation No.1346/2000* (Hart Publishing 2014) 166.

¹⁰⁸ Moss (n 81) 99; Andrew Denatale and Daniel Ginsberg, ‘Cross- Border Insolvencies Under United States Law an Update’ (2005) 24 *Journal of International Banking and Financial Law* 14.

insolvency of MCGs.¹⁰⁹ Thus, the CJEU only answered the five questions referred to it and chose not to take advantage of the opportunity to advance rules that could be applicable to cases involving MCGs. It is acknowledged that the role of the CJEU is limited to answering the questions submitted to it, but this was a missed opportunity for judicial activism by the CJEU, a practice that has been seen in some prior cases.¹¹⁰ Also, the *Eurofood* judgment appeared to be disappointing because it affirmed that the COMI should be identified according to criteria which are both ‘objective and ascertainable by third parties’.¹¹¹ Regrettably, it failed to provide valid examples of how these criteria can be identified. Thus, the judgement was criticised for failing to explain and clarify what could constitute these objective criteria.

Nevertheless, the *Eurofood* judgment is important because it provides guidance for the interpretation of Article 3(1) EIR 2000, but it stipulates the presumption that the place of a company’s registered office should be its COMI in the absence of proof to the contrary. Thus, as Moss pointed out, there is no further explanation or indication provided by the CJEU regarding the nature or degree of proof required to rebut this presumption.¹¹² It could be argued that formulating such an explanation on the nature or degree required would make the presumption difficult to rebut because the facts and circumstances vary from case to case, and it is therefore difficult to stipulate a precise formula that can be applied in all cases.

¹⁰⁹ Christoph Paulus, ‘The Aftermath of “Eurofood” – BenQ Holding BV and the Deficiencies of the ECJ Decision’ (2007) 20 *Insolvency International* 85.

¹¹⁰ Case 314/85 *Frost v Hauptzollamt Lubeck - Ost* [1987] ECR 4199; Henri Waele and Anna Vleuten, ‘Judicial Activism in the European Court of Justice – the Case of LGBT Rights’ (2011) 19 *Michigan State Journal of International Law* 639.

¹¹¹ Thomas Bachner, ‘The Battle over Jurisdiction in European Insolvency Law’ (2006) 3 *European Company and Financial Law Review* 310.

¹¹² Gabriel Moss, Ian Fletcher, and Stuart Isaacs, *The EC Regulation On Insolvency Proceedings* (2edn, Oxford University Press 2009) 446; Bob Wessels, ‘The Place of the Registered Office of a Company: A Cornerstone in the Application of the Insolvency Regulation’ (2006) 3 *European Company Law* 183.

In addition, the meaning of ‘third party’ remains ambiguous, there no clear definition is given as to who may be considered a third party.¹¹³ In regard to the ascertainability requirement, third party can be understood to refer to creditors, but not all creditors are of the same level. It could be argued that third party should be understood to mean only creditors with larger claims or creditors with secured credit.¹¹⁴ However, this argument is not fully convincing because making a distinction between creditors contradicts the principle that all creditors must be treated equally.¹¹⁵ It seems to be widely accepted that the term ‘third party’ can refer to creditors in general, which should comprise all types of creditors without any distinction being made between them. Hence, all creditors will have the same protection, especially less secured creditors, such as the employees of the insolvent company. It could be argued that the aim of Article 3(1) is not solely to provide protection for creditors, as the notion of the COMI is intended to allocate jurisdiction to the courts of a particular Member State, which has a closer connection with the debtors.¹¹⁶ Nevertheless, it is argued in this Thesis that the most important third parties to be protected are the creditors.

Based on the foregoing analysis, and despite the criticisms of the CJEU’s decision in the *Eurofood* case, it is argued that the decision has given clear direction for the interpretation and application of the COMI - the registered office, which is useful guidance on how to locate a company’s COMI.¹¹⁷ Also, the decision emphasised the importance of the presumption that the COMI of a company is the place of its registered office as a strong stand

¹¹³ Jasnica Garasic, ‘What is Right and What is Wrong in the ECJ’s Judgment on Eurofood IFSC’ in Petar Sarcevic, Andera Bonomi, and Paul Volken *Yeabook of Private International Law* (European Law Publisher 2006) 87.

¹¹⁴ *In re Daisytek – ISA Ltd* [2003] BCC 562.

¹¹⁵ Garasic (n 113) 87.

¹¹⁶ Opinion of AG Kokott in *Interedil Srl* Case C-396/09 para 53; Irit Mevorach, ‘Home Country of a Multinational Enterprise Group Facing Insolvency’ (2008) 57 *International and Comparative Law Quarterly* 427.

¹¹⁷ Victoria Thompson, ‘Clash of Jurisdictions over EC Insolvency Regulation’ (2004) 25 *Credit Control Journal* 19.

which can rarely be rebutted. Support for the COMI presumption by the CJEU has helped to simplify the application of the notion of the COMI and reduce the risk of courts of different Member States reaching different conclusions.¹¹⁸

This section illustrated that the courts do not have a single approach to determining the location of the COMI. In *Daisytek*, the English courts used the office function approach, while in *Eurofood*, the CJEU used the registered office approach. Even though *Eurofood* is the latter case, the CJEU did not state that the office function approach is not an acceptable approach to use, leaving the option open for future cases to use either of these approaches, which could consequently lead to very different outcomes. However, subsequent cases at the CJEU, such as *Interdil* and *Mediasucre*, show that the CJEU clearly leans towards the registered office approach. The non-rejection of the office function approach solution nevertheless leaves room for uncertainty. The next section explores how this uncertainty may lead to the abusive forum shopping.

2.3 Forum Shopping and European Insolvency Regulation

As discussed in the preceding section, the EIR 2000 does not provide a comprehensive definition of COMI. Therefore, in determining the COMI, courts have adopted two different interpretations. The ambiguity of the notion of COMI has encouraged some interested parties, such as directors, to migrate the company from one Member State to another to obtain a more favourable legal position. This section therefore discusses forum shopping, which is one of the problems that results from applying the COMI to MCG cases. Both legal scholars and practitioners involved in international disputes agree on the importance of determining where

¹¹⁸ Look Chan Ho, 'Cross- Border Insolvency: Proving COMI and Seeking Recognition under UK Model Law' (2009) 24 *Journal of International Banking and Financial Law* 536.

litigation may take place in cross-border transactions.¹¹⁹ That is because there is usually competition among different courts in different States to assume jurisdiction and apply their own laws.¹²⁰ The reasons for this competition are the lack of uniformity in substantive laws as well as the desire of the parties to commence litigation in a forum that provides them with more benefits.¹²¹

The difference in procedural laws and substantive laws may make one jurisdiction more favourable than others, from the debtor's or creditor's point of view. For example, the plaintiff will attempt to select the jurisdiction that is less expensive, has faster litigation, and has judges with more experience.¹²² Thus, uniformity of insolvency law among all Member States will discourage forum shopping.¹²³ However, it is hard to reach such uniformity among all Member States because the insolvency law of each Member State is different, especially on such matters as statutory priorities and security rights.¹²⁴ Also, discouraging forum shopping may negatively affect regulatory competition among Member States to develop their insolvency laws to become more favourable.¹²⁵ Moreover, uniformity of insolvency laws between Member States may not reduce forum shopping, as some parties move to jurisdictions that they consider more favourable to them on the basis of other grounds. For

¹¹⁹ Marek Szydło, 'Prevention of Forum Shopping in European Insolvency Law' (2010) 11 *European Business Law Review* 253, 255. More recently, the European Commission has presented a comprehensive proposal to amend and reform the Insolvency Regulation and the aim of this proposal is to prevent forum shopping. More details about this proposal: Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No1346/2000 on Insolvency Proceedings.

¹²⁰ McCormack, (n 17) 68.

¹²¹ Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003) 15

¹²² Simon Pearl, 'Forum Shopping in the EEC' (1987) 15 *International Business Lawyer* 391; Bell (n 121) 25.

¹²³ Alexandra Kastrinou, 'Forum Shopping Under the EC Regulation on Insolvency Proceedings' (2013) 24 *International Company and Commercial Law Review* 20.

¹²⁴ Adrian Walters and Anton Smith, 'Bankruptcy Tourism under the EC Regulation on Insolvency Proceedings: a View from England and Wales' (2010) 19 *International Insolvency Review* 181; John Briggs, 'Cross-Border Insolvency the Treatment of Legal Acts Detrimental to Creditors in English and Italian Insolvency Law and Under the European Insolvency Regulation' (2016) 29 *Insolvency Intelligence* 49, 51.

¹²⁵ John Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition' (2005) 48 *Current Legal Problems* 369; Mitchell Kane and Edward Rock, 'Corporate Taxation and International Charter Competition' (2008) *Michigan Law Review* 1229.

example, the other jurisdiction may have more favourable procedure rules, more experienced judges, or lower litigation expenses.¹²⁶

It is important to note that the EU legislator has clearly combated the phenomenon of forum shopping in the precise wording of the fourth recital of the preamble of the EIR 2000: ‘It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)’.¹²⁷ This can be considered a more advanced step compared with the Model Law, which contains no mention of the issue of forum shopping within its provisions.¹²⁸ Thus, forum shopping consists of two different elements, the physical and the mental element. The physical element includes the transfer of assets or judicial proceedings while the mental element includes parties’ intentions to obtain a more favourable legal position.¹²⁹ However, in the EIR 2000 there is no further mention of the forum shopping phenomenon. Rather, it provides some legal tools to prevent forum shopping. For instance, the EIR 2000 introduces the notion of COMI as a criterion for allocating jurisdiction in cross-border insolvency to prevent forum shopping.¹³⁰ Moreover, the CJEU provides some explanatory guidelines for interpreting the notion of COMI.¹³¹

The New Recast EIR 2015 contains extensive reforms, including provisions governing jurisdiction for opening insolvency proceedings, actions derived from insolvency proceedings and provisions to ensure the coordination of insolvency proceedings involving the same

¹²⁶ Bell (n 121) 15.

¹²⁷ EIR 2000 recital 4.

¹²⁸ Irit Mevorach, ‘Forum Shopping in Times of Crisis: A Director’s Duties Perspective’ (2013) 4 *European Company and Financial Law Review* 523, 529.

¹²⁹ Paschalis Paschalidis, *Freedom of Establishment and Private International Law for Corporations* (Oxford University Press 2012) 221.

¹³⁰ EIR 2000 recital 4.

¹³¹ Case C- 341/04 *Eurofood* (n 20).

debtor or several members of the same group of companies.¹³² However, the question of whether there would be mechanisms to ensure the full implementation of these reforms by both the CJEU and courts of Member States remains unanswered, and as noted earlier, the reforms proposed by the New Recast EIR 2015 can only be tested in 2017 when it enters into force. Certainly, the New Recast EIR 2015 is a great step in the right direction because, as explained by the European Commission, certain provisions of the extant Regulation have been amended several times and further amendments have been recommended, as a result of which the New Recast EIR 2015 was in the interests of a holistic reform to ensure clarity.¹³³ Also, the new cut-off period of three months is meant to prevent abusive forum shopping. Nevertheless, interpretation and application by the courts will determine the effectiveness of these reforms and how they can solve the problems of MCGs.

(A) The Implications of Forum Shopping in the Insolvency Regulation

The differences between the insolvency laws of various jurisdictions give the relevant parties a greater incentive to select the most favourable legal regime for them, and ultimately this leads to forum shopping.¹³⁴ Different kinds of stakeholders (in particular, creditors, shareholders, managers and employees) have interests in selecting the insolvency law that serves their best interest and provides them with high protection. For example, creditors could be interested in selecting the insolvency law that provides them with a high guarantee

¹³² The New Recast EIR 2015 art 6.

¹³³ Recital 1, EIR Recast 2015. See also, 'Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings' 12 December 2012. <http://ec.europa.eu/justice/civil/files/insolvency-report_en.pdf> accessed 10 May 2016.

¹³⁴ Szydło (n 119) 256; see also case of German company (Schefenacker) where financial difficulties pushed a move of COMI to the UK in order to profit from English insolvency law; Laura Pineiro, 'Towards the Reform of the European Insolvency Regulation: Codification rather than Modification' (2014) 2 *Nederland International Privaatrecht* 209. In the more recent case *Magyar Telecom* which involved a COMI immigration by a Dutch firm to England for the same aim. *Magyar Telecom BV* [2013] EWHC 3800 (Ch), [2014] B.C.C. 448; Horst Eidenmüller and Kristin Zwieten, 'Restructuring the European Business Enterprise: the EU Commission Recommendation on a New Approach to Business Failure and Insolvency' (2015) *Oxford Legal Studies Research Paper* 52/2015, 17 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662213> accessed 4 May 2016.

for their credits and insolvency system, the quick realisation of assets and a clear scheme for the distribution of assets. Managers may opt for the insolvency law that gives them the power to continue to manage a company during the period of insolvency and minimises their personal liability.¹³⁵ Furthermore, employees and shareholders could be interested in an insolvency law that allows the insolvent company or the reorganisation of the entire group to have another opportunity to restructure and operate so the workers will not lose their jobs.¹³⁶ For example, the UK regime seems to be more attractive to companies seeking the opportunity for restructuring.¹³⁷

Forum shopping also has the capability of adversely affecting the insolvency proceedings for creditors, debtors, and directors. Zywicki defines abusive forum shopping as forum shopping that is ‘not driven by consent and efficiency concerns, but rather by rent-seeking opportunities for some interest groups to redistribute wealth to themselves from others’.¹³⁸ Forum shopping harms the insolvency proceedings in numerous ways that reduce the certainty of the proceedings due to the possibility of a change in applicable law.¹³⁹ The uncertainty not only affects their ability to predict the rules that apply, the priority their claims will be given depending on the insolvency law applicable to the case,¹⁴⁰ and the extent

¹³⁵ Epp Aasaru, ‘The Desirability of Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross- Border Insolvency Law’ (2011) 22 *European Business Law Review* 349,352; Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 13.

¹³⁶ Jona Israel, *European cross- border insolvency Regulation* (Intersentia 2005) 18, Gabriel Moss and Christoph Paulus, ‘The European Insolvency Regulation –the Case for Urgent Reform’(2006) 19 *Insolvency International* 4.

¹³⁷ Wolf-Georg Ringe, ‘The European Company Law Statute in the Context of Freedom of Establishment’ (2007) 7 *Journal of Corporate Law Studies* 285.

¹³⁸ Todd Zywicki, ‘Is Forum Shopping Corrupting America’s Bankruptcy Courts?’ (2006) 94 *Georgetown Law Journal* 1141.

¹³⁹ John Pottow, ‘The Myth (and Realities) of Forum Shopping in Transitional Insolvency’ (2007) 32 *Brooklyn Journal of International Law* 785.

¹⁴⁰ Gerard McCormack, ‘Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies’ (2014) 63 *International and Comparative Law Quarterly* 815.

to which claims in tort could be relevant to the insolvency,¹⁴¹ but also has direct financial consequences for creditors, as they do not know if they will have to hire foreign experts, travel to another location, or conduct the proceedings in another language.¹⁴² Forum shopping could also be seen as abusive when directors take advantage of it to select a jurisdiction that enables them to avoid personal liability or delay the proceedings.¹⁴³ Finally, abusive forum shopping could place extra burdens on the courts of certain jurisdictions which appear to be more favourable to the debtors or directors of a company.¹⁴⁴

There have also been many incidences of positive forum shopping, which is how London became a well-known centre for restructuring in Europe. This can be illustrated in three different cases,¹⁴⁵ namely, *Shafenacker*, *Deutsche Nickel* and *Hans Brochier*, wherein three German companies migrated to London to obtain the more flexible tools for restructuring which are available under English Law. In particular, section 6 of the Insolvency Act 1986 permits a proposed voluntary arrangement between creditors that requires only a 75% majority vote among creditors rather than unanimity.¹⁴⁶ Thus, there have been several proposals in Germany to amend German law to become more flexible in order to stop companies from moving from Germany to other States.¹⁴⁷

¹⁴¹ Joseph McCahery, 'Creditor Protection in a Cross-Border Context' (2006) 7 European Business Organization Law Review 455,458.

¹⁴² Amy Cobum, 'The Growth of Bankruptcy Tourism in the United Kingdom' (2012) 25 Insolvency Intelligence 8.

¹⁴³ Szydlo (n 119) 256.

¹⁴⁴ Cobum (n 142)11.

¹⁴⁵ *Hans Brochier Holdings Ltd v Exner* [2007] BCC 127 is the only reported decision, but other cases have been reported in the traditional press; Robert Hickmott 'Forum Shopping is Dead: Long Live Migration' (2007) 5 Journal of International Banking and Financial Law 272.

¹⁴⁶ See Insolvency Act 1986, Part1 regarding companies voluntary arrangements See section 6.

¹⁴⁷ Sacha Lurken, 'German Law Reform Could Halt Migration' (*Global Turnaround*, July 2007) <<http://www.kirkland.com/siteFiles/News/05A9FFFBABD0FF4163F66F6E12588885.pdf>> accessed 29 May 2016. See also Susan Moore 'COMI Migration: the Future' (2009) 22 Insolvency International 25.

One of the benefits associated with forum shopping is the possibility of involving judges with expertise who are competent and quick in tackling complex international corporate insolvency cases.¹⁴⁸ This will increase the value of the assets and will help reduce the costs of the proceedings. Also, the managers of a company may select a forum that serves and promotes their own interests and the interests of the entire company.¹⁴⁹ Another benefit is that the increasing rate of forum shopping in Europe may inspire EU Member States to modernise their insolvency laws and offer optimal insolvency regimes.¹⁵⁰ The reason Member States are competing to offer an attractive insolvency regime is that doing so entices more companies to set up their businesses in the country in addition to attracting more bankruptcy cases, which could generate millions of pounds through tackling international insolvency proceedings via their judges and practitioners.¹⁵¹

Furthermore, Ringe argues that forum shopping can motivate Member States of the EU to harmonise substantive insolvency laws, so there will be no reason for forum shopping because the outcome will be the same in all Member States.¹⁵² From the creditors' point of view, forum shopping can be beneficial, because in most cases, it is largely impossible to move or relocate the functional base of a company without the approval of its creditors.¹⁵³ There is no doubt that creditors will only allow the migration of a company if such migration of the COMI will result in a positive outcome for the creditors.

¹⁴⁸ Kenneth Ayotte and David Skeel, 'Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy' (2004) University of Pennsylvania Institute for Law & Economics Research Paper < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=463001 > accessed 29 May 2016.

¹⁴⁹ Robert Rasmussen and Randall Thomas, 'Timing Matters: Promoting Forum Shopping by Insolvent Corporations' (1999) 94 North Western University Law Review 13.

¹⁵⁰ Luca Enriques and Martin Gelter, 'Regulatory Competition in European Company Law and Creditor Protection' (2006) 7 European Business Organization Law Review 421.

¹⁵¹ John Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition' (2005) 48 Current Legal Problems 369. Some Judges prefer to deal with complex international insolvency corporate cases because they like the intellectual challenges of such cases.

¹⁵² Ringe (n 43) 620.

¹⁵³ *ibid.*

The critical question that may arise from the EIR 2000 is: should the EIR prevent forum shopping or should it support the efficient and effective administration of cross-border insolvency? Should forum shopping be allowed, taking into consideration that in order to ensure an effective and efficient administration, shifting the COMI of the company to a new place in certain circumstances may be required? Thus, there appears to be a conflict between the two goals in the EIR 2000, and achieving the first aim seems to be more beneficial. There are several convincing arguments that support achieving the efficient and effective administration of the cross-border insolvency goal.¹⁵⁴ First, the EIR 2000 has offered national courts a degree of flexibility in determining the COMI in cross-border insolvency cases.¹⁵⁵ In other words, if the main aim is to prevent forum shopping, the EIR 2000 could have inserted a strict and clear criterion to make it difficult for debtors to change COMI.

In the absence of a cut-off period, the prevention of forum shopping may not be a paramount goal of the EIR 2000.¹⁵⁶ However, with the New Recast EIR 2015, a cut-off period has been introduced, thus discouraging abusive forum shopping. In addition, it might be said that preventing forum shopping in some circumstances can lead to legal uncertainty when tackling jurisdictional issues, which may increase litigation costs.¹⁵⁷

Also, the efficient and effective administration of cross-border insolvency is supported from a practical perspective by the case of *PIN Group*¹⁵⁸, a holding company engaged in the email business. It shifted its COMI from Luxembourg to Cologne for reorganisation purposes. The local court in Cologne did not consider shifting the COMI as forum shopping; rather, it

¹⁵⁴ Eidenmuller (n 37)11, 15.

¹⁵⁵ McCormack (n 18)178.

¹⁵⁶ Eidenmuller (n 37) 15.

¹⁵⁷ Commission Staff Working Document Impact Assessment accompanying the document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings, at 29 COM (2012) 416 final (Dec. 12, 2012).

¹⁵⁸ Local Court ("Amtsgericht") Cologne, Resolution of 19 February 2008 (73 IE 1/08) [2008] Zeitschrift Fur Wirtschaftsrecht 423.

facilitated the reorganisation of the group. The courts justified the decision by stating that shifting the COMI was obviously in the interest of creditors of the PIN group because the insolvency proceedings were more effective and much easier; they would also increase the asset value of the group to satisfy the creditors' claims, which is the main aim of the EIR 2000.¹⁵⁹ The main aim for any insolvency proceeding, either nationally or internationally, is to maximise net assets in order to satisfy creditors' claims, regardless of whether there is forum shopping or not. Hence, it appears that the efficient and effective administration of the cross-border insolvency (namely, the economic interest of creditors) is of paramount importance and the need to prevent abusive forum shopping is only of secondary importance.

The conclusion that can be drawn from the above discussion is that forum shopping as a phenomenon has both negative and positive consequences for debtors and creditors alike, from both the legal and economic perspectives. The problem of forum shopping is that it is not easy to draw a clear dividing line between good and bad forum shopping.¹⁶⁰ It seems the notion of COMI has the objective of preventing forum shopping and increasing the economic efficiency of the insolvency.¹⁶¹ Certainly, increasing the economic efficiency for creditors, insofar as it leads to maximising the value of assets in order to satisfy creditors' claims and preventing abusive forum shopping, should be advanced. Therefore, courts should focus on how to prevent abusive forum shopping that does not serve the interests of creditors.

(B) Preventing Abusive Forum Shopping

As discussed above, the lack of clarity in the notion of COMI may lead to difficulties in allocating jurisdiction, and this may result in abusive forum shopping. However, there are a

¹⁵⁹ Eidenmuller (n 37) 17.

¹⁶⁰ R.J.de Weijts and M.S.Breeman, 'Comi-Migration: Use or Abuse of European Insolvency Law?' (2014) 11 European Financial Law Review 495.

¹⁶¹ John Armour, 'Abuse of European Insolvency Law? A Discussion' in Rita de La Faria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing, 2011) 144.

number of possible mechanisms that can help reduce the opportunities for abusive forum shopping. Creditors could insert into lending contracts a clause that determines where the COMI of the debtors is, thereby preventing debtors from shifting courts unless they obtain approval from all of their creditors.¹⁶² However, a theoretical and practical analysis reveals that there are some obstacles that prevent this solution from being fully implemented.¹⁶³ From a practical point of view, one obstacle is that reaching a written agreement between all parties is complicated.¹⁶⁴ In some cases, a firm has numerous creditors, and some have more rights than others. Thus, it is difficult to reach an agreement that would be approved of by all creditors. In addition, the cost of drafting and negotiating contracts is very high because this is carried out by professional lawyers.¹⁶⁵

Schwartz has demonstrated the potential problem of debtors' circumstances, which may change from the time of establishing the company's bankruptcy.¹⁶⁶ This means that although the initial choice may have been efficient at the beginning, it may become inefficient and expensive later. Another possible problem is that the clause that determines where the COMI is situated is the existing status quo and cannot deter the subsequent shift of a COMI.¹⁶⁷ Another possible significant obstacle is that some firms may choose a jurisdiction that does not benefit involuntary creditors, such as tort creditors, because involuntary creditors do not

¹⁶² Barry Adler, 'Financial and Political Theories of American Corporate Bankruptcy' (1993) 45 Stanford Law Review 311.

¹⁶³ Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 101 Yale Law Journal 1807. See also Barry Adler and Ian Ayres, 'A Dilution Mechanism for Valuing Corporation in Bankruptcy' (2001) 111 Yale Law Journal 83.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ Eidenmuller (n 37) 14.

negotiate terms and conditions of contracts at all.¹⁶⁸ Thus, from the perspective of these creditors, the benefits will be limited to affluent and sophisticated creditors, such as banks.

In view of the problems enumerated above, the courts have formulated certain procedures to deal with abusive forum shopping, such as introducing a cut-off period in order to challenge potential abuse of bankruptcy tourism. For example, in France, any migration of the COMI of a company will not be recognised if it occurs less than six months prior to the insolvency.¹⁶⁹ A similar approach can be observed in the German case of VIII ZR 51/95, which viewed the behaviour of a company as forum shopping when the insolvency proceedings took place within three weeks after the transfer of the COMI.¹⁷⁰ Other Member States have introduced legislation that stipulates a minimum period of time before the COMI shifts for the purpose of insolvency proceedings, such as six months in Spain and a year plus one day in Italy.¹⁷¹ It can be said that this method will help reduce the uncertainty relating to the determination of COMI and will reduce the possibility of abusive forum shopping.¹⁷²

The EIR 2000 contains several rules to provide sufficient safeguards and protect creditors from abusive forum shopping. For instance, the creditors have the right to challenge the opening of insolvency proceedings by asking for a judicial review.¹⁷³ Furthermore, according to Art 3(2), creditors can open secondary proceedings where the debtors have ‘an establishment’ and the law of the country where the secondary proceedings are commenced

¹⁶⁸ Lynn LoPuck ‘Cooperation International Bankruptcy: A post Universalist Approach’ (1999) 84 Cornell Law Review 696.

¹⁶⁹ Georg Schlaefer, ‘Forum Shopping under the Regime of the European Insolvency Regulation’ (2010) The International Insolvency Institute <<http://iiiglobal.org/component/jdownloads/finish/39/5922.html>> accessed 29 May 2015.

¹⁷⁰ BGHZ Case Number VIII ZR 51/95 (3 April 1996).

¹⁷¹ Spanish Insolvency Act (22/2003) art 10.1; Italian Royal Decree No 267, Article 9, as amended by the Legislative Decree No5 of 9 January 2006.

¹⁷² Andrew (n 121) 245, 247.

¹⁷³ *ibid* 252.

will apply.¹⁷⁴ Therefore, wherever the creditors are situated, the secondary insolvency proceeding can be opened and creditors will obtain protection according to their own law.¹⁷⁵

Furthermore, another possible mechanism to prevent abusive forum shopping is using the registered office as a decisive criterion for determining jurisdiction instead of the notion of the COMI; this view has been supported by influential scholars including Ringe, Skeel, Armour, and Eidenmuller.¹⁷⁶ The registered office approach is believed to be more visible to creditors compared to the notion of the COMI, as creditors can easily determine where the company is registered through an internet search. This solution would bring more certainty to the allocation of jurisdiction.¹⁷⁷ It also ensures that company law rules applicable to a specific business and applicable insolvency rules would always belong to the same jurisdiction, and this provides a stable and ascertainable forum, making it minimally sensitive and reducing the administrative costs.

According to Marek, there are two main reasons that make the notion of the COMI a very important criterion to prevent abusive forum shopping.¹⁷⁸ First, it is quite hard for debtors to shift their COMI quickly from one Member State to another. As was explained earlier, the COMI of a company should refer to the place where the administration of a debtor's activities, that is, the daily management operation of the company, takes place.¹⁷⁹ Thus, the place where strategic decisions are made is not sufficient for it to be considered to be the debtor's COMI. Also, the location of the COMI should be ascertainable by third parties, in

¹⁷⁴ On these possible solutions see Ringe (n 43) 620.

¹⁷⁵ EIR 2000 art 28.

¹⁷⁶ Ringe (n 43) 620; David Skeel, 'European Implications of Bankruptcy Venue Shopping in the U.S' (2006) 54 Buffalo Law Review 439; John Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition' Current Legal Problems (2005) 58 369; Horst Eidenmuller, 'Free Choice in International Company Insolvency Law in Europe' (2005) European Business Organization Law Review 426.

¹⁷⁷ Horst Eidenmueller, 'A New Framework for Business Restructuring in Europe: The EU Commission Proposals for A Reform of the European Insolvency Regulation and Beyond' (2013) 20 Maastricht Journal 133.

¹⁷⁸ Szydło (n 17) 747.

¹⁷⁹ EIR 2000 recital 13.

particular, creditors.¹⁸⁰ The EU legislator intended to make the COMI of a debtor clearly and easily identifiable by creditors so they can calculate the risk before entering into any legal relationship with the debtor. An essential factor in calculating the risk is identifying where international insolvency will take place and the legal order that will govern any insolvency proceedings.¹⁸¹

The second reason that the COMI is an essential criterion for the prevention of abusive forum shopping is pointed out by Marek.¹⁸² He states that the notion of COMI is not entirely obvious, and sometimes it is not easy to predict exactly where a national court will locate the COMI. This might prevent debtors from engaging in forum shopping to avoid unsatisfactory results.¹⁸³ Nevertheless, it can be argued that the debtors are unlikely to shift the COMI to another Member State unless they have strong evidence that the law of the new court provides it with the legal right to assume jurisdiction. Moreover, from the creditors' perspective, a clear definition of the COMI is the only way to prevent forum shopping, which allows creditors to anticipate the risks before engaging in a relationship with debtors.

2.4 Conclusion

This chapter analysed the notion of the COMI in relation to cross-border insolvency cases of MCGs, as contained in the EIR 2000, through a black letter analysis and an examination of court cases relating to it. The chapter also looked at the problem of forum shopping that may be caused by the lack of certainty in the definition of the COMI.

The first section of this chapter examined the extent to which the EIR 2000 itself provides a sufficient explanation of the notion of the COMI. Whilst the COMI was defined in Article 3 of the EIR 2000 and additional guidance is provided in Recital 13, these combined do not

¹⁸⁰ *ibid.*

¹⁸¹ EIR 2000 art 4 (principle of *lex fori concursus*).

¹⁸² Szydło (n 119) 258.

¹⁸³ *ibid.*

offer a precise definition, especially as a result of the lack of any provision relating to the insolvency of groups of companies.

The second section looked at the jurisprudence of domestic courts and of the CJEU. It identified two distinct approaches to determining the place of the COMI, namely, the head office function approach, formulated by the Courts in England, and the registered office approach, which is favoured by the CJEU, and appears to be more commonly used, but not definitely decisive, as the CJEU has not explicitly rejected the head office function approach.

The third section explored the extent to which the notion of the COMI fails in enhancing legal certainty and consequently leads to abusive forum shopping. The section argues that certain forms of forum shopping may be beneficial to creditors and that abusive forum shopping should be discouraged if it harms their interests. It also made proposals to help reduce the problem of forum shopping, one of which is that the creditors may insert a clause into lending contracts that determines where COMI of the debtor is located. Another proposal is that the court can formulate certain procedures to deal with abusive forum shopping, such as introducing a cut-off period. The third proposal is using the registered office as a decisive criterion for determining jurisdiction instead of the notion of the COMI.

The notion of the COMI has helped the courts in allocating jurisdiction in cross-border insolvency cases of MCGs; however, as has been discussed above, this notion is not without its shortcomings. The next chapter looks at a number of proposals for enhancing legal certainty in the allocation of jurisdiction in such cases. These proposals go beyond the notion of the COMI to include substantive consolidation, procedural coordination, harmonisation, international protocols, the choice model, and the UNCITRAL Model Law in Cross-Border Insolvency.

Chapter 3:

Other Mechanisms for Enhancing Legal Certainty

The previous chapter examined how the EIR utilises the notion of the COMI as a mechanism to enhance legal certainty in the cross-border insolvency of MCGs and the reasons why the COMI is not sufficient to prevent the problem of abusive forum shopping.¹ This chapter examines a number of mechanisms other than the COMI, as provided by the EIR, to help enhance legal certainty in such cases of cross-border insolvency.

This chapter examines four mechanisms for enhancing legal certainty in the insolvency cases of MCGs: (1) the ‘substantive consolidation’ mechanism, also referred to as the ‘pooling mechanism’, which combines the assets and liabilities of several or all entities belonging to the same group in a single insolvency proceeding; (2) the ‘coordination and cooperation’ mechanism, which facilitates the insolvency proceeding by coordinating the administration of the insolvency through a single proceeding; (3) the ‘harmonisation’ mechanism, which harmonises the substantive insolvency laws so that no advantage can be gained from forum shopping; and (4) the ‘party autonomy’ mechanism, which grants the parties to the insolvency proceedings the right to choose the court and applicable law through the protocols of the Choice Model.

It is acknowledged that no single mechanism has proven to fully resolve the problem of the lack of legal certainty in cross-border insolvency cases of MCGs due to major differences

¹ See Chapter 2.3 on Forum Shopping and European Insolvency Regulation.

between the structures of various groups of companies.² For example, a distinction can be made between groups which have a horizontal structure and groups which have a vertical structure.³ Moreover, groups of companies might adopt different degrees of integration to achieve certain business or regulatory objectives.⁴ It is also worth noting that the proposed mechanisms are not necessarily separate and independent, and some may be used simultaneously or at different stages of the insolvency proceedings.⁵

3.1 Substantive Consolidation

Substantive consolidation, which is also referred to as the ‘pooling mechanism’, entails combining the assets and liabilities of several or all entities belonging to the same group in a single insolvency proceeding.⁶ It is an approach that allows a common body of creditors of different entities to share a common pool of assets. Thus, the impact of substantive consolidation, as the literature has pointed out, is equal to that of a corporate merger.⁷ The presumption is that the separation between entities of the same group should be kept and substantive consolidation will not be imposed except in certain circumstances in order to

² Bob Wessels, ‘The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation’ (2009) 4 *European Company Law* 169.

³ Mark Roe, ‘Some Differences in Corporate Structure in Germany, Japan, and the United States’ (1993) 102 *The Yale Law Journal* 1928.

⁴ Hugh Collins, ‘Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration’ (1990) 53 *the Modern Law Review* 731; Roman Tomasic, Stephen Bottomley and Bob McQueen, *Corporations Law in Australia* (2nd edn, The Federation Press 2002) 182.

⁵ Janis Sarra, ‘Maidum’s Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies’ (2008) 17 *International Insolvency Review* 84.

⁶ *ibid* 92; Nigel Sander and Mathew Newman, ‘Pooling of Assets and Liabilities of Insolvent Companies in the Channel Islands’ (2016) 13 *International Corporate Rescue* 107.

⁷ Samuel Bufford, ‘Coordination Of Insolvency Cases For International Enterprise Groups: A Proposal’ (2012) 86 *American Bankruptcy Law Journal* 685; Steven Schwarcz, ‘Collapsing Corporate Structure: Resolving The Tension Between Form And Substance’ (2004) 60 *Business Lawyer* 114; Elisabeth Kors, ‘Altered Ego: Deciphering Substantive Consolidation’ (1998) 59 *University of Pittsburgh Law Review* 381; Christopher Frost, ‘Organizational Form Misappropriation Risk and Substantive Consolidation of Corporate Groups’ (1993) 44 *Hastings Law Journal* 449.

achieve insolvency goals.⁸ The approach has been utilised in a few Member States of the EU,⁹ such as Ireland,¹⁰ France¹¹, and the Netherlands.¹² It should be noted that this approach was discussed by INSOL Europe in their proposal for the revision of the EIR.¹³

Although the substantive consolidation approach does not exist in USA legislation, it is derived from the case of *In Re Augie/Restivo Baking Company Limited* in 1988, and since then it has been used by the courts to protect the rights of creditors.¹⁴ Substantive consolidation is not automatic; therefore, the creditors or debtors must request it from the bankruptcy court, and all unsecured creditors are treated equally.¹⁵ The bankruptcy court will order substantive consolidation after obtaining the creditors' consent or upon examination of the facts of the case.¹⁶ Accordingly, the court may take factors similar to those used in 'piercing the corporate veil' as useful for a substantive consolidation analysis. These factors

⁸ UNCITRAL, 'UNCITRAL Legislative Guide on Insolvency Law' (10 February 2010) UN Doc A/CN.9/WG.V/WP.92 ("UNCITRAL Legislative Guide") part III states that insolvency laws should respect the separate legal identity of each group member. Insolvency aims are (1) Maximisation assets value (2) Reducing the cost and length of the proceeding (3) Equality of distribution.

⁹ *In re Augie/Restivo Baking Company Limited*, Re 860 F.2d 515, 518 (2d Cir 1988)..

¹⁰ Companies Act 1990 (Ireland) art 141.

¹¹ French Code de Commerce 2006, it is worth noting that section 105 does not explicitly allow substantive consolidation but it is interpreted as permitting it under certain circumstances; Christoph Paulus, 'Europeanisation of the Member States Insolvency Law' (2015) 3 Nottingham Insolvency and Business Law e-Journal 301.

¹² Hoge Raad 25 September 1987, NJ 1988,136 (*Van Kempen/Zilfaen DWC*).

¹³ INSOL Europe is the European organisation of professionals who specialise in insolvency, bankruptcy and business reconstruction & recovery. See INSOL Europe, 'Revision of European Insolvency Regulation, Proposals by INSOL Europe' (*INSOL Europe*, 20 June 2012) <<http://www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe/>> accessed 20 February 2016.

¹⁴ *In re Augie/Restivo Baking Company Limited* (n 9); English courts do not usually implement substantive consolidation measures, except in exceptional cases. See for example *Re BCCI SA*[1992] BCLC 1490.

¹⁵ J William Boone, *International insolvency: Jurisdictional Comparisons* (3rd edn, European Lawyer 2012) 423; Lesley Salafia, 'Cross-Border Insolvency Law in the United States and its Application to Multinational Corporate Groups' (2006) 21 Connecticut Journal of International Law 297.

¹⁶ Boone (n 15) 423; Kit Weitnauer, 'Third Circuit Restricts Substantive Consolidation Corning' (2005) 24 American Bankruptcy Institute journal 26.

include whether the companies of the same group share common directors and whether one subsidiary in the group finances the other subsidiaries.¹⁷

The UNCITRAL Working Group has yet to reach a consensus regarding when an application may be appropriate for substantive consolidation.¹⁸ As a result, substantive consolidation is applied to deal with the insolvency of MCGs in certain circumstances. First, it is applied where the creditors deal with the entire group as a single economic unit in good faith.¹⁹ In this situation, creditors rely on the group as a whole, not as separate entities. Notably, the UNCITRAL Working Group has rejected this factor for being vague and subjective.²⁰ Besides, as Wouters and Raykin argued, ‘dismantling the pre-established legal separateness may not offer a broad solution, but can be useful in limited circumstances.’²¹ Second, substantive consolidation is applied where the estates and the financial affairs of various companies of the same group cannot be disentangled and the separation of the actual ownership of assets and liabilities will involve higher expense or delay.²² Third, it is applied where many group members are involved in some fraudulent scheme activity, as the Working Group has suggested.²³ In this context, fraud could be established when the debtor moves all of their assets to a newly incorporated company in order to hide them from the creditors and to exclude themselves from liability.

¹⁷ *ibid*; Jenny Dickfos, Colin Anderson and David Morrison, ‘The Insolvency Implication for Corporate Groups in Australia Recent Events and Initiative’ (2007) 16 *International Insolvency Review* 103.

¹⁸ UNCITRAL, ‘UNCITRAL Draft Report of Working Group V’ (7 March 2008) UN Doc A/CN.9/647; Sarra (n 5) 92.

¹⁹ Timothy Graulich, ‘Substantive Consolidation – A Post-Modern Trend’ (2006) 14 *American Bankruptcy Institute Law Review* 527.

²⁰ UNCITRAL (n 18).

²¹ Nora Wouters and Alla Raykin, ‘Corporate Group Cross-Border Insolvencies between the United States & European Union: Legal & Economic Developments’ (2013) 29 *Emory Bankruptcy Developments Journal* 387.

²² UNCITRAL, ‘UNCITRAL Draft Report of Working Group V’ (9 November 2009) UN Doc A/CN.9/686; Robert Van Galen, ‘International Groups of Insolvent Companies in the European Community’ (European Insolvency and Restructuring Congress of the Arbeitsgemeinschaft für Insolvenzrecht und Sanierung, Brussels, February 2012) <http://www.arge-insolvenzrecht.de/Speech_van_GALEN.pdf> accessed 20 February 2016.

²³ UNCITRAL (n 18) 16.

A number of factors may help the court to decide whether or not to grant substantive consolidation in the case of the entire group. These factors include the presence of consolidated financial statements for the whole group and the use of a single bank account by the entire group.²⁴ In such cases, courts may find it difficult to separate assets and liabilities among various group members. The appointment of common directors, the combined meetings of the boards and the reality of coordinated operations encourage creditors to treat all members of the group as one entity. In the United States, and specifically in the case of *In re Owens Corning*,²⁵ the court in Delaware applied some of these factors, because the affairs of the group members were found to be so intermingled that the separation of assets and liabilities would be extremely expensive and time consuming.²⁶ However, courts in the UK refuse to apply the substantive consolidation approach, as it fails to respect the distinct legal personality as enunciated in *Salomon* and subsequent cases.²⁷

The foregoing analysis suggests that substantive consolidation removes the barriers between legal entities and consolidates them into one entity.²⁸ Specifically, it is used by bankruptcy courts to reject corporate separateness.²⁹ Thus, there are instances as well as factors that would assist courts in deciding whether to grant substantive consolidation or not. Therefore, although the approach is not followed by the UK, and granted that the UNCITRAL Working Group suggests that it could only be applied in certain circumstances, the evaluation of substantive consolidation is important in order to analyse the extent to which this approach helps in promoting legal certainty to protect the interests of creditors.

²⁴ Christopher Predko, 'Substantive Consolidation Involving Non-Debtors Conceptual and Jurisdictional Difficulties in Bankruptcy' (1995) 41 The Wayne Law Review 1741.

²⁵ *In re Owens Corning* 419 F.3d 195 (3d Cir 2005).

²⁶ *ibid.*

²⁷ *Salomon v Salomon Ltd* [1897] UKHL 1, [1897] AC 22; *Prest v Petrodel Resources Ltd Ltd* [2013] UKSC 34, [2013] 3 WLR 1, *VTB Capital Plc v Nutritek Inter-National Corp* [2013] UKSC 5, [2013] 2 WLR 398.

²⁸ Wouters & Raykin (n 21) 387.

²⁹ Corporate separateness is used to describe the legal distinctiveness of a corporation in relation to its owners or other entities, and as a distinct entity, the corporation may own assets and become obligated on debts.

As stated in the introduction of this Thesis,³⁰ legal certainty is a crucial element in international insolvency proceedings because the rights and obligations of all parties need to be clear, predictable, stable and precise.³¹ Thus, creditors, debtors and other parties could predict with sufficient certainty which court will have jurisdiction and which law will apply to insolvency proceedings in order to avoid unexpected monetary expenses and liabilities.³² It helps to reduce the transaction cost of the insolvency proceedings for all parties, as knowing their rights and duties in advance allows them to plan their business accordingly. Furthermore, the predictability in most cases reduces the possibility of abusive forum shopping, which may harm the creditors, as it is easy to anticipate the court that will have jurisdiction and the applicable law.³³

Admittedly, the literature suggests that there is lack of certainty and predictability in substantive consolidation regarding where the insolvency proceedings will take place and which law will apply. Predicting the insolvency law is important because different insolvency laws could stipulate different priorities in paying creditors.³⁴ In this respect, Benjamin Christenson, one of the proponents of the substantive consolidation approach, argues that all insolvency proceedings could take place where the parent company is located so the ambiguity regarding the jurisdiction issue will disappear.³⁵ Plausible as this may seem, it is not very convincing because in the case of MCGs, some subsidiaries run separately without any intervention from the parent company. Another reason is that it is difficult to distinguish

³⁰ See the introduction section 1 (b).

³¹ Epp Aasaru, 'The Desirability of Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law' (2011) 22 *European Business Law Review* 349.

³² *ibid*; Anthony D'Amato, 'Legal Uncertainty' (1983) 71 *California Law Review* 1, 17.

³³ John Pottow, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency' (2007) 32 *Brooklyn Journal of International Law* 785.

³⁴ Benjamin Christenson, 'Best Let Sleeping Presumptions Lie: International of "Centre of Main Interest" Under Chapter 15 of The Bankruptcy Code And An Appeal For Additional Judicial Complacency' (2010) 5 *University of Illinois Law Review* 1565, 1591.

³⁵ Christenson (n 34) 1591.

between the parent company and its subsidiaries in some groups of companies, especially where a group has more than one parent company.³⁶

Similarly, Mevorach argues that even when courts adopt the substantive consolidation approach, they are often uncertain about the precise circumstances in which it should be permitted.³⁷ For instance, under US bankruptcy legislation, courts may permit a substantive approach whereby the creditors of subsidiaries deal with those entities as a single economic unit, not relying on their separate legal entities when extending credit.³⁸ However, it is difficult for creditors to prove such a situation. Besides, it has been argued that a consolidation arrangement meets the expectations of some creditors, but might not meet the considerations and expectations of others.³⁹

Furthermore, proponents of substantive consolidation argue that it may increase predictability because it should not be permitted unless all of the creditors approve it.⁴⁰ Again, this argument seems plausible, as it implies that all of the creditors will be able to know where the insolvency proceedings will take place, which law will be applicable and that they might predict the risks that may arise.⁴¹ However, the argument is significantly flawed because it might be difficult for all creditors of the entire group to reach an agreement, and even if there is a consensus among them, there may be no guarantee that the court will approve it.

³⁶ Tom Hadden, 'Inside Corporate Groups' (1984) 12 *International Journal of Sociology of Law* 271; Muzaffer Eroglu, *Tort Liabilities an Interdisciplinary and Comparative Examination* (Edward Elgar 2008) 71.

³⁷ Irit Mevorach, 'INSOL Europe's Proposals On Group of Companies (In Cross-Border Insolvency): A Critical Appraisal' (2012) 21 *International Insolvency Review* 183.

³⁸ See for instance *Soviero v Franklin National Bank* [1964] 328F. 2d.446 (2ndCirc).

³⁹ Christopher Frost, 'Organizational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups' (1993) 44 *Hastings Law Journal* 449.

⁴⁰ *ibid*; see for example Henry Peter, 'Insolvency in a Group of Companies, Substantive and Procedural Consolidation: when and how Companies' in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006) 200.

⁴¹ *ibid*.

Moreover, there is no certainty that the court in a particular state will help the court of another state where the substantive consolidation takes place.⁴² Besides, as Mevorach suggested, the ‘pooling’ mechanism may be implemented with caution, and courts should use clear and objective tests.⁴³ Consequently, if there is no evidence proving that the members of the group were strongly integrated, the court can reject substantive consolidation. However, each court will interpret and implement these tests differently, which indeed will reduce certainty and predictability. Thus, substantive consolidation makes the insolvency proceedings less predictable, which could render it an ineffective approach to deal with the international insolvency of a corporate group.

Another argument against substantive consolidation is that it can be beneficial for some creditors, but can deprive others of some advantages that they might obtain if the principle of separate legal entity is maintained.⁴⁴ This argument can be illustrated by the following hypothetical example: assuming that company A has £100 in assets and £250 is owed to creditors, all of whom are of the same level. Company B has £100 in assets and £500 is owed to creditors. If the insolvency proceedings for both companies are dealt with separately, the creditors of company A would gain 40% of their claim, while company B’s creditors would receive 20%. Nevertheless, if substantive consolidation is applied, all creditors will get 27%, so it is profitable for creditors B but it is harmful for the other creditors.⁴⁵ Thus, it is proposed that substantive consolidation is not a good solution, as the above example illustrates,

⁴² Robert Miller, ‘Economic integration: an American Solution to the Multinational Enterprise Groups Conundrum’ (2012) 11 *Richmond Journal of Global Law and Business* 185, 195.

⁴³ Irit Mevorach, ‘Appropriate Treatment of Corporate Groups in Insolvency: A Universal View’ (2007) 8 *European Business Organization Law Review* 179.

⁴⁴ Robert van Galen, ‘The European Insolvency Regulation and Groups of Companies’ (The Future of the European Insolvency Regulation Conference, Amsterdam, 28 April 2011) <<http://www.eir-reform.eu/uploads/papers/Robert%20van%20Galen.pdf>> accessed 20 February 2016.

⁴⁵ Andrew Brasher, ‘Substantive Consolidation: A Critical Examination’ (*Harvard Law School*, 2006) <http://www.law.harvard.edu/programs/corp_gov/papers/Brudney2006_Brasher.pdf> accessed 20 June 2016).

especially as some companies in the group may be in a better financial situation than others, so combining their assets with the assets of the insolvent companies can be detrimental.

The Canadian courts have similarly recognised that consolidation may benefit some classes of creditors over others.⁴⁶ For instance, in *Ashley v. Marlow Group Private Portfolio Management Inc.*,⁴⁷ an application for substantive consolidation was declined by the Ontario Superior Court of Justice on the basis that it would profoundly affect the substantive rights of debtors and creditors.⁴⁸ Daniel Staehelin argued that not all of the creditors have an interest in accepting substantive consolidation, which may lead them to block the procedures for a long time, which would raise the cost of insolvency proceedings and minimise the entire group's value.⁴⁹

Critics of substantive consolidation have also raised concerns about how the disappearance of inter-company claims would affect the creditors. Following the settlement of insolvency proceedings, the creditors of a company which is holding such claims are assumed to receive less because the claims will disappear.⁵⁰ Similarly, Van Galen argued that creditors who have security interests in inter-company claims lose these rights as a result of substantive consolidation. This is because they are more likely to receive a lower percentage in the distribution. Van Galen further argued that when two or more of the debtors are jointly and severally liable for a claim, the position of the creditors concerned becomes weak. Thus,

⁴⁶ *Re A. &F. Baillargeon Express Inc.* (1993), 27 C.B.R. (3d) 36 (Que. S.C.).

⁴⁷ *Ashley v. Marlow Group Private Portfolio Management, Inc.* (2006) 22 CBR (5th) 126 (Ont. Sup. Ct.) [Commercial List].

⁴⁸ *ibid* para 78.

⁴⁹ Daniel Staehelin, 'No Substantive Consolidation in the Insolvency of Groups of Companies' in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006) 214.

⁵⁰ Robert van Galen, 'The European Insolvency Regulation and Groups of Companies' (n 44).

when the consolidation approach is applied, the creditor only has one claim as opposed to two.⁵¹

Furthermore, as Miller pointed out, the sovereignty of the State where assets are found and the desire of that State to protect its own local credits may go against the desirability of the application of substantive consolidation.⁵² Also, insolvency practitioners may not have sufficient experience to deal with substantive consolidation in cases of the insolvency of corporate groups at the international level.⁵³ Moreover, as Virgos and Garcimartin suggest, since ‘the phenomenon of substantive consolidation is unfamiliar to the national laws of most Member States, it seems that this recommendation is too ambitious.’⁵⁴ Besides, substantive consolidation is not consistent with the judgement in the *Rastelli*⁵⁵ case, where the CJEU held that ‘the mere finding that the property of those companies has been intermixed is not sufficient to establish that the Centre of the main interests of the company concerned by the action is also situated in that other Member State’.⁵⁶ Moreover, substantive consolidation is not compatible with the EIR because the cooperation between the main and the secondary proceedings required in the EIR cannot result in a substantive consolidation of the estates.⁵⁷

Another argument against substantive consolidation is that it is doubtful whether it can help reduce the cost of insolvency proceedings or make them faster. The reason for this is that it is unclear and uncertain where the insolvency proceedings will take place and which law will be applied. Indeed, the lack of clarity and uncertainty regarding the venue of insolvency

⁵¹ *ibid.*

⁵² Miller (n 42) 185.

⁵³ Stephen Taylor, ‘Practical Difficulties in Handling Group Insolvencies’ in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006) 248.

⁵⁴ Miguel Virgos & Francisco Garcimartin, *The European Insolvency Regulation: Law and Practice* (Kluwer 2004) 73.

⁵⁵ Case C-191/10 *Rastelli Davide e C Snc v Hidoux* [2012] EWIR 87.

⁵⁶ *ibid* para 39

⁵⁷ Burkhard Hess, Paul Oberhammer, and Thomas Pfeiffer, *European Insolvency Law* (Hart Publishing 2014) 127, 157.

proceedings would translate into high costs, which in turn would lead to abusive forum shopping.

Despite the above limitations, there are some arguments in favour of substantive consolidation. As Peter argued, substantive consolidation would in general be beneficial for the creditors in reducing the costs, increasing the value of assets, and saving time when the estates of a whole group are intermingled and therefore separating them would sometimes be very difficult if not impossible.⁵⁸ Thus, substantive consolidation will save money because there is just one administrator and one court, and the revenue from the sale of assets of the entire group is higher than the revenue of the sale of assets of each separate company, in most cases. According to Skeel, the circumstances which lead courts to pierce the corporate veil could be similar to those leading to the adoption of substantive consolidation.⁵⁹ Nevertheless, the circumstances in which the corporate veil can be pierced are uncertain and depend on the discretion of the court. In most cases, the courts' discretion does not lead to certainty, and lack of certainty increases risks and insolvency costs, which will negatively affect creditors.

The substantive consolidation approach deals with MCGs as one entity and allows all of the assets and liabilities of the different groups of a corporation to be put into a single 'pot'. A few jurisdictions, such as the US, Canada and a few EU countries permit substantive consolidation in exceptional cases, when the assets of various companies of the same group are highly intermingled.⁶⁰ Also, discussions in the UNCITRAL Working Group seem to support substantive consolidation in certain circumstances where the assets of the group of

⁵⁸ Peter (n 40) 208 ; French provision allowing substantive consolidation art L621-2 of the Code de Commerce, that states: "The opened insolvency proceedings may be extended to one or more other persons if their assets are intermingled with those of the debtor or when the legal entity is a sham".

⁵⁹ David Skeel, 'Groups of Companies: Substantive Consolidation in the US Companies' in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds) *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006) 229.

⁶⁰ In European Union, substantive consolidation is applied in Ireland, France and Netherlands. Art. 141 in conjunction with Art. 140 Companies Act 1990 (Ireland) and Article L621-2(2) Code de Commerce (France)

companies have been intermingled to a great degree.⁶¹ In light of the above analysis, which noted that substantive consolidation has been restrictively utilised in some courts in the US, it may have a slight positive impact. Nevertheless, the approach has not been welcomed in most jurisdictions, and it may not be an ideal approach, especially with regard to the protection of the interests of creditors and in promoting legal certainty.

3.2 Coordination and Cooperation

There are two different ways in which coordination and cooperation can take place: procedural coordination, and enhanced cooperation and coordination. Each one of these will be discussed subsequently.

(A) Procedural Coordination

Procedural coordination is another approach for dealing with the international insolvency of corporate groups.⁶² The approach connotes that the coordination of the administration of the insolvency proceedings for all of the subsidiaries of the same group can be achieved through a single proceeding. Procedural coordination intends to reduce the costs of insolvency proceedings and avoid the duplication of effort. This approach is different from substantive consolidation in that it does not involve the consolidation of assets and liabilities of the subsidiaries because each member of the corporate group remains separate and distinct from the other members.

⁶¹ UNCITRAL Legislative Guide (n 18) para 106.

⁶² Horst Eidenmuller, 'A New Framework for Business Restructuring in Europe: the EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' Working Paper No 199/2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230690> accessed 29 May 2016.

Accordingly, the impact of this approach is limited to administrative aspects of the insolvency proceedings.⁶³ Procedural coordination can be done in various ways, including coordinating the sale of assets, facilitating the sharing of information, and the preparation of a single list of creditors. Also, it may include appointing one insolvency representative, establishing a single creditor committee, and enhancing cooperation among two or more courts, which may include combining hearings and sharing information.⁶⁴ This is made possible where, for instance, in coordinated hearing or conference courts, different jurisdictions are able to deal with the complex issues of various insolvency proceedings directly and in a timely manner. Regarding the sharing of information, either through written documents or orally between courts or parties, the parties can explain in the agreement which information can be shared and which information can be made publicly available.⁶⁵ Significantly, the court can evaluate the various factors to decide whether procedural coordination is an appropriate approach. This may require the court to examine the connection between the group members and to ensure that this approach is beneficial for the entire group and in the interests of the creditors.

The procedural coordination approach is allowed in some countries, such as the US and Canada, but it is not allowed under the EIR.⁶⁶ If, for instance, there are several companies with multinational subsidiaries in different countries, this means that hundreds of secondary proceedings will be opened. Indeed, this lays the ground for inefficient proceedings due to the lack of an explicit procedural coordination provision in the EIR. For instance, within the EU, an estimated 700 companies with multinational subsidiaries were shown to open hundreds of

⁶³ Jeanette Weideman and Leonie Stander, 'European and American Perspective on the Choice of Law Regarding Cross- Border Insolvencies of Multinational Corporations – Suggestion for South Africa' (2012) 15 Potchefstroom Electronic Law Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233255> accessed 29 June 2016.

⁶⁴ United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law (United Nations 2005) 276.

⁶⁵ United Nations Commission (n 64) 277-279.

⁶⁶ This approach is not permissible in Germany, France, Hungary or Spain. Wouters and Raykin, (n 21) 405.

secondary proceedings in 2012.⁶⁷ Therefore, procedural coordination would help to avoid high transaction costs and discrepancies.⁶⁸ This is because, in this approach, there is only one court or insolvency administrator managing the whole insolvency proceedings of companies within the group.

Prior to the commencement of insolvency proceedings, it appears that procedural coordination promotes cost efficiency and timely proceedings by expediting the sharing of information regarding the economic activities of the multinational group.⁶⁹ Besides, it increases the value of the assets because the revenue derived from selling the group as a whole is much higher than the revenue derived when the group is sold separately.⁷⁰ Furthermore, in procedural coordination, the corporate identity of the separate group companies stays intact, in contrast to the substantive consolidation approach.⁷¹ Thus, this approach complies with the separate legal personality principle⁷² because each group is treated separately including their assets and liabilities.⁷³

Despite the advantages of the procedural coordination approach, it also has many shortcomings. One disadvantage of this approach is the difficulty posed by the need to identify the court that has jurisdiction among all of the other courts.⁷⁴ For instance, is it the

⁶⁷ Commission Staff Working Document Impact Assessment accompanying the document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings, at 29 COM (2012) 416 final (Dec. 12, 2012).

⁶⁸ Heribert Hirte, 'Towards a Framework for the Regulation of Corporate Groups Insolvencies' (2008) 5 European Company and Financial Law Review 213.

⁶⁹ Sarra (n 5) 89.

⁷⁰ Irit Mevorach, 'INSOL Europe's Proposals On Group of Companies (In Cross-Border Insolvency): A Critical Appraisal' (n 37 190; Fernando Locatelli, 'International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency and Answer for Brazil? An Economic Analysis of its Benefits on International Trade' (2008) Law and Business Review of the Americas 314, 324.

⁷¹ Nicholaes Tollenaar, 'Dealing with the Insolvency of Multinational Groups Under the European Insolvency Regulation' (2010) 14 Insolvency Intelligence 100.

⁷² Legal Separate personality approach is discussed in Chapter 1.1.A.

⁷³ Eva De Vette, 'Multinational Enterprise Groups in Insolvency: How Should the European Union Act?' (2011) 7 Utrecht Law Review 216, 226.

⁷⁴ Irit Mevorach, 'Enterprise Groups in Insolvency: Recent International Developments' (2014) Annual Review of Insolvency Law 495.

court where the parent company of the group is located? In some cases, identifying the parent company presents a challenge, and sometimes there is more than one parent company in the group. In this regard, the question that may arise is, what is the legal basis for one company to claim the position of parent company and to assume jurisdiction among all of the other companies in the same group? All of these challenges make it difficult for procedural coordination to work effectively. Furthermore, in practice, communication between the courts of different countries is neither easy nor cheap. Rather, such communication is costly because judges and administrators from various countries speak different languages; consequently, it will lead to high costs in terms of translation and the consumption of massive amounts of time, which in turn, weakens communication between the representatives from various countries. Moreover, procedural coordination between judges and representatives in cross-border insolvency is difficult because not all countries have specific rules on how the coordination might be achieved.⁷⁵

Furthermore, procedural coordination may reduce legal certainty for a number of reasons. First of all, since the courts have discretion to evaluate various factors to decide whether procedural coordination is appropriate or not, the court will have to decide on the appropriateness of the process, and this will reduce certainty. Second, there is no rule or legislation mandating that a judge apply this approach and, thus, the lack of a legal rule also reduces legal certainty, which in turn would negatively affect the creditors' interests. Moreover, judges have different legal backgrounds, and this might hinder effective communication. Furthermore, in procedural coordination, either the parties or the court can appoint one insolvency administrator for all of the insolvency proceedings, and this may

⁷⁵ Jenny Clift, 'International Insolvency Law : the UNCITRAL Experience with Harmonisation and Modernisation Techniques' in Andrea Bonomi and Paul Volken *Yearbook of Private International Law* (Swiss Institute of Comparative Law 2009) 405.

result in a loss of neutrality and independence.⁷⁶ However, it can be argued that the role of the administrator is to achieve uniformity among all interested parties. The court will observe this procedure in order to ensure that the administrator is performing his duties properly and independently.

Thus, procedural coordination can negatively affect the interests of creditors and their expectations as well as the choice of jurisdiction and applicable laws.⁷⁷ However, this argument does not appear to be widely appreciated because one of the main goals of procedural coordination is maximising the economic return for the benefit of creditors, and most likely this approach will not be taken without the creditors' consent. De Vette has suggested that in the case of an integrated group, the coordination of multiple insolvency proceedings of companies in the same group would be a good option for dealing with their insolvencies.⁷⁸ However, the decision is likely to be uncertain, and hence, the suggestion by De Vette may not be fully accepted due to difficulties in distinguishing between an integrated and an unintegrated group.

The foregoing analysis demonstrates that although the procedural coordination approach safeguards the principle of separate corporate personality by treating members of MCGs distinctly, it can be said that procedural coordination is difficult to apply in practice. In addition to the communication barriers identified, centralising the insolvency proceedings in one court is also problematic, and there is no guarantee that the judges or practitioners have adequate experience to apply this approach; they may need further training and experience.

⁷⁶ Hirte (n 68) 214.

⁷⁷ *ibid* 217.

⁷⁸ De Vette (n 73) 216.

(B) Enhanced Cooperation and Coordination

Enhanced cooperation and coordination is one of the approaches proposed to deal with the insolvency of MCGs. With regard to this approach, neither the EIR nor the UNCITRAL Model Law requires judges and practitioners to cooperate. The EIR and Model law have only addressed cooperation in the case of individual companies in the main insolvency proceedings and secondary proceedings, without addressing the case of a group of companies. Under the EIR, the role of coordination and cooperation is taken on by liquidators not judges.⁷⁹ Thus, the liquidators must cooperate through exchanging adequate information with each other, and the liquidator in the main insolvency proceedings may have the authority to intervene in secondary proceedings to propose a reorganisation plan or to suspend any action regarding the assets in those proceedings. A key difference between individual insolvency and group insolvency proceedings is that in the latter, the court does not deal with individual debtors; rather, it deals with a multiplicity of debtors.

As there are no rules to enhance cooperation and coordination, there are challenges in the EIR that may have an impact on the cooperation and coordination of the insolvency proceedings of MCGs.⁸⁰ In addition to the lack of rules, the courts and liquidators are not obliged to exercise control or to coordinate the separate insolvency proceedings of a group; instead, they do so on a voluntary basis.⁸¹ Another challenge is that Article 31 EIR requires the liquidators in the main insolvency proceedings and the liquidators in secondary proceedings to cooperate with one another, but unfortunately, it fails to provide a clear way for how such cooperation

⁷⁹ Virgos & Garcimartin (n 54) 226; Titia Bos, 'The European Insolvency Regulation and The Harmonization of Private International law in Europe' (2003) 50 Netherlands International Law Review 31, 44.

⁸⁰ However, Chapter V of the New EIR Recast 2015 proposes that 'group coordination proceeding' may be requested by a 'coordinator', see the New Recast art 71-72.

⁸¹ Hirte (n 68) 213.

will function in practice, and it does not make much effort to ensure proper cooperation among the liquidators of different insolvency proceedings.⁸²

It could be said that the extent of such cooperation is left to the national laws of each Member State, and this makes cooperation uncertain. Furthermore, coordination of the main and secondary insolvency proceedings varies significantly in the case of MCGs.⁸³ Moreover, the shortcomings associated with procedural coordination, analysed above, apply here, because judges and liquidators from different backgrounds may be faced with the challenges of differences of opinion, communication barriers and outright unwillingness to cooperate.

One example of effective cooperation and coordination between courts for the international insolvency proceedings of a corporate group is provided in the case of *Nortel Networks Group*.⁸⁴ In this case, joint administrators were appointed to coordinate the reorganisation of the whole group. The integration between the members of the group was very high. Thus, the administrators believed that the best way to maximise the return for the creditors would be through coordinating the insolvency proceedings of the whole group to facilitate the reorganisation of the entire Nortel group.⁸⁵ Administrators prevented multiple insolvency proceedings and succeeded in restructuring the entire group.⁸⁶

The decision in the *Nortel Networks Group* case implies that the opening of secondary proceedings will most likely impede restructuring and global reorganisation, and it will

⁸² *ibid* 234; Harry Rajak, 'Corporate Groups and Cross-Border Bankruptcy' (2009) 44 *Texas International Law Journal* 521, 539.

⁸³ Various national reports from various Member States, for instance Greece, Malta, Poland, Slovenia and Sweden, have stated that the model of main and secondary insolvency proceedings is not applicable for a group of companies, see Annex 1 National Reports (JUST/2011/JCIVPR/0048/A4-External Evaluation of Regulation No.1346/2000/EC On Insolvency Proceedings) <http://ec.europa.eu/justice/civil/files/annex_i_en.pdf> accessed 3 March 2016.

⁸⁴ *Re Nortel Networks & Ors* [2009] EWHC 206, [2009] BCC 343; Adam Al-Attar, 'Using and Losing Secondary Proceedings' (2009) 22 *Insolvency Intelligence* 76.

⁸⁵ Nicholas Herrod and Emily Dupee, 'EC Insolvency Regulation – Coordinating a Group-Wide Rescue' (*Allen & Overy*, 19 June 2009) <<http://www.allenoverly.com/publications/en-gb/Pages/EC-Insolvency-Regulation-%E2%80%93-Coordinating-a-group-wide-rescue.aspx>> accessed 20 February 2016.

⁸⁶ Simona Sano, 'The Third Road to Deal with the Insolvency of Multinational Enterprise' (2011) 21 *Journal of International Banking Law and Regulation* 23.

ultimately reduce the benefits that the creditor may gain from the sale of the assets of the MCGs.⁸⁷ This can be considered a step further towards a universalism approach in the EU, as it marks a move away from modified universalism.⁸⁸ However, it can be argued that the cases have not shifted to the universalism approach; rather the circumstances of each case and the need to protect the interests of creditors may motivate the application of this approach.

In the meantime, it is argued that cooperation between the courts of Member States of the EU remains a matter of discretion and willingness to cooperate in each case. Besides, the degree of cooperation is uncertain, as a result of which, for example, a particular court may decide that cooperation in a certain case may be unreasonable and inappropriate and therefore may decide not to cooperate.⁸⁹ Moreover, the ability and willingness of judges in various jurisdictions to engage in such international cooperation and coordination remain uncertain. Furthermore, cooperation amongst 28 Member States is a challenging task, taking into consideration the differences in legal cultures, languages, terminology and other practical difficulties.⁹⁰

According to Moss and Paulus, communication is a key factor for the successful implementation of this proposal.⁹¹ This is because the effective coordination of several proceedings, in order to ensure efficient insolvency proceedings, is meaningful only if there is better communication than the mere exchange of information between courts.⁹² Based on Article 31 EIR, a group of legal scholars have proposed guidelines for liquidators and judges on how to communicate and cooperate with the courts and liquidators involved in an

⁸⁷ Look Chan, 'Perfecting the Union, Perfecting Universalism' (2009) 2 Corporate Rescue and Insolvency 71.

⁸⁸ *ibid.*

⁸⁹ Ian Fletcher, *Insolvency in Private International Law* (2nd edn, Oxford University Press 2005) 480.

⁹⁰ Gabriel Moss and Christoph Paulus, 'The European Insolvency Regulation- the Case for Urgent Reform' (2006) 19 *Insolvency Intelligence* 1, 4; Nicholas Foster, 'Company Law Theory in Comparative Perspective: England and France' (2000) 48 *American Journal of Comparative Law* 573.

⁹¹ Moss and Paulus (n 90) 1.

⁹² Lucio Ghia, 'Regulation No. 1346/2000 And Protection of Creditors' (The Future of the European Insolvency Regulation Conference, Amsterdam, April 2011) 117.

international insolvency.⁹³ As a result, principles were published to inform court-to-court communication, i.e. the European Communication and Cooperation Guidelines.⁹⁴ Also, the Global Principles for Cooperation in International Insolvency Cases, published by the American Law Institute (ALI),⁹⁵ were meant to guide court-to-court communication in cases dealing with the insolvency of MCGs.

The enhanced cooperation and coordination approach has been adopted by the new EIR 2015. Although further analysis is provided subsequently in Chapter 4, its main objective is to enable the courts and liquidators to operate effectively and efficiently and to strike a balance between efficient insolvency administration and the protection of creditors' interests.⁹⁶ Thus, it is anticipated that under the new EIR the provisions on cooperation and coordination will be useful in ensuring greater coordination between the various insolvency proceedings of a particular MCG. Nevertheless, it is argued that the effectiveness of the coordination process depends largely on the willingness of courts and liquidators. Also, since there are multiplicities of liquidators within an MCG⁹⁷, it is doubtful whether this proposal will adequately create a unified approach to the insolvent group issue.⁹⁸ Thus, as argued by Martens, conflicts may arise between the liquidator of the secondary proceeding and the

⁹³ Bob Wessels, 'Accommodating Cross- Border Co-ordination: European Communication and Co-operation Guidelines for Cross- Border Insolvency' (2007) 4 *International Corporate Rescue* 250.

⁹⁴ European Communication and Cooperation Guidelines for Cross-border Insolvency 2007.

⁹⁵ Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases. Report to (*The American Law Institute*, 30 March 2012) <http://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf> accessed 1 March 2016.

⁹⁶ See for example New Recast EIR 2015 art 41-43 which introduced 'synthetic secondary proceedings' and which would be analysed in detail in Chapter 4.

⁹⁷ Michel Menjucq, 'EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies' (2008) 5 *European Company and Financial Law Review* 138; van Galen, 'The European Insolvency Regulation and Groups of Companies' (n 44).

⁹⁸ Nauta Dutilh, 'International Groups of Insolvent Companies in the European Community' (European Insolvency and Restructuring Congress of the Arbeitsgemeinschaft für Insolvenzrecht und Sanierung, Brussels February 2012) 8.

liquidator of the main proceeding.⁹⁹ As a result, the proposal may not be the best solution for dealing with the insolvency of MCGs.

This section has discussed the three main approaches to dealing with the insolvencies of MCGs. These are the substantive consolidation, the procedural coordination and the enhanced cooperation and coordination approaches. While each approach is found to have merits in its application, they also have significant shortcomings, as all of them lack certainty and do not seem to protect the interests of creditors. It is important to evaluate whether the harmonisation of substantive insolvency laws of Member States of the EU could help in dealing with the insolvency of MCGs. This evaluation is the focus of the next section.

3.3 Harmonisation of Insolvency Laws within the EU

There are two different ways in which harmonisation of insolvency laws within the EU can be realised: full harmonisation and the harmonisation of selected insolvency topics. Each of these is discussed subsequently.

(A) Full Harmonisation

Another proposal to deal with the international insolvency of corporate groups is to harmonise the substantive insolvency laws among Member States. It is important to note that the Treaty on the Functioning of the European Union (TFEU) does not contain definitive legal principles that allow the Union to adopt the measures needed to harmonise substantive insolvency laws. However, a solid legal basis in the TFEU is essential to demonstrate that the Commission is able to enact rules in order to achieve EU aims.¹⁰⁰

⁹⁹ Laurien Martens, 'A Definition of the Term Centre of Main Interests for Insolvent Cross-Border Groups of Companies' (Master Thesis, Tilburg University 2013) 65.

¹⁰⁰ TFEU art 50 (freedom of establishment), art 81 (2) TFEU (cross-border judicial cooperation and art 114 TFEU (measures for approximation).

Therefore, Article 81, which provides for judicial cooperation in Civil Matters based on the principle of the mutual recognition of judgments, could be utilised as a legal basis for the harmonisation of insolvency laws.¹⁰¹ It is worth noting that, to date, Article 81 has been exclusively utilised as a legal basis for adopting measures in private international law matters, such as the Brussels 1 Regulation, the Insolvency Regulation and other Regulations and Directives.¹⁰² Consequently, there are legal grounds for harmonising the substantive laws of the Member States in general, even though it appears that harmonisation can only be achieved where the issue has international aspects.¹⁰³

Thus, close examination of Article 81 reveals that there is nothing prohibiting the harmonisation of the substantive law of Member States insofar as such harmonisation will help to achieve the general aim of judicial cooperation in civil proceedings.¹⁰⁴ In this regard, it is argued that Article 81 can be utilised as a legal basis for the harmonisation of substantive law, as this is considered legal and thus permitted unless there is proof to the contrary.¹⁰⁵ However, the application of Article 81 in cross-border civil cases is limited because not all Member States of the EU have adopted it. For example, Denmark has not assented to Title V of the TFEU and as a result is not bound by measures adopted on the grounds of Article 81.¹⁰⁶

¹⁰¹ The Article stipulates *inter alia* that the adoption of the measures is necessary for the proper functioning of the internal market, aimed at ensuring mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases and in cross-border service of judicial and extrajudicial documents – art 81(a) & (b).

¹⁰² Directorate General for Internal Policies, ‘Current Gaps and Future Perspective in European Private International Law: Towards a Code on Private International Law?’ (European Parliament, 2012).

¹⁰³ Ian Fletcher and Bob Wessels, *Harmonisation of Insolvency Law in Europe* (Deventer Kluwer 2012) 57.

¹⁰⁴ Jan-Japp Kuipers, ‘The Legal Basis for a European Optional Instrument’ (2011) 5 *European Review of Private Law* 545, 554.

¹⁰⁵ *ibid* 555.

¹⁰⁶ Protocol 22 on the Position of Denmark attached to the TFEU art 1, provides that Denmark shall not take part in the adoption of measures pursuant to Title V of part three of the TFEU.

Proponents of the harmonisation of substantive insolvency laws claim that it is worthwhile at the EU level for several reasons. The first reason is that harmonisation of substantive insolvency laws among Member States will help to avoid forum-shopping.¹⁰⁷ To clarify this point, the present regime of various Member States allows the debtor to move the COMI of a company from one jurisdiction to another in order to find the most favourable law that serves their interest.¹⁰⁸ Harmonisation of insolvency laws would render such a move pointless, as the laws would be essentially the same throughout the EU. The second reason is that the harmonisation of substantive insolvency laws would increase the effectiveness and efficiency of dealing with the insolvency of MCGs and improve the company reorganisation process at the EU level.¹⁰⁹ However, there is no evidence to justify this assertion. Third, full harmonisation of insolvency laws can help to reduce legal costs, as there will be little to no divergence in the laws and there will be no requirement to deal with the substantive insolvency rules of each Member State.

Furthermore, harmonisation may enhance legal certainty because the insolvency laws of all Member States would be similar. However, inconsistencies and unpredictability may arise in the interpretation and application of the laws by different Member States' courts, which will in turn result in legal uncertainty. Where such harmonised laws are subject to the vagaries of interpretation by the courts of Member States, the CJEU may answer specific questions and provide guidance. However, this does not solve the problem of uncertainty nor does it guarantee legal certainty because the CJEU only provides answers in specific situations when

¹⁰⁷ Federico Mucciarell, 'Not Just Efficiency: Insolvency law in the EU and its Political Dimension' (2013) 14 *European Business Organization Law Review* 175.

¹⁰⁸ Paschalis Paschalidis, *Freedom of Establishment and Private International Law for Corporations* (Oxford University Press 2012) 134; Horst Eidenmüller, 'Abuse of Law in the Context of European Insolvency Law' (2009) 6 *European Company and Financial Law Review* 1.

¹⁰⁹ Giorgio Cherubini, Neil Cooper, Daniel Fritz and Others, 'Harmonisation of Insolvency Law at EU Level' (April 2010) the report was prepared by an INSOL< <https://www.insol-europe.org/eu-study-group-introduction-and-members>>; Susan Block-Lieb and Terence Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency' (2007) 42 *Texas International Law Journal* 481; Thomas Gaa and Paula Garzon, 'International Creditor's Rights and Bankruptcy' (1997) 31 *The International Lawyer* 273 ; Irit Mevorach, 'European Insolvency Law in a Global Context' (2011) 7 *Journal of Business Law* 666.

questions are referred to it. Thus, if there is no case, there is no guidance, and if the question is too specific, then there will be no effective guidance. Thus, the harmonisation of the insolvency laws of Member States of the EU still leaves the goal of achieving legal certainty unfulfilled.

Harmonisation does not appear to be widely appreciated for several other reasons. Under the present structure of EU institutions and legislative mechanisms, the harmonisation of the insolvency laws of all Member States is not feasible,¹¹⁰ especially due to the so-called ‘democratic deficit’ of European institutions. The Treaty on the Functioning of the European Union states that harmonisation instruments can only be adopted following legislative negotiations between the European Commission, the Council and the European Parliament.¹¹¹ This makes the enactment of an instrument to harmonise the substantive insolvency rules an extremely cumbersome and challenging process from a bureaucratic perspective, without even considering the complexities in harmonising the actual substantive rules.¹¹²

Social security strategies in each Member State are different and are thus treated exclusively by the individual state.¹¹³ While some Member States provide some classes of creditors with more protection and have preferences for employees’ claims, other States provide more protection for creditors who collect revenue and/or taxes.¹¹⁴ Another reason the harmonisation of insolvency law may prove difficult is the slow process of EU integration as

¹¹⁰ Mucciarell (n 107) 198; Block-Lieb and Halliday (n 109) 493.

¹¹¹ Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *Wyatt and Dashwood’s European Union Law* (Hart Publishing 2011) 73.

¹¹² Mucciarell (n 107) 198, Paul Craig, ‘Integration, Democracy and Legitimacy’, in Paul Craig and Grainne de Burca, eds, *The Evolution of the EU Law* (Oxford University Press 2011) 30.

¹¹³ Nicole Bolleyer and Christine Reh, ‘EU Legitimacy Revisited: The Normative Foundation of a Multilevel Polity’ (2012) 19 *Journal of European Public Policy* 472.

¹¹⁴ Chrispas Nyombi, ‘Employees’ Rights During Insolvency’ (2013) 6 *International Journal of Law and Management* 417; Lukas Becker, ‘“EU Insolvency Harmonisation” A Step Too Far’ (2011) 30 *International Financial Law Review* 19.

a result of political obstacles.¹¹⁵ Also, it is perceived that the harmonisation of insolvency rules may negatively affect regulatory competition among Member States.¹¹⁶ Even though regulatory competition may serve as motivation for Member States to develop their insolvency rules to attract foreign investors, Enriques and Gelter have argued that ‘States will not actively compete to attract bankruptcies’.¹¹⁷ This argument can be challenged because States could benefit from insolvency proceedings that are commenced in their jurisdiction. Thus, judges, as well as insolvency practitioners may develop a wealth of experience from dealing with complex insolvency proceedings, and the Member State would ultimately be the beneficiary of the expertise and money gained from those cases. Also, the harmonisation of insolvency laws may be problematic, as Member States may not like the idea of being compelled to enact or amend their laws to suit continuous changes.¹¹⁸ Moreover, full harmonisation can lead to legal rigidity because changes or amendments would then take a considerable amount of time, entailing complex negotiations among all Member States, and this may be an extremely difficult task to achieve in practice.¹¹⁹

¹¹⁵ Mucciarell (n 107) 177.

¹¹⁶ Sachdeva defines regulatory competition as “the competition between states, in their capacity as regulators, for attracting resources and mobile factors of production by creating and providing potential subjects with the opportunity to exploit their “different and better” regulatory product.’ Amit Sachdeva, ‘Regulatory Competition in European Company Law’ (2010) 30 *European Journal of Law & Economics* 170; Alan Stomel, ‘Answering the Call of the European Court of Justice in Eurofoods’ (*Institute for European Studies*, 2011) <<http://www.ies.be/files/WP%203:2011%20Alan%20J%20Stomel.pdf>> accessed 3 March 2016; John Armour, ‘Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition’ (2005) ECGI- Law Working Paper No.54/2005 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=860444> accessed 3 March 2016; Stelios Andreadakis, ‘Regulatory Competition or Harmonisation: The Dilemma, the Alternatives and the Prospect of Reflexive Harmonisation’ in Mads Andenas and Camilla Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011) 52.

¹¹⁷ Luca Enriques and Martin Gelter, ‘How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate Bankruptcy Law’ (2007) 81 *Tulane Law Review* 577.

¹¹⁸ Nicholas Tollenaar, ‘Proposal for Reform: Improving the Ability under the European Insolvency Regulation to Rescue Multinational Enterprises’ (2011) *International Insurance Law Review* 252; Philip Wood, *Principles of International Insolvency* (2nd edn, Sweet& Maxwell 2007) 1019. He argued that ‘... the need for competition as a spur to legal systems, the need for local democratic and accountable control, the need for freedom and Plurality, the need to avoid the inability to change a rule because one has to persuade everybody to change it so that it does not get change, and the need to reflect different cultures.’

¹¹⁹ Holger Fleischer and Klaus Schmolke, ‘The Reform of Transparency Directive: Minimum or Full Harmonisation of Ownership Disclosure’ (2011) 12 *European Business Organization Law Review* 121, 136.

This section has analysed whether the full harmonisation of insolvency laws of Member States of the EU could achieve legal certainty in dealing with international insolvencies of MCGs. Granted that harmonisation has its merits, which include the mitigation of differences between domestic laws, predictability and certainty regarding the jurisdiction and applicable law, the analysis revealed that this may be difficult to achieve in practice. This is because the process of getting legislators of Member States to amend their laws and to bring them into conformity with changes may be a difficult task. The recent revision carried out by the Commission, the EU Council and Parliament, which culminated in the adoption of the new EIR 2015, is a clear example of the length of time and legislative debates before an already existing Regulation could be amended. Chapter 4 will demonstrate how far-reaching a solution the new EIR Recast 2015 has proposed for the problem of abusive forum shopping resulting from the lack of legal certainty in cross-border insolvencies of MCGs. Until then, could the harmonisation of selected issues of Member States' insolvency legislation be considered as a possible solution? The analysis in the next subsection will provide some guidance in this regard.

(B) Harmonisation of Selected Insolvency Topics

The analysis from the previous section suggests that full harmonisation of the insolvency rules in EU Member States might not be achievable due to a number of reasons. Therefore, it might be better to harmonise some substantive insolvency rules that are similar in most Member States, such as those in the areas of creditor action ranking and priority rules, as well as the coordination of proceedings involving corporate groups so as to avoid extreme disparities in the future.¹²⁰

¹²⁰ David Marks, 'EC Insolvency Regulation: Is it Reform Time?' (2012) 9 International Corporate Rescue 227; INSOL Europe, 'Harmonisation of Insolvency Law at EU Level' (*Note of European Parliament*, April 2010), <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings_/empl_study_insolvencyproceedings_en.pdf> accessed 31 May 2016; see also Paul Omar, 'Upstreaming Rescue:

As Tollenaar pointed out, a harmonised sale of assets rule is impossible because there are several European jurisdictions (at least in the Netherlands, the United Kingdom, Belgium and, to a large extent, Germany) which permit a quick sale of assets to be concluded.¹²¹ Nevertheless, other Member States do not have specific rules regarding the quick sale of assets, so it would be problematic to harmonise this rule. It can be argued that Member States that do not have rules for the quick sale of assets may not reject this rule, as they only need to develop a similar rule in their national laws.

It appears that there are substantial differences in the insolvency laws of Member States in certain areas, such as security rights and classes of creditors, and this makes both full and selected harmonisation extremely difficult. Thus, the answer to the question of whether the harmonisation of substantive insolvency laws at the EU level is necessary or useful in addressing the problem of the insolvency of MCGs may have been answered in the new EIR. However, currently, and as will be revealed in the analysis of the new EIR, there appears to be no solution, because the actual implementation of the EIR in cases of the insolvency of MCGs manifests the difficulty of attaining legal certainty. Underpinning this dilemma is the assertion by Tuleasca that introducing an instrument that has no mandatory nature may improve the consistency of the European Union law as concerns insolvency issues, but practical implementation remains a challenge.¹²² While harmonisation of the insolvency laws in the EU is found to have merits in its application, it has some shortcomings in terms of lacking certainty and not protecting the interests of creditors. Thus, it is crucial to examine whether party autonomy could help in dealing with the insolvency of MCGs. This examination is the focus of the next section.

Pre-Insolvency Proceedings and the European Insolvency Regulation' (2014) 25 *International Company and Commercial Law Review* 19; John Lowry, 'The Harmonisation of Bankruptcy Law in Europe the Role of the Council of Europe' (1985) 16 *Journal of Business Law* 73.

¹²¹ Tollenaar (n 118) 252.

¹²² Luminita Tuleasca, 'The Harmonization of the European Laws on Insolvency' (2011) 1 *Lex Et Scientia Juridical Series* 144, 158.

3.4 Party Autonomy

International protocols and choice models are examined in this section.

(A) International Protocols: An Effective Tool for Dealing with the Insolvency of MCGs

This section examines the potential of international protocols to function as a tool for dealing with the cross-border insolvency of MCGs and whether these could help to achieve legal certainty. Specifically, it considers how international protocols could be used by Member States of the EU in insolvency cases. It will also assess whether international protocols are, in fact, an effective tool for resolving the problems of international insolvencies involving MCGs. The importance of the analysis to the Thesis is that international protocols are regarded as the most frequently utilised mechanism in cases of the cross-border insolvency of MCGs, and since the analysis in the preceding sections has not demonstrated a mechanism that can ensure legal certainty, it is proposed that the use of international protocols may provide some guidance.

Cross-border agreements or protocols are the most frequently utilised mechanisms for enhancing cross-border cooperation between business enterprise groups, and the existence of such protocols is widely acknowledged.¹²³ The UNCITRAL Model Law on Cross-Border Insolvency 1997 used the term ‘cross-border agreement’ interchangeably with the term ‘protocols’ in setting out the comity and cooperation between different courts in cross-border insolvency cases.¹²⁴ The International Bar Association Insolvency and Creditors Rights Committee drafted the cross-border insolvency concordat. Principle 4 of the Cross-Border Concordat makes provision for the need to have protocols to coordinate various insolvency

¹²³ Power Johnston and John Han, ‘A Proposal for Party – Determined COMI in Cross-Border Insolvencies Groups’ (2007) 16 Norton Annual Review of International Insolvency 811.

¹²⁴ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations 2014) <<http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>>accessed 4 March 2016.

proceedings in different jurisdictions.¹²⁵ Notably, there is no standard format for protocols, and not all of them share the same nature and scope.¹²⁶

Insolvency practitioners as well as judges widely use protocols because they provide the courts and parties of any insolvency proceedings with a framework for communication and cooperation.¹²⁷ The problem of multiple jurisdictional conflicts in cross-border insolvency cases can be resolved using international protocols as a pragmatic solution. Protocols are usually adopted or utilised by the key parties in the insolvency proceedings, and this agreement is then endorsed by the relevant courts.¹²⁸ The protocol assists the courts of each jurisdiction by providing an opportunity to become aware of what is happening in the other courts and the impact of these proceedings on the assets of the other debtors and stakeholders, wherever a joint hearing is situated.¹²⁹ A joint hearing can be accomplished through various ways, such as through video or telephone links, so that courts in other places can listen in on the proceedings.¹³⁰

Additionally, protocols have authorised judges in different courts to communicate directly with the preservation of the independence of the courts.¹³¹ Protocols have been developed to achieve several objectives in international insolvency cases. The first objective of the

¹²⁵ The International Bar Association, Cross –Border Insolvency Concordat (Committee J: Insolvency and Creditors Right 1995).

<http://www.iiiglobal.org/sites/default/files/media/17_IBA_Cross_Border_0.PDF>accessed 4 March 2016.

¹²⁶ Ralph Mabey & Susan Johnston, ‘Coordination among Insolvency Courts in the Rescue of Multinational Enterprises’ (2009) 130 Norton Annual Review of International insolvency 33.

¹²⁷ Johnston and Han (n 123) 812.

¹²⁸ Janis Sarra, ‘Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings’ (2009) 44 Texas International Law Journal 547, 563; Rosalind Mason, ‘Cross-Border Insolvency and Legal Transnationalisation’ (2012) 21 International Insolvency Review 105, 122.

¹²⁹ Johnston and Han (n 123) 825; Bob Wessels, ‘The Role of Courts in Solving Cross- Border Insolvency Cases’ (2011) 24 Insolvency Intelligence 65.

¹³⁰ Wessels (n 129) 65.

¹³¹ Office of the superintendent of Bankruptcy Canada, Crossing the Finish Line: the Potential Impact on Business Rescue of Adoption of the New Cross-Border Insolvency Provisions –Part 2: Part II: Chapter 47 Provisions as Compared with the Model Law and Chapter 15 of the U.S. Bankruptcy (2008).

protocols is to maintain the independence of and comity between jurisdictions.¹³² It is the duty of the courts to ensure that the protocol will not infringe on the sovereignty of any court and that courts offer comity to one another.¹³³ Another aim of protocols is to avoid multiple insolvency proceedings, thereby ensuring that courts and parties can reduce the administration and litigation costs, which in turn increases the return to creditors and, in some circumstances, to the debtors as well.¹³⁴

Protocols also aim at ensuring cooperation and coordination amongst courts by providing them with the means to facilitate this cooperation.¹³⁵ They increase certainty by helping to clarify the parties' expectations and preventing any jurisdictional conflict.¹³⁶ Furthermore, protocols aim at avoiding contradiction between judgements from different courts dealing with the same matter, either at the same time or at different times. Thus, cross-border insolvency protocols have been accepted by judiciaries of different jurisdictions and are supported by some legal scholars.¹³⁷ The *Maxwell Communication Corporation, Olympia & York* and *Commodore Business Machines* cases are a few examples of the successful application of protocols that resulted in maximum efficiency and minimum dispute.¹³⁸ The leading case in exemplifying this approach, *Maxwell Communication Corporation*, is examined below to demonstrate the implementation of protocols in international insolvency

¹³² Comity is a term utilized to indicate the extent to which one country allows the law of another country to have effect within its territory. See Samuel Bufford, Louise Adler, Sidney Brooks and Marcia Krieger, 'International Insolvency' (*Federal Judicial Center*, 2001) <[http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/\\$file/IntlInso.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/$file/IntlInso.pdf)> accessed 5 March 2015.

¹³³ Johnston and Han (n 123) 825.

¹³⁴ Devi Shah, 'The UNCTRAL Practice Guide on Cross-Border Insolvency Cooperation: A Good Practice Guide to Cross – Insolvency Agreements' (2010) 5 *International Corporate Rescue* 325.

¹³⁵ Paul Zumbro, 'Cross- Border Insolvencies and International Protocols – an Imperfect but Effective Tool' (2010) 11 *Business Law International* 157.

¹³⁶ Irit Mevorach, 'Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap' (2015) 10 *Brooklyn Journal of Corporate, Financial and Commercial Law* 1.

¹³⁷ Evand Flaschen and Ronald Silverman, 'Cross-Border Insolvency Cooperation Protocols' (1998) 33 *Texas International Law Journal* 587; Elizabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors* (6th edn, Wolters Kluwer Law & Business 2009) 873

¹³⁸ *In re Maxwell Communication Corp*, Case No 91-15741 (Bankr SDNY 15 January 1992); Ian Fletcher, 'International Insolvency Issues: Recent Cases' (1997) *Journal of Business Law* 471,477.

cases and how they can be an effective tool for dealing with the insolvency of corporate groups.

In *Maxwell Communication Corporation*, a media holding company based in the UK was a parent company to 400 subsidiaries in several countries, including the UK, US and Canada. After defaulting on its loan, two insolvency proceedings were commenced: the first insolvency proceeding in the USA and the second in the UK. Courts in both jurisdictions faced the challenges of harmonising and coordinating the insolvency proceedings without undermining the sovereignty of either. The UK court appointed three joint administrators and the US court appointed one examiner. Both courts attempted to coordinate the insolvency proceedings for the interests of the creditors, stockholders and other parties. A protocol was negotiated and agreed upon to coordinate both insolvency proceedings with the aim of preserving the value of assets and reorganising the company.¹³⁹ The protocol expressly provided guidance to the parties for developing and coordinating the reorganisation plan and the scheme of arrangement.¹⁴⁰

In December 1993, a scheme of arrangement and a reorganisation plan were approved without a clash between the two jurisdictions and there was no need for a judicial resolution. The outcome of this protocol was the partial liquidation and reorganisation of the *Maxwell* entity. Thus, the *Maxwell* case introduced the protocol as an essential mechanism in cross-border insolvency cases.¹⁴¹ Matousekova asserted that the coordination between the UK and the USA in managing the insolvency of the whole group was able to occur because the two countries share the same language and a similar legal background, and that such coordination

¹³⁹ *In re Maxwell Communication Corp* (n 138).

¹⁴⁰ *ibid.*

¹⁴¹ Jay Westbrook, 'The Lessons of Maxwell Communication' (1996) 64 *Fordham Law Review* 2531; Terence Halliday and Bruce Carruthers, *Global Law Making and Systemic Financial Crisis* (Stanford University Press 2009) 41.

might not have occurred between countries where different languages are spoken or where the legal backgrounds differ.¹⁴²

The application of protocols can serve as a useful international instrument to deal with cross-border insolvency cases, particularly in the cases of MCGs. Importantly, the protocols being adopted and implemented are influenced by the universality principle and certain constraints of territoriality.¹⁴³ Articles 25-27 of the Model Law explicitly requests that jurisdictions that have adopted it employ cross-border protocols. Thus, the adoption of the Model Law in most countries furthers the implementation of protocols in cross-border insolvency cases in those countries. These Articles authorise and require the courts and the official representatives of foreign proceedings to cooperate and communicate with each other.¹⁴⁴ In the discussion that follows, an evaluation of protocols is provided, focussing on the extent to which they achieve the above aims and work as a substitute for a possible Regulation.

The analysis may appear superfluous, especially with the newly adopted EIR 2015. However, it is important because the new EIR will take effect only in 2017, and until it is fully implemented, protocols will continue to be relevant to cases of insolvencies of MCGs amongst Member States of the EU. This is because protocols are widely accepted, especially in common law countries, as both judges and insolvency practitioners encourage their use.¹⁴⁵ The relevance of protocols is demonstrated when judges and insolvency practitioners who have utilised them successfully are especially likely to employ them again as precedents. Importantly, most protocols use precedent protocols, following the same formats and

¹⁴² Marina Matousekova, 'Private International Law Answers to the Insolvency of Cross Border Groups: Comparative Analysis of French and English Law' (2008) 2 International Business Law Journal 141.

¹⁴³ Flaschen and Silverman (n 137) 588.

¹⁴⁴ *ibid.*

¹⁴⁵ Akshaya Kamalnath, 'Cross- Border Insolvency Protocols: A Success Story' (2013) 2 International Journal of Legal Studies and Research 13.

sometimes similar wording, thereby reducing cost and time when negotiating complex agreements.

Additionally, protocols are useful to all relevant parties because they prevent parallel litigations that would increase the costs or delay the reorganisation of the entire group.¹⁴⁶ Also, protocols can be effective in achieving a universal approach to the insolvency of MCGs.¹⁴⁷ Protocols may diminish the problems of jurisdictional matters and choice of law questions because the parties will insert into protocols stipulations concerning which court will have jurisdiction and which law will apply.¹⁴⁸ Protocols can help resolve the problems that arise when the assets of different companies in the same group are intermingled to the extent that it would be complicated and expensive to separate them.

Despite the above advantages, protocols have some limitations as an effective tool for dealing with cross-border insolvency involving a group of companies. First, without specific permission from the court, it remains problematic in some jurisdictions to achieve cooperation and to reach an agreement. For example, in some countries, protocols will not be effective unless there is permission or authorisation from the courts. This means that although there would be protocols, they could not be used, and the lack of use could imply that protocols cannot be a tool, let alone an effective one. Second, reaching an agreement where there are no clear guidelines or generally accepted rules will take a long time and may require extensive costs, although this problem might be reduced when there are precedent protocols in place. Taking into account that such an agreement will be between creditors and debtors from various countries, it should be of paramount consideration that both secured and unsecured ones are not of the same level. Third, administrators or creditors sometimes refuse

¹⁴⁶ Jay Westbrook, 'International Judicial Negotiation' (2003) 38 Texas International Law Journal 567.

¹⁴⁷ Sano (n 86) 23.

¹⁴⁸ S. Chandra Mohan, 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer' (2012) 21 International Insolvency Review 199, 221.

to sign the protocol when it reduces their opportunity to recover some of their claims.¹⁴⁹ This point can be illustrated in the case of *Lehman Brother International Europe*¹⁵⁰ in which the administrators refused to sign any protocol because they had some concerns regarding how inter-company claims would be resolved.¹⁵¹

A further complication is that protocols are not well-established in most civil law countries, which poses the question of whether civil judges will authorise protocols without specific legislation in place.¹⁵² Furthermore, there is a question of whether the protocol reached between parties will be binding against a third party, who is not a creditor but will be affected by the agreement. Also, if the protocol has succeeded in some cases, there is no evidence to suggest that it will work effectively in other cases. This is because these cases may not be the same; the parties, the facts and the circumstances may be completely different. Thus, even in the same jurisdictions where judgments have been rendered, there is no guarantee that the protocols applied will be applied in subsequent cases.¹⁵³ Moreover, the transaction costs of negotiating complex protocols for the allocation of court or the issue of recovering claims or assets are high. As the parties have different preferences and expectations, satisfying all of them might be problematic and demand a great deal of effort and time.¹⁵⁴

Thus, although the EIR has recently been revised, it is argued that protocols are most likely to continue to be an effective tool for dealing with the insolvencies of MCGs and they represent a major step forward in international cooperation in insolvency and reorganisation cases, but they have limited impact. The most significant limitation is the limited application of the

¹⁴⁹ Anthony Sexton, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law and the EU Insolvency Regulation' (2011-2012) 12 *Chicago Journal of International Law* 811.

¹⁵⁰ *Re Lehman Brothers International Europe (In Administration)* [2012] UKSC 6.

¹⁵¹ Sexton (n 149) 811.

¹⁵² Sarra (n 128) 563.

¹⁵³ Thomas Gaa, 'Harmonization of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible' (1993) 27 *The International Lawyer* 901.

¹⁵⁴ Gaa (n 153) 901.

protocol mechanism in civil law countries. Therefore, as the effectiveness of protocols remains limited, especially in non-binding recommendations, the merits of protocols lie in the uniqueness of every case.

(B) Choice Model

This section examines the Choice Model as a solution to the problem of cross-border insolvencies of MCGs at the EU level.¹⁵⁵ Choice model gives the creditors and the debtors the right to select the jurisdiction and the applicable law preferable to them.¹⁵⁶ In other words, the courts have the power to determine where the COMI is located only if the parties have not reached an agreement to locate the jurisdiction and the applicable law. This solution is suggested by legal scholars as an effort to address the current gap in the treatment of a group of companies.¹⁵⁷ It is also relevant because the New Recast EIR 2015 does not reflect any reform in this area.

The rationale for adopting the Choice Model mechanism is based on the option to choose the most efficient law. Indeed, choice model would not restrict companies to domestic insolvency proceedings. Rather, it allows the parties to choose the law of another Member State if that other law will be more favourable and efficient to them and if it permits restructuring that is unavailable under the original law.¹⁵⁸ In other words, companies would select across the EU Member States the most efficient legislation, thereby avoiding slow and inefficient

¹⁵⁵ Robert Rasmussen, 'Resolving Transnational Insolvencies Through Private Ordering' (1999) 98 Michigan Law Review 2252; John Pottow, 'Beyond Carve- Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law' (2015) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 196,208.

¹⁵⁶ Jackie Gardina, 'The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage' (2006) 86 Boston University Law Review 881.

¹⁵⁷ Christenson (n 34) 1591.

¹⁵⁸ Horst Eidenmuller, 'Free Choice in International Company Insolvency Law' (2005) 6 European Business Organization Law Review 429.

regulations.¹⁵⁹ Two alternatives are available to implement the choice model in the EU. The first option is to permit free selection of the insolvency law to be applied.¹⁶⁰ The second option is to replace the COMI as a choice of forum and choice of law criterion.¹⁶¹

Under both options of the Choice Model mechanism, the insolvency procedure becomes more predictable for all relevant parties, because they have explicitly selected the choice of law and therefore they can anticipate in advance the rules and costs associated with the proceedings.¹⁶² Indeed, predictability is crucial to lenders and other contract creditors because they need to assess the risk and the cost of this agreement based on the country where the insolvency proceedings would potentially take place. Thus, they need to know at the time they make the loan agreement which country's laws will apply in the event of insolvency.¹⁶³ Thus, in the case of liquidation, the rules will be beneficial to creditors and investors of the company.¹⁶⁴

Additionally, the Choice Model mechanism mitigates the problem of abusive forum shopping through identifying, at the time of the establishment of a company, in its articles of association, the court which will have jurisdiction to handle any bankruptcy problem that might occur in the future.¹⁶⁵ Also, parties' agreeing regarding the country, court and law ultimately supports the universalism scheme, which in turn facilitates efficient insolvency proceedings. Also, the choice of law model would enhance overall efficiency by permitting

¹⁵⁹ Robert Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Michigan Journal of International Law 1.

¹⁶⁰ Bolleyer Reh (n 113) 472.

¹⁶¹ Eidenmuller (n 158) 438; John Armour, 'Who Should Make Corporate Law: EC Legislation versus Regulatory Competition' (2005) 58 European Corporate Governance Institute 401.

¹⁶² Rasmussen (n 155) 2252.

¹⁶³ Christenson (n 34) 1591.

¹⁶⁴ Lynn Lopucki, 'Cooperation International Bankruptcy: A Post-Universalist Approach' (1999) 94 Cornell Law Review 696.

¹⁶⁵ Robert Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 Texas Law Review 51.

the parties to choose the most preferable insolvency law.¹⁶⁶ Thus, this option allows the parties to select the acceptable law, which will, in most cases, lead to a more effective procedural or substantive outcome for all the creditors, particularly involuntary creditors (e.g. tort victims).¹⁶⁷ However, it can be argued that it is extremely difficult to define and to know what the acceptable law is. Besides, this acceptable law may not be acceptable to all parties.

In furtherance of this shortcoming, Schwartz has demonstrated the potential problem of debtors' circumstances, which may change from the time of establishing the company to the time of bankruptcy. If the initial choice was efficient at the beginning, it may not be efficient after a while.¹⁶⁸ Similarly, the debtors, in most cases, have the tendency to select the jurisdiction that serves their own interests instead of choosing the most efficient insolvency law, and this may negatively affect the creditors' interests.¹⁶⁹ In addition, it has been submitted that the choice model approach can have a negative impact on creditors who have enforceable security interests according to a certain jurisdiction.¹⁷⁰ The choice model also does not deter parties from opening secondary proceedings, which may reduce the efficiency of the insolvency proceedings.¹⁷¹

Taken together, the foregoing analysis suggests that the choice model has a number of advantages, as it permits the directors and shareholders to select the most useful and efficient regime. However, this model is unpredictable for all creditors and does not serve the interests of all of the concerned parties. Thus, companies do not enjoy the right to select the insolvency law that serves their needs irrespective of the creditors' expectations.

¹⁶⁶ Bolleyer and Reh (n 113) 472.

¹⁶⁷ Christenson (n 34) 1591.

¹⁶⁸ Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1997) 107 Yale Law Journal 1807.

¹⁶⁹ Fletcher and Wessels (n 103) 56.

¹⁷⁰ *ibid.*

¹⁷¹ Frederick Tung, 'Is International Bankruptcy Possible?' (2001) 23 Michigan Journal of International Law 31.

3.5 Conclusion

This chapter provided an overview of a number of mechanisms for enhancing legal certainty in cases of the cross-border insolvency of MCGs with the objective of reducing abusive forum shopping, namely, the substantive consolidation mechanism, the cooperation and coordination mechanism, harmonisation, and the party autonomy mechanism.

The substantive consolidation mechanism enables the treatment of MCGs as a single entity by combining all of the assets and liabilities of the group into a single ‘pot’, which makes it easier to take control and distribute all of the assets of the company. This mechanism is very useful when the assets of the group cannot be disentangled and the identification of the actual ownership and the division of assets is extremely expensive or time-consuming. However, court decisions show that it is extremely difficult to determine the circumstances in which a court will decide to treat all the assets of the company as a single unit, and this consequently makes it inadequate for enhancing legal certainty in the cross-border insolvency of MCGs.

The coordination and cooperation mechanism is less difficult to implement than the substantive consolidation mechanism because coordination and cooperation respects the separate legal personality of the companies in the group. By effectively utilising coordination between the courts or the administrators involved in the insolvency proceedings, legal certainty can increase, especially when the coordination is led by the court or administrator in charge of the main insolvency proceedings. However, this is not always a guaranteed result because the courts have the discretion to evaluate various factors to determine whether procedural coordination is appropriate or not. Coordination and cooperation can also be very expensive and time-consuming because of linguistic differences between the different courts and the resistance of some judges to interacting with foreign courts.

The harmonisation mechanism can help enhance legal certainty in cross-border insolvency cases of MCGs by harmonising the substantive insolvency laws of EU Member States, thereby causing insolvency cases at different EU domestic courts to produce the same outcome. This is useful for enhancing legal certainty and can make abusive forum shopping redundant. These results, however, are not guaranteed, because domestic courts can still interpret and apply the same law in different ways. It is also practically difficult to force Member States to adopt the same insolvency laws because of the challenges mentioned above, such as social security strategy and regulatory competition.

Finally, the “party autonomy” approach could be achieved through international protocols, which are cross-border agreements that provide the courts and the parties to any insolvency proceedings with a framework for communication and cooperation. Such protocols can enhance legal certainty by helping clarify the expectations of the parties and preventing any jurisdictional conflict. However, the utility of this mechanism is limited in places where it is not permissible to conclude such protocols without the prior permission of the court, especially in civil law countries where judges may or may not be willing or able to authorise such protocols without specific legislation in place. It is also questionable whether a protocol reached between the parties will be binding upon a third party.

Alternatively, the ‘party autonomy’ approach can be in the form of the “Choice Model”, which gives companies the right to select the jurisdiction and the applicable law most preferable to them. This contributes to enhancing legal certainty by allowing the parties to choose in advance which law will be applicable in the event of insolvency. However, it is uncertain whether all relevant parties will reach an agreement, and the debtors in most cases have the tendency to select the jurisdiction that serves their own interests instead of choosing the most efficient insolvency law, and this may negatively affect the creditors’ interests.

The examination of these mechanisms illustrates that they all have advantages and disadvantages when it comes to enhancing legal certainty in cross-border insolvency cases involving MCGs. However, these mechanisms are not independent and some can be used collectively or at different stages of the insolvency proceedings. In light of the fact that these mechanisms do not provide a complete solution to the problem of legal certainty in such insolvency cases, the next chapter examines the Recast Regulation, which was issued in the Official Journal on 5 June 2015 and will replace Regulation 1346/2000 with effect from 26 June 2017, to assess the extent to which it helps resolve this problem.

Chapter 4:

The New Recast EIR 2015: An Enhancement of Legal Certainty?

Chapter 2 enumerated the problems associated with legal certainty in the way the rules of the European Insolvency Regulation 2000 (EIR 2000) have been applied to cross-border insolvencies. It also looked at the extent to which the notion of the Centre of Main Interests (COMI) enhances legal certainty in the cross-border insolvency of multinational company groups (MCGs) and the lack of any specific rules in the Regulation relating to the insolvency of such groups.¹ The focus of the analysis was on the extent to which these issues could lead to abusive forum shopping, to the disadvantage of creditors. The analysis in Chapter 3 of the Thesis of the potential mechanisms that could be used to enhance legal certainty in cross-border insolvency cases revealed that even though such mechanisms provide numerous opportunities for enhancing legal certainty through consolidation, cooperation, coordination, and harmonisation, they also have certain disadvantages and may not provide a workable solution to the problems of legal certainty and abusive forum shopping.²

After 10 years, the EIR 2000 was due for a revision, and this was especially needed as the notion of the COMI under the EIR 2000 was vague, and the EIR 2000 did not include any special provisions for MCGs, making cross-border insolvency proceedings problematic for such companies in the EU.³ Additionally, the New Recast EIR 2015 intends to ensure that the

¹ See Chapter 2 “Centre of Main Interests as a Mechanism to Enhance Legal Certainty”.

² See Chapter 3 “Other Mechanisms for Enhancing Legal Certainty”.

³ Michael Weiss, ‘Bridge over Troubled Water: The Revised Insolvency Regulation’ (2015) 24 International Insolvency Review 192.

insolvency regulatory framework is kept up to date with market practices, especially as effective and efficient cross-border insolvency proceedings are seen as a requirement for the proper functioning of the internal market.⁴ As will be explored in detail below, the New Recast EIR 2015 also attempts to improve the legal certainty of the cross-border insolvency proceedings by codifying some of the major decisions of the CJEU that are relevant to the understanding of the Regulation. Such codification of CJEU decisions in the New Recast EIR 2015 represents an endorsement of the validity of these decisions and will ensure that principles deduced from these decisions are consistently followed as a matter of law across the EU. This consequently will contribute to enhancing legal certainty in cross-border insolvency cases.

This chapter is divided into three sections. In order to properly understand the New Recast EIR 2015 in context, the first section provides a brief overview of the development of the New Recast EIR 2015 and outlines the key features of the Regulation. The second section looks specifically and in more depth at the provisions of the New Recast EIR 2015 that aim at enhancing legal certainty, namely those relating to secondary proceedings, the COMI, and the entirely new chapter relating to groups of companies. Before concluding, the third section explores the extent to which the New Recast EIR 2015 could be further improved to enhance legal certainty for the benefit of creditors.

4.1 Overview of the EIR Recast

This section analyses the background to the amendments of the EIR and the changes reflected in the new EIR 2015. The analysis is important as it has a direct impact on the argument in this Thesis, especially regarding the question of how to deal with cases of the insolvency of

⁴ Regulation (EU) 2015/848 of the European Parliament of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L141, recital 3.

MCGs. Thus, when the New Recast EIR 2015 becomes operational in 2017, it would be important to determine whether adequate answers have been provided to address the shortcomings of the EIR 2000 and if not, what other solutions may be proffered, especially relating to the insolvency of MCGs.

The European Commission originally proposed, in its review of the EIR 2000, an amendment to the existing Regulation. The original proposal went as far as introducing amending instruments that were approved by the Parliament in its first reading,⁵ but the changes proposed by the Council proved too complicated to implement through an amendment format, which led to the adoption of a recast proposal.⁶ The New Recast EIR 2015 includes some old provisions from the EIR 2000, which aim to expand and clarify the old provisions of the latter, as well as entirely new provisions that regulate matters that were not originally covered by the EIR 2000.⁷

The New Recast EIR 2015 is the result of an ‘insolvency package’⁸ which was adopted by the European Commission in December 2012.⁹ The package comprises the proposal to revise Regulation 1346/2000 as well as the Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer

⁵ The Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation; Guidelines 18 & 19 (*Eur Lex Europe*, 2013) <<http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf>> accessed 30 April 2016.

⁶ See the Agreement between the European Commission and European Parliament 2014-2019, 23 October 2014. <http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-62.pdf> accessed 30 April 2016.

⁷ European Parliament Council Commission Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal 2002/C77/01 (*Eur Lex Europe*, 28 November 2001) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002Q0328&from=EN>> accessed 30 April 2016.

⁸ Geert van Calster, ‘COMIng, and here to Stay. The Review of the European Insolvency Regulation’ [Unpublished] (SSRN, 28 July 2015) <<http://ssrn.com/abstract=2637003>> accessed 30 April 2016.

⁹ European Commission Press Release, ‘Giving Honest Businesses a Second Chance: Commission Proposes Modern Insolvency Rules’ IP/12/1354 Strasbourg 12 December 2012 (*European Commission Press Release Database*, 5 February 2014) <http://europa.eu/rapid/press-release_IP-12-1354_en.htm> accessed 30 April 2016.

European Insolvency Law Report on the application of that Regulation.¹⁰ It also includes an impact assessment,¹¹ a communication on a new European approach to business failure and insolvency,¹² guidelines on the facilitation of negotiations for business restructuring, and a summary proposal from the European Commission to amend the insolvency Regulations.¹³ The Europe Commission's summary proposal to amend the insolvency Regulation encompassed five broad areas, namely: (1) the extension of the scope of the EIR to proceedings aimed at giving the debtor a 'second chance'; (2) the strengthening of the current jurisdictional framework in terms of certainty and clarity; (3) the improvement of coordination among insolvency proceedings opened in respect of the same debtor and striking a balance between efficient insolvency administration and the protection of local creditors; (4) the reinforcement of the publicity of the proceedings by compelling Member States to introduce insolvency registers and to cooperate in regard to interconnecting national registers; and (5) the management of multiple insolvency proceedings relating to a group of companies.¹⁴

¹⁰ Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report 2014 (Hereinafter the 'Hess/Oberhammer/Pfeiffer Report' <http://www.beck-shop.de/fachbuch/inhaltsverzeichnis/Hess-European-Insolvency-Regulation-9783406655012_2911201306152697_ihv.pdf> accessed 30 April 2016.

¹¹ European Commission, 'Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings' SWD (2012) 417 final Strasbourg 12 December 2012 <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf> accessed 30 April 2016.

¹² European Commission, 'Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency' C (2014) 1500 final Brussels 12 March 2014 <http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf> accessed 30 April 2016; Roisin Murphy, 'Reformation of the European Insolvency Regulation to Act As a Legislative Tool to Assist in Europe's Agenda' (2015) 26 European Business Law Review 283.

¹³ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/ 2000 on Insolvency Proceedings' SWD (2012) 744 final Strasbourg 12 December 2012.

¹⁴ Antonio Leandro, 'The New European Insolvency Regulation' (*Conflict of Laws net*, 28 May 2015) <<http://conflictflaws.net/2015/the-new-european-insolvency-Regulation/>> accessed 30 April 2016; Van Calster (n 8) 4.

The New Recast EIR 2015 comprises seven chapters, four annexes, and 92 articles. In comparison, the EIR 2000 contained five chapters, three annexes, and 47 articles.¹⁵ The New Recast EIR 2015 also has 89 recitals, while the EIR 2000 had only 33. This increase in the volume of the Regulation is an indication of the wider scope of application and the desire of the EU to cover all of the gaps of the EIR 2000. This chapter attempts to assess whether the new provisions contribute to enhancing legal certainty for creditors in general, and more specifically in the context of the cross-border insolvency of MCGs, by examining the new provisions on secondary proceedings, those aiming to clarify the notion of the COMI, and the new chapter on groups of companies.

The first chapter (Chapter I) of the New Recast EIR 2015 is composed of Articles 1 to 18. This chapter covers the general provisions and main principles for regulating cross-border insolvency in the EU; therefore, it explains the scope of the Regulation,¹⁶ states the definitions of the terms used in the Regulation,¹⁷ prescribes rules for allocating jurisdiction (on the principle that the court of the Member State in the territory in which the COMI is situated is the one to have jurisdiction to commence insolvency proceedings),¹⁸ and stipulates the mechanism for determining the applicable law.¹⁹ It also includes numerous exceptions to the standard rule for determining the applicable law, such as those relating to third parties' rights in rem,²⁰ set off,²¹ reservation of title,²² and contracts relating to immovable property.²³

¹⁵ Francisco Garcimarin, 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' [Unpublished] (SSRN, 21 March 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412> accessed 27 April 2016.

¹⁶ New Recast EIR 2015 art 1.

¹⁷ New Recast EIR 2015 art 2.

¹⁸ New Recast EIR 2015 art 3.

¹⁹ New Recast EIR 2015 art 7.

²⁰ New Recast EIR 2015 art 8.

²¹ New Recast EIR 2015 art 9.

²² New Recast EIR 2015 art 10.

²³ New Recast EIR 2015 art 11.

It is also worth noting that the New Recast EIR 2015 uses the term ‘insolvency practitioner’ instead of ‘liquidator’, which is the term that was used in the EIR 2000. The use of this term indicates that the intention of the insolvency proceedings is not simply to liquidate a company’s assets through a winding up procedure, but to consider rescuing or restructuring the company instead.²⁴

The second chapter (Chapter II) comprises Articles 19 to 33. This chapter covers the provisions relating to the recognition of insolvency proceedings. According to the main principle of this chapter, ‘any judgment opening insolvency proceedings handed down by a court of a Member State, which has jurisdiction pursuant to [this Regulation], shall be recognised in all other Member States from the moment it becomes effective in the State of the opening of proceedings’.²⁵ In other words, recognition of the insolvency proceedings shall be ‘compulsory’ and ‘automatic’.²⁶ However, such recognition does not forbid other courts to commence secondary proceedings in a State where the debtor has an establishment, in accordance with Article 19(2). This chapter also prescribes the powers and duties of the insolvency practitioner,²⁷ the process for establishing insolvency registers²⁸ and the conditions for accessing insolvency information via the system of interconnection.²⁹

The third chapter (Chapter III) spans Articles 34 to 52. This chapter covers the provisions relating to secondary insolvency proceedings.³⁰ As noted earlier, the commencement of the main insolvency proceedings does not prohibit a court in another Member State where a

²⁴ New Recast EIR 2015 art 2 (5) and recital 21.

²⁵ New Recast EIR 2015 art 19.

²⁶ Bob Wessels, *European Union Regulation on Insolvency Proceedings An Introductory Analysis* (2nd edn, American Bankruptcy Institute 2007) 154.

²⁷ New Recast EIR 2015 art 21.

²⁸ New Recast EIR 2015 art 24.

²⁹ New Recast EIR 2015 art 25.

³⁰ New Recast EIR 2015 art 34.

debtor has an establishment from commencing secondary proceedings. The objective of opening secondary proceedings may be to achieve one of two aims: protecting local creditors or supporting the operation of the main insolvency proceedings. The chapter also includes provisions for avoiding the opening of secondary proceedings and rules establishing who has the right to request the opening of secondary insolvency proceedings.

The fourth chapter (Chapter IV) is made up of Articles 53 to 55. This chapter covers rules about providing information to creditors and the lodging of creditor claims. This chapter provides that ‘any foreign creditor may lodge claims in insolvency proceedings by any means of communication’.³¹ This chapter also imposes an obligation on the insolvency practitioner to ‘immediately inform the known foreign creditors’ of any insolvency proceedings that are open in a Member State.³² The chapter provides further details of the required information and the process for lodging claims. Such provisions may also be beneficial to tax authorities because this information could help in numerous ways, such as identifying assets and understanding the financial standing of a company.³³

The fifth chapter (Chapter V) is composed of Articles 56 to 77. This chapter covers rules relating to the insolvency proceedings of members of a group of companies. Weiss considers this chapter to be the ‘real novelty’ of the New Recast EIR 2015 because the EIR 2000 contained no such provisions.³⁴ This chapter is split into two sections: (1) cooperation and communication, and (2) coordination. It firstly explains the procedure for cooperation and communication between insolvency practitioners, between courts, and between practitioners and courts. Then it outlines the procedure for requests to open group coordination

³¹ New Recast EIR 2015 art 53.

³² New Recast EIR 2015 art 54.

³³ New Recast EIR 2015 art 55.

³⁴ Weiss (n 3) 208.

proceedings, sets priority rules, details the formalities for making notices by the court, and stipulates the rules for making objections by insolvency practitioners. This topic will be explored in detail later in the chapter.

The sixth chapter (Chapter VI) consists of Articles 78 to 83. This chapter is a new addition to the European Insolvency Regulations and covers rules relating to data protection. It imposes responsibilities on Member States regarding the processing of personal data in national insolvency registers and on the Commission in relation to the processing of personal data. The chapter goes into detail with regard to information obligation, the storage of personal data, and access to personal data via the European e-Justice Portal.

The seventh and final chapter (Chapter VII) contains Articles 84 to 92. This chapter covers rules relating to transitional and final provisions, such as the entry into force of the Regulation and the relationship of the Regulation with other conventions. Articles 84(1) and 92 make it clear that the New Recast EIR 2015 will take effect on 26 June 2017 and thus will only apply to insolvency proceedings opened after that date. Consequently, the EIR 2000 continues to apply to insolvency proceedings which have been opened or will be opened prior to that date. The New Recast EIR 2015 will be subject to a full review after 10 years of applicability and then every 5 years after that.³⁵

Now that the key features of the New Recast EIR 2015 have been outlined, it is possible to move into a more detailed analysis of some of the main provisions that relate to enhancing legal certainty in the cross-border insolvency of MCGs.

³⁵ New Recast EIR 2015 art 90.

4.2 Legal Certainty-Enhancing Provisions of the EIR Recast

This section analyses the three main provisions of the New Recast EIR 2015 that have an impact on enhancing legal certainty and aim at reducing the opportunity for abusive forum shopping, namely the provisions relating to secondary proceedings, the understanding of the notion of the COMI, and the new Chapter V, which relates to the insolvency proceedings of members of a group of companies. The first of these are relevant to the analysis because they determine the extent to which a creditor can predict with certainty that a main proceeding will not be interrupted by the commencement of a secondary proceeding. The notion of the COMI is relevant because it helps all parties involved in a case of insolvency to determine with certainty which court will have jurisdiction and the applicable law to the proceedings. The new Chapter V on groups is also relevant because it attempts to enhance legal certainty in insolvency cases involving MCGs by utilising the mechanisms of cooperation and coordination.

(A) Secondary Proceedings

The New Recast EIR 2015 includes new provisions relating to secondary proceedings that have the potential to improve legal certainty for creditors in cross-border insolvency cases in general. This section explains the secondary proceedings system as envisaged by the New Recast EIR, illustrating the reasons behind the use of secondary proceedings and the nature of the changes introduced by the New Recast EIR 2015.

Secondary proceedings are proceedings other than main proceedings which are opened in a jurisdiction where the debtor has an establishment. According to Article 37(1), it is possible for the insolvency practitioner or ‘any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of

which the opening of secondary proceedings is requested'.³⁶ The right to open such secondary proceedings may be limited in accordance with Article 37(2) as a result of an undertaking made in accordance with Article 36, which will be explained in more detail later.³⁷ Prior to commencing any secondary proceedings, the insolvency practitioner of the main proceedings must be notified and given the opportunity to voice his opinion in accordance with Article 38(1).³⁸ Secondary proceedings can only be opened in a jurisdiction where the debtor has an 'establishment'. The New Recast EIR 2015 changed the definition of 'establishment' to include 'any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets'.³⁹ Other significant changes to this definition include replacing the term 'goods' with 'assets', which may add more certainty in regard to the inclusion of businesses in the services industry, as this industry does not trade in 'goods' and should be covered by the Regulation, as well as introducing a 3-month period for limiting the recognition of relocating a registered office or place of business for the purpose of determining the COMI, which may also increase certainty for creditors and help in reducing abusive forum shopping.⁴⁰

The system envisaged by the New Recast EIR 2015 is based on the assumption that in most cases there would only be one insolvency proceeding (i.e. the main one that commences at the location of the COMI). Such insolvency proceedings are expected to cover all the assets

³⁶ New Recast EIR 2015 art 37 (1); Robert Arts, 'Main and Secondary Proceedings in the Recast of the European Insolvency Regulation the only Good Secondary Proceeding is a Synthetic Secondary Proceeding'

<[https://www.iiiglobal.org/sites/default/files/media/Arts%20-](https://www.iiiglobal.org/sites/default/files/media/Arts%20-%20Main%20and%20Secondary%20Proceedings.pdf)

[%20Main%20and%20Secondary%20Proceedings.pdf](https://www.iiiglobal.org/sites/default/files/media/Arts%20-%20Main%20and%20Secondary%20Proceedings.pdf)>accessed 10 May 2016; Signe Viimsalu, 'The Meaning and Functioning of Secondary Proceedings' (PhD Thesis, University of Tartu 2011) 56.

³⁷ Samantha Bewick, 'The EU Insolvency Regulation Revisited' (2015) 24 *International Insolvency Review* 172, 181; Weiss (n 3) 206.

³⁸ Bob Wessels, *International Insolvency Law* (Kluwer 2012) 729.

³⁹ New Recast EIR 2015 art 2 (10).

⁴⁰ Van Calster (n 8) 15.

and creditors of the debtor irrespective of their location within the EU, and consequently, only one court should have jurisdiction over the insolvency proceedings. Such an approach for dealing with insolvency might reflect the intention to adopt the universality principle, where one court and one law apply to the insolvency proceedings.⁴¹ However, the New Recast EIR 2015, in a manner similar to the EIR 2000, permits secondary proceedings to be commenced alongside main proceedings to deal with the insolvency of the same debtor, as a result of which the approach adopted by the Regulation is, in fact, a modified universality approach.⁴² The modified universalism approach strives to strike a balance between purely territorial bankruptcy systems and a wholly universal bankruptcy system. It achieves this by reserving discretionary power to local courts to protect certain local interests,⁴³ and by giving local courts the right to assess the fairness of the home country's main proceedings and the right to protect the interests of local creditors as well as the interests of the State itself.⁴⁴ This is demonstrated in the New Recast EIR 2015 through the ability of the court in any Member State to commence secondary proceedings to protect its local creditors.⁴⁵

By permitting the commencement of secondary proceedings, the Regulation reduces legal certainty, since one cannot predict if and when they will be commenced and the extent to which they may interrupt the main proceedings. However, it must be admitted that secondary proceedings have some advantages that may justify their limited interference with main proceedings in rare circumstances. For instance, in certain jurisdictions, local preferential creditors, such as employees, may not have any preferential treatment in accordance with the

⁴¹ Universalism is explored in more detail in Chapter 1 section 1.2 (A).

⁴² Reinhard Bork and Renato Managano, *European Cross-Border Insolvency Law* (Oxford University Press 2016) 230.

⁴³ Ulrik Bang-Pedersen, 'Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests' (1999) 73 *American Bankruptcy Law Journal* 386.

⁴⁴ *ibid*; John Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests' (2006) 104 *Michigan Law Review* 1899.

⁴⁵ See Chapter 1.2(B) for an overview of the modified universalism approach.

applicable law of the jurisdiction where the main proceedings are taking place.⁴⁶ Having secondary proceedings can ensure that preferential creditors do not lose their privileges. Likewise, secondary proceedings can avoid clashes between domestic laws and may help avoid the complexity of administering a single, very large insolvency proceeding.⁴⁷ However, secondary proceedings should be avoided as much as possible to ensure the effective operation of the main proceedings.

Another significant change to the way secondary proceedings are handled under the New Recast EIR 2015 is that they are no longer limited to being winding-up proceedings.⁴⁸ The fact that the EIR 2000 allowed secondary proceedings only to be winding-up proceedings has been seen as an impediment to the development of a reorganisation culture in the EU,⁴⁹ as such winding-up proceedings made it extremely difficult, or at times impossible, to rescue a corporation or sell its assets as a going concern.⁵⁰ Under the New Recast EIR 2015, it is now possible for secondary proceedings to be either reorganisation or winding-up proceedings.⁵¹ In the latter, the assets of the company are liquidated in order to pay off the company's debt to its creditors according to their priority,⁵² whereas in the former, the objective is not to sell the company, but to rescue it and give it a chance to pay its debts back to its creditors.

⁴⁶ Michel Menjucq & Reinhard Dammann, 'Regulation No.1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon' (2008) 9 *Business Law International* 154; Federico Mucciarelli, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo' [Unpublished] (SSRN, 25 August 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650414> accessed 26 April 2016 17.

⁴⁷ Bork and Managano (n 42) 231-234; Gerard McCormack, 'Reforming the European Insolvency Regulation: A Legal and Policy Perspective' (2014) 10 *Journal of Private International Law* 41.

⁴⁸ Richard Tett and Katharina Crinson, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision' (2015) 8 *Corporate Rescue and Insolvency* 1756, 1764.

⁴⁹ Emilie Ghio, 'European Insolvency Law : Development ,Harmonisation and Reform A Case Study on the European Internal Market' (2015) 1 *Trinity College Law Review* 154,164

⁵⁰ Manfred Balz, 'The European Union Convention on Insolvency Proceedings' (1996)

70 *American Bankruptcy Law Journal* 485, 520.

⁵¹ Mucciarelli (n 46) 17.

⁵² Tomas Arons, 'Recognition of Debt Restructuring and Resolution Measures under the European Union Regulatory Framework' (2014) 23 *International Insolvency Review* 57.

Reorganisation can also ensure the employees of the company do not lose their jobs and that the company continues to operate while satisfying its debts.⁵³

Another major development in the New Recast EIR 2015 is the concept of ‘synthetic secondary proceedings’. This has been described by Mucciarelli as the ‘most significant innovation’ in the New Recast EIR 2015.⁵⁴ In accordance with Article 46, the insolvency practitioner of the main insolvency proceedings may request from a court that has opened secondary proceedings ‘to stay the process of realisation of assets in whole or in part’. The court may require the insolvency practitioner ‘to take any suitable measures to guarantee the interests of the creditors in the secondary insolvency proceedings and of the individual classes of creditors’. The secondary proceedings court may reject the request of the insolvency practitioner ‘if it is manifestly of no interest to the creditors in the main insolvency proceedings’. This is a great addition to the New Recast EIR 2015, as it has the potential to reduce costs and consolidate the insolvency procedure with the objective of maximising the opportunity for creditors to receive their money back. By empowering the insolvency practitioner to stay secondary proceedings, the insolvency practitioner can make the main insolvency proceedings more predictable and certain to creditors because doing so reduces the potential for the main insolvency proceedings to be disrupted by secondary proceedings. However, a minor concern with this provision is that the term ‘manifestly’ is not defined and therefore undermines legal certainty in this context.

⁵³ Gordon Johnson, ‘The European Union Convention on Insolvency Proceedings: A Critique of the Corporate Rescue Paradigm’ (1995) 5 *International Insolvency Review* 80; Muir Hunter, ‘The Nature and Functions of A Rescue Culture’ (1999) 104 *Commercial Law Journal* 426.

⁵⁴ Mucciarelli (n 46) 18; Paul Omar, ‘The Inevitability of Insolvency Tourism’ (2015) 62 *Netherlands International Law Review* 429, 437.

This last innovation involves a codification of recent English High Court decisions.⁵⁵ In the case of *Re Nortel Networks SA*,⁵⁶ the court in charge of the main proceedings mandated that the insolvency practitioner should be involved in any decision to open secondary proceedings. Consequently, insolvency practitioners of a number of companies in the Nortel Group were allowed to order other courts in the EU to give notice prior to commencing secondary insolvency proceedings in relation to the insolvency cases of any member of the Nortel Group.⁵⁷ The objective of this was to allow a more effective global structuring and maximise the benefits to creditors.⁵⁸ The involvement of the insolvency practitioner can help reduce the circumstances in which secondary proceedings may be opened and therefore minimises the risk that such secondary proceedings will obstruct the main proceedings as well as reduces the potential for increased costs and delays.

For example, if main proceedings commence in one of the Member States, the potential for these main proceedings to be disrupted remains an uncertain risk for creditors throughout the proceedings, but the new provisions in the New Recast EIR 2015 help reduce this risk by facilitating ‘synthetic’ secondary proceedings whereby an insolvency practitioner requests a court that opens secondary proceedings to stay their proceedings with a promise to respect the interests of local creditors. Therefore, changes to the system of secondary proceedings in the New Recast EIR 2015 are a positive contribution to the law and to enhancing legal certainty for creditors in cross-border insolvency cases, especially now that secondary proceedings are not limited to being winding-up proceedings, that they only acknowledge changes to the

⁵⁵ *Re Collins & Aikman SA and others* [2006] EWHC 1343 (Ch) paras 5-6; *Re MG Rover Espana SA and others* (Norris J, 11 May 2005, Chancery Division, High Court: Birmingham District Registry), reported in Springford (2005).

⁵⁶ *Re Nortel Networks SA* [2009] EWHC 206, [2009] BCC 343.

⁵⁷ *ibid*; Bob Wessels, ‘The Role of Courts in Solving Cross-Border Insolvency Cases’ (2011) *Insolvency Intelligence* 24 65.

⁵⁸ Gerard McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (2016) 79 *The Modern Law Review* 121, 134.

relocation of the establishment if such relocation has taken place more than three months prior to the commencement of insolvency proceeding, and that the insolvency practitioner may be able to reduce the potential of secondary proceedings to disrupt the main insolvency proceedings. However, Tollenaar stresses that secondary proceedings are meant to be the exception, and it would be more effective for an insolvency to be dealt through one main proceeding with minimum distractions from secondary proceedings.⁵⁹ As noted by Bewick, as ‘useful as these changes [to secondary proceedings] will be, a degree of caution is still required. If the rights of the local creditors are respected, opening secondary proceedings, in addition, may introduce an unhelpful degree of cost and complexity. Secondary proceedings should remain rare’.⁶⁰

(B) Clarification of the Notion of the COMI

The second main feature is the clarification of the COMI under the New Recast EIR 2015. The foreseeability of the COMI is highly relevant to the cross-border insolvency of MCGs. Part of the insolvency risk calculation made by creditors intending to undertake business with a certain company requires them to anticipate the jurisdiction where claims would be filed in the event that the company becomes insolvent.⁶¹ The analysis of the notion of the COMI in Chapter 2 highlighted its shortcomings in terms of improving legal certainty for creditors in insolvency cases of MCGs under the EIR 2000. This was demonstrated by analysing the vague definition of the COMI under the EIR and by looking at the jurisprudence of domestic courts and the CJEU in this regard. The lack of certainty resulting from the ambiguity of the notion of the COMI is a great concern because it can lead to abusive forum shopping that is harmful to creditors. The New Recast EIR 2015 attempts to resolve this problem by codifying

⁵⁹ Nicholaes Tollenaar, ‘Dealing with the Insolvency of Multi-National Groups Under the European Insolvency Regulation’ (2010) 23 *Insolvency Intelligence* 65.

⁶⁰ Bewick (n 37) 183.

⁶¹ Garcimartin (n 15) 13.

the jurisprudence of the CJEU.⁶² This section thus examines the extent to which the New Recast EIR 2015 contributes to defining the COMI for the benefit of creditors in insolvency cases involving MCGs.

Article 3 also provides new concrete limitations on forum shopping by revoking the presumption of the COMI as being the place of the registered office if a legal entity changes its office to another Member State within three months prior to the request for the opening of insolvency proceedings.⁶³ This is very useful for meeting creditor expectations, as companies which try to abuse the notion of the COMI by moving their registered office to another jurisdiction will not be able to benefit from this transfer unless a period of three months has passed.⁶⁴

The New Recast EIR 2015 does not attempt to resolve the uncertainties pertaining to insolvency cases of MCGs by establishing a new method for identifying the COMI of an MCG that differs from that of individual companies, but instead it did so by enhancing the clarity of the notion of the COMI in general. This should not be regarded as a lacuna; rather it should be seen as a specific policy decision consistent with the approach of allowing each individual case to be determined on its merits, as endorsed by in Article 3.⁶⁵ As argued by Bork and Mangano, this implies that, as a general rule, there will be as many COMIs as there are companies.⁶⁶ The main idea underlying the clarifications made to the notion of the COMI in the New Recast EIR 2015 was to consolidate the existing jurisprudence of the CJEU and

⁶² *ibid*; Gerald McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 69 *The Cambridge Law Journal* 169.

⁶³ New Recast EIR 2015 art 3(1) paras 2-4. The three-month rule applies to (a) legal persons or (b) individuals exercising an independent business or professional activity. For individuals other than those exercising an independent business or professional activity, the term is extended to six months.

⁶⁴ Recital 31 and art 3(1) the three months applies to businesses, whereas the six-month period applies to individual debtors; Garcimartin (n 15) 14.

⁶⁵ Bork and Mangano (42) 282.

⁶⁶ *ibid* 283.

some of the domestic decisions of various Member States in a clear and explicit manner, rather than introduce structural changes to the COMI. Therefore, the changes made to the COMI in the New Recast EIR 2015 did not transform it drastically, but maintained the approach of the CJEU in *Eurofood*.⁶⁷ Instead, the New Recast EIR 2015 adopted an elaborate chapter on cooperation and coordination, which will be discussed separately below, to help mitigate the problems associated with the insolvency of MCGs.

The notion of the COMI under the New Recast EIR 2015 has been clarified, to the benefit of creditors in insolvency cases of MCGs, in a number of ways. First of all, the definition of the COMI is now a substantive provision in the Regulation and not merely a concept in the preamble. The inclusion of the notion of the COMI in the preamble of the previous EIR 2000 meant that it was a non-binding explanatory notion, while the inclusion of a substantive provision in the New Recast EIR 2015 makes it a binding legal concept that courts have no choice but to abide by. This is also highlighted by replacing the term ‘should’ with the term ‘shall’.⁶⁸ However, the benefits of the relocation of the notion of the COMI from the preamble to the body of the Regulation should not be overstated, because the definition of the COMI has not dramatically changed.⁶⁹ Bork and Mangano argue that the removal of the term ‘therefore’ from the definition has added more clarity to its meaning, as this single word ‘had been responsible for a number of interpretative problems’.⁷⁰ However, there has been no case

⁶⁷ Ignacio Tirado, ‘An Evaluation of COMI in the European Insolvency Regulation: From ‘Insolvenzimperialismus’ to the Recast’ [Unpublished] (*SSRN*, 6 November 2015) accessed 3 June 2016 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2688169>.

⁶⁸ For an overview of the significance of the use of the term ‘shall’ in legal documents, see Kenneth Adams, ‘Making Sense of Shall’ [2007] *New York Law Journal* 1.

⁶⁹ According to art 3(1) of the New Recast EIR, ‘The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties’, while according the Recital 13 of the EIR 2000, ‘The “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’.

⁷⁰ Bork and Mangano (n 42) 80.

thus far where the term ‘therefore’ has caused a problem in the interpretation of the notion of the COMI.

Additionally, the notion of the COMI has been made clearer in the Regulation through a number of recitals that are useful in ensuring a consistent and predictable interpretation. Even though these recitals do not lay out any ground-breaking principles for interpreting and applying the notion of the COMI, as they merely primarily codified CJEU case law in relation to the COMI, the process of codifying such jurisprudence into the text of the Regulation adds a great level of certainty as it makes them an indisputable part of the law.⁷¹ The first of these recitals is Recital 28, which incorporates the principles established in cases like *ISA Daisytek* relating to the understanding of the term ‘third parties’.⁷² Recital 28 provides that the term ‘third parties’ focuses on creditors by stating that a shift in the COMI may require ‘informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means’.⁷³ As the EIR 2000 did not clarify who may be included in the term ‘third parties’, the addition of this recital enhances the position of creditors in regard to this concept.⁷⁴

⁷¹ Mucciarelli (n 46) 19.

⁷² *Re Daisytek ISA Ltd* [2003] BCC 562- [2003] EIRCR (A) 266; Gabriel Moss, ‘Coordination of Multinational Corporate Group Insolvencies: Solving the COMI Issue. Group Insolvency Choice of Forum and Law: the European Experience under the Influence of English Pragmatism’ (2007) 32 Brooklyn Journal of International Law 1005; Gabriel Moss and Christoph Paulus, ‘The European Insolvency Regulation –the Case for Urgent Reform’ (2006) 19 Insolvency Intelligence 1.

⁷³ Recital 28 reads as follows: ‘When determining whether the centre of the debtor’s main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to whether a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example, by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means’.

⁷⁴ New Recast EIR recital 5 and 11.

In an attempt to safeguard against abusive forum shopping,⁷⁵ Recital 30 codifies the principle established in the *Interdil* case that the ‘registered office’ approach will be rebutted as the basis for allocating the COMI if the place of the central administration is not the same as the place of the registered office.⁷⁶ According to Recital 30, the court may rebut the presumption that the COMI is located at the place of the registered office if ‘a comprehensive assessment of all relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in another Member State’.⁷⁷ This helps improve the clarity of the notion of the COMI from the perspective of creditors in insolvency cases of MCGs by clearly stating that the registered office presumption may be rebutted and by setting the conditions for applying the ‘centre of administration’ approach in a manner that takes into consideration the expectations of creditors (by requiring the place to be ‘ascertainable by third parties’). For example, if a company operates and is managed from a certain Member State, but it is registered in another Member State merely to benefit from the legal aspects of registration in that location, the court can determine the COMI to be at the place of central administration and not the place of registration, especially if the place of central administration is ascertainable by creditors. While one can argue that the registered office approach is more

⁷⁵ The objective of preventing forum shopping has been expressed in Recital 29 which reads as follows: ‘This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping’. However, the actual safeguards are stipulated in the following recitals such as Recital 30 and 31.

⁷⁶ Case C-396/09 *Interdil Srl (In liquidation) v Fallimento Interdil Srl and another* [2011] WLR 334.

⁷⁷ Recital 30 reads as follows: ‘Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor’s main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company’s central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State. In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor’s assets is located outside the Member State of the debtor’s habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation’; Heribert Hirte, ‘Towards a Framework for the Regulation of Corporate Groups Insolvencies’(2008) 5 European Company and Financial Law Review 213.

predictable and certain than the place of central administration, the New Recast EIR 2015 acknowledges that this position could be easily abused by companies and may be misleading to many creditors who identify a company by its place of operation and are not necessarily aware of where the company is registered. It is therefore justified that the registered office approach is rebutted in such cases.

The New Recast EIR, therefore, does not prohibit the relocation of the COMI for insolvency purposes, and, in other words, does not prohibit forum shopping, as long as the relocation is real and ascertainable for the purposes of the insolvency proceedings.⁷⁸ However, Tidaro convincingly argues that:

The expression is confusing. It is unclear what “management” means or, at least, how it is different to the “centre of management and supervision”. The interpreter may choose to believe that the legislator, and previously the ECJ, is being redundant by using two different expressions for the same concept; but it is also arguable that the expression “management of its interests” may be referring to the direct, physical conduction of businesses (ie, where the main productive or commercial centre is located), something that would not normally be comprised in the “Central administration” concept.⁷⁹

Additionally, Garcimartin logically questions the practical effectiveness of these safeguards:

For companies, a shift of the registered office would imply a change of *lex societatis*. Most legal systems, however, establish rules aimed at protecting shareholders and creditors *vis a vis* such changes, so that risk of *forum shopping* via change of registered office is more costly and cumbersome than genuine factual shift of the COMI.⁸⁰

⁷⁸ Garcimartin (n 15) 14.

⁷⁹ Tirado (n 67) 17, 18.

⁸⁰ Garcimartin (n 15) 21.

It is also worth noting that the New Recast EIR 2015 is the first EU legal text that distinguishes between positive and negative forum shopping, as the New Recast EIR 2015 clearly prohibits ‘fraudulent and abusive forum shopping’, which inversely means that forum shopping that is not fraudulent or abusive and positively contributes to insolvency proceedings is permitted.⁸¹ This is unlike the EIR 2000, which mentioned forum shopping in general without distinguishing between positive and negative forum shopping. However, even though this distinction is a great development, it is not easy for the courts to differentiate between positive and negative forum shopping, as the interests of the creditors, debtors, and directors are not necessarily the same. For example, a certain jurisdiction might appear favourable to a creditor because of the priority given to the creditor under the law of that jurisdiction, yet the same jurisdiction might appear unfavourable to a director because the law of that country might not permit reorganisation of the company and therefore it will limit the ability of the director to rescue the company. Therefore, what might appear to be efficient or useful forum shopping for one party might not be efficient or useful for another.

In conclusion, the New Recast EIR 2015 makes a substantial contribution towards removing the ambiguity and uncertainty regarding the notion of the COMI. The codification of court decisions relating to the notion of the COMI, such as those that clarify that creditors should be the main focus in the interpretation of the term ‘third parties’, as well as those that detail the conditions for rebutting the registered office approach, are all helpful in ensuring the consistent application of this notion across the EU. However, a number of these clarifications are made in recitals rather than in the body of the Regulation, which reduces the certainty that they will be strictly followed by the courts. Similarly, there are some concerns regarding the use of the centre of administration approach when rebutting the registered office approach in

⁸¹ New Recast EIR recitals 5, 29 to 32.

cases where a company opens several operational establishments with no single main headquarters.⁸² It is not clear in this case how the court will determine the COMI.

(C) Chapter V on Insolvency Proceedings of a Member of a Group of Companies

The third and final main feature relevant to the analysis is the new Chapter V on the insolvency proceedings of members of a group of companies. As explored in the previous chapters, there is usually a domino effect within a group when one member goes into insolvency, as it usually means that the whole group is facing financial difficulties. However, the fact that each member of the group has a separate legal personality means that the assets of one member cannot be legally acquired in order to pay the debts of another member in the event of insolvency.⁸³ The reality of multiple debtors and creditors being scattered across different jurisdictions makes it difficult to determine the most appropriate jurisdiction for commencing insolvency proceedings and makes the coordination between different insolvency proceedings very challenging.⁸⁴ All this complexity contributes to increased costs in the insolvency proceedings for all parties involved and makes the process extremely lengthy in terms of time.⁸⁵ The fact that the interests of both debtors and creditors involved in the insolvency proceedings are divergent, and at many times conflicting, can lead to abusive forum shopping, which could consequently have a negative impact on legal certainty for determining jurisdiction and the applicable law.⁸⁶

⁸² Irit Mevorach, 'The Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57 The International and Comparative Law Quarterly 427,441.

⁸³ Damien Murphy, 'Holding Company Liability for Debts of Its Subsidiaries: Corporate Governance Implications' (1998) 10 Bond Law Review 241; Epp Aasaru, 'The Desirability of 'Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law' (2011) 22 European Law Review 351.

⁸⁴ Jona Israel, *European Cross-Border Insolvency Regulation* (Hart Publishing 2005) 11.

⁸⁵ Eva M F de Vette, 'Multinational Enterprise Groups in Insolvency: How Should the European Union act?' (2011) 7 Utrecht Law Review 216.

⁸⁶ Bob Wessels, 'The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation' (2009) 6 European Company Law 169; Irit Mevorach, 'Towards a Consensus on the Treatment of

The new Recast EIR 2015 includes an entirely new chapter entitled “Insolvency Proceedings of Members of a Group of Companies” that aims to overcome some of the challenges associated with the cross-border insolvency of MCGs in the EU.⁸⁷ This chapter does not use a ‘one group-one COMI’ approach, even though Bork and Mangano believe that this chapter ‘seems to permit’ it, albeit ‘to a limited extent’.⁸⁸ The New Recast EIR 2015 instead adopts a ‘one group-many COMIs’ approach by respecting the separate legal personality of each member of the group and facilitating a more efficient group-wide insolvency process through cooperation among the insolvency practitioners and the courts involved in the insolvency proceedings of the various members of the group, and through non-mandatory coordination between the insolvency proceedings.⁸⁹

This section explores the two main mechanisms provided by the New Recast EIR 2015 directed towards the insolvency of MCGs, cooperation and coordination, and evaluates the extent to which they may contribute to enhancing legal certainty for the benefit of creditors. Therefore, the first part will look at cooperation and communication, while the second will look at coordination.

(i) Cooperation and Communication

As discussed in Chapter 3 of this Thesis, one of the issues with the EIR 2000 was the fact that it only regulated cooperation between liquidators involved in main and secondary

Multinational Enterprise Groups in Insolvency’ (2010) 18 Cardozo Journal of International & Comparative Law 359.

⁸⁷ Ioanna Chaika, ‘Insolvency of Group of Companies Through the Prism of the Recast Insolvency Regulation (EU) 2015/848’ [Unpublished] (SSRN, 13 August 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687623>

accessed 30 April 2016; Kristin Zwieten, ‘An Introduction to the European Regulation, as Made as Recast’ [Unpublished] (SSRN, 1 April 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775814> accessed 13 June 2016.

⁸⁸ Bork and Mangano (42) 282.

⁸⁹ Bork and Mangano (42) 282.

proceedings and only in relation to the insolvency of a single company.⁹⁰ This meant that there was no legal framework for a liquidator to cooperate with a court or for a court to cooperate with another court; moreover, there was no legal framework to enable cooperation between insolvency proceedings relating to different members of a group of companies, either between liquidators or between courts.⁹¹

The New Recast EIR 2015 attempts to fill this gap by introducing a section in the new Chapter V on cooperation and communication. In accordance with Chapter V, insolvency practitioners and courts may cooperate and communicate to ensure the effective administration of the insolvency proceedings of different members of a group of companies. Such cooperation may take any form, such as through the conclusion of an agreement or a protocol. The New Recast EIR 2015 does not require a specific format for such agreements or protocols, as Recital 49 states that they can take any form, written or oral, and may cover any scope, whether generic or specific, and may be concluded between different parties, for example between insolvency proceedings or between courts.⁹²

The New Recast EIR 2015 permits cooperation between insolvency practitioners with the objective of exchanging information, considering the possibility of coordinating the group insolvency in accordance with Section 2 of Chapter V, and considering the possibility of restructuring the group members involved in the insolvency proceedings.⁹³ The Regulation also permits cooperation between the courts involved with the objective of coordinating the appointment of the insolvency practitioner, communicating information, coordinating the administration of the assets, coordinating the conduct of the hearings, and coordinating the

⁹⁰ EIR 2000 art 31(1).

⁹¹ Michele Reumers, 'Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR' (2013) 4 European Company and Financial Law Review 554.

⁹² New Recast EIR recital 49.

⁹³ New Recast EIR 2015 art 56(2).

approval of any necessary protocols.⁹⁴ Finally, the Regulation permits cooperation between insolvency practitioners and the court in regard to requests for the opening of proceedings in respect of another member of the same group, requesting information concerning the proceedings regarding other members of the group, and requesting assistance concerning the proceedings.⁹⁵ The cooperation section of Chapter V also grants insolvency practitioners a number of extra powers relating to the proceedings of other members of a group of companies with the objective of facilitating the effective administration of the proceedings. Such powers include the right to be heard in any of the proceedings opened in respect of any other member of the group, the right to request the stay of any measure relating to the realisation of the assets of any other member of the group for a period of up to three months, and the right to apply for the opening of group coordination proceedings in accordance with Section 2 of Chapter V.⁹⁶

The new provisions in the New Recast EIR 2015 on cooperation in the insolvency cases of MCGs are a great addition towards enhancing legal certainty in such cases, as the law now clearly provides a framework for insolvency practitioners and the courts to cooperate. This is especially useful in situations where the integration between members of the group is very high and the relationship very strong, and such cooperation becomes the optimal way to maximise the return for creditors or to ascertain the best way to avoid multiple insolvency proceedings and facilitate the reorganisation of the entire group.⁹⁷ The New Recast EIR 2015 attempts to ensure that such cooperation is undertaken for the benefit of creditors and requires that the cooperation and communication be appropriate to facilitate effective administration,

⁹⁴ New Recast EIR 2015 art 57(3).

⁹⁵ New Recast EIR 2015 art 58.

⁹⁶ New Recast EIR 2015 art 60(1); Martin Davies, 'Parallel Proceedings for Insolvency and Limitation of Liability' (2015) 1 Lloyd's Maritime and Commercial Law Quarterly 24.

⁹⁷ Philipp Esser, 'Reform of the EU Regulation New Framework for Insolvent Company Groups: Part 1' (2015) 34 American Bankruptcy Institute Journal 38.

that they do not entail any conflict of interest, and that appropriate arrangements are made to protect confidential matters.⁹⁸ The existence of such rules enabling cooperation among insolvency practitioners and the courts may be seen a step away from modified universalism and towards a universal approach in the EU.⁹⁹ This is a positive step, as the closer the policy gets towards universalism, the more certain the proceedings become, as a single court applying a single law is more certain.

While acknowledging the benefits of having a mechanism for cooperation in the New Recast EIR 2015 in terms of facilitating the efficient administration of cross-border insolvencies of MCGs, there remains a considerable amount of uncertainty with regard to its actual, practical implementation. The New Recast EIR 2015 does not make cooperation mandatory; rather, it is up to the insolvency practitioner and the courts to initiate a request for cooperation.¹⁰⁰ As this is a new mechanism in the EU, only time will tell if such a culture of cooperation exists amongst insolvency practitioners and judges, especially as there might be non-legal barriers to cooperation, such as linguistic and logistical barriers.¹⁰¹ The text of the New Recast EIR 2015 itself also contains a number of new terms and concepts that remain uncertain. For example, Article 56 permits cooperation ‘to the extent that such cooperation is appropriate’, but does not define what would be considered ‘appropriate’.¹⁰² Similarly, Article 60(1) (a) (i) uses the phrase ‘reasonable chance of success’, which again may be a cause of uncertainty.¹⁰³

⁹⁸ New Recast EIR 2015 art 56 (2) (a) and art 57(1); Bork and Mangano (42) 289.

⁹⁹ See chapter 1; Moss and Paulus (n 72) 4.

¹⁰⁰ Gerard McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (n 58) 144; Bob Wessels, ‘A Glimpse into the Future: Cross-Border Judicial Cooperation in Insolvency Cases in the European Union’ (2015) 24 *International Insolvency Review* 96.

¹⁰¹ Bob Wessels and Miguel Virgos, ‘European Communication and Cooperation Guidelines for Cross-Border Insolvency’ (*INSOL Europe*, July 2007)

<<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>> accessed 30 April 2016.

¹⁰² Esser (83) 38.

¹⁰³ New Recast EIR 2015 art 60.

(ii) Coordination

In addition to the cooperation and communication provisions, the New Recast EIR provides a much more powerful and useful system for coordination between the insolvency proceedings of different members within a group. According to the system of coordination provided in the New Recast EIR 2015, group coordination proceedings may be requested by an insolvency practitioner before any court involved in insolvency proceedings of any member of the group.¹⁰⁴ The objective of such coordination is to ensure the efficient administration of the insolvency proceedings of all members of the group.¹⁰⁵ Such coordination is to be administered by the insolvency practitioner, to be identified as the coordinator, and the court first seized shall have exclusive jurisdiction over the coordinated insolvency proceedings.¹⁰⁶

However, this system of coordination is not mandatory, as the insolvency practitioners responsible for insolvency proceedings of other members of the group may accept or decline to join the coordination plan.¹⁰⁷ The insolvency practitioner may object to joining a coordination plan on two grounds: an objection may be raised against the coordination plan itself or an objection may be raised against the proposed coordinator.¹⁰⁸ It is also possible for an insolvency practitioner to subsequently join group coordination proceedings even if an objection was made at an earlier stage. It is possible for the insolvency practitioners to agree that a specific court is the most appropriate for the group coordination proceedings if two-thirds of all appointed insolvency practitioners agree in writing to such an allocation.¹⁰⁹ The group coordination proceedings shall be conducted in accordance with the coordination plan designed by the insolvency coordinator. The coordinator may also issue recommendations for

¹⁰⁴New Recast EIR 2015 art 61.

¹⁰⁵ New Recast EIR 2015 art 63.

¹⁰⁶ New Recast EIR 2015 art 66 (1).

¹⁰⁷ New Recast EIR 2015 art 66(3).

¹⁰⁸ New Recast EIR 2015 art 64.

¹⁰⁹ New Recast EIR 2015 art 66.

all insolvency practitioners joining the group coordination proceedings. However, the insolvency practitioners are not obliged to follow, either in whole or in part, the recommendation or the plan of the coordinator.¹¹⁰ The coordinator also has other rights, such as the right to be heard and participate in any proceedings relating to the insolvency proceedings of any member of the group.¹¹¹

The approach taken by the New Recast EIR 2015 was to respect the separate legal personality of the members of the group and, as argued by Thole and Duenas, wisely adopts a soft approach instead of following the substantive consolidation approach.¹¹² The coordination approach taken by the New Recast EIR 2015 promotes efficiency while acknowledging, first, that there might be areas of inconsistency in the substantive consolidation approach, and second, the inherent difficulty in bringing all of the assets of the members of the group together under one proceeding in light of the inevitable legal discrepancies arising from the application of foreign laws.¹¹³ This coordination approach attempts to achieve consistency across the insolvency proceedings of all of the members of the group through coordination between the group coordinator and the insolvency practitioners at the insolvency proceedings of the members.¹¹⁴ Also, as noted by van Calster, the possibility of having two-thirds of the insolvency practitioners agree regarding which court has exclusive jurisdiction is a welcome step for avoiding the hijacking of the proceedings by a minority and ‘effectively amounts to cram-down of choice of court of group coordination proceedings’.¹¹⁵ An effective implementation of this coordination approach could have a positive impact on the cost and

¹¹⁰ New Recast EIR 2015 art 70 (2).

¹¹¹ New Recast EIR 2015 art 72 (2).

¹¹² Christoph Thole and Manuel Duenas, ‘Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation’ (2015) 24 *International Insolvency Review* 214. See Chapter 3 for more details about substantive consolidation approach.

¹¹³ Thole and Duenas (n 112) 215.

¹¹⁴ *ibid.*

¹¹⁵ Van Calster (n 8) 14.

may help save time in the overall insolvency proceedings of the group, as the group coordinator can ensure the reduction of repetition, the mediation of disputes, and the provision of information to all insolvency practitioners involved in the proceedings.¹¹⁶

The coordination approach adopted by the New Recast EIR 2015 can be extremely useful in cases of group insolvencies. However, there are a number of drawbacks in the way this approach has been implemented by the Regulation that negatively contribute by reducing legal certainty for creditors and other relevant parties. First of all, it is not entirely clear which court has jurisdiction to oversee the group coordination proceedings. Also, the fact that two-thirds of the insolvency practitioners can agree to change the court that has jurisdiction may act as a guarantee that the most appropriate court will be in charge, but the Regulation does not provide guidelines on how this selection is to be made.¹¹⁷ Secondly, participation in the group coordination proceedings is voluntary, and insolvency practitioners are not required to join the coordination proceedings if they are not happy with them or with the insolvency practitioner making the request, and, as noted by Weiss, ‘unfortunately, the group coordination plan can turn into a lame duck as there is no obligation on the insolvency practitioner to follow any recommendation or the coordination plan’.¹¹⁸

The New Recast EIR 2015 also provides a great deal of flexibility in the coordination proceedings and allows insolvency practitioners to join them even if they object to doing so at the beginning. While this may seem useful, it makes the process very unpredictable and uncertain. Thirdly, the recommendations and the plan issued by the coordinator are not binding, and the Regulation makes it very clear that insolvency practitioners are not under

¹¹⁶ Thole and Duenas (n 112) 216.

¹¹⁷ New Recast art 66.

¹¹⁸ Weiss (n 3) 212.

obligation to follow the recommendations or the plan in whole or in part.¹¹⁹ This creates further uncertainty. Finally, the Regulation is also not entirely clear as to how the coordination itself is meant to be carried out effectively. In particular, there are no guarantees that the coordination will not damage the interests of the creditors or that it will balance the interests of all stakeholders.¹²⁰

However, even with these drawbacks, as Thole and Duenas note, the ‘rules for the new group coordination proceedings can be useful in isolated cases’.¹²¹ McCormack understandably worries that the ‘voluntary nature of the regime, however, many mean that they are unlikely to be much used in practice but they may have a use in the ‘big ticket’ cases where there is a high degree of coordination among [insolvency practitioners] at the outset.’¹²² The coordination is definitely a positive step towards creating a legal framework for dealing with the insolvency cases of MCGs, but there is still room for improvement, especially in order to enhance legal certainty for creditors in such cases.

This section has explored the main provisions of the New Recast EIR 2015 that may contribute to enhancing legal certainty in cross-border insolvency cases involving MCGs, namely the new provisions on secondary proceedings, the new provisions clarifying the notion of the COMI, and the new Chapter V on the insolvency proceedings of members of a group of companies. The analysis above demonstrates that these provisions provide great opportunities for enhancing legal certainty and reducing the possibility of abusive forum shopping. However, this section also highlighted some of the shortcomings of these new provisions. Therefore, the next section points out a number of opportunities for reforming the

¹¹⁹ New Recast EIR 2015 art 70 (2).

¹²⁰ Thole and Duenas (n 112) 216.

¹²¹ *ibid* 227.

¹²² McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (n 58) 144.

New Recast EIR with the objective of further improving legal certainty for the benefit of creditors.

4.3 Opportunities for Reform

It is acknowledged that the New Recast EIR 2015 is a major step forward towards resolving many of the shortcomings of the EIR 2000 in dealing with cross-border insolvency cases of MCGs. However, in light of the examination of the New Recast EIR 2015 and its shortcomings, there is still room to further enhance legal certainty, to the benefit of creditors, in such insolvency cases. Therefore, this section makes a number of proposals which would render the Regulation more effective in this regard.

These proposals may be classified into two main categories: proposals for substantive provisions and proposals for procedural provisions. In regard to the substantive provisions of the New Recast EIR 2015, the discussion above demonstrated the need for greater clarity and precision in defining the terms and concepts used in the Regulation, which should consequently reduce the opportunity for abusive forum shopping. For example, the terms ‘ascertainable’, ‘regular basis’, ‘reasonable’, ‘manifestly’ and ‘appropriateness’ need to be defined in a much clearer manner to avoid divergent interpretations of these terms or concepts by courts in the EU. Such improvements in clarity will definitely enhance legal certainty, which is one of the primary aims of the New Recast EIR 2015. Some commentators, such as Mucciarelli, are optimistic that the CJEU will play a pivotal role in the development of a clearer interpretation of these concepts.¹²³ It is also possible that legislators of the next Regulation will clarify the meanings of these terms.

¹²³ Mucciarelli (n 46) 20.

The New Recast EIR 2015 does not change the notion of the COMI, but it helps clarify what this means through Recitals 30, 32, and 33, which explain that the court's decision in the *Interdil* case is the one to be followed, that creditors may present their views to the court if the applicable law permits it, and that the court may refuse to open main insolvency proceedings if it comes to the conclusion that the COMI is not located within its jurisdiction. Recital 53 provides additional useful guidance on the notion of the COMI and how it can be applied in the context of groups of companies. However, the fact that this guidance is found in a recital may limit its usefulness and fails to guarantee that it will be applied in the intended manner in all cases, which could adversely affect legal certainty in insolvency cases of MCGs. Additionally, a major area of ambiguity is in the fact that the factors for which the presumption that the COMI is at the place of the registered office may be rebutted still remain ambiguous, as the New Recast EIR 2015 has not made this matter any clearer. The courts have identified some of these factors in cases made in accordance with the current EIR, but the priority and the weight of each one of them are yet to be determined. It is proposed that the legislators of the next Regulation establish a clear and precise definition of these factors.

One of the developments in the New Recast EIR 2015 is its distinction between abusive and beneficial forum shopping, which is embodied in the Regulation through provisions that enable creditors to present their views with regard to determining jurisdiction to the courts.¹²⁴ This solution is not perfect, however, because it is not compulsory for the court to take into consideration the views of the creditors. This position may be justified because creditors are not the only stakeholders in insolvency proceedings, and it might be necessary in certain cases for the court not to take their views if that would be prejudicial to the interests of others. The New Recast EIR 2015 also does not clearly distinguish between abusive and

¹²⁴ RJde Weijjs and MS Breeman, 'Comi-Migration: Use or Abuse of European Insolvency Law' (2015) 11 European Company and Financial Law Review 495.

beneficial forum shopping, probably because, as discussed earlier, the divergent interests of the various stakeholders in insolvency proceedings could mean that what is considered abusive for one party may be beneficial to another. It is therefore proposed that the legislator of the next Regulation make it clear that the understanding of the term ‘abusive’ should be made with reference to the impact of forum shopping on creditors. Similarly, the Regulation does not specify how to deal with cases where there are conflicting views amongst creditors regarding the determination of jurisdiction, which can be problematic when some consider the forum shopping to be abusive while others consider it to be beneficial. Article 66 of the New Recast EIR 2015 provides a mechanism for dealing with a multiplicity of views among creditors in regard to group cooperation proceedings by requiring a minimum of two thirds of the creditors to share the same view for it to be considered valid. Therefore, it is proposed that this same principle be used where there are conflicting views among the creditors in regard to the determination of jurisdiction in cases of abusive forum shopping.

In addition to the proposals for improving the substantive provisions of the New Recast EIR 2015, there are a number of proposals for improving the procedural provisions of this Regulation. First of all, the new provision in Article 3(1), which states that the COMI is presumed to be the place of the registered office, does not apply if the registered office has been moved to another Member State less than 3 months before the commencement of the insolvency proceedings. This is a positive move towards combating abusive forum shopping. However, the New Recast EIR 2015 sets this period at 3 months for companies and 6 months for individuals. The rationale behind this distinction is not clear, and it appears to make more sense to set the longer period for businesses that are riskier to creditors, such as MCGs. The longer the limitation period, the more protected creditors are from abusive businesses that would relocate their registered office for the sake of avoiding liability.

The cooperation and coordination mechanisms found in Chapter V are some of the great innovations of the New Recast EIR 2015 that may be utilised by insolvency practitioners and courts alike to the benefit of creditors and the insolvency proceedings of the group as a whole. However, not all jurisdictions have the required legal framework to enable such cooperation and coordination, especially for their courts to cooperate with foreign courts. Even though Recital 61 states that the application of national laws should not ‘impair the efficiency of the rules’ on cooperation, communication, and coordination, there still needs to be a binding mechanism for ensuring that the domestic laws of Member States facilitate cooperation and coordination.¹²⁵

It is acknowledged that legislative solutions are extremely cumbersome to realise, and therefore, the duty lies on judges to give effect to the commercial realities of situations involving MCGs in their interpretation of the COMI and by embracing the culture of cooperation and coordination.

The New Recast EIR 2015 is definitely a positive development in terms of providing greater certainty and reducing abusive forum shopping in the cross-border insolvency cases of MCGs, and the proposals made above can help improve this Regulation further.

4.4 Conclusion

The EIR 2000 was reviewed 10 years after its adoption to reflect the new market practices in the EU and improve some of its shortcomings, including those relating to the cross-border insolvency of MCGS. The resulting New Recast EIR 2015 is more comprehensive, as it includes more chapters and articles than the EIR 2000 and has a wider scope as well. More

¹²⁵ New Recast EIR recital 61.

importantly, the New Recast EIR 2015 includes a new chapter dedicated solely to dealing with the insolvency of groups of companies.

The New Recast EIR 2015 did not attempt to resolve the problem of cross-border insolvency of MCGs by changing any of the principles of company law relating to separate legal personality or lifting the veil. Instead it respects the separate legal personality of each member of a group and takes a soft approach by adopting the system of cooperation and coordination, as well as a number of smaller enhancements in areas such as secondary proceedings and the notion of the COMI. By respecting the principle of separate legal personality, the New Recast EIR 2015 avoids all of the legal uncertainties relating to situations in which the veil should be lifted, and therefore it avoids adding more uncertainty to cross-border insolvencies involving MCGs.

There are a number of features in the New Recast EIR 2015 that have the potential to enhance legal certainty in cross-border insolvency for the benefit of creditors. First, the New Recast EIR 2015 provides new rules for secondary proceedings and no longer limits secondary proceedings to being winding up proceedings, as it now allows such proceedings to be either for winding up or restructuring, as may be most appropriate for the insolvency case at hand. Secondly, the new provisions relating to secondary proceedings allow the insolvency practitioner of the main proceedings to request the stay of the secondary proceedings. The court of the secondary proceedings can accept the stay if it is convinced that this would be in the interest of the local creditors. Such power can enable the main insolvency proceedings to reduce the potential of the secondary proceedings to disrupt the main insolvency proceedings.

Secondly, the New Recast EIR 2015 made the notion of the COMI clearer to the benefit of creditors. The definition of COMI is now mentioned in a substantive article of the Regulation

and not in a recital, as was the case in the EIR 2000. The notion of the COMI has been further defined in the New Recast EIR 2015 through the codification of a number of European court decisions relating to cases such as *Interdil* in certain recitals.¹²⁶ It must, however, be acknowledged that the benefit of these clarifications is limited as they are included in recitals and it is not clear how the courts will apply them.

Thirdly, a significant contribution to enhancing legal certainty for the benefit of creditors in cross-border insolvency cases of MCGs is the addition of the brand new Chapter V, which is concerned with groups of companies. This chapter provides two mechanisms to assist in the insolvency of groups, namely (a) cooperation and communication and (b) coordination. The cooperation provisions provide a legal framework for insolvency practitioners and courts dealing with the insolvency proceedings of different members of the same group to cooperate among themselves to the extent that such cooperation is appropriate to facilitate the effective administration of the insolvency proceedings of the group. Coordination, on the other hand, provides a deeper mechanism for collectively administering the insolvency of multiple members of a group by allowing an insolvency practitioner to act as a group coordinator who draws up a coordination plan and becomes responsible for facilitating effective insolvency proceedings for all members joining the coordinating proceedings. These two mechanisms are extremely useful for enhancing the legal certainty of the insolvency proceedings of members of a group of companies, but the extent to which they will be beneficial in practice will depend on how often they get used by insolvency practitioners and the courts, and whether or not a cooperation and coordination culture is adopted in the EU, especially as these mechanisms are not mandatory.

¹²⁶ *Interdil Srl (in liquidation) v Fallimento Interdil Srl and another*, (n 76).

Even with these useful additions to the New Recast EIR 2015 that enhance legal certainty in cross-border insolvency cases of MCGs, to the benefit of creditors, a number of substantive and procedural recommendations can be made to improve the chances of achieving this goal. Substantively, there are terms, such as ‘ascertainable’, ‘regular basis’, ‘reasonable’, ‘manifestly’ and ‘appropriateness’, that could still benefit from additional clarification. Furthermore, a number of the clarifications introduced in the New Recast EIR 2015 are found in recitals, whereas they could benefit from a more legally binding status by being placed in the body of the regulation itself. In regard to forum shopping specifically, it would be useful to explicitly define abusive forum shopping by making reference to its impact on the interests of creditors. In determining these interests, it is possible to rely on the opinion of at least two thirds of the creditors, in a manner similar to that which is already used in the New Recast EIR 2015 in other provisions. Procedurally, the provisions relating to the recognition of a shift in the place of the registered office in regard to businesses should be extended to 6 months in a manner similar to the treatment of the shift in the place of the registered office in regard to individuals. Finally, the regulations should have a legally binding mechanism to ensure that domestic laws do not impair the efficiency of the rules on cooperation, communication and coordination.

The New Recast EIR 2015 definitely constitutes a positive step towards enhancing legal certainty in cross-border insolvencies of both single companies and groups of companies. The previous EIR 2000 did not include any special provisions relating to groups of companies, but now a whole chapter is dedicated exclusively to dealing with groups of companies. This represents a major achievement for European insolvency law that should be acknowledged. However, as noted by Mucciarelli, the New Recast EIR 2015 ‘does not drastically alter the

private insolvency law scenario for cross-border insolvencies',¹²⁷ and that simply, as noted by McCormack, 'the reality on the ground seems to be that European law is built incrementally by a series of small steps.'¹²⁸ Of these steps, as noted by Thole and Duenas, 'new provisions should be viewed as a first step in the right direction to set the framework for insolvencies of multinational corporate groups with hopefully a more powerful tool to follow'.¹²⁹ This is especially so because of the non-mandatory nature of the mechanisms, such as those relating to cooperation and coordination, available in the New Recast EIR 2015, and only time will reveal the extent to which insolvency practitioners and courts take advantage of these mechanisms.

¹²⁷ Mucciarelli (n 46) 20.

¹²⁸ McCormack, 'Something Old, Something New: Recasting the European Insolvency Regulation' (n 58) 146.

¹²⁹ Thole and Duenas (n 112) 227.

Conclusion

This Thesis examined the extent to which European insolvency rules attempt to resolve the problem of the lack of legal certainty in cross-border insolvency cases of multinational corporate groups (MCGs) and the potential that this has to reduce abusive forum shopping that is harmful to creditors. This chapter will provide a conclusion to the Thesis by first highlighting the main outcomes of each of the chapters of the Thesis, and then by identifying areas for future research related to the topic of the cross-border insolvency of MCGs.

1 Cross-Border Insolvency of MCGs

The objective of this Thesis is to examine the extent to which EU insolvency rules provide sufficient legal certainty in cases of cross-border insolvency of multinational corporate groups to reduce abusive forum shopping and protect the interests of creditors. The Thesis attempted to answer this question by first looking, in Chapter 1, into certain aspects of company law and conflicts of laws. The company law principles of limited liability and separate legal personality have a direct impact on the extent to which a group of companies may be held liable for the debts of any of its members. The chapter examined domestic court cases that dealt with the application of the principles of separate legal personality and limited liability in relation to groups of companies. *Adams*¹ and *Chandler*² demonstrate that there is no legal certainty as to when, exactly, the court will lift the veil. In *Adams*, the Court of Appeal reaffirmed the principle of separate legal personality and noted that the veil will only be lifted in very limited circumstances. More specifically, the Court stated that it must be established that there was fraud between the parent company and the subsidiary,³ that the

¹ *Adams v Cape Industries Plc* [1990] Ch 433.

² *Chandler v Cape Plc* [2012] EWCA Civ 525.

³ For cases in this regard based on 'fraud' see *Giford Motor Co Ltd v Horne* [1933] Ch 935; *re FG (Films) Ltd* (1953) 1 All E R 615; *Re Bugle Press Ltd* (1961) Ch 270.

subsidiary was acting as the agent of the parent company,⁴ or that there is a statutory or contractual relationship to make the parent company liable for the debt of its subsidiary.⁵ Furthermore, in *Chandler*, the court used the ‘control, fairness and reliance’ test, which is ambiguous and not clearly defined.⁶ Such cases show that dealing with separate legal personality and groups of companies is extremely complicated in a single domestic jurisdiction, so one can only imagine how complicated the matter would be when a group of companies operates across more than one jurisdiction. In order to examine whether or not conflict of laws theories help in resolving some of the uncertainty surrounding the cross-border insolvency of MCGs, Chapter 1 also looked at the universalism theory, the modified universalism theory, the territoriality theory, the cooperative territory theory, and the contractualism theory. The analysis showed that each of these theories has strengths and weaknesses and could be applied at different times, but there are no definitive rules for applying them to the cross-border insolvencies of MCGs.

As company law and conflicts of laws do not sufficiently contribute to enhancing legal certainty in cross-border insolvency cases of MCGs, Chapter 2 turned to critically examine the notion of the COMI under the currently applicable European Insolvency Regulation 2000 (EIR 2000). The EIR 2000 uses the notion of the COMI as a mechanism for allocating jurisdiction in cross-border insolvency cases within the EU. The Chapter examined the extent to which the COMI notion can be applied to cross-border insolvency cases of MCGs in a manner that increases legal certainty and reduces abusive forum shopping. This was conducted through a black letter analysis of the text of the EIR 2000 and an analysis of the

⁴ For cases of disregard based on ‘agency’ see *Gramophone and Typewriter Ltd v Stanley* [1908] 3 K B 89; *IRC v Sanson* (1921) 2 KB 492; *Rainham Chemical Works Ltd v Blevedere Fish Guano Co* [1921] 2 AC 465.

⁵ *Adams* at 508 and 532; Sneha Mohanty, ‘The Evolution of the Separate Legal Personality Doctrine and Its Exceptions: A Comparative Analysis’ (2011) 32 *Company Lawyer* 194.

⁶ Martin Petrin, ‘Assumption of Responsibility in Corporate Groups: *Chandler v Cape Plc*’ (2013) 76 *Modern Law Review* 589.

jurisprudence of the CJEU. The black letter analysis showed that, even though the notion of the COMI is found in Article 3 of the EIR and additional guidance on its meaning is found in Recital 13, its meaning is still not clearly understood, especially in regard to cross-border insolvencies of MCGs, as the EIR lacks any provisions dedicated to groups of companies. The jurisprudence of the CJEU is characterised by the existence of two opposing approaches. Firstly, the case of *Daisytek*⁷ adopted the head office function approach, which locates the COMI at the place where the operation of the company takes place, and secondly the case of *Eurofood*⁸ adopted the registered office approach, which locates the COMI where the company is registered. Such diverging approaches demonstrate that the notion of the COMI can be understood in different ways and may lead to different outcomes, which could consequently reduce legal certainty in the cross-border insolvency of MCGs. The chapter also demonstrated that the notion of the COMI is ambiguous, and this could lead to abusive forum shopping. It is acknowledged that not all forms of forum shopping have a negative effect on creditors, and the chapter considered a number of mechanisms for reducing abusive forum shopping, such as contractual solutions, cut-off periods, judicial review, and the use of the registered office approach as an exclusive test for allocating jurisdiction.

Chapter 3 consequently examined a number of mechanisms outside the notion of the COMI that are capable of enhancing legal certainty in cross-border insolvency cases of MCGs. The first mechanism examined was the ‘substantive consolidation’ mechanism, which is also referred to as the ‘pooling mechanism’, as it attempts to combine the assets and liabilities of all of the members of a group into a single insolvency proceeding. Such an undertaking makes the management and distribution of the assets easier because all of the assets and liabilities are placed in a single ‘pot’. Even though the benefits of such a mechanism are clear

⁷ *Re Daisytek-ISA Ltd and Others* [2003] All ER (D) 312 (Jul) 16 May 2003.

⁸ Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813.

in cases where there is a high level of entanglement among the members of the group, case law demonstrates that it is extremely difficult to determine the circumstances in which the court can decide to consolidate a group's assets and liabilities, and such a lack of certainty negatively affects creditors' interests. The second mechanism examined was the 'coordination and cooperation' mechanism, which has the potential to facilitate insolvency proceedings by coordinating the administration of the insolvency proceedings through a single person. Such mechanisms can have a positive impact on legal certainty if the coordination is effectively utilised, especially when led by the court or the administrator in charge of the main insolvency proceedings. It is also easy to implement such mechanisms because they respect the separate legal personality of the members of the group. However, such mechanisms are not always guaranteed to succeed in enhancing legal certainty because courts have the discretion to allow cooperation or coordination, and the creditors cannot be sure if or when the court will utilise them.

The third mechanism examined was the harmonisation mechanism, which can contribute to enhancing legal certainty by harmonising the substantive insolvency laws of EU Member States. This has the potential to remove the benefits of abusive forum shopping by ensuring that domestic courts in all Member States of the EU produce the same outcome. However, such a mechanism is not guaranteed to produce consistent outcomes because domestic courts may still interpret the laws differently. The final mechanism examined was the 'party autonomy' mechanism, which grants parties to insolvency proceedings the right to agree to a court and applicable law. Such an agreement could be achieved through a protocol or the Choice Model. Protocols can enhance legal certainty by helping to clarify the expectations of the various parties and prevent any jurisdictional conflict. However, neither mechanism is guaranteed to enhance legal certainty as they both depend on the ability of the parties to reach an agreement, which is not an easy task as their interests are not always aligned. The

examination of these mechanisms illustrates that they all have advantages and disadvantages when it comes to enhancing legal certainty in cross-border insolvency cases of MCGs, and it should be remembered that such mechanisms are not mutually exclusive but rather may be used in conjunction or at different stages of the insolvency proceedings.

The Thesis finally examined, in Chapter 4, the New Recast EIR 2015 and the extent to which the EU has managed, through this Regulation, to resolve some of the issues of legal certainty in cross-border insolvency cases of MCGs in Europe. Chapter 4 focused on the legal certainty-enhancing aspects of the New Recast EIR 2015. The first of these aspects is the new way in which secondary proceedings are regulated. Under the New Recast EIR 2015, secondary proceedings are no longer restricted to being winding up proceedings, and instead are allowed to be winding up or restructuring proceedings. Insolvency practitioners of main proceedings are also now allowed to request the stay of any secondary proceedings relating to the same insolvency; in this way, it reduces the possibility of the secondary proceeding disrupting the main insolvency proceedings.

The second new aspect relates to improving the definition of the notion of the COMI by moving its definition into a substantive article of the regulation, rather than confining it to a recital, as was the case in the EIR 2000, and by introducing new recitals that codify CJEU decisions that have clarified the meaning of the COMI, such as that in the *Interdil* case.⁹ The final new aspect examined is Chapter V, an entirely new addition which is concerned with groups of companies. This chapter provides two mechanisms to assist in the insolvency of groups, namely (a) cooperation and communication and (b) coordination. These two mechanisms have great potential for enhancing legal certainty in the insolvency proceedings of members of a group of companies in Europe, but the extent to which they will have a

⁹ Case C-396/09 *Interdil Srl (In liquidation) v Fallimento Interdil Srl and another* [2011] WLR 334.

practical impact will depend on how often they are utilised by insolvency practitioners and the courts, and whether or not a cooperation and coordination culture is adopted in the EU, especially as these mechanisms are not mandatory.

The last section proffers a number of proposals for making the Regulation more effective in order to enhance legal certainty and to assist in the reduction of abusive forum shopping. Such proposals include clarifying undefined terms, moving the clarifications to binding sections of the New Recast EIR 2015, and explicitly defining abusive forum shopping by making reference to its impact on the interests of creditors. The chapter concludes by noting that the New Recast EIR 2015 is a positive step towards enhancing legal certainty in cross-border insolvency for both individual companies and groups of companies and could help in reducing abusive forum shopping. However, there is still room for improvement and reform, especially as many of the new provisions in the New Recast EIR 2015 are not mandatory in nature.

2 Original Contribution

This Thesis provided an original approach to analysing the problem of the lack of legal certainty for creditors in cross-border insolvency cases of MCGs by first examining the problem from a company law perspective and then from a conflict of laws perspective. The Thesis subsequently critically examined the EIR 2000 in depth and demonstrated that the notion of the COMI on its own is not capable of providing a satisfactory solution to the problem of legal certainty, especially as the EU insolvency rules and the jurisprudence of the CJEU do not contribute substantially to adding more certainty to the notion of the COMI. The Thesis examined proposals for filling the gaps of the EIR 2000, before critically examining the New Recast EIR 2015, where it was found that the codification of many of the CJEU decisions relating to the notion of the COMI in the New Recast EIR 2015 and the

introduction of a new chapter on groups of companies have filled many of the gaps of the EIR 2000. Nevertheless, there is still room for improvement in terms of enhancing legal certainty for creditors in such insolvency cases, and therefore the Thesis makes a number of recommendations for resolving some of the shortcomings of the New Recast EIR 2015.

3 Future Research

This Thesis is one of only a few studies focusing on the legal aspects of legal certainty in cross-border insolvency cases of MCGs. The Thesis highlighted the existence of many ambiguous terms and concepts which have the potential to be understood more through further research. This section identifies a number of potential areas for future research that are relevant generally to private international law and more specifically to cross-border insolvency.

Future research can attempt to understand legal certainty from the perspective of creditors in cross-border insolvency cases by recognising the existence of three different levels of legal certainty: low, average, and absolute. A low level of legal certainty is the situation where there is no mechanism available to assist the creditor in determining the jurisdiction, the applicable law, or the enforcement of any judgement relating to the cross-border insolvency proceeding. An average level of certainty refers to the situation where there is a mechanism available, such as the notion of the COMI, to assist the creditor in ascertaining the jurisdiction, applicable law, or the enforcement of the judgment, but this mechanism may not be capable of producing consistent outcomes due to certain ambiguities. An absolute level of certainty is found where there is a mechanism available to assist the creditor in determining the jurisdiction, applicable law, or the enforcement of the judgement, and this mechanism is guaranteed to produce consistent outcomes, as it relies on clear and easy to follow criteria, such as using the registered office approach. It would be helpful to analyse the problem of

cross-border insolvency of MCGs through this understanding of the different levels of certainty, and then attempting to rank or quantify the level of certainty provided by the various mechanisms available for dealing with such insolvency cases.

Another way to understand legal certainty in cross-border insolvency cases is to look at the progress of the insolvency through different phases. The first stage of the cases is prior to the actual proceedings, the second stage is the actual litigation proceedings, and the third stage is the enforcement stage, which takes place after the court makes its judgement. It is important to acknowledge that legal certainty at each of these three stages has different requirements, and may invariably increase or decrease through these stages for any given insolvency case. A more comprehensive solution to the problem of the lack of legal certainty in cross-border insolvency cases of MCGs could be achieved by acknowledging the differences between these three stages and attempting to find mechanisms that address the unique needs of MCGs in each of these stages.

This Thesis looked at the problem of cross-border insolvency of MCGs primarily from a conflict of laws perspective, and does not examine the substantive insolvency laws of the Member States of the EU, as that would go beyond the scope of this work. However, the Thesis discussed the ability to find a solution to the cross-border insolvency problem of MCGs through harmonising substantive insolvency laws within the Member States of the EU. The Thesis found that this is probably impossible to be achieved in the foreseeable future because there are fundamental differences between these laws amongst the Member States. It needs to be admitted that this opinion is not definitive, and it would be worthwhile to study in depth the differences between these substantive insolvency rules and the extent to which they could be harmonised through EU initiatives. Such research could consider gradual

approaches to harmonisation, such as attempting to approximate the laws between the Member States in phases as opposed to harmonisation through a single instrument.

4 Final Remarks

The New Recast EIR 2015 is not a perfect solution to all of the problems relating to the lack of legal certainty and abusive forum shopping in cross-border insolvency cases of MCGs in the EU. However, it is definitely a step in the right direction and a reflection of the European approach of implementing incremental and pragmatic policy solutions. The incremental aspect of the European insolvency rules is extremely important for the success of this legal instrument, as the substantive insolvency laws of EU Member States can be extremely divergent, and therefore it would not be wise or possible to introduce drastic changes that do not respect or acknowledge these legitimate differences. The European approach to insolvency has also been pragmatic by providing solutions to MCG insolvency cases that do not challenge the core principles of company law or conflict of laws, but instead respects them by focusing on voluntary cooperation and coordination. Even though there are ambiguities in some of the new concepts introduced by the New Recast EIR 2015, these concepts will become more definitive as upcoming cases will require the courts to interpret their meaning. This should work towards achieving the main objective of the Regulation, which is to ensure the proper functioning of the internal market, as this requires that cross-border insolvency proceedings operate efficiently and effectively.

It is hoped that this contribution will provide a greater understanding of the issues surrounding the cross-border insolvency of MCGs in the EU and the extent to which European insolvency rules contribute to enhancing legal certainty and reducing abusive forum shopping, for the benefit of creditors. It is hoped that this improved understanding will help the EU formulate more effective and efficient insolvency rules.

Bibliography

Bibliography

A

Aasaru E, 'The Desirability of Centre of Main Interests as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law' (2011) 22 *European Business Law Review* 349

Adams E and Fincke J, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 *Columbia Journal of European Law* 43

Adams K, 'Making Sense of Shall' [2007] *New York Law Journal* 1

Adler B, 'Financial and Political Theories of American Corporate Bankruptcy' (1993) 45 *Stanford Law Review* 311

— — and Ayres I, 'A Dilution Mechanism for Valuing Corporation in Bankruptcy' (2001-2002) 111 *Yale Law Journal* 83

Al-Attar A, 'Using and Losing Secondary Proceedings' (2009) 22 *Insolvency Intelligence* 76

Anderson H, 'Challenging the Limited Liability of Parent Companies: A Reform Agenda for Piercing the Corporate Veil' (2012) 22 *Australian Accounting Review* 129

Anderson K, 'The Cross-Border Insolvency Paradigm: A Defence of the Modified Universal Approach Considering the Japanese Experience' (2000) 21 *University of Pennsylvania Journal of International Law* 679

Andreadakis S, 'Regulatory Competition or Harmonisation: The Dilemma, the Alternatives and the Prospect of Reflexive Harmonisation' in Mads Andenas and Camilla Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011)

Antunes J, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German, and EEC Law: An International and Comparative Perspective* (Kluwer Law and Taxation Publishers 1994)

Armour J, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition' (2005) ECGI- Law Working Paper No 54/2005 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=860444> accessed 3 March 2016

— —, 'European Cross –Border Insolvencies: Race Goes to the Swiftest' (2006) 65 the Cambridge Law Journal 505

Arnold M, 'Truth or Illusion? COMI Migration and Forum Shopping Under the EU Insolvency Regulation' (2013) 14 Business Law International 245

Arons T, 'Recognition of Debt Restructuring and Resolution Measures under the European Union Regulatory Framework' (2014) 23 International Insolvency Review 57

Arts R, 'Main and Secondary Proceedings in the Recast of the European Insolvency Regulation the only Good Secondary Proceeding is a Synthetic Secondary Proceeding' <<https://www.iiiglobal.org/sites/default/files/media/Arts%20-%20Main%20and%20Secondary%20Proceedings.pdf>> accessed 10 May 2016

Avila H, *Certainty in Law* (Springer 2016)

B

Baer G, 'Towards an International Insolvency Convention: Issues, Options and Feasibility Considerations' (2016) 17 Business Law International 5

— — and O'Flynn K (eds), *Financing Company Group Restructurings* (Oxford University Press 2015)

Bachner T, *Creditor Protection in Private Companies Anglo-German Perspectives for a European Legal Discourse* (Cambridge University Press 2009)

Ballantine H, 'Separate Entity of Parent and Subsidiary Corporations' (1925) 14 California Law Review 12

Barthet J, *The Governing Law of Companies in EU Law* (Hart Publishing 2012)

Beale S, 'The Judgment in Eurofood: the European Court of Justice Gives Guidance on the EC Insolvency Regulation' (2006) 21 *Journal of International Law and Regulation* 487

Bebchuk L and Guzman A, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 *Journal of Law and Economics* 775

Becker L, "'EU Insolvency Harmonisation" A Step Too Far' (2011) 30 *International Financial Law Review* 19

Bell A, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003)

Bewick S, 'First do no Harm -Changes to the EU Insolvency Regulation' (2012) 5 *Corporate Rescue and Insolvency* 207

— — 'The EU Insolvency Regulation Revisited' (2015) 24 *International Insolvency Review* 172

Block-Lieb S and Halliday T, 'Harmonization and Modernization in UNCIRAL's Legislative Guide on Insolvency' (2007) 42 *Texas International Law Journal* 481

Blumberg P, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporation Law* 578

— — *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press 1993)

— —, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37 *Connecticut Law Review* 605

Bogdan M, *Concise Introduction to EU Private international Law* (2nd edn, Europe Law Publishing 2012)

Bolleyer N and Reh C, 'EU Legitimacy Revisited: The Normative Foundation of a Multilevel Polity' (2012) 19 *Journal of European Public Policy* 472

Boone J, *International insolvency: Jurisdictional Comparisons* (3rd edn, European Lawyer 2012)

Bork R and Managano R, *European Cross-Border Insolvency Law* (Oxford University Press 2016)

Bos T, 'The European Insolvency Regulation and The Harmonization of Private International law in Europe' (2003) 50 *Netherlands International Law Review* 31

Bouderhem R, 'Conflicts of Jurisdiction as Regards Trading Companies in French Private International Law' (2014) 11 *International Business Law Journal* 55

Braak S, 'The European Private Company, its Shareholders and its Creditors' (2010) 6 *Utrecht Law Review* 1

Braithwaite J, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47

Brasher A, 'Substantive Consolidation: A Critical Examination' (Harvard Law School, 2006) <http://www.law.harvard.edu/programs/corp_gov/papers/Brudney2006_Brasher.pdf> accessed 20 February 2016)

Brouwer M, 'Reorganization in US and European Bankruptcy Law' (2006) 22 *European Journal of Law and Economics* 5

Bufford S, Adler L, Brooks S and Krieger M, 'International Insolvency' (Federal Judicial Center, 2001) <[http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/\\$file/IntlInso.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/$file/IntlInso.pdf)> accessed 5 March 2015

— — 'Global Venue Controls Are Coming: A Reply to Professor Lopucki' (2005) 79 *American Bankruptcy Law Journal* 105

— — *United States International Insolvency Law 2008-2009* (Oxford University Press 2009)

— — 'Coordination of Insolvency Cases for International Enterprise Groups: A Proposal' (2012) 86 *American Bankruptcy Law Journal* 685

Buxbaum H, 'Rethinking International Insolvency: The Neglected Role of Choice of Law Rules and Theory' (2000) 36 Stanford Journal of International Law 23

C

Calleros C, 'Toward Harmonization and Certainty in Choice of Law Rules for International Contracts: Should the U.S Adopt the Equivalent of Rome 1?' (2011) 28 Wisconsin International Law Journal 639

van Calster G, 'COMIng, and here to Stay. The Review of the European Insolvency Regulation' [Unpublished] (SSRN 2016) <<http://ssrn.com/abstract=2637003>> accessed 30 April 2016

Carruthers B and Halliday T, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Clarendon Press 1998)

Chaika I, 'Insolvency of Group of Companies Through the Prism of the Recast Insolvency Regulation (EU) 2015/848' [Unpublished] (SSRN, 13 August 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687623> accessed 30 April 2016

Chan L, 'Perfecting the Union, Perfecting Universalism' (2009) 2 Corporate Rescue and Insolvency 71

Cheng T, 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S Corporate Veil Doctrines' (2011) 34 Boston College International and Comparative Law Review 329

Cherubini G, Cooper N, Fritz D and Others, 'Harmonisation of Insolvency Law at EU Level' (April 2010) Report prepared by INSOL < <https://www.insol-europe.org/eu-study-group-introduction-and-members>> accessed 20 July 2016

Christenson B, 'Best Let Sleeping Presumptions Lie: International of "Centre of Main Interest" Under Chapter 15 of The Bankruptcy Code And An Appeal For Additional Judicial Complacency' (2010) 5 University of Illinois Law Review 1565

Chung J, 'The New Chapter 15 of the Bankruptcy Code: A Step Towards Erosion of National Sovereignty' (2006-2007) 27 North western Journal of International Law & Business 89

Clarkson C and Hill J, *Conflict of Laws* (Oxford University Press 2012)

Clift J, 'International Insolvency Law: the UNCITRAL Experience with Harmonisation and Modernisation Techniques' in Andrea Bonomi and Paul Volken Yearbook of Private International Law (Swiss Institute of Comparative Law 2009)

Collins H, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 the Modern Law Review 731

Conac P, 'Director's Duties in Groups of Companies – Legalizing the Interests of the Group at the European Level' (2011) 21 European Company and Financial Law Review 194

Cottrell S, *Critical Thinking Skills: Developing Effective Analysis and Argument* (2nd edn, Palgrave Macmillan 2011)

Craig P, 'Integration, Democracy and Legitimacy', in Paul Craig and Grainne de Burca, eds, *The Evolution of EU Law* (Oxford University Press 2011)

D

Damar D, 'Negligence and the Corporate Veil: Parent Companies Duty of Care to Their Subsidiaries Employees' (2014) Lloyd's Maritime and Commercial Law Quarterly 454

D'Amato A, 'Legal Uncertainty' (1983) 71 California Law Review 1

Daniel A, 'Goals of a Multinational Corporation and the Role of a Financial Manager' [Unpublished] (SSRN, 31 July 2010).
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651469> accessed 27 May 2016

Dashwood A, Dougan M, Rodger B, Spaventa E and Wyatt D, *Wyatt and Dashwood's European Union Law* (Hart Publishing 2011)

Davies M, 'Parallel Proceedings for Insolvency and Limitation of Liability' (2015) 1 Lloyd's Maritime and Commercial Law Quarterly 24

Davies P, Worthington S and Gower L, *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008)

Denoza F, 'Different Policies for Corporate Creditor Protection' (2006) 7 *European Business Law Review* 409

Dickfos J, Anderson C and Morrison D, 'The Insolvency Implication for Corporate Groups in Australia Recent Events and Initiative' (2007) 16 *International Insolvency Review* 103

— — 'Corporate Groups: A Case for Protection of Unsecured Creditors Do Unsecured Creditors of Corporate Group Members Require Additional Contractual or Statutory Protection?' (2009) Griffith University Law Working Paper <<http://www.clta.edu.au/professional/papers/conference2009/DickfosCLTA09.pdf>> accessed 23 July 2016

Dickinson A, *The Brussels I Regulation Recast* (Oxford University Press 2015)

Dignam A and Lowry J, *Company Law* (8th edn, Oxford University Press 2014)

Dine J, *The Governance of Corporate Groups* (Cambridge University Press 1993)

Dunning J and Lundan S, *Multinational Enterprises and the Global Economy* (2nd edn, Edward Elgar 2008)

Dunning N and Raykin A, 'Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal & Economic Developments' (2013) 29 *Emory Bankruptcy Developments Journal* 387

Dutilh N, 'International Groups of Insolvent Companies in the European Community' (European Insolvency and Restructuring Congress of the Arbeitsgemeinschaft für Insolvenzrecht und Sanierung, Brussels February 2012)

E

Easterbrook F and Fischel D, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89

Eccles P, 'Liability of Parent Companies and the Actions of Their Subsidiaries' (Shoosmiths, 4 May 2012) <<http://www.shoosmiths.co.uk/client-resources/legal-updates/Liability-of-parent-companies-and-the-actions-of-their-subsiidiaries-1498.aspx>> accessed 4 August 2015

Eidenmuller H, 'Free Choice in International Company Insolvency Law' 6 European Business Organization Law Review (2005) 429

— — 'Abuse of Law in the Context of European Insolvency Law' (2009) 6 European Company and Financial Law Review 1

— — 'A New Framework for Business Restructuring in Europe: the EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' (2013) 20 Maastricht Journal 133

Enriques L and Gelter M, 'How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate Bankruptcy Law' (2007) 81 Tulane Law Review 577

Erens B, Friedman S and Mayerfeld K, 'Bankrupt Subsidiaries: The Challenges to the Parent of Legal Separation' (2008) 25 Emory Bankruptcy Development Journal 65

Eroglu M, *Multinational Enterprises and Tort Liabilities An Interdisciplinary and Comparative Examination* (Edward Elgar 2008)

Esser P, 'Reform of the EU Regulation New Framework for Insolvent Company Groups: Part 1' (2015) 34 American Bankruptcy Institute Journal 38

Etukakpan S, 'The Lost Voice in Insolvency: Theories of Insolvency Law and Their Implications for the Employees' (2014) 23 Nottingham Law Journal 34

European Bank for Reconstruction and Development, 'Core Principles for an Insolvency Regime' (*European Bank for Reconstruction and Development*, 2006) <<http://www.ebrd.com/downloads/legal/insolvency/principle.pdf>> accessed 14 May 2016

European Commission, 'Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Document Revision of Regulation (EC) No

1346/2000 on Insolvency Proceedings’ SWD (2012) 417 final Strasbourg 12 December 2012
<http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf> accessed 30 April 2016

— — ‘Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency’ C (2014) 1500 final Brussels 12 March 2014
<http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf> accessed 30 April 2016

— — ‘Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings’ SWD (2012) 417 final Strasbourg 12 December 2012
<http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf> accessed 30 April 2016

— — (Press Release), ‘Giving Honest Businesses a Second Chance: Commission Proposes Modern Insolvency Rules’ IP/12/1354 (European Commission Press Release, 12 December 2012) <http://europa.eu/rapid/press-release_IP-12-1354_en.htm> accessed 30 April 2016

— — ‘Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/ 2000 on Insolvency Proceedings’ SWD (2012) 744 final Strasbourg 12 December 2012

— — (Press Release), ‘Giving Honest Businesses a Second Chance: Commission Proposes Modern Insolvency Rules’ IP/12/1354 Strasbourg 12 December 2012 (European Commission Press Release Database, 5 February 2014) <http://europa.eu/rapid/press-release_IP-12-1354_en.htm> accessed 30 April 2016

European Parliament Council Commission Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal 2002/C77/01(Eur Lex Europe, 28 November 2001)

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002Q0328&from=EN>> accessed 30 April 2016

F

Farrar J, *Corporate Governance in Australia and New Zealand* (Oxford University Press 2001)

Farrar J, 'Piercing the Corporate Veil in Favour of Creditors and Pooling of Groups A Comparative Study' (2013) 25 Bond Law Review 31

Fentiman R, *International Commercial Litigation* (2nd edn, Oxford University Press 2015)

Fieldhouse DK, 'The Multinational: A Critique of a Concept' in A Teichova et al. (eds) *Multinational Enterprise in Historical Perspective* (Cambridge University Press 1986)

Fierbinteanu G, 'Amending Regulation (EC) NO.1346/2000 on Insolvency Proceedings – Solving deficiencies or Attempt to Rescue Companies in Difficulty?' (2013) 20 Scientia International Journal 7

Finch V, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009)

Flaschen E and Silverman R, 'Cross-Border Insolvency Cooperation Protocols' (1998) 33 Texas International Law Journal 587

Fleischer H and Schmolke K, 'The Reform of Transparency Directive: Minimum or Full Harmonisation of Ownership Disclosure' (2011) 12 European Business Organization Law Review 121

Fletcher I, 'International Insolvency: A Case for Study and Treatment' (1993) 27 The International Lawyer 429

— — 'International Insolvency Issues: Recent Cases' (1997) Journal of Business Law 471

— — 'The European Union Convention on Insolvency Proceedings: Choice of Law Provisions' (1998) 33 Texas International Law Journal 119

— — *Insolvency Law in Private International Law* (2nd, Oxford University Press 2005)

— — *The Law of Insolvency* (Sweet & Maxwell 2009)

— — and Wessels B, *Harmonisation of Insolvency Law in Europe* (Deventer Kluwer 2012)

Forbes K, 'Limited Liability and the Development of the Business Corporation' (1986) 2 Journal of Law, Economic and Organisation 163

Foster N, 'Company Law Theory in Comparative Perspective: England and France' (2000) 48 American Journal of Comparative Law 573

Franken S, 'Three Principles of Transnational Corporate Bankruptcy Law: A Review' (2005) 11 European Law Journal 241

French D, Mayson C and Ryan C, *Mayson, French & Ryan Company Law* (31st edn, Oxford University Press 2014-2015)

Frost C, 'Organizational Form Misappropriation Risk and Substantive Consolidation of Corporate Groups' (1993) 44 Hastings Law Journal 449

G

Gaa T, 'Harmonization of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible' (1993) 27 The International Lawyer 901

van Galen R 'Insolvent Groups of Companies in Cross Border Cases and Rescue Plans Report to the Netherlands Association for Comparative and International Insolvency Law (Conference of 8 November 2012) <https://www.nautadutilh.com/Documents/Publications%20to%20profiles/Insolvent_Groups_of_Companies_in_Cross_Border_cases_and_rescue_plans.pdf> accessed 4 May 2016

— — 'International Groups of Insolvent Companies in the European Community' (European Insolvency and Restructuring Congress of the Arbeitsgemeinschaft für Insolvenzrecht und Sanierung, Brussels, February 2012) <http://www.arge-insolvenzrecht.de/Speech_van_GALEN.pdf> accessed 20 February 2016

— — 'The European Insolvency Regulation and Groups of Companies' (The Future of the European Insolvency Regulation Conference, Amsterdam, 28 April 2011) <<http://www.eir-reform.eu/uploads/papers/Robert%20van%20Galen.pdf>> accessed 20 February 2016

Garasic J, 'What Is Right and What Is Wrong in the ECJ's Judgment on Eurofood IFSC' in Petar Sarcevic, Paul Volken and Andrea Bonomi (eds), *Yearbook of Private International Law* (Sellier 2005) 87

Garcimarin F, 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction' [Unpublished] (SSRN 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412> accessed 27 April 2016

Gardina J, 'The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage' (2006) 86 *Boston University Law Review* 881

Gaughey E, 'Donoghue v Salomon in the High Court' (2011) 4 *Journal of Personal Injury Law* 249

Gelb H, 'Limited Liability Policy and Veil Piercing' (2009) 9 *Wyoming Law Review* 551

Ghia L, 'Regulation No. 1346/2000 and Protection of Creditors' (The Future of the European Insolvency Regulation Conference, Amsterdam, April 2011) 117

Ghio E, 'European Insolvency Law: Development, Harmonisation and Reform A Case Study on the European Internal Market' (2015) 1 *Trinity College Law Review* 154

Gillooly M, *The Law Relating to Corporate Groups* (The Federation Press 1993)

Gopalan S and Guihot M, 'Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap –Filling' (2015) 48 *Vanderbilt Journal of Transnational Law* 1225

— — 'Cross-Border Insolvency Law and Multinational Enterprise Groups: Judicial Innovation as an International Solution' (2016) 48 *George Washington International Law Review* 549

Gower L.C.B, *Modern Company Law* (3rd ed, K. W. Wedderburn, O. Weaver and A.E.W Park 1969)

Graulich T, 'Substantive Consolidation – A Post-Modern Trend' (2006) 14 *American Bankruptcy Institute Law Review* 527

Griffin S, *Personal Liability Disqualification Company Directors* (Hart Publishing 1999)

— — ‘Limited Liability - A Necessary Revolution’ (2004) 25 *Company Lawyer* 99

Gropper A, ‘The Payment of Priority Claim in Cross-Border Insolvency Cases’ (2011) 46 *Texas International Law Journal* 559

Gullifer L and Payne J, *Corporate Finance Principles and Policy* (2nd Oxford Hart Publishing 2015) 114 and 115

Guzman A, ‘International Bankruptcy: In Defence of Universalism’ (2000) 98 *Michigan Law Review* 2177

H

Hadden T, ‘Inside Corporate Groups’ (1984) 12 *International Journal of Sociology of Law* 271

Halliday T and Carruthers B, *Global Law Making and Systemic Financial Crisis* (Stanford University Press 2009)

Hannigan B, *Company Law* (4th edn, Oxford University Press 2016)

Harmer R and Cooper N, ‘Report on the Results of the Assessment of the Insolvency Laws of Countries in Transition’ (*European Bank for Reconstruction and Development*, June 2003) <http://www.ebrd.com/downloads/legal/insolvency/report_ia.pdf> accessed 11 May 2016

Harris J and Hargovan A, ‘Corporate Groups: The Intersection between Corporate and Tax Law Commissioner of Taxation VBHP Billiton Finance Ltd’ (2010) 32 *Sydney Law Review* 723

Hess B, Oberhammer P and Pfeiffer T, *European Insolvency Regulation Heidelberg-Luxembourg-Vienna Report* (Hart Publishing 2014)

— — European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report 2014 (Hereinafter the ‘Hess/Oberhammer/Pfeiffer Report’ <<http://www.beck->

shop.de/fachbuch/inhaltsverzeichnis/Hess-European-Insolvency-Regulation-9783406655012_2911201306152697_ihv.pdf> accessed 30 April 2016

Herrod N and Dupee E, 'EC Insolvency Regulation – Coordinating a Group-Wide Rescue' (*Allen & Overy*, 19 June 2009) <<http://www.allenoverly.com/publications/en-gb/Pages/EC-Insolvency-Regulation-%E2%80%93Coordinating-a-group-wide-rescue.aspx>> accessed 20 February 2016

Hicks A and Goo S, *Cases and Materials on Company Law* (6th edn, Oxford University Press 2008)

Hillman R, 'Limited Liability in Historic Perspective' (1997) 54 *Washington & Lee Law Review* 615

Hirte H, 'Towards a Framework for the Regulation of Corporate Groups Insolvencies' (2008) 5 *European Company and Financial Law Review* 213

Hofstetter K, 'Parent Responsibility for Subsidiary Corporations: Evaluating European Trends' (1990) 39 *International and Comparative Law Quarterly* 576

Hunter M, 'The Nature and Functions of A Rescue Culture' (1999) 104 *Commercial Law Journal* 426

Huss R, 'Revamping Veil Piercing for all Limited Liability Entities: Forcing the Common Doctrine into the Statutory Age' (2001) 70 *University of Cincinnati Law Review* 95

I

INSOL Europe, 'Harmonisation of Insolvency Law at EU Level' (Note of European Parliament, April 2010),

<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings_/empl_study_insolvencyproceedings_en.pdf> accessed 31 May 2016

— — 'Revision of European Insolvency Regulation, Proposals by INSOL Europe' (INSOL Europe, 20 June 2012) <<http://www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe/>> accessed 20 February 2016

Isham S, 'UNCITRAL's Model Law Cross-Border Insolvency: A Workable Protection for Transnational Investment at Last' (2001) 3 Brooklyn Journal of International Law 1181

— — 'European Cross-Border Insolvency Regulation: A Critical Appraisal of Council Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitatus Europaea' (PhD Thesis, University of Florence 2004)

— — *European Cross-Border Insolvency Regulation a Study of Regulation 1346/2000 on insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitatus Europaea* (Intersentia 2005)

— — *European Cross-Border Insolvency Regulation* (Hart Publishing 2005)

Iwai K, 'Person Thing and Corporations: The Corporate Personality and Comparative Corporate Governance' (1999) 47 American Journal of Comparative Law 583

J

Jackson T and Kronman A, 'Secured Financing and Priority Among Creditors' (1979) 88 Yale Law Journal 1143

Jackson T, *The Logic and Limits of Bankruptcy* (Harvard University Press 1986)

Janger E, 'Universal Proceduralism' (2006-2007) 32 Brooklyn Journal of International Law 819

— — 'Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcy' (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 85

Johnson G, 'The European Union Convention on Insolvency Proceedings: A Critique of the Corporate Rescue Paradigm' (1995) 5 International Insolvency Review 80

Johnston P and Han J, 'A Proposal for Party – Determined COMI in Cross-Border Insolvencies Groups' (2007) 16 Norton Annual Review of International Insolvency 811

K

Kamalnath A, 'Cross- Border Insolvency Protocols: A Success Story' (2013) 2 International Journal of Legal Studies and Research 13

Kane M and Rock E, 'Corporate Taxation and International Charter Competition' (2008) Michigan Law Review 1229.

Karasz A, 'Corporate World Today: Courts Respond to Limited Liability and Board's Decision Making – A Fight for a Justice or Rather Prosperity at Stake?' (2009/2010) The Common Law Review 24

Keay A, 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over –Protection of Creditors' (2003) 66 The Modern Law Review 665

— — 'Wrongful Trading and the Liability of Company Directors: a Theoretical Perspective' (2005) 25 Legal Studies 431

— — *Company Directors Responsibilities to Creditors* (Routledge 2007)

Kershaw D, *Company Law in Context* (2nd edn, Oxford University Press 2012)

Khumalo S, 'International Response to the UNCITRAL Model Law on Cross-Border Insolvency' (2004) International Insolvency Institute 6

Kipnis A, 'Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency' (2008) 36 Denver Journal of International Law and Policy 168

Korobkin D, 'Employees Interests in Bankruptcy' (1996) 4 American Bankruptcy Law Review 5

Kors E, 'Altered Ego: Deciphering Substantive Consolidation' (1998) 59 University of Pittsburgh Law Review 381

Kramer X, 'Current Gaps and Future Perspective in European Private International Law: Towards a Code on Private International Law?' [Unpublished] (SSRN, 15 November 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200977> accessed 3 June 2016

Kress K, 'Legal Indeterminacy' (1989) 77 California Law Review 283

— — ‘Legal Reasoning and Coherence Theories: Dworkin’s Rights Thesis, Retroactivity, and the Linear Order of Decisions’ (1984) 72 California Law Review 369

Kuipers J, ‘The Legal Basis for a European Optional Instrument’ (2011) 5 European Review of Private Law 545

L

Laryea E, ‘International Legal Instruments to International Sale of Goods Transaction’ (2011) 19 African Journal of International and Comparative Law 1

Laski H, ‘The Personality of Associations’ (1916) 29 Harvard Law Review 404

Latella D, ‘The “COMI” Concept in the Revision of the European Insolvency Regulation’ (2015) 11 European Company Law and Financial Law Review 497

Leandro A, ‘The New European Insolvency Regulation’ (*Conflict of Laws net*, 28 May 2015) <<http://conflictoflaws.net/2015/the-new-european-insolvency-regulation/>> accessed 30 April 2016

Locatelli F, ‘International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency and Answer for Brazil? An Economic Analysis of its Benefits on International Trade’ (2008) Law and Business Review of the Americas 314

Lopucki L, ‘Cooperation International Bankruptcy: A Post Universalist Approach’ (1999) 94 Cornell Law Review 696

— — ‘The Case for Cooperative Territoriality in International Bankruptcy’ (1999-2000) 98 Michigan Law Review 2216

— — ‘Cooperation International Bankruptcy: A Post-Universalist Approach’ (1999) 94 Cornell Law Review 696

— — ‘Cooperation International Bankruptcy: A Post Universalist Approach’ (1999) 94 Cornell Law Review 696

— — *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Court* (The University of Michigan Press 2005)

Lowry J, 'The Harmonisation of Bankruptcy Law in Europe the Role of the Council of Europe' (1985) 16 *Journal of Business Law* 73

M

Mabey R & Johnston S, 'Coordination among Insolvency Courts in the Rescue of Multinational Enterprises' (2009) 130 *Norton Annual Review of International insolvency* 33

Machen A, 'Corporate Personality' (1911) 24 *Harvard Law Review* 253

Maitland F, *Introduction to Gierke's Political Theories of the Middle Age* (Cambridge University Press 1900)

Maloy R, 'Forum Shopping? What's Wrong with That' (2005) 24 *Quinnipiac Law Review* 25

Mann R and Roberts B, *Study Guide for Mann /Roberts' Smith and Roberson's Business Law* (15th edn, South –Western College 2011)

Marks D, 'EC Insolvency Regulation: Is it Reform Time?' (2012) 9 *International Corporate Rescue* 227

Martens L, 'A definition of the term Centre of Main Interests for Insolvent Cross-Border Groups of Companies' (Master Thesis, Tilburg University 2013)

Maslin J, 'The Effectiveness of European Cross-Border Insolvency Regulation as a Tool Against Forum Shopping' [Unpublished] (SSRN, 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539391> accessed 12 May 2016.

Mason R, 'Cross-Border Insolvency Law: Where Private International Law and Insolvency Meet' in Omar, Paul (eds), *International Insolvency Law: Themes and Perspectives* (Ashgate 2008)

— — ‘Cross-Border Insolvency and Legal Transnationalisation’ (2012) 21 International Insolvency Review 105

Matousekova M, ‘Private international law Answers to the Insolvency of Cross Border Groups: Comparative Analysis of French and English Law’ (2008) 2 International Business Law Journal 141

Matthew C, ‘UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to Substantive Problem’ (1999) 24 Journal of Corporation Law 709

Maxeiner J, ‘Legal Certainty: A European Alternative to American Legal Indeterminacy’ (2006-2007) 15 Tulane journal of International and Comparative Law 541

McBryde W, Flessner A and Kortmann S (eds), *Principles of European Insolvency Law* (Kluwer Legal Publishers 2003)

McConville M and Chui W, *Research Methods for Law* (Edinburgh University Press 2007)

McCormack G, ‘Jurisdiction Competition and Forum Shopping in Insolvency Proceedings’ (2009) 68 The Cambridge Law Journal 169

— — ‘COMI and Comity in UK and US Insolvency Law’ (2012) 128 Law Quarterly Review 140

— — ‘Reconciling European Conflict and Insolvency Law’ (2014) 15 European Business Organization Law Review 309

— — ‘Bankruptcy Forum Shopping: the UK and US as Venues of Choice for Foreign Companies’ (2014) 63 International and Comparative Law Quarterly 815;

— — ‘Reforming the European Insolvency Regulation: A Legal and Policy Perspective’ (2014) 10 Journal of Private International Law 49

— — ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (2016) 79 The Modern Law Review 121

Menjucq M, 'EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies' (2008) 5 *European Company and Financial Law Review*

Mevorach I, 'The Road to a Suitable and Comprehensive Global Approach to Insolvencies for Multinational Corporate Groups' (2006) 15 *Norton Journal of Bankruptcy Law and Practice* 5

— — 'Appropriate Treatment of Corporate Groups in Insolvency: A Universal View' (2007) 8 *European Business Organization Law Review* 179

— — 'The Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57 *The International and Comparative Law Quarterly* 427

— — *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009)

— —, 'Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency' (2010) 18 *Cardozo Journal of International & Comparative Law* 359.

— — 'European Insolvency Law in a Global Context' (2011) 7 *Journal of Business Law* 666

— — 'INSOL Europe's Proposals On Group of Companies (In Cross-Border Insolvency): A Critical Appraisal' (2012) 21 *International Insolvency Review* 183

— — 'Is the Future Bright for Enterprise Groups in Insolvency? Analysis of UNCITRAL's New Recommendations on the Domestic Aspects' in Paul Omar *International Insolvency Law Reforms and Challenge* (Ashgate 2013)

— — 'Forum Shopping in Times of Crisis: A Director's Duties Perspective' (2013) 4 *European Company and Financial Law Review* 523

— — 'Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge' (2014) 9 *Brooklyn Journal of Corporate, Financial and Commercial Law* 226

— — 'Enterprise Groups in Insolvency: Recent International Developments' (2014) *Annual Review of Insolvency Law* 495

— — ‘Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap’ (2015) 10 Brooklyn Journal of Corporate, Financial and Commercial Law 183

Miguens H, ‘The Insolvent Subsidiary and Liability of the Parent Corporation in the USA, Argentina and UNCITRAL’ (2010) 19 International Insolvency Review 239

Miller R, ‘Economic Integration: An American Solution to the Multinational Enterprise Group Conundrum’ (2012) 11 Richmond Journal of Global Law and Business 185

Milman D, ‘*Groups of Companies: the Path Towards Discrete Regulation*’ in David Milman, *Regulating Enterprise Law and Business Organisations in the UK* (Hart Publishing 1999)

— — *Groups of Companies: the Path Towards Discrete Regulation in Civil and Commercial Law Review* (Law Press 2002)

— — *Personal Insolvency Law, Regulation and Policy* (Ashgate 2005)

Milo D, ‘The Liability of A Holding Company for the Debts of Its Subsidiary: Is Salomon Still Alive and Well?’ (1998) 115 The South African Law Journal 318

Mohan S, ‘Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer’ (2012) 21 International Insolvency Review 199

Mohanty S, ‘The Evolution of the Separate Legal Personality Doctrine and Its Exceptions: A Comparative Analysis’ (2011) 32 Company Lawyer 194

Morris C and Murphy C, *Getting a PhD in Law* (Hart Publishing 2011)

Moss G, ‘Coordination of Multinational Corporate Group Insolvencies: Solving the COMI Issue. Group Insolvency Choice of forum and Law: the European Experience under the Influence of English Pragmatism’ (2007) 32 Brooklyn Journal of International Law 1005

— — ‘Group Insolvency Forum - EC Regulation and Model Law under the Influence of English Pragmatism’ (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 250

— — and Fletcher I & Isaacs S (eds), *The EC Regulation on Insolvency Proceedings* (2nd edn, Oxford University Press 2009)

— — and Paulus C, ‘The European Insolvency Regulation- the Case for Urgent Reform’ (2006) 19 *Insolvency Intelligence* 1

Muchlinski P, ‘Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review’ (2002) 23 *Company Lawyer* 168

— — *Multinational Enterprises and the Law* (Blackwell 2005)

— — *Multinational Enterprise and the Law* (2nd edn, Oxford University Press 2007)

— — ‘Limited Liability and Multinational Enterprises: A Case for Reform’ (2010) 34 *Cambridge Journal of Economics* 915

Mucciarelli F, ‘The Unavoidable Persistence of Forum Shopping in European Insolvency Law’ (CEFIN, 2013) Working Papers No 36
<http://www.cefin.unimore.it/?q=webfm_send/186> accessed 5 May 2016

— — ‘Not Just Efficiency: Insolvency law in the EU and its Political Dimension’ (2013) 14 *European Business Organization Law Review* 175

— — ‘Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo’ [Unpublished] (SSRN, 25 August 2015)
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650414> accessed 26 April 2016

Mujih E, ‘piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching Towards Abolition?’ (2016) 37 *Company Lawyer* 39

Murphy D, ‘Holding Company Liability for Debts of Its Subsidiaries: Corporate Governance Implications’ (1998) 10 *Bond Law Review* 241

Murphy R, ‘Reformation of the European Insolvency Regulation to Act As a Legislative Tool to Assist in Europe’s Agenda’ (2015) 26 *European Business Law Review* 283

Muscat A, *The Liability of the Holding Company for the Debts of Its Insolvency Subsidiaries* (Dartmouth 1996)

N

Nadelmann K, 'Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?' (1943) 91 *University of Pennsylvania Law Review* 601

— — 'Legal Treatment of Foreign and Domestic Creditors' (1945-1946) 11 *Law and Contemporary Problems* 696

Nicholls C, 'Piercing the Corporate Veil and 'Pure Form' of the Corporation as Financial Innovation' (2008) 46 *Canadian Business Law Journal* 233

Nyombi C, 'Employees' Rights During Insolvency' (2013) 6 *International Journal of Law and Management* 417

O

Okoli P, 'In Pursuit of Substantial Justice: Navigating between Flexibility and Certainty in International Commercial Law' (2014) 7 *International journal of Private Law* 376

Omar P, 'Upstreaming Rescue: Pre-Insolvency Proceedings and the European Insolvency Regulation' (2014) 25 *International Company and Commercial Law Review* 19

— — 'The Inevitability of Insolvency Tourism' (2015) 62 *Netherlands International Law Review* 429

Ottolenghi S, 'From Peeping Behind the Corporate Veil, to Ignoring Completely' (1990) 53 *The Modern Law Review* 338

P

Pae J, 'The EU Regulation on Insolvency Proceedings: The Need for a Modified Universal Approach' (2003-2004) 27 *Hastings International and Comparative Law Review* 556

Pannen K (eds), *European Insolvency Regulation* (De Gruyter 2007)

Paulus C, 'Europeanisation of the Member States Insolvency Law' (2015) 3 Nottingham Insolvency and Business Law e- Journal 301

Paunio E, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Routledge 2016)

Paschalidis P, *Freedom of Establishment and Private International Law for Corporations* (Oxford University Press 2012)

Pedersen U, 'Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests' (1999) 73 American Bankruptcy Law Journal 386

Perkins L, 'A Defence of Pure Universalism in Cross-Border Corporate Insolvencies' (1999-2000) 32 New York University Journal of international Law and Politics 787

Peter H, 'Insolvency in a Group of Companies, Substantive and Procedural Consolidation: when and how Companies' in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006)

Petrin M, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape Plc' (2013) 76 Modern Law Review 589

Popelier P, 'Legal Certainty and Principle of Proper Law Making' (2000) 2 European Journal of Law Reform 321

— — 'Five Paradoxes on Legal Certainty and the Lawmaker' (2007) 2 Legisprudence 47

Pottow J, 'Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45 Virginia Journal of International Law 935

— — 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests' (2006) 104 Michigan Law Review 1899

— — 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency' (2007) 32 Brooklyn Journal of International Law 785

— — ‘A New Role for Secondary Proceedings in International Bankruptcies’ (2011) 46 Texas International Law Journal 579

— — ‘Beyond Carve- Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law’ (2015) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 196

Predko C, ‘Substantive Consolidation Involving Non-Debtors Conceptual and Jurisdictional Difficulties in Bankruptcy’ (1995) 41 The Wayne Law Review 1741

Prentice D, ‘Some Aspects of the Law Relating to Corporate Groups in the United Kingdom’ (1999) 13 Connecticut Journal of International Law 305

R

Rajak H ‘The Harmonisation of Insolvency Proceedings in the European Union’ (2000) Company Financial and Insolvency Law Review 180

— — ‘Corporate Groups and Cross-Border Bankruptcy’ (2009) 44 Texas International Law Journal 526

Rammeloo S, *Corporation in Private International Law* (Oxford University Press 2001)

Ramsay I, ‘Models of Corporate Regulation: The Mandatory Enabling Debate’ in R Grantham and C. Rickett (eds), *Corporate Personality in the 20th Century* (Hart Publishing 1998)

Rasmussen R, ‘Debtor’s Choice: A Menu Approach to Corporate Bankruptcy’ (1992) 71 Texas Law Review 51

— — ‘The Ex Ante Effects of Bankruptcy Reform on Investment Incentives’ (1994) 72 Washington University Law Review 1159

— — ‘A New Approach to Transnational Insolvencies’ (1997-1998) 19 Michigan Journal of International Law 1

— — ‘Resolving Transnational Insolvency Through Private Ordering’ (2000) 98 Michigan Law Review 2252

Reumers M, ‘Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR’ (2013)¹⁰ European Company and Financial Law Review 554

Roe M, ‘Some Differences in Corporate Structure in Germany, Japan, and the United States’ (1993) 102 The Yale Law Journal 1928

S

Sachdeva A, ‘Regulatory Competition in European Company Law’ (2010) 30 European Journal of Law & Economics 170

Salafia L, ‘Cross-Border Insolvency Law in the United States and its Application to Multinational Corporate Groups’ (2006) 21 Connecticut Journal of International Law 297

Sander N and Newman M, ‘Pooling of Assets and Liabilities of Insolvent Companies in the Channel Islands’ (2016) 13 International Corporate Rescue 107

Sano S, ‘The Third Road to Deal with Insolvency of Multinational Enterprise’ (2011) 21 Journal of International Banking Law & Regulation 23

Sarra J, ‘Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings’ (2009) 44 Texas International Law Journal 547

— — ‘Maidum’s Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies’ (2008) 17 International Insolvency Review 84

Schenck D, ‘Jurisdiction Over the Foreign Multinational in the EEC: Lifting the Veil on the Economic Entity Theory’ (1989)¹¹ University of Pennsylvania Journal of International Business Law 495

Schiller C and Braun E, ‘The New Insolvency Code’ in Jonathan Reuvid and Roderick Millar (eds) *Doing Business with Germany* (Kogan Page 1999)

Schwartz A, 'A Contract Theory Approach to Business Bankruptcy' (1997, 1998) 107 Yale Law Journal 1807

Schwarcz S, 'Collapsing Corporate Structure: Resolving The Tension Between Form and Substance' (2004) 60 Business Lawyer 114

Sexton A, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law and the EU Insolvency Regulation' (2011-2012) 12 Chicago Journal of International Law 811

Shah D, 'The UNCTRAL Practice Guide on Cross-Border Insolvency Cooperation: A Good Practice Guide to Cross – Insolvency Agreements' (2010) 5 International Corporate Rescue 325

Sheldon R, *Cross –Border Insolvency* (Fourth edn, Bloomsbury Professional 2014)

Shepherd N, 'Petrodel v Prest: Charter or Legal Consistency' (2013) 1 Private Client Business 40

Siemon K and Frind F, 'Groups of Companies in Insolvency: A German Perspective Overcoming the Domino Effect in an International Group Insolvency' (2013) 22 International Insolvency Review 61

Silverman R, 'Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency' (2000) 6 Journal of International and Comparative Law 265

Skeel D 'European Implication of Bankruptcy Venue Shopping in the U.S' (2006) 54 Buffalo Law Review 459

— — 'Groups of Companies: Substantive Consolidation in the US Companies' in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds) *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006)

Smart P, *Cross-Border Insolvency* (2nd edn, Butterworth 1998)

Sommer J, 'The Subsidiary: Doctrine Without A Cause?' (1990) 59 Fordham Law Review 227

Staehelin D, 'No Substantive Consolidation in the Insolvency of Groups of Companies' in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006) 214

Stolowy N, 'The Concepts of the Group of Companies: The Specificity of the French Model' (2014) 8 Journal of Business Law 640

Stomel A, 'Answering the call of the European Court of Justice in Eurofoods: a proposed package of Due Process Rights with a view toward the 2012 Revision of European Insolvency Regulation' (*Institute of European Studies*, 2011) <<http://www.ies.be/working-paper/answering-call-european-court-justice-eurofoods>> accessed 14 May 2016

Stomel A, 'Answering the Call of the European Court of Justice in Eurofoods'

(*Institute for European Studies*, 2011) <<http://www.ies.be/files/WP%203:2011%20Alan%20J%20Stomel.pdf>> accessed 3 March 2016

Stone P, *Research Handbook on EU Private International Law* (2nd edn, Edward Elgar 2011)

Strasser K, 'Piercing the Veil in Corporate Groups' (2005) 37 Connecticut Law Review 637

Szydło M, 'Prevention of Forum Shopping in European Insolvency Law' (2010) 11 European Business Organization Law Review 253

— — 'The Notion of COMI in European Insolvency Law' (2009) 20 European Business Law Review 747

T

Talbot L, *Critical Company Law* (Taylor and Francis 2015)

Taylor S, 'Practical Difficulties in Handling Group Insolvencies' in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Zurich 2006)

Teubner G, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) 36 *American Journal of Comparative Law* 130

Tett R and Crinson K, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision' (2015) 8 *Corporate Rescue and Insolvency* 1756

Thole C and Duenas M, 'Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation' (2015) 24 *International Insolvency Review* 214

Thompson R, 'Piercing the Veil: Is the Common Law the Problem' (2005) 37 *Connecticut Law Review* 619

Tirado I, 'An Evolution of COMI in the European Insolvency Regulation: From 'Insolvenzimperialismus' to the Recast' [Unpublished] (*SSRN*, 6 November 2015)

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2688169> accessed 27 July 2016

Tollenaar N, 'Dealing with the Insolvency of Multi-National Groups under the European Insolvency Regulation' (2010) 23 *Insolvency Intelligence* 65

— — 'Proposal for Reform: Improving the Ability under the European Insolvency Regulation to Rescue Multinational Enterprises' (2011) *International Insurance Law Review* 252

Tomasic R, Bottomley S and McQueen B, *Corporations Law in Australia* (2nd edn, The Federation Press 2002)

— — *Insolvency Law in East Asia* (Ashgate 2006)

Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases. Report to (The American Law Institute, 30 March 2012)
<http://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf> accessed 1 March 2016

Trautman D, Westbrook J, and Gaillard E, 'Four Models for International Bankruptcy' (1993) 3 American Journal of Comparative Law 576

Townsend J, 'International Co-operation in Cross- Border Insolvency: HIN Insurance (2008) 71 Modern Law Review 801

Tuleasca L, 'The Harmonization of the European Laws on Insolvency' (2011) 1 Lex Et Scientia Juridical Series 144

Tung F, 'Is International Bankruptcy Possible?' (2001) 23 Michigan Journal of International Law 31

U

Unt L, 'International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue' (1996-1997) 28 Law and Policy in International Business 1040

UNCITRAL (ed), *Legislative Guide on Insolvency Law* (United Nations Publication 2005) <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> accessed 26 May 2016

— — 'UNCITRAL Draft Report of Working Group V' (7 March 2008) UN Doc A/CN.9/647

— — 'UNCITRAL Draft Report of Working Group V' (9 November 2009) UN Doc A/CN.9/686

— — 'UNCITRAL Legislative Guide on Insolvency Law' (10 February 2010) UN Doc A/CN.9/WG.V/WP.92 ("UNCITRAL Legislative Guide") part III

V

Vareilles P, *Forum Shopping in the Judicial Area* (Oxford Hart Publishing 2007)

Vette E, 'Multinational Enterprise Groups in Insolvency: How Should the European Union Act?' (2011) 7 Utrecht Law Review 216

Viimsalu S, 'The Meaning and Functioning of Secondary Proceedings' (PhD Thesis, University of Tartu 2011)

Virgos M and Schmit E, '*Report on the Convention on Insolvency Proceedings*' (*Archive of European Integration*, 1996)

< http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf > accessed 15 May 2016

— — and Garcimartin F, *The European Insolvency Regulation: Law and Practice* (Kluwer Law 2004)

Voorhees R, Seim E & Coppett J, 'Global Logistics and Stateless Corporations' (1992) 59 *Transportation Practitioners Journal* 144

W

Wade J, 'The Centre of Main Interests Connecting Factor Affords Creditors no Certainty under the Model Law Regime' (2011) 22 *International Company and Commercial Law Review* 102

Wagner H, 'Economic Analysis of Cross-Border Legal Uncertainty: The Example of the European Union' in Jan Smits (eds), *The Need for a European Contract Law Empirical and Legal Perspectives* (Groningen Europe Law Publishing 2005)

Wardman K, 'The Search for Virtual Reality in Corporate Relations' (1994) 6 *Company Lawyer* 179

Warner S, 'Cross Border Insolvency: The COMI Issue in the Stanford Case' (*Legal Houdini*, 15 June 2011)
< http://www.legalhoudini.nl/images/upload/S%20Warner_Cross%20Border%20Insolvency.pdf > accessed 6 May 2016

Warren E and Westbrook J, 'Contracting out of Bankruptcy: An Empirical Intervention' (2005) 118 *Harvard Law Review* 1197

— — *The Law of Debtors and Creditors* (6th edn, Wolters Kluwer Law & Business 2009)

Weideman J and Stander L, 'European and American Perspective on the Choice of Law Regarding Cross- Border Insolvencies of Multinational Corporations – Suggestion for South Africa' (2012) 15 Potchefstroom Electronic Law Journal
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233255> accessed 29 February 2016

Weijs R and Breeman M, 'Comi-Migration: Use or Abuse of European Insolvency Law' (2015) 11 European Company and Financial Law Review 495

Weiss M, 'Bridge over Troubled Water: The Revised Insolvency Regulation' (2015) 24 International Insolvency Review 192

Weitnauer K, 'Third Circuit Restricts Substantive Consolidation Corning' (2005) 24 American Bankruptcy Institute journal 26

Wendel WB, 'Essay Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Legal Analysis' (2010-2011) 96 Cornell Law Review 1035

Wessels B, 'Current Developments Towards International Insolvency in Europe' (2004) 13 International Insolvency Review 43

— — 'European Union Regulation On Insolvency Proceedings An Introductory Analysis' (*INSOL International*, 2006)
<<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Union%20Regulation%20on%20Insolvency%20Proceedings%20An%20Introductory%20analysis.%20Bob%20Wessels.pdf>> accessed 9 May 2016

— — 'The Place of the Registered Office of a Company: A Cornerstone in the Application of the Insolvency Regulation' (2006) 3 European Company Law 183

— — 'The Changing Landscape of Cross- Border Insolvency Law in Europe' (2007) 12 Juridica International 116

— — 'Accommodating Cross- Border Co-ordination: European Communication and Co-operation Guidelines for Cross- Border Insolvency' (2007) 4 International Corporate Rescue 250

- — and Miguel Virgos, ‘European Communication and Cooperation Guidelines for Cross-Border Insolvency’ (*INSOL Europe*, July 2007) <<http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>> accessed 30 April 2016
- — ‘The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation’ (2009) 4 *European Company Law* 169
- — and Markell B & Kilborn J, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford University Press 2009)
- — ‘The Role of Courts in Solving Cross- Border Insolvency Cases’ (2011) 24 *Insolvency Intelligence* 65
- — *International Insolvency Law* (Kluwer 2012)
- — ‘Towards a Next Step in Cross-Border Judicial Cooperation’ (2014) 27 *Insolvency Intelligence* 100
- — ‘Themes of the Future: Rescue Businesses and Cross-Border Cooperation’ (2014) 27 *Insolvency Intelligence* 4
- — ‘A Glimpse into the Future: Cross-Border Judicial Cooperation in Insolvency Cases in the European Union’ (2015) 24 *International Insolvency Review* 96
- Westbrook J, ‘Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum’ (1991) 65 *American Bankruptcy Law Journal* 457
- — ‘The Lessons of Maxwell Communication’ (1996) 64 *Fordham Law Review* 2531
- — ‘A Global Solution to Multinational Default’ (1999-2000) 98 *Michigan Law Review* 2276
- — ‘Multinational Enterprises in General Default: Chapter 15, the ALI principles, and the EU Insolvency Regulation’ (2002) 76 *American Bankruptcy Law Journal* 5

— — ‘International Judicial Negotiation’ (2003) 38 Texas International Law Journal 567

— — ‘Universalism and Choice of Law’ (2004-2005) 23 Penn State Law Review 625

— — ‘Locating the Eye of the Financial Storm’ (2006- 2007) 32 Brooklyn Journal of International Law 1019

— — ‘A Comment on Universal Proceduralism’ (2010) 48 Columbia Journal of Transnational Law 503

Whincop M, ‘Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law’ (1999) 19 Oxford Journal of Legal Studies 19

Woelki K, *Unifying and Harmonising Substantive Law and the Role of Conflict of Laws* (2010 The Pocketbooks of the Hague Academy of International Law)

Wood J, ‘Director Duties and Creditor Protections in the Zone of Insolvency: A Comparison of the United States, Germany and Japan’ (2007) 26 Penn State International Law Review 139

Wood P, *Principle of International Insolvency* (Sweet & Maxwell 2007)

World Bank, ‘Principles and Guidelines for Effective Insolvency and Creditor Rights Systems’ (*World Bank*, April 2001) <http://www.worldbank.org/ifa/ipg_eng.pdf> accessed 2 August 2015

— — ‘Principles for Effective Insolvency and Creditor Rights Systems (Revised)’ (*World Bank*, 2005) <<http://www.worldbank.org/ifa/FINAL-ICRPrinciples-March2009.pdf>> accessed 2 August 2015

Wouters N and Raykin A, ‘Corporate Group Cross-Border Insolvencies between the United States & European Union: Legal & Economic Developments’ (2013) 29 Emory Bankruptcy Developments Journal 387

Wuisman I, Adriannse J and Santen B, ‘European Principles and Best Practices for Insolvency Office Holders’ (Universiteit Leiden, 19 September 2013) <http://www.tri-leiden.eu/uploads/files/IOH_project_-_Report_I.pdf> accessed 11 May 2016

Z

Zhao J and Shuangge W, 'The Legitimacy of Unsecured Creditors Protection Through the Lens of Corporate Social Responsibility' (2013) 8 Journal of Business Law 868

Zumbro P, 'Cross- Border Insolvencies and International Protocols – an Imperfect but Effective Tool' (2010) 11 Business Law International

Zwieten K, 'An Introduction to the European Regulation, as Made as Recast' [Unpublished] (SSRN, 1 April 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775814> accessed 13 June 2016