

## Journal of Business Law

2011

### European insolvency law in a global context

Irit Mevorach

**Subject:** Insolvency. **Other related subjects:** Company law. European Union. International law

**Keywords:** Centre of main interests; Corporate insolvency; Cross-border insolvency; EU law; Groups of companies; Multinational companies; UNCITRAL

**Legislation:** Regulation 1346/2000 on insolvency proceedings

#### **\*J.B.L. 666** Introduction

The EC Regulation on Insolvency Proceedings (the EC Regulation)<sup>1</sup> has introduced new concepts and measures for dealing with the conundrum of a multi-jurisdictional insolvency which were consequently followed in other models,<sup>2</sup> placing the EU as a world leader in the regulation of cross-border insolvency. Yet the Regulation left a considerable gap where it refrained from providing frameworks for dealing with multinational groups in insolvency.<sup>3</sup> Other models for cross-border insolvency followed suit and left this issue unresolved as well.<sup>4</sup> There has also been no attempt thus far on the European level to harmonise core insolvency laws,<sup>5</sup> and thus although there are pressures on legal systems to converge in this area,<sup>6</sup> laws of insolvency still differ among Member States, including the treatment of groups in insolvency.

On the global level, the United Nations Commission on International Trade Law (UNCITRAL), via its working group which deals with insolvency matters (the Working Group) has recently attempted to address the problem of groups (in insolvency) both in terms of the core insolvency remedies (pertaining to groups) **\*J.B.L. 667** and the private international law aspects (the cross-border insolvency of a multinational group). The recommendations on this matter will be included in a new part of the *UNCITRAL Legislative Guide on Insolvency Law*.<sup>7</sup> Thus new international standards in the area of insolvency of groups are now available. With the revision of the EC Regulation soon approaching<sup>8</sup> there is, therefore, an opportunity to learn from the experience and suggestions of UNCITRAL and push the area of European insolvency forward. Moreover, the special position of the European regulator, which refers to a limited number of rather closely related states, enables it to potentially improve on the UNCTIRAL recommendations (which still leave gaps), leading the way once again in those areas.

This article discusses the proposals of UNCITRAL and their suitability in the European context. In that, the article takes a global perspective. That is, the desirable approach for Europe is investigated through the assessment of recommendations set out by another international lawmaker. Critically, though, the differences in the infrastructures and available frameworks at each level (the regional and global) are taken into account--considering any limitations or otherwise opportunities for more comprehensive solutions on the European level. The goals of European insolvency law and the accumulated practical experience of using the EC Regulation are also taken into account.

The article discusses these issues in four sections. The first gives background on the current regulatory framework for European insolvencies and the treatment of groups, while the other three sections consider the suitability of the UNCITRAL proposals (or other solutions) for groups in the EU context: the second section focuses on core insolvency solutions for groups and the desirability of harmonisation in this area in Europe; the third and fourth sections address the private international law aspects, i.e. the cross-border insolvency measures for groups. While the third section considers measures for co-operation and co-ordination between affiliate companies (suggested by UNCITRAL), the fourth considers the possibility of achieving more ambitious solutions in the European context.

#### **European insolvency law and the treatment of groups--background**

The entry into force of the EC Regulation<sup>9</sup> (in 2002)<sup>10</sup> has marked a dramatic change in the regulation of cross-border insolvency proceedings with European elements (i.e. creditors, assets, branches, subsidiaries and so forth located in more than one **\*J.B.L. 668** Member State). Previously each

Member State could have determined for itself whether it had jurisdiction over debtors' insolvencies (even when the debtor might have had a tenuous connection to the jurisdiction and a considerable presence in another Member State), which laws should apply to the proceedings and whether or not to recognise insolvency proceedings opened in other Member States. This situation could have easily resulted in legal chaos which was what the EC Regulation attempted to resolve. Being binding and directly applicable in all Member States (except Denmark),<sup>11</sup> since its adoption the Regulation determines the proper forum for handling insolvency proceedings in Europe<sup>12</sup> --which is the place where the debtor has its centre of main interests (COMI),<sup>13</sup> and consequently the laws that will apply to insolvency matters (the laws of the forum).<sup>14</sup> It also provides that only one such principal proceedings may be opened and that it will have a universal effect and apply to all (European) aspects of the debtor's insolvency wherever located. The proceedings should then be automatically recognised in all Member States without further formalities.<sup>15</sup> This enables the office holder to take speedy measures in other Member States to assert the rights to control and administer the entire estate.<sup>16</sup>

In addition to the main proceedings opened at the COMI forum the Regulation allows for opening of any number of "territorial" proceedings ("secondary" to the main proceedings or "independent territorial") in other Member States.<sup>17</sup> The effects of the territorial proceedings should be limited, though, to the local assets (situated in the jurisdiction opening the proceedings),<sup>18</sup> and in the case of "secondary" proceedings they may only be winding-up proceedings.<sup>19</sup> Furthermore, the liquidators in the main and secondary proceedings are duty bound to co-operate with each other,<sup>20</sup> and the liquidator in the secondary proceedings has to allow the main liquidator to submit proposals on the liquidation or use of the assets in the secondary proceedings.<sup>21</sup> The court of the secondary proceedings shall also stay these proceedings at the request of the main liquidator subject to possible guarantees by the main liquidator and assuming it is in the interest of the creditors in the main proceedings.<sup>22</sup>

**\*J.B.L. 669** The EC Regulation refrained, though, from dealing with two major issues--the harmonisation of domestic insolvency laws and the regulation of cross-border insolvency of groups. Generally, it was appreciated that domestic laws on matters concerning credit, security and insolvency widely differ. Against such background, a full harmonisation project might have been too farfetched at that point in time. The Regulation confined itself to a framework which could be workable and politically acceptable.<sup>23</sup> Thus, the Regulation only harmonises the private international law aspects of insolvency--as aforementioned it determines the forum and laws to which the proceedings will be subjected, but thereafter the insolvency solutions that may apply (both matters of procedure and substantive law) depends on the law applicable which may differ from Member State to Member State. With respect to the treatment of groups it means that their insolvencies may eventually be handled in some joint manner (if proceedings against group members are consolidated) or on a separate basis, depending on the particular legal system in which the case may end up--the Regulation itself does not provide mechanisms such as substantive consolidation whereby separate corporate entities may be regarded as one in the course of their insolvency.<sup>24</sup> The private international law aspects, on the other hand, are dealt with quite comprehensively within the Regulation, as delineated above, yet without providing explicit (private international law) rules for international groups in insolvency.<sup>25</sup> Again, this might have made sense at the time--dealing with the complex case of enterprise groups at the same time of devising a whole new framework for cross-border insolvency could have impeded the success of the whole endeavour.<sup>26</sup> Anyhow, the result is that the Regulation does not address, for example, the possibility of centralising insolvency proceedings against group members in a single jurisdiction and does not provide a mechanism for locating a group centre for this purpose. Jurisdiction in this context is supposed to be determined for each group member separately.<sup>27</sup> There are also no provisions regarding means of co-operation between courts or representatives presiding over affiliate companies' insolvency proceedings.<sup>28</sup>

The question is whether the time has come for further development of European insolvency law in these directions, namely advancing mechanisms specific for groups which may give effect to the links between the group entities inter-se (allowing a degree of consolidation of the proceedings) as well as the links between them across borders (enhancing global group-wide solutions). The following sections examine this question while considering the new proposals of UNCITRAL with regard to the treatment of enterprise groups in insolvency.

### **\*J.B.L. 670 Taking UNCITRAL's advice on consolidation of group proceedings**

The concept of the corporate form<sup>29</sup> dictates that each entity in an enterprise group is treated

separately--in the ordinary course of business as well as when a group collapses. However, there is merit in applying “group solutions” in the course of insolvency which could allow unified group-wide sales or reorganisation plans. Especially where the group was integrated (i.e. it operated a single business or otherwise there were significant administrative or financial links between the entities), unified solutions may be more efficient and produce greater returns to creditors.<sup>30</sup> In some instances, in particular where the assets and debts of the different entities were intermingled, it might even be impossible or highly costly to separate the different businesses in the course of insolvency.<sup>31</sup> Each of the circumstances just delineated may require different solutions but certainly a completely separate process with no link among the entities in the course of insolvency may result in losses to creditors in both scenarios.

The new addition to the Insolvency Guide<sup>32</sup> aims to tackle this problem. It includes recommendations regarding the regulation of group insolvencies, and proposes that legal regimes adopt the doctrines of procedural co-ordination and substantive consolidation and allow co-ordinated reorganisation plans to be proposed.<sup>33</sup> Within the Guide those measures pertain to domestic groups (the private international law aspects pertaining to multinational groups are dealt with separately). However, such measures will also serve multinational groups which may end up being handled in a jurisdiction which has adopted any of the proposed measures.

In essence, procedural co-ordination will allow the handling of two or more proceedings against members of the same group in some joint manner. The Insolvency Guide suggests flexibility here, so that co-ordination can be implemented in different ways--the entire process may be handled under the supervision of a single court (where this is permitted by domestic law) or via co-ordination among several proceedings opened in different courts; it may involve different co-ordination techniques regarding different aspects of the process, such as co-ordinated hearings, co-ordination of avoidance proceedings and so forth.<sup>34</sup> A single representative may be appointed to all group members.<sup>35</sup> Alternatively, if more than one representative is appointed the representatives should co-operate to the maximum extent possible.<sup>36</sup> Such co-operation may deal with the sharing of information, the division of powers and responsibilities in regard to the enterprise (with the possibility of any of the representatives taking a leading role), the co-ordination of reorganisation plans' proposals, and co-ordination of administration \***J.B.L. 671** of debtors' affairs including matters of funding, preservation and selling of assets.<sup>37</sup> A co-ordinated reorganisation plan for an enterprise group may be proposed either within a procedural co-ordination process or absent a formal order of co-ordination.<sup>38</sup> The Guide envisages group-wide reorganisation plans comprising several group members under insolvency, yet an enterprise group entity which is not subject to insolvency proceedings may participate in such a plan as well. This will be based on an ordinary business decision taken by that member, subject to applicable company law.<sup>39</sup>

Substantive consolidation--i.e. the pooling of assets and debts (of the various entities) together--is kept for the rare circumstances where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay<sup>40</sup>; or where the court is satisfied that enterprise group members were engaged in a fraudulent scheme or activity with no legitimate business purpose.<sup>41</sup>

It seems that UNCITRAL generally got it right.<sup>42</sup> It suggests different measures for different types of scenarios. In the more common scenario procedural co-ordination of some sort will suffice in order to promote efficiency of the process. In those circumstances the assets, debts and creditors of each member remain intact and thus there is no real intervention with the notions of separate corporate personality and limited liability. Only in exceptional cases the “veil of incorporation” may be lifted in the sense that assets and debts will be mixed. Intermingling of assets is indeed a scenario where the partitioning of assets (usually regarded as the key economic benefit of separate personality in the group context<sup>43</sup>) was just a façade,<sup>44</sup> and fraud is always a reason to look behind the “corporate veil”.<sup>45</sup> Thus, the exceptions are certainly limited and are within the legitimate boundaries of the corporate form concept.<sup>46</sup>

Within Europe such solutions are only entertained by some Member States. Additionally, even where measures are available, the circumstances when they may be applied often differ or are not readily apparent (especially to foreign “users”). For example, procedural consolidation is provided for in the Spanish Insolvency Act<sup>47</sup> (but not substantive consolidation), whereas in the United \***J.B.L. 672** Kingdom there is no equivalent provision, though de facto procedural consolidations are often being achieved as a matter of practice where the same insolvency practitioners from the same major firm of accountants may be appointed as liquidators or administrators to the various entities comprising the

corporate group.<sup>48</sup> Irish law allows, in legislation, ordering the pooling of the assets and debts of related companies together whenever this is “just and equitable” (while taking into account a range of factors),<sup>49</sup> whereas in other jurisdictions (such as the United Kingdom and Spain) pooling or substantive consolidation is not available at all in the legislation (though courts may allow it in rare cases of confusion of assets).<sup>50</sup> French law does not provide rules on procedural co-ordination, but provides that proceedings against a group member may be extended to one or more other persons where their assets are intermingled with those of the debtor or where their legal entity is a sham.<sup>51</sup> There is, thus, significant divergence in the approach to groups in insolvency. Notably, to a considerable extent, Member States' legal systems do not comply with the international standards agreed upon at UNCITRAL level, either because they lack measures for groups, or because the measures they suggest are too broad--allowing the mixing of assets and debts whenever this is “just and equitable” (which may result with excessive intervention with the corporate form).

There is, therefore, scope for further harmonisation in this area--ensuring that mechanisms such as procedural and substantive consolidation are available in Member States' legal systems, and that the particulars of these remedies are within the internationally acceptable limits of the corporate form (in the insolvency context). This will be particularly conducive to cross-border insolvencies. Whichever type of international framework is applied to such cases (be it co-ordination between the group members' proceedings or centralisation of the process in some way),<sup>52</sup> the success of such insolvencies will depend on the availability of group solutions in the legal system and on sufficient similarities among those “domestic” measures. Otherwise, any international co-ordination might be difficult to achieve (in the absence of coherence between the solutions available in the relevant systems). Centralisation of the process in a single jurisdiction might also be useless if the case ends up being handled in a jurisdiction where there are no available group solutions. Centralisation would also most likely be perceived as threatening to state sovereignty, and thus difficult to agree upon (voluntarily or ex ante in international legislation<sup>53</sup>), in the absence of a harmonised approach to the treatment of groups. Finally, forum shopping will be diminished if a level playing field is provided for throughout the EU regarding the treatment of groups.<sup>54</sup>

Such harmonisation may be achieved on a Member State by Member State basis which may be engaged in reforms or renovation of their domestic insolvency laws, and in this process may, as envisaged by UNCITRAL, have regard to the **\*J.B.L. 673** recommendations provided in the Guide. A better approach, though, which could accelerate the harmonisation process, would be that European bodies (rather than each Member State separately) will be guided by the Guide while devising or renovating European insolvency laws embracing the above group solutions on a European level, by way of directives or regulation.<sup>55</sup> This could enhance compliance, or allow that provisions be directly applicable in the laws of the Member States.

In fact, providing solutions for group insolvencies (“from the top”--enhancing harmonisation in this area) is something that has been viewed favourably in the past on the European level. Thus, in the 2002 Report of the High Level Group of Company Law Experts, it was recommended that rules on groups' bankruptcies, in particular procedural and substantive consolidation, should be devised.<sup>56</sup> This recommendation has not been taken on board, though, thus far, probably since it was seen as a matter of bankruptcy law and thus outside the remit of the company law harmonising programme.

In light of the urgency for solutions for enterprises in distress, especially groups which are a prevalent phenomenon and whose collapse result in tremendous shockwaves, it is time to revive this positive attitude towards harmonisation in insolvency, particularly dealing with the group problem. A support for this approach can now be found in the INSOL Report and the EU Draft Report which propose developing rules for groups on the European level. The reports recommend that intermingled groups will be substantively consolidated (and in that they follow UNCITRAL's suggestions). Procedural consolidation (and other aspects of groups in insolvency) is not discussed as the recommendations seem to focus on international groups and on jurisdictional issues (on which see further below).<sup>57</sup>

### **Expanding the concept of co-operation in cross-border insolvency and applying it to groups (as advised by UNCITRAL)**

The question is how such group solutions as mentioned above can be achieved on a pan-European level in those cases where the group members were not all located in the same country. As with single debtor cross-border insolvencies, private international law complexities come into play, only now these also interact with the notion of the corporate form, since the different entities are not only controlled by different jurisdictions, they are also legally separated from their affiliates. A relatively simple way to overcome this challenge is not to make too much change in how things are: leave each

entity to the control of its local state, yet co-operate between the different states' courts and representatives (or even appoint the same insolvency representative to the different group members) to smooth the group proceedings and perhaps achieve group-wide solutions. This will still be a considerable improvement on the more "territorialist" (and entity-based) alternative where each entity will handle its insolvency on a completely separate basis with no link created between the entities situated in the different territories, a solution which may well be desirable for non-integrated groups but may be disadvantageous to those groups which were somewhat unified in the ordinary course of business and would benefit from a degree of co-operation and co-ordination in the course \*J.B.L. 674 of insolvency. At the same time, such co-operation between affiliates' proceedings will not be "interventionist"--neither to state control nor to the corporate form--as each set of proceedings remains local and the assets and debts are not being mixed.

This is what UNCITRAL suggests for international groups, in the new part of the Guide.<sup>58</sup> The Guide builds on the provisions on co-operation, co-ordination and communication provided in the Model Law,<sup>59</sup> and expand them to groups, suggesting that insolvency laws will allow courts and insolvency representatives presiding over the proceedings of different members of the same group to co-operate, including by way of agreeing on protocols (cross-border insolvency agreements), and communicate (including directly between the courts).<sup>60</sup> The Guide goes beyond that and propose some additional forms of co-operation and communication among group members' proceedings, including the appointment of the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different states,<sup>61</sup> which can assist in achieving global group-wide solutions. It also refers to a new document recently concluded by UNCITRAL<sup>62</sup> in which accumulated experience of using protocols, including between affiliate entities, is provided in detail which could further enhance the use of such agreements.

A similar exercise can be applied at EU level--expanding on existing notions of co-operation and utilising them in groups. The EC Regulation is somewhat limited, though, in terms of the co-operation measures. Currently, there is a rather general requirement in the Regulation that the liquidators in the main and secondary proceedings co-operate and communicate,<sup>63</sup> with no further delineation of possible methods of co-operation and communication. There is, therefore, room for improvement here in regard to single companies too.<sup>64</sup> In any case, co-operation techniques should be available for all situations where there is more than one set of related proceedings which have been or may be opened, be it secondary proceedings in regard to the same debtor or main proceedings regarding a separate entity part of a group. Even if more comprehensive measures may be available for both scenarios (i.e. the opening of all proceedings against a debtor of a group in the same jurisdiction<sup>65</sup>), there may be situations where such a solution would not be adequate, especially where the presence of the company or of the group in the foreign jurisdiction is substantial.<sup>66</sup> Moreover, although such measures (for example, direct communication between courts) are already being applied in practice, even in the absence of concrete rules,<sup>67</sup> the inclusion of such mechanisms explicitly in \*J.B.L. 675 the legislation<sup>68</sup> could facilitate and encourage their use, especially where jurisdictions which are less familiar with such measures are involved. Indeed, in the case of a multinational group, the mere use of co-operation mechanisms (linking entities across borders) may not be trivial.<sup>69</sup> Currently, the EU Draft Report recommends that where the operational structure of the group does not allow identification of a group centre, the proceedings should at least be co-ordinated.<sup>70</sup> For the reasons mentioned above, this would be a considerable improvement on the current state of affairs. Furthermore, as these draft recommendations closely follow UNCITRAL's standards they contribute to global harmonisation and compliance with international standards beyond the confines of the EU.

### **Going beyond the UNCITRAL proposals to define the leader in a multinational group insolvency process**

Undoubtedly, a multiple-jurisdiction (and multiple-law) insolvency process may often require greater effort and costs and will be more prone to interruptions compared with a single process handled in one jurisdiction. UNCITRAL's new standards on the treatment of international groups in insolvency do not, however, go beyond the concept of co-ordination and co-operation as delineated above. However, more comprehensive measures were discussed throughout the deliberations of the Working Group. In particular, the idea of identifying the centre of main interests (COMI) of an enterprise group where the different proceedings may be centralised was discussed.<sup>71</sup> An alternative, where the COMI forum will be regarded as a co-ordination centre (allowing the opening of local proceedings and subjecting them to the leadership of the centre forum) was also considered.<sup>72</sup> None of these concepts had culminated in concrete recommendations. The Working Group considered the COMI to be a vague and not fully developed notion, and thus saw its extension into enterprise groups

premature at the moment. In addition, UNCITRAL's cross-border insolvency measures (i.e. the Model Law<sup>73</sup>) do not encompass rules for international jurisdiction and automatic recognition and thus applying a group COMI concept may be more problematic.<sup>74</sup> The fear was that COMI is still not a universal concept and so it will be difficult to enforce it in relation to groups.<sup>75</sup> Furthermore, in the group context, COMI would be used for the purpose of global consolidation, but this is contingent upon adoption of consolidation concepts in the legal systems.<sup>76</sup> There was also some concern that **\*J.B.L. 676** group COMI (and the concentration of the proceedings in a single jurisdiction) might intervene with state control over local proceedings and harm local creditors.<sup>77</sup> On the more practical level, the Working Group was under time pressure to provide the world with measures for group insolvency urgently owing to the financial crises. In this light, more controversial solutions had to wait until a later stage. This was also the background to the decision to include the international measures for groups in a Guide rather than a Model Law at this stage.<sup>78</sup>

However, the Working Group at no point decided that the idea of centralising group proceedings (at the group centre forum) is flawed. On the contrary, several times in the deliberations it noted the desirability of avoiding multiple proceedings in the corporate group context and that an enterprise group COMI concept could facilitate cost reduction, co-ordination of global sales of assets, value maximisation, minimisation of forum shopping and the promotion of global reorganisations of groups.<sup>79</sup> It did realise, however, that enterprise groups perhaps require more nuanced solutions and that the notion of COMI itself (in its current form within the key cross-border insolvency models) needs to be further improved. Indeed, the Working Group has determined that one of its main projects for future work should be the development of the COMI concept.<sup>80</sup> For the time being, though, it focused on encouraging courts and representatives to co-operate. Of course, the possibility that such co-operation will lead to centralised proceedings where a single court or at least a single representative will lead the process (or otherwise parallel processes will be co-ordinated to the maximum extent possible) is acknowledged and encouraged.<sup>81</sup> However, the Working Group refrained from recommending which forum or representative should take up the leading role or what will be its actual role and powers.

Back in Europe, the question is whether it is desirable to take that further step in Europe and implement a group COMI concept--clarifying ex ante what will be the principal forum in a group process and what will be its role. It is submitted that this is indeed the right approach to take.

First, it will fit with a key goal of cross-border insolvency, enshrined in the Regulation, namely improving the efficiency and effectiveness of cross-border insolvency proceedings.<sup>82</sup> Developing the notion of COMI in a way that will allow the identification of a mutual centre for group members could ensure that in appropriate circumstances a parallel process is avoided and a degree of centralisation is achieved. Specifically, avoiding parallel proceedings in the context of integrated groups would save costs of multiple hearings, cross-border communication and flow of information where information and activities taken in one part of the group are relevant to the other parts. Especially where a rescue **\*J.B.L. 677** process is envisaged, centralisation would be a significant advantage, considering the more complex decision-making involved and the need for urgent measures to be taken. Centralisation would be even more crucial in the cases of intermingled groups requiring greater unity in the handling of the process and the application of measures such as substantive consolidation.<sup>83</sup> Although centralisation may be achieved on an ad hoc basis, this may not always be the case, especially in large and globally spread groups where different groups of creditors in different countries may pull to different directions impeding global group-wide solutions. Pre-defined rules on the centralisation of proceedings would also enhance predictability and thus ex ante efficiency.<sup>84</sup>

Secondly, such a pre-defined centralisation concept would not defeat state sovereignty, if the concept is applied in a nuanced way. A group COMI notion could allow a number of "centralisation levels", the full one saved for the integrated centralised groups, namely those that were centrally controlled from the group head office in the ordinary course of business. In these cases, the group operated de facto as a single company with branches. It is therefore equivalent to the centralization of proceedings in the (single) company's home state (COMI) with the possibility of opening secondary proceedings in the host states (establishments). In other words, in terms of state control there is no real harm in centralisation in those scenarios since the host states of the subsidiaries were not really in complete control over the local entities in the ordinary course of business, as these were managed and controlled via a common head office located in the centre forum of the group.<sup>85</sup> It should also be noted that the corporate form concept is not affected either, as the group is being unified for jurisdictional purposes only, and otherwise the veil is not lifted.<sup>86</sup>

Of course, one should consider other scenarios and circumstances where full centralisation may not

be adequate--for instance, decentralised groups (a scenario in which the subsidiaries are autonomous and independently and locally managed). Indeed, a nuanced solution for groups is required, and a "one size fits all" approach is inadequate. A group COMI could be useful for these scenarios too, though. It could result in these cases with a lower level of centralisation solution (and a different role designated to the group COMI), where the centre forum would be the co-ordinator (the leader) of the group process rather than the only forum for opening proceedings.<sup>87</sup> This solution can be applied, for example, by way of allowing additional (secondary or main) proceedings to be opened in the subsidiaries' jurisdictions while retaining the supervisory role of the centre forum. The latter appointed representative may be the one appointed to all other proceedings and/or have additional prerogatives such as the power to request the stay of the local process in the interest of the group, or the opportunity to submit proposals on the liquidation or the use of assets of the subsidiary by the liquidator \**J.B.L. 678* in the principal proceedings (similar to the powers granted to the liquidator in the main proceedings under the EC Regulation<sup>88</sup>). However, in such cases the principal representative should not receive assets remaining in the subsidiaries' proceedings and use them in the insolvency of other related companies,<sup>89</sup> as (unless in the case of substantive consolidation) the assets and debts of each entity should remain intact. On the other hand, the opening of main proceedings in regard to any of the affiliates should allow taking the rescue path, though again this should be subject to supervision and interventionist powers by the principal representatives to ensure that a global reorganisation is achievable in the appropriate cases.

Thirdly, the Regulation provides the framework for achieving rather smooth centralisation of insolvency proceedings. In contrast with the Model Law, it does provide rules on international jurisdiction and automatic recognition, as well as choice of law rules.<sup>90</sup> In other words, Member States party to the Regulation have already agreed to surrender a considerable degree of control for the purpose of achieving greater efficiency in the handling of cross-border insolvency. This regulatory infrastructure can facilitate more coherent rules for groups too, where a group centre forum could be identified, and could then be automatically recognised following the opening of the main proceedings (being the lead proceedings or the only set of proceedings opened against the group members, depending on the circumstances). Subsequently, the law of the forum could mainly apply to the bankruptcy issues,<sup>91</sup> with the remedies for group insolvencies qualifying as such matters. Undoubtedly, as observed by the Working Group of UNCITRAL, not much can be achieved if no such procedural and substantive remedies for groups are available in the legal system.<sup>92</sup> This brings us back to the discussion above that amplified the need to comply with the new international standards on group solutions and their inclusion in European legal systems.

Fourthly, there are indications that a centralisation concept is not only desirable and fits with the Regulation's framework--it is also feasible, particularly with the COMI test becoming quite consistent and stable in its current application. Furthermore, it also seems to be the case that COMI is applied in such a way that allows for group solutions to be achieved in practice--emphasising the real seat nature of COMI rather than the statutory seat element (the latter being enshrined in the presumption that COMI is at the registered office and would lead to the opening of multiple proceedings wherever there is a registered office of a subsidiary), and aspects of management. This approach is apparent from considering cases such as *Daisytek*,<sup>93</sup> *Energotech*,<sup>94</sup> *Hettlage*<sup>95</sup> and *Nortel*<sup>96</sup> where main proceedings against all European group members were opened in one jurisdiction (the location of the group head office), even though subsidiaries were registered in different states. An empirical study which investigated a larger dataset of Member \**J.B.L. 679* States' courts' decisions concerning ascertaining COMI points to the same direction. It was evident from the case law analysed in the study that Member States' courts (of different jurisdictions), when making a COMI determination regarding companies which had connections to different jurisdictions,<sup>97</sup> tend to rebut the presumption that COMI is at the registered office of the company, and quite consistently emphasise elements of central administration (the head office functions) as key connecting factors.<sup>98</sup> As aforementioned, this is conducive to centralisation of groups. By adopting a jurisdictional test which is based on economic realities, in particular where it focuses on aspects of management, a group centre can be identified (the central administration of the members of the integrated group) and group solutions can be promoted.<sup>99</sup>

The Working Group of UNCITRAL, while considering what could potentially serve as a definition of an enterprise group COMI,<sup>100</sup> was also in favour of an economic realities-based test. The presumption was still to be preserved but transferred to the parent company. Rebutting the presumption would then follow if it was shown that the economic centre of the group is elsewhere.<sup>101</sup>

The case of *Stanford*,<sup>102</sup> though, may mark a shift in the approach. The English court (first instance)

simply rejected the “simple head office test”--which was embraced by the same court in previous cases.<sup>103</sup> Instead, the court seemed to have focused on the presumption regarding the location of the registered office and third parties' perceptions as leading factors. Based on this approach, it considered Antigua (and not the United States) to be the COMI of the Stanford company in issue (SIB).<sup>104</sup> It is arguable that the SIB company was managed in Antigua,<sup>105</sup> and thus the group as a whole or at least this part of the group could be regarded as a decentralised one and there might have been sense, therefore, in conducting local Antiguan proceedings.<sup>106</sup> It is difficult to draw conclusions from fraud cases where the structure of the business may be artificial and a mask to hide the fraudulent endeavours. Anyhow, in other cases the head office may be in a place other than the place of incorporation, the group may be centralised and a unified process may be impeded if too much weight is given to the presumption (which links the COMI to the registered office). It is somewhat reassuring, though, that one of the judges *\*J.B.L. 680* in the Court of Appeal (in *Stanford*) re-emphasised the head office test as a key one in COMI determination, and that even after *Stanford* the COMI is still usually at the head office functions of the company.<sup>107</sup>

Indeed, if the trend of focusing on the economic reality and the head office functions test does continue, or even more so if an explicit rule along these lines is devised which elevates central administration and management factors over other factors in group cases, then it will be possible to continue achieving centralisations of proceedings. Such seems to be the approach currently taken in the EU Draft Report which recommends that main proceedings against members of centrally controlled groups will be opened in the place of the operational headquarters of the group.<sup>108</sup>

Yet, less than full centralisation should be allowed too, avoiding the abandoning of group-wide solutions in the cases where it is not straightforward that the direct head office of each subsidiary is located in the same place. Thus, for example, a group process may encompass all the integrated and centrally controlled entities and be handled at the group head office (the central administration of those entities). At the same time, though, separate proceedings may be opened in another Member State against a particular entity which was independently managed. This subsidiary's proceeding can still be linked to the main group process--either by means of co-operation or, if appropriate, by subordinating the process to an extent to the centre process, granting the group representative some prerogatives and powers in regard the subsidiary's proceedings, as mentioned above. This may be especially acute where the group has been dependent on this entity prior to insolvency. In this context, it should also be possible to take into account “group considerations” (and what is the purpose of the proceedings) when determining whether and to what extent to centralise or co-ordinate the group process. For example, an intention to restructure the group as a whole (because it was integrated and operated a single business) or to pool assets and debts together in the course of insolvency (because the affairs of the members were intermingled) should support greater centralisation of the process.

Having pre-defined centralisation rules would, to an extent, make co-operation techniques less dominant. However, as mentioned above, even where a degree of centralisation is adequate and achievable, additional proceedings may need to be opened (either main proceedings against an independent subsidiary or secondary proceedings) in which case additional co-operation measures, such as the use of protocols, may further enhance the co-ordination of the process. Furthermore, there may be cases, such as where the business was split organisationally and was *\*J.B.L. 681* controlled via several sets of management,<sup>109</sup> where the identification of a single controller or co-ordinator is impossible and the only way to co-ordinate the process is by way of co-operation and co-ordination between parallel proceedings (unless otherwise agreed upon by the parties).

Further developing COMI as an economic realities-based test which can enhance centralisation of group proceedings would also help to solidify the concept (which is still looked at with some suspicion).<sup>110</sup> It would also make other international bodies more comfortable in continuing spreading it and applying it to groups. Undoubtedly, for COMI (in particular in its application to groups) to work well on the global level it is required that it would be widely embraced and recognised by nation states. This eventuality may become more achievable if the concept is first firmly established within the confines of European insolvency law.

All in all, the development of a centralised approach for international groups in insolvency fits with the goals of cross-border insolvency and with the current trend in practice of facilitating smooth global solutions for multinational groups. UNCITRAL appreciated this too, and thus its proposals on co-operation and communication (discussed above) can be perceived as a sufficient minimum rather than the final word on this topic. Europe can now take the matter one step forward--adopting means of co-operation and communication between group members, as well as further enhancing



centralised solutions.

## Conclusion

Global lawmakers are catching up with economic realities. The enterprise group is no longer the “long lost son” and international bodies dealing with insolvency attempt to address the issue comprehensively, recognising the significance of this phenomenon. Specifically, UNCITRAL has made a breakthrough in suggesting almost for the first time explicit internationally standardised solutions for groups. Europe is now in the process of addressing the matter too, where it seems to take into account the experience and suggestions of UNCITRAL as well. Looking outwards to this global initiative with a view of complying with the new international standards will enhance “cross-model” harmonisation and uniformity across regimes within and outside Europe. At the same time, Europe can further lead the way in suggesting improved concepts which can allow greater efficiency and the ability to devise smooth and harmonised solutions for groups—building on its rather comprehensive framework for cross-border insolvency and the accumulative experience of Member States’ courts. The result could then be a “race to the top” where best practice comprehensive solutions may ultimately be implemented worldwide.

Associate Professor, School of law, University of Nottingham. The article is based on papers presented at the INSOL Europe academic conference (Stockholm, October 2009) and at the Banca d'Italia seminar (Rome, June 2010). I am grateful for the helpful comments of colleagues in attendance at those meetings. I would also like to thank the British Academy for funding parts of the research on which this article is based.

J.B.L. 2011, 7, 666-681

1. Council Regulation 1346/2000 on Insolvency Proceedings [2000] OJ L160/1.
2. e.g. the concept of COMI (centre of main interests) as the jurisdictional test for international insolvencies (EC Regulation art.3(1)), adopted by other major frameworks for cross-border insolvency, in particular the UNCITRAL Model Law on Cross Border Insolvency (UN Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Model Law on Cross-Border Insolvency with Guide to enactment, U.N. Sales No.E.99.V.3) (the Model Law) (see arts 2(b) and 16(3)).
3. An enterprise (or corporate) group may mean different things. UNCITRAL is suggesting a broad definition: “two or more enterprises that are interconnected by control or significant ownership” (see UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law* (2004), Part III, Glossary 4(a)). A multinational group may be viewed as an enterprise group with entities established or centred in different countries (see I. Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford University Press, 2009), p.31).
4. The UNCITRAL Model Law deals with single debtors; cf. ALI, *Principles of Cooperation Among the NAFTA Countries* (2003) which, although bounding their scope to a limited number of legal issues, do explicitly provide a couple of principles addressing the matter of groups.
5. However, see the discussion of the High Level Group of Company Law Experts which touched on insolvency matters: *Report of the High Level Group of Company Law Experts* (November 4, 2002), Ch.V(3). And, more recently, the report prepared by INSOL Europe (commissioned by the European Parliament): European Parliament Report, *Harmonization of Insolvency Law at EU Level* (April 26, 2010) (INSOL Report) and the European Parliament (Committee of Legal Affairs) Draft Report with recommendations to the Commission on insolvency proceedings in the context of EU company law (June 6, 2011) 2011/2006(INI) (the EU Draft Report) currently recommending harmonisation of insolvency laws in various areas.
6. See J.L. Westbrook, “A Global Solution to Multinational Default” (2000) 98 Mich. L. Rev. 2276, 2288-2292.
7. UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law*, 2004 (the Insolvency Guide). A pre-release (July 21, 2010) of the new part (Pt III) is available at <http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf> [Accessed July 29, 2011] (Pt III of the Guide). I had the privilege of serving as an adviser to the UK delegation in the deliberation of the Working Group on this topic. The views expressed in this study in regard to the work of UNCITRAL are, however, my own views and do not necessarily reflect those of the UK delegation or of the Working Group.
8. Set for 2012.
9. Council Regulation 1346/2000 on Insolvency Proceedings [2000] OJ L160/1.
10. The EC Regulation was adopted by the Council of the European Union on May 29, 2000, and entered into force on May 31, 2002. The

EC insolvency project first assumed the form of a Convention and was later transposed into a Regulation. For comprehensive commentaries in English on the EC Regulation see G. Moss, I.F. Fletcher and S. Isaacs (eds), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, 2nd edn (Oxford University Press, 2009); B. Wessels, *International Insolvency Law* (Kluwer, 2006), Part IV; I.F. Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2005, supplement 2007), Ch.7.

11. There is no need for ratification or implementation by domestic legislation: EC Regulation art.47. The EC Regulation's scope is limited, though, to cases where the centre of main interests of the debtor is located within the European Community (any of the Member States, except Denmark): Recital 14. If the centre of main interest is outside the Community, the proceedings will be governed by the domestic law.
12. "Insolvency proceedings" includes both winding up and reorganisation proceedings: EC Regulation arts 1(1) and 2(a).
13. EC Regulation art.3(1). COMI is not defined in the Regulation. It is only presumed to be (with regard to legal persons) in the company's place of registered office while the presumption can be rebutted if there is proof that the COMI is located in some other Member State.
14. EC Regulation art. 4, subject to various exceptions (arts 5-15).
15. EC Regulation art.16(1). For this purpose, the Regulation grants primacy of effect to the first court to open such proceedings.
16. See I.F. Fletcher, "The European Union Regulation on Insolvency Proceedings" [2003] *INSOL INTERNATIONAL*, *Cross-Border Insolvency* 15, 38-39.
17. EC Regulation arts 3(2) and (4), and art.16(2). The classification of territorial proceedings between "secondary" and "independent territorial" depends on whether or not main insolvency proceedings have been opened.
18. EC Regulation art.27.
19. EC Regulation art.3(3). Independent territorial proceedings will have to convert to winding-up proceedings after any subsequent opening of main proceedings.
20. EC Regulation art.31(1) and (2).
21. EC Regulation art.33(1).
22. EC Regulation art.31(3). See further prerogatives given to the liquidator in the main proceedings in arts 34, 35 and 37.
23. See Fletcher, *Insolvency in Private International Law*, 2005, p.342.
24. Moss et al., *The EC Regulation on Insolvency Proceedings*, 2009, pp.257-258. On consolidation of group proceedings see further in the next section below.
25. The Virgos/Schmit Report (M. Virgos and E. Schmit, "Report on the Convention on Insolvency Proceedings" (1996) 6500/1/96, REV1, DRS 8 (CFC)), which has been issued to serve as an interpretive guide to the Insolvency Convention of 1995) states at para.76 that "[T]he Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes) ...".
26. I. Mevorach, "Is the future bright for enterprise groups in insolvency? -- analysis of UNCITRAL's new recommendations on the domestic aspects" (forthcoming in P.J. Omar (ed.), *International Insolvency Law: Reforms and Challenges* (Ashgate, 2011).
27. See Mevorach, *Insolvency within Multinational Enterprise Groups*, 2009, p.93.
28. Mevorach, *Insolvency within Multinational Enterprise Groups*, 2009, p.93.
29. Encompassing the notions of "separate personality" and "limited liability".
30. See Mevorach, *Insolvency within Multinational Enterprise Groups*, 2009, pp.153-159.
31. Mevorach, *Insolvency within Multinational Enterprise Groups*, 2009, pp.153-159.
32. UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law*, 2004, Part III of the Guide at

<http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf> [Accessed July 29, 2011].

- [33.](#) Part III of the Guide proposes some additional remedies for group insolvencies, which will not be discussed in this article, including provisions on avoidance proceedings and comments (but not recommendations) on the contentious issue of group liability.
- [34.](#) Part III of the Guide, recommendation 204, and para.23.
- [35.](#) Part III of the Guide, recommendation 232.
- [36.](#) Part III of the Guide, recommendations 234 and 235.
- [37.](#) Part III of the Guide, recommendation 236.
- [38.](#) Part III of the Guide, recommendation 237.
- [39.](#) Part III of the Guide, recommendation 238.
- [40.](#) It seems that consolidation will apply to all the intermingled part of the group. It may be then that a particular member, although formally solvent, would take part in the pooling order as owing to the intermingling scenario it is not possible to ascertain its true financial situation.
- [41.](#) Part III of the Guide, recommendation 220.
- [42.](#) For critical accounts see Mevorach, "Is the future bright for enterprise groups in insolvency?" in *International Insolvency Law*, forthcoming 2011; I. Mevorach, "Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency" (2010) 18 *Cardozo J. of Int'l & Comp. L.* 359.
- [43.](#) The asset partitioning between the company and the shareholders or among the members in a groups means that creditors do not need to monitor the creditworthiness of other group members when they extend credit to a particular entity: see H. Hansmann and R. Kraakman, "The Essential Role of Organizational Law" (2000) 110 *Yale L.J.* 387.
- [44.](#) See Mevorach, "Is the future bright for enterprise groups in insolvency?" in *International Insolvency Law*, forthcoming 2011, pp.224-227.
- [45.](#) Limited liability should only operate to restrict liability where the risk taking is based on conduct which society regards as legitimate: see P. Davies, "Directors' Creditor-Regarding Duties in the Vicinity of Insolvency" (2006) 7 *E.B.O.R.* 301, 331.
- [46.](#) Though fraud could be tackled in other ways, for instance by avoiding illegitimate transactions. Indeed the recommendation on substantive consolidation provides that the doctrine should be applied only when substantive consolidation is essential to rectify that scheme or activity: see Part III of the Guide, recommendation 220.
- [47.](#) Ley 22/2003 art.10.4, Concursal, July 9, 2003, BOE No.164, July 10, 2003.
- [48.](#) See Moss et al., *The EC Regulation on Insolvency Proceedings*, 2009, p.173.
- [49.](#) E.g. the conduct of the related company towards the company being wound up. See Irish Companies Act 1990 s.141.
- [50.](#) See, e.g., *Bank of Credit & Commerce International SA (No.3), Re* [1993] B.C.L.C. 1490 CA (Civ Div).
- [51.](#) French Commercial Code art.L621-2.
- [52.](#) International frameworks for dealing with cross-border insolvencies (of groups) will be discussed below.
- [53.](#) See below.
- [54.](#) One of the proclaimed aims of the EC Regulation is 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): see Recital 4.
- [55.](#) E.g. within the EC Regulation.

- [56.](#) See Report of the High Level Group of Company Law Experts of November 4, 2002, Ch.V(3).
- [57.](#) See INSOL Report, para.XIII; EU Draft Report, Pt 3.1.
- [58.](#) Part III of the Guide, recommendations 239-254.
- [59.](#) See Model Law arts 25-27.
- [60.](#) See Part III of the Guide, recommendations 240-242, 246-250, 253-254.
- [61.](#) Part III of the Guide, recommendation (251).
- [62.](#) The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), referred to in Part III of the Guide, section E.
- [63.](#) See EC Regulation art.31(1) and (2).
- [64.](#) Indeed, the EU Draft Report currently recommends elaboration of the co-operation provision (specifically the inclusion of a duty to communicate between courts; see Pt 2.4).
- [65.](#) On which concept see the next section below.
- [66.](#) See next section below.
- [67.](#) See, e.g., court-to-court communication between Dutch and German courts in the case of *BenQ (BenQ Mobile GmbH & Co OHG [a trading partnership] and BenQ Mobile Holding BV*, Docket No.1503 IE 4371/05 Munich, February 5, 2007); co-operation and communication agreement (protocol) agreed upon between the German and English insolvency representatives in the insolvency of *Daisytek* (High Court of England and Wales, Chancery Division, Leeds and the Insolvency Court of Düsseldorf, (Germany)).
- [68.](#) The Regulation could also refer to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, 2009, in this context.
- [69.](#) See Mevorach, "Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency" (2010) 18 *Cardozo J. of Int'l & Comp. L.* 359, 420.
- [70.](#) See EU Draft Report, Pt 3.2.
- [71.](#) See Working Papers of the Working Group: A/CN.9/WG.V/WP.85/Add.1, paras 3-12 (WP.85/Add.1); A/CN.9/WG.V/WP.82/Add.4, paras 3-15 (WP.82/Add.4); A/CN.9/WG.V/WP.76/Add.2, paras 2-17 (WP.76/Add.2); A/CN.9/WG.V/WP.74/Add.2, paras 6-12 (WP.74/Add.2).
- [72.](#) See Working Papers of the Working Group: WP.85/Add.1, paras 3-12; WP.82/Add.4, paras 3-15; WP.76/Add.2, paras 2-17 (WP.76/Add.2); WP.74/Add.2, paras 6-12.
- [73.](#) UNCITRAL Model Law on Cross Border Insolvency.
- [74.](#) It was thought that it may be difficult to avoid parallel proceedings in multiple jurisdictions, with each seeking to be main proceedings: UNCITRAL, Working Group V, *Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Fifth Session*, paras 26-27, U.N. Doc A/CN.9/666 (December 2, 2008) (*Report, Thirty-Fifth Session*); WP.76/Add.2, paras 3-4.
- [75.](#) WP.76/Add.2, paras 3-4.
- [76.](#) WP.76/Add.2, paras 27, 96.
- [77.](#) WP.76/Add.2, para.13.
- [78.](#) UNCITRAL, Working Group V (Insolvency Law), *Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Sixth Session*, para.55, U.N. Doc. A/CN.9/671 (May 25, 2009).
- [79.](#) See WP.76/Add.2, para.16; UNCITRAL, Working Group V, *Report of Working Group V (Insolvency Law) on the Work of Its Thirty-First*

Session, para.54, U.N. Doc. A/CN.9/618 (January 8, 2007); WP.82/Add.4, paras 2-15.

- [80.](#) U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Group V (Insolvency Law), *Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Eighth session* (New York: April 19-23, 2010), para.104(a), U.N. Doc A/CN.9/691 (April 28, 2010). This project has now started (discussions are ongoing) and it is interesting that the issue of group COMI has been raised again in the context of clarifying the meaning of COMI generally: see UNCITRAL, Working Group V (Insolvency Law), *Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Ninth Session* (Vienna: December 6-10, 2010), U.N. Doc A/CN.9/715 (December 20, 2010).
- [81.](#) As delineated in the previous section.
- [82.](#) EC Regulation Recital 2.
- [83.](#) See Part III of the Guide, recommendation 220.
- [84.](#) If everything is decided post hoc it is impossible to ascertain the jurisdiction and laws which will apply.
- [85.](#) See also, Mevorach, "Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency" (2010) 18 *Cardozo J. of Int'l & Comp. L.* 359, 400.
- [86.](#) Unless there is justification for substantive consolidation as explained above.
- [87.](#) Similar to the "coordination centre" solution considered by the Working Group of UNCITRAL. Though the Working Group considered suggesting it as a general solution, for any type of group. See also I. Mevorach, "The Home Country of a Multinational Enterprise Group Facing Insolvency" (2008) 57 *International and Comparative Law Quarterly* 427, 446-447.
- [88.](#) See EC Regulation art.33(1) and art.31(3). See also INSOL Report, para.XIII (mentioning the possibility of giving prerogatives to the liquidator of the ultimate parent's main proceedings).
- [89.](#) See EC Regulation art.35.
- [90.](#) See EC Regulation art.3(10), art.4, art.16(1).
- [91.](#) Building on the choice of law rule in the EC Regulation: see EC Regulation art. 4.
- [92.](#) See UNCITRAL, *Report, Thirty-Fifth Session*, paras 27, 96.
- [93.](#) *Daisytek-ISA Ltd, Re* [2003] B.C.C. 562 Ch D at 564.
- [94.](#) *Energotech Sàrl, Tribunal de Grande Instance Lure (France)*, March 29, 2006 [2007] B.C.C. 123.
- [95.](#) *Hettlage KghA, Re* District Court of Munich (Germany) May 4, 2004, ZIP 2004, 962 (AG München Beschl.v.4.5.2004-1501 IE 1276/04).
- [96.](#) *Nortel Networks* January 14, 2009 High Court of Justice Chancery Division Companies Court.
- [97.](#) e.g. the registered office was in country X, and the head office or the principal place of business or other factors in country Y.
- [98.](#) See I. Mevorach, "Jurisdiction in insolvency -- a study of European courts' decisions" (2010) 6(2) *Journal of Private International Law* 327.
- [99.](#) See also Mevorach, "The Home Country of a Multinational Enterprise Group Facing Insolvency" (2008) 57 *International and Comparative Law Quarterly* 427.
- [100.](#) See Working Papers of the Working Group: WP.85/Add.1, paras 3-12; WP.82/Add.4, paras 3-15; WP.76/Add.2, paras 2-17 (WP.76/Add.2); WP.74/Add.2, paras 6-12; WP.76/Add.2, paras 3-4, 27, 96.
- [101.](#) However, the definition provided a "pool" of factors (including elements of central administration) which should be considered collectively, without elevating any of them to the position of a key factor (see WP.85/Add.1, para.17(B)(3)-(4)).
- [102.](#) *Stanford International Bank Ltd (In Receivership), Re* [2009] EWHC 1441 (Ch), [2009] B.P.I.R. 1157; *Stanford International Bank Ltd, Re*

[2010] EWCA Civ 137; [2011] Ch. 33. This is a case based on the English UNCITRAL Model Law (Cross-Border Insolvency) Regulation 2006) yet the court applied the EC Regulation concept of COMI and the ECJ decision in *Eurofood* [2006] E.C.R. I-3813; [2006] B.C.C. 397.

- [103.](#) *Stanford* [2009] EWHC 1441 (Ch), [2009] B.P.I.R. 1157 at [61].
- [104.](#) *Stanford* [2009] EWHC 1441 (Ch), [2009] B.P.I.R. 1157 at [70].
- [105.](#) *Stanford* [2009] EWHC 1441 (Ch), [2009] B.P.I.R. 1157 at [11]-[28]. Note, though, that the centre of the fraudulent scheme was in the US and thus one could argue that this was the real COMI of the group (see the approach taken by the Canadian court in *Stanford International Bank, Re*, September 11, 2009 Superior Court, District of Montreal, Quebec).
- [106.](#) See Mevorach, "The Home Country of a Multinational Enterprise Group Facing Insolvency" (2008) 57 *International and Comparative Law Quarterly* 427.
- [107.](#) See *Stanford* [2010] EWCA Civ 137; [2011] Ch. 33 at [58] and [152]. Subsequent decisions (of English courts) apparently follow the *Stanford* approach by emphasising the presumption and the fact that it can be rebutted only by objective factors. Yet, de facto the real seat of the company still prevails--the presumption is rebutted when there is a conflict between connecting factors, and COMI is usually at the forum of central administration and head office functions (ascertainable by third parties) (see, e.g., *In the matter of European Directories (DH6) BV* [2010] EWHC 3472 (Ch), [2011] B.P.I.R. 408; *Kaupthing Capital Partners II Master LP Inc, Re* [2010] EWHC 836, [2011] B.C.C 338; *In the Matter of Gallery Capital SA v In the Matter of Gallery Media Group Ltd* 2010 WL 4777509). Further clarifications on COMI determination may be forthcoming as ECJ decisions are pending (see Reference for a preliminary ruling from the Cour de Cassation (France)--*Rastelli Davide v Jean-Charles Hidoux*, in his capacity as liquidator appointed by the court for *Médiasucre International* [2010] OJ C161/36; Reference for a preliminary ruling from the Tribunale ordinario di Bari (Italy)--*Interedil Srl, in liquidation v Fallimento Interedil Srl, Banca Intesa Gestione Crediti Spa* (C-396/09) [2009] OJ C312/21).
- [108.](#) See EU Draft Report, Pt 3.1.
- [109.](#) See Mevorach, "The Home Country of a Multinational Enterprise Group Facing Insolvency" (2008) 57 *International and Comparative Law Quarterly* 427, 447-448.
- [110.](#) See, e.g., H. Eidenmuller, "Free Choice in International Company Insolvency Law in Europe" (2005) 6 *European Business Organization Law Review* 423, 430-431; G. McCormack, "Jurisdictional competition and forum shopping in insolvency proceedings" [2009] *Cambridge Law Journal*, 169, 196.