

## THE 'HOME COUNTRY' OF A MULTINATIONAL ENTERPRISE GROUP FACING INSOLVENCY\*

Identifying the 'home country' for the multinational enterprise group's insolvency proceedings can be crucial for allowing an effective insolvency process for related entities. However, this is a challenging task given the diversity of group structures and insolvency scenarios. This article attempts to deal with this issue by applying alternatives of 'insolvency venues' to the group case and confronting them with key insolvency goals, to assess which standard venue could most effectively enhance cost efficiency, predictability and transparency of the rules (regarding jurisdiction), control forum shopping and accord with creditors' legitimate expectations. The paper suggests that operational headquarters is in principle the most efficacious test for multinational groups, yet it also points out its limitations.

### I. INTRODUCTION

Promoting key insolvency goals in the context of insolvency within multinational enterprise groups (MEGs) heavily relies on the adoption of a global approach to handling such proceedings. This is particularly pronounced in respect of maintaining fair and efficient international insolvency regime, but also in enhancing certainty and predictability and preventing forum shopping.<sup>1</sup> A 'global approach' in this context implies taking a worldwide perspective on the MEG insolvency which may also involve a disregard of the corporate form to a certain extent. In other words, it suggests a 'groupwide' concept. In appropriate cases (crucially when dealing with an integrated MEG or any integrated part thereof) a centralized process could be the most effective way forward for an insolvent MEG. This may imply handling the insolvency proceedings of the various entities from a single jurisdiction and under a single legal regime. Consequently, reducing costs of parallel proceedings, and facilitating the coordination of a global sale of assets or the orchestration of reorganization on a group scale. Furthermore, even when subsidiaries are significantly independent and a local process is both efficient and fair, it may still be beneficial for the various proceedings to be supervised and coordinated from a single jurisdiction.<sup>2</sup> Which ever is the case, it should be emphasized that handling (or supervising) the insolvency proceedings from a single jurisdiction does not necessarily entail substantive consolidation of the insolvency estates.<sup>3</sup> In fact, in most scenarios 'a consolidation of the cases' (consolidating the procedural aspect of the insolvency rather than the actual entities) would be the necessary and sufficient mechanism to facilitate the insolvency process. This way a particular court presides over all the cases and one office-holder (or a bundle of joint administrators) is appointed for the various debtors (hence, a joint administration of the

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<sup>1</sup> See I Mevorach, 'The road to a suitable and comprehensive global approach to insolvencies within multinational corporate groups' [2006] 15 JBLP 455, 463–64 and 466–530.

<sup>2</sup> *ibid* 466–530. See also I Mevorach, 'Centralizing insolvencies of pan-European corporate groups: a creditor's dream or nightmare?' [2006] JBL 468.

<sup>3</sup> Combining the assets and liabilities of the affiliates in the course of insolvency.

affiliated companies' proceedings can be held). However, crucially each company remains separate in the course of insolvency, and creditors recover their claims from the particular entity to which they belong.<sup>4</sup>

Taking such a 'global approach' to cases of MEG insolvency not only implies taking an enterprise-law point of view in this respect (as opposed to strict adherence to 'entity law') but also that the 'enterprise' (the group as a whole) has a single common geographical locus and that such a locus may be identified. Evidently, determining the 'home country' of the enterprise group as such (namely the proper venue from which the 'group insolvency process' could be jointly handled, or supervised) is a fundamental challenge to the application of a 'global approach'. The main hurdle here is that any such definition of the 'home country' would need to accommodate a variety of situations and possible scenarios and at the same time support the fulfilment of the insolvency goals (eg maintain cost-efficiency and predictability and prevent forum shopping). Indeed, it has been argued<sup>5</sup> that the Achilles' heel of universalism is the difficulty to apply it to multinational groups, in particular the indeterminacy of the home country issue in this regard. Arguably, 'the greatest uncertainty as to the meaning of 'home country' results from the fact that most large firms are not single entities, but corporate groups'.<sup>6</sup>

Evidently, there is no ready-made 'home country' concept of an MEG. Thus far, cross-border insolvency models have not provided an answer for the question of proper jurisdiction in cases of international corporate groups. The EU Regulation on Insolvency Proceedings<sup>7</sup> and the UNCITRAL Model Law on Cross-Border Insolvency<sup>8</sup> do not deal explicitly with the issue of enterprise groups.<sup>9</sup> The ALI Principles<sup>10</sup> do allow for a subsidiary to open insolvency proceedings in the parent's jurisdiction, yet this place does not necessarily reflect the proper venue of the group,

<sup>4</sup> This tool is available in several national laws. In Canada and the US, for example, it is counted as essential that corporate groups will be subjected to a joint administration (procedural consolidation) when a financially distressed group seeks to reorganize itself (see DG Baird, 'Substantive Consolidation Today' (2005) 1 *Bost Col L Rev* 5, 6. (on procedural consolidation in the United States); JS Ziegel, 'Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective' [2002] 7 *Fordham J Corporate & Financial L* 367, 376 (explaining that procedural consolidation 'is almost de rigueur' in Canada and US corporate groups' reorganizations). In the UK, as a matter of practice, coordination of group insolvency may be achieved via the appointment of an insolvency representative to two or more members of the same group.

<sup>5</sup> See LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' [1999] 84 *Cornell L Rev* 696 [hereinafter: LoPucki, Cooperation]; LM LoPucki, 'Universalism Unravels' [2005] 79 *American Bankruptcy L J* 143.

<sup>6</sup> LoPucki, Cooperation (n 5) 716.

<sup>7</sup> Council Regulation 1346/2000 on Insolvency Proceedings (<<http://www.europa.eu.int/eur-lex>>) [hereinafter: EU Regulation].

<sup>8</sup> UN Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Cross-Border Insolvency with Guide to enactment, UN Sales No E.99.V.3 (<<http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>>) [hereinafter: UNCITRAL Model Law].

<sup>9</sup> However, the topic of enterprise groups in insolvency is currently under consideration by UNCITRAL working group V (insolvency law) (see documents and reports of 31st-39th sessions of working group V, available at <[http://www.uncitral.org/uncitral/en/commission/working\\_groups/5Insolvency.html](http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html)>).

<sup>10</sup> The American Law Institute, *Transnational Insolvency: Cooperation among the NAFTA Countries* (2003) [hereinafter: ALI Principles].

and it is only provided as an option for each subsidiary separately.<sup>11</sup> Hence, the ALI too lacks a comprehensive treatment of groups. Therefore, the proper venue for MEG insolvency, which is invoked by the application of a 'global approach', has to be thoroughly considered. It is the aim of this paper to address this issue and consequently to suggest the criteria for identifying this potential locus while at the same time specifying any limitations it may hold. It will be done by first delineating the evaluation method of the possible alternatives for the proper venue and subsequently discussing those alternatives. Other questions pertinent to international groups in insolvency such as the appropriate remedies that should be available during the insolvency process itself are outside the scope of this paper. However, before venturing forth, another preliminary issue must be addressed. That is, the nature of the multinational group with which we are dealing and for which a 'home country' needs to be identified. Obviously, this should be clarified in order to come up with a competent test for the proper venue. Later on, we will also discuss particular circumstances in which a single venue for the MEG insolvency can not be located or where the test provided is impractical or inappropriate and alternative tests for identifying the venue need to be applied.

## II. THE SCENARIO OF MEG IN INSOLVENCY AND THE FACTOR OF INTEGRATION

We have referred above to 'an MEG' and 'an integrated MEG'; however, these two terms need further clarification in the context of this paper before embarking on the quest for the proper forum for the MEG. With respect to the phenomenon of an MEG, it should be considered whether we are going to have as our subject-matter only 'equity based' groups, or whether we should include other business structures as well. In addition we need to identify what would constitute the international dimension of such groups. Furthermore, as integration is supposedly the specific attribute of an MEG that dictates whether identification of a proper venue in the insolvency of group members' case will be a relevant issue, it should be clarified what sort of MEG attributes reflect on its level of integration. This is also linked to the question of what parts of the group will we look at when choosing the place in which to handle the proceedings.

### *A. The Multinational Enterprise Group (MEG)*

Worldwide business operating via a bundle of linked undertakings may take various legal forms, though two main broad types of structure can be identified. One type is the 'equity-based' form of multinational enterprises. It may occur in the classic 'pyramid' form of ownership that crosses borders, or alternatively as transnational mergers in which two or more parent firms integrate their business operations and jointly hold a company. Additional example could take the form of cross-shareholding groups coupled with coordinated management.<sup>12</sup> The other type is the 'contractual-based' form of MEGs which emphasizes contractual linkages between foreign companies or

<sup>11</sup> ALI Principles, Procedural Principle 23.

<sup>12</sup> Developed in Japan (see PT Muchlinski, *Multinational Enterprises and the Law* (Blackwell, Oxford, 2007) 63–65).

international 'network organizations'.<sup>13</sup> Such structures can be achieved in various ways, for instance via the establishment of distribution franchise alliances, or by licensing production rights as part of a production franchise package.<sup>14</sup> It should be noted that multinational enterprises may be structured as supranational forms of international business, but this is just a particular type of a single corporation.<sup>15</sup> Certainly, such types of supranational entities can be part of a group in which the top company can be supranational as well or a national one. To summarize, firms may subdivide their economic activities among separate entities operating in different countries in a variety of legal patterns (such as networks and other type of interrelations) rather than exclusively relying on the basic equity based 'pyramid' form. In terms of the international aspect, a multinational group is a group whose constituents (two or more) are established or centred in different countries, so that they may be subjected to different jurisdictions if they were to be looked at separately.

Evidently, all these various structures involve a number of undertakings that are linked in some form or another. As a result, a degree of control or coordination may potentially occur in any of the above legal patterns. Thus, for instance, parent and subsidiaries (linked by equity) may altogether operate a single business, or parents may be significantly involved in the management of the subsidiaries. Crucially however, this may also happen where an international business is carried on by means of contract, where there may still emerge a relationship of control or coordination.<sup>16</sup>

Indeed, economists have suggested that trans-national businesses may be tied by contract rather than equity and may be organized with a high degree of decentralization. The vital link can thus be control, (actual, or capacity to control) or coordination between (or over) equity or contractually based entities, even when it is exerted over autonomous action centres.<sup>17</sup> National laws refer to various features as sufficient to create a group. These normally include elements of ownership and control. Yet as most jurisdictions do not have specific laws tailored to corporate groups there is normally absence of a coherent definition for groups (domestic or international).<sup>18</sup> Reinforcement to the use of a broad meaning to MEGs can be found in the OECD Guidelines for Multinational Enterprises,<sup>19</sup> which allows for either coordination or

<sup>13</sup> As such associations were described by Teubner (see eg G Teubner, 'The many-headed Hydra: networks as higher order collective actors' in J McCahery and S Picciotto and C Scott (eds), *Corporate Control and Accountability* (OUP, Oxford, 1993) 41).

<sup>14</sup> Muchlinski (n 12) 53–54.

<sup>15</sup> See the initiatives within the EC: the Statute for a European company (SE) (Council Regulation (EC) No 2157/2001, OJ L 294/1, 10.11.2001) and Council Regulation (EEC) 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)/[1985] OJ L 199/1.

<sup>16</sup> Muchlinski (n 12) 152–153.

<sup>17</sup> See eg, JH Dunning, *Multinational Enterprises and the Global Economy* (Edward Elgar, Cheltenham, 1993) 3.

<sup>18</sup> See eg, English Companies Act which offers no formal definition of a group, though it seeks to define the key players within a group. For certain purposes the definition refers to group of undertakings embracing an elaborated list of optional connecting factors that can establish a parent undertaking (including the power to exercise dominant influence or the fact that the parent and subsidiary are managed on a unified basis (Companies Act 1985 (UK) s 258, replaced by s 1162 of the Companies Act 2006 (UK)). For other purposes the definitions is narrower and refers only to body corporate (Companies Act 1985 (UK) s 736, replaced by s 1159 of the Companies Act 2006 (UK)).

<sup>19</sup> OECD Guidelines for Multinational Enterprises 27 June 2000 (<<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>).

control to be the possible manifestation of linkage between the entities comprising the international group, and suggests that the amount of influence and control over the entities may differ between enterprises with different degrees of autonomy enjoyed by them.<sup>20</sup>

It is suggested here that for our purposes, a lenient approach to the phenomenon of an MEG should be adopted, as a starting point. Indeed, any of the above mentioned legal forms may bring about an insolvency scenario of multiple debtors in a number of countries (if the enterprise or any part thereof collapses) which are linked, and therefore may require the application of a worldwide perspective to the group's insolvency. Furthermore, it would be of limited practical value to apply such a centralized approach as was mentioned in the Introduction only to certain sorts of group structures (for instance the equity based ones). Such a 'limited' approach will permit certain MEGs to evade legal consequences (in the context of insolvency) as well as prohibit MEGs from the benefits a global approach may propose, if their operational structure is different than the 'basic' traditional one. Hence, a limited method that applies only to a restricted version of the MEG will lack generality and will be less effective. For our present context we therefore consider any group comprised of a number of enterprises<sup>21</sup> established or centred in more than one country as long as those are mutually connected either by common or interlocking shareholding or via contract, so that they can be controlled or may coordinate their businesses.

Our starting point is a very wide one which encompasses any possible structure that supports a group operation. However, whereas different structural mechanisms may bring about the need to link between connected entities in the course of insolvency, it is only when the multinational enterprise is functionally integrated and under insolvency (or any part thereof) that assigning a single venue becomes necessary.<sup>22</sup>

### *B. The Integration Factor of MEGs*

When considering the application of a centralized approach to the MEG insolvency, it becomes clear that it should be specifically directed at those MEGs in which the various components comprising the group are significantly functionally linked. Accordingly, the need to identify a proper venue is particularly pronounced in the case of an 'integrated' MEG. More specifically, the term Integrated MEG refers to those worldwide enterprises that were managed as a group, jointly operating a coordinated single business or even centrally controlled one. The case of an MEG in which the various components were inter-linked resulting with significant financial and administrative interdependence may also be included under this term.<sup>23</sup> However,

<sup>20</sup> *ibid.*, 'Concepts and Principles', 3.

<sup>21</sup> The multinational group may comprise of companies or other forms of undertakings. The typical scenario though is the group of companies, on which the paper is mainly focused.

<sup>22</sup> We may need though to look at other parts of the MEG (that were not necessarily integrated with the rest and not under insolvency) for other issues pertaining to its insolvency, such as the issue of group liability—where the question is whether one member should be responsible for the debts of another (see Mevorach (n 1) 515–19). However, this is outside the scope of this paper.

<sup>23</sup> In conglomerate groups that operate diversified businesses the group structure may be used for various reasons other than the imposition of a single business strategy; however this sort of enterprises may in fact operate in an integrated way through financial and administrative

this does not necessitate that the entities are commingled or very highly interdependent (this type of groups can be referred to as strongly integrated MEGs).

Integrated MEGs may be hierarchically structured with senior decision making centralized, so that the entire enterprise is controlled from a single place (we will refer to those as 'integrated centralized groups'), typically through the parent company. Alternatively, they can operate in a more decentralized manner. It often happens that, when a firm becomes multinational the division of responsibilities and tasks between the headquarters, regional offices and affiliates changes.<sup>24</sup> In cases where the need to coordinate the global activities is important the locus of decision taking remains in the centre, though the role of the head office may change. Instead of the ultimate policy-maker and directing 'brain' the headquarters will act as coordinator and identifier of new business opportunities and the creator of task force networks within the firm.<sup>25</sup> Where the managements of local units need a great deal of local information the locus of decision taking may be largely decentralized to regional offices and/or local affiliates. Nevertheless, even this latter case in which the group is managed through a decentralised operational mechanism can fall under our definitions of integrated MEG if the group components coordinated a single business or were significantly inter-linked. Additionally, certain parts of the group may be centralized (a regional division for instance) while the group as a whole is decentralized.

In any case, if the group was conducted as an integrated one in the ordinary course of business profitable 'cross-entity' insolvency solutions are very likely to be attainable and thus it would be beneficial to operate a joint insolvency process. Whether for the purpose of liquidation or reorganization, it will often be beneficial to link between the separate entities, their assets and businesses 'mimicking' the MEG's 'real' way of conducting the business in its 'golden days' and its operational links. This linkage in the course of the insolvency procedure will broaden the opportunities available to the stakeholders.

Finally, we should clarify which parts of the integrated group will be included in our joint insolvency process and for which we will need to locate the proper forum. Insolvency should receive here a broad interpretation, taking into account the special characteristic of a group and the integration between the relevant members. In fact, integration and insolvency are interdependent in this context. The solvency of a particular entity may be very much contingent upon the financial situation of other group members, to the extent that it is an integrated group. The financial state of a member of a group may jeopardize the financial survival of other affiliates. Liquidation of a particular component may have a damaging effect upon the reputation of the rest of the group. It may also affect the financial viability of the others resulting with a 'domino effect' leading to a total shutdown. Therefore, the insolvent group to which we are referring comprises all those entities that are insolvent or on the verge of insolvency or are likely to enter insolvency following the insolvency of other group members.

In sum, our subject-matter is any sort of MEG, within which we will look for the insolvent integrated parts (for the purpose of centralization and consolidation).

interdependence. (see PI Blumberg, *The Multinational Challenge to Corporation Law: the search for a new corporate personality* (OUP, Oxford, 1993) 144–45).

<sup>24</sup> See Dunning (n 17) 223.

<sup>25</sup> See Muchlinski (n 12) 48.

Non-integrated parts of the group or truly solvent entities will normally be excluded, at least initially, subject to new information being revealed. It should be remembered that an insolvency case is dynamic and further in the process it may appear beneficial to tighten the linkage between the insolvencies.

### III. THE SORT OF VENUE WE ARE LOOKING FOR

After setting the context in terms of the nature of multinational groups we are interested in, we can now proceed to explore the main question of the present study—what will constitute the proper venue (or the ‘home country’) of the MEG in distress? It will be based on the premise set out in the beginning of this paper, that a ‘global approach’ to insolvencies within MEG is a necessity as it will promote key objectives of an insolvency system, on an international scale. We will now examine what sort of standard venue could also correspond with such goals, so that it will fit with the idea of having a system which will promote cost efficiency, fairness, certainty and predictability and prevent, or at least reduce, forum shopping. Obviously these goals have various dimensions; however, we will concentrate here only on those particular aspects pertaining to the issue of jurisdiction. These aspects will be now discussed.

#### A. ‘One Would Be More than Enough’: Looking For a Single Substantial Venue

The goal of enhancing economic efficiency in the handling of the international insolvency of the integrated group<sup>26</sup> dictates that our standard venue will be such that it could refer us to a single location (a ‘group home country’), although we are dealing with separate entities. This way it will be possible to have a unified process to the maximum extent.

The alternative approach of looking for the home country of each related entity separately, currently taken under the EU Regulation (in the lack of specific rules for enterprise groups) may in some cases result with efficient joint administration, when all entities involved share a mutual COMI.<sup>27</sup> However, if the goal is to enable joint proceedings in a variety of scenarios, providing a standard venue for *the group* will be more appropriate. We would then also aim at investigating the entire group at once, avoiding successive filing by those entities that entered insolvency as a result of the situation of other members.

It can be argued that there is an intervention here with the corporate form,<sup>28</sup> as we are looking at the group as an ‘entity’ for the purpose of identifying a venue for insolvency proceedings. However, it should be emphasized that this does not in itself constitute ‘lifting the veil’ or mixing assets and debts of the separate entities, not in the

<sup>26</sup> I refer here to ex post efficiency. That is, the ability of the system to maximize the values of insolvency estates in liquidations and facilitate reorganizations, while minimizing expenses and delays. Ex ante aspects will be discussed below under the ‘predictability’ goal.

<sup>27</sup> That is, the centre of main interests of the debtor company, which is the test adopted in the Regulation for ascertaining international jurisdiction (Article 3(1) of the EU Regulation).

<sup>28</sup> Most pronouly when dealing with enterprises comprising of companies which are linked by limited liability share holding. But, an equivalent problem in regard to ‘network’ enterprises for instance (linked via contracts) could be the interference with the ‘contractual veil’ (on network organizations see in Teubner (n 13)).

common scenario at least. As mentioned earlier, when the entities are not intermingled, the idea—and the ultimate purpose of the process of forum identification—is to consolidate the cases procedurally for coordination purposes, leaving the corporate form of each entity intact.<sup>29</sup>

This will also accord with the concept of applying a vigorous use of the ‘doing of business’ or ‘presence’ criteria of jurisdiction (here in the context of insolvency proceedings for an MEG). Indeed, it has been suggested, with regard to jurisdiction over holding companies in countries where their subsidiaries operate and vice versa (whether creditors of a subsidiary can sue in the home country of the parent) that referring to each company separately or relying on a pure agency relationship might not be the ideal solution.<sup>30</sup> Similarly, a more flexible test should be applied to the case of relationship between affiliate companies in the context of handling insolvency of an MEG. The focus here should be on the economic reality of the relationship between the parent and subsidiaries rather than looking at each company separately.

Additionally, in order to enhance the efficiency and convenience of the handling of the joint insolvency process it should be placed in a location with a strong connection to the various group members. The standard venue should preferably direct us to a place with most of the relevant documentation and information regarding the group affairs, whose laws govern the main contracts of the group business and so forth.

#### *B. A Venue which Corresponds with Legitimate Expectations*

Certain dimensions of the goal of promoting fairness, particularly those aspects bearing on the location of proceedings (in the context of international insolvency) demand that the designated forum will accord with creditors’ legitimate expectations, taking into account the various groups of creditors involved with an MEG. Namely, the local and foreign creditors’ viewpoint, and those belonging to a particular company at hand as well as those related to its affiliates should be considered, appreciating the disadvantageous position any of them may have resulting from being located in a foreign country.<sup>31</sup>

Indeed, creditors’ legitimate or reasonable expectations are recognized as fundamental to the issue of international jurisdiction in which to handle cross-border insolvencies.<sup>32</sup> An insolvency system should aim at enabling creditors to foresee where

<sup>29</sup> See n 4 and accompanying text.

<sup>30</sup> See eg PT Muchlinski, ‘Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases’ (2001) 50 ICLQ 1; LP Kessel ‘Trends in the Approach to the Corporate Entity Problem in Civil Litigation’ (1953) 41 Georgetown L J 525, 526–32; JJ Fawcett, ‘Jurisdiction and Subsidiaries’ [1985] JBL 16; JK Rothpletz, ‘Ownership of a Subsidiary as a basis for jurisdiction’ (1965) 20 New York University Intramural Law Review 127.

<sup>31</sup> Thus, treating the creditors as equals (applying ‘real equality’), in the context of ascertaining the group home country and evaluating creditors’ expectations (see R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge, MA, 2000) for the distinction between formal and real equality).

<sup>32</sup> In the EU context, the EU Regulation stresses that a major factor in determining where the main proceedings of a debtor should be taking place is third party expectations (see Recital (13) of the EU Regulation). The importance of meeting third parties’ legitimate expectations with regard to jurisdiction to open insolvency proceeding was also expressed in numerous EU Regulation cases, see eg *Geveran Trading Co Ltd v Skjevesland* [2003] BCC 209; *Re Daisytek-ISA Ltd*



the insolvency of a company is going to take place and calculate their risk accordingly. Indeed, substantial legal rights (such as the ranking of claims) might be affected by changing the location of the insolvency proceedings of a particular group member,<sup>33</sup> as well as the ability of creditors to participate in a foreign process. However, as we noted, in an international group scenario there are various clusters of creditors involved, and they may be located in different countries. In addition, different creditors may have different interests and different expectations regarding the location in which a certain member's insolvency will be handled. Therefore a desired venue should strive to accord with the aggregate of expectations in relation to jurisdiction in the entire group. Yet, it should be appreciated that not all creditors are capable of anticipating jurisdictional outcomes prior to insolvency, as is the case with involuntary creditors (such as tort claimants). Hence creditors' expectations is only one aspect to consider and balance with other goals and should not be the decisive factor.

### *C. A predictable Venue*

In addition, meeting creditors' expectations in this way should go hand in hand with the goal of producing clear, predictable and transparent rules regarding jurisdiction. It can then increase the chances that different creditors (for example those that belong to different components of the group) will arrive at the same conclusion regarding jurisdiction. Clarity in this sense will also enhance efficiency, as it will reduce jurisdictional battles (litigation over the issue of jurisdiction resulting from vagueness in the rules). The ability to predict where the insolvency of the MEG will take place (and accordingly which laws will apply to the case) is also desirable considering ex ante efficiency that is, the facilitation of investment and lending. Therefore, the designated venue should also be a place easy to identify and to predict, ie the connection between the MEG and the forum should be sufficiently salient and transparent.

### *D. A Real versus 'Surreal' Venue*

We have just mentioned the need for predictability in the context of jurisdiction, yet in global litigation achieving that goal also demands controlling venue shopping at least to some extent. Certainly, at the outset MEGs are able to choose the forum which later on will regulate their insolvency, as they are free to structure their business according to the rules of jurisdiction in the context of insolvency, whatever those rules may be. What the system should nevertheless avoid in the context of groups is MEGs using the separateness between entities to subject the group to a particular jurisdiction to which the group has no real connection, or otherwise subject a particular entity to a jurisdiction to which it has thin connection, by artificially separating it from the rest of the group. The venue choice should have 'group sense' (in terms of the economic reality) so long as we are dealing with integrated MEGs. The system should also be concerned

[2003] BCC 562 (Ch D); *Re Parmalat Hungary/Slovakia*, Municipality Court of Fejer, 14 June 2004; *Ci4Net.com Inc* [2005] BCC 277 (Ch D); *Eurofood IFSC Ltd (ECJ)* [2006] BCC 397, paras 33–37.

<sup>33</sup> If we will subject the subsidiary to the law of the forum, and since presently there is no prospect of achieving unification of domestic insolvency laws.

with alterations of the venue at the eve of insolvency, manipulating the order of filing insolvencies against group members for the purpose of venue choice, and determination of venue based on biased accounts presented to court by either debtors or creditors of any group members. These various attempts of manipulating the venue may be done for the benefit of the group insiders (and perhaps influential creditors) but not other mal-adjusting creditors.<sup>34</sup> It can also increase litigation and affect predictability of the venue. Hence, the venue should reflect a real connection to the insolvent integrated MEG as a whole from an objective point of view and should be one as much as possible not easily manipulable, in particular using the group structure for this purpose.

To summarize, the standard venue should refer us to a single location that reflects a real centre of the group, to which the integrated insolvent group as a whole has connection. At the same time, it is our objective that the designated venue will normally accord with creditors' legitimate expectations regarding jurisdiction for insolvency proceedings (a place which can be regarded as generally foreseeable to voluntary creditors) and that can be relatively easily identified and predicted by relevant parties.

#### IV. 'MEET THE CANDIDATES': ALTERNATIVES FOR A PROPER VENUE

Several possible bases for jurisdiction in the context of insolvency (of single debtors) can be identified. That is, those tests based on the debtor's place of incorporation (or formation, statutory seat or registered office),<sup>35</sup> the location of principal assets of the debtor (or its operations or activities), central administration and control (aspects of management) of the debtor, and centre of main interests (COMI)<sup>36</sup> which is rather vague in its meaning. Evidently, the COMI test is the most prominent one and as such was incorporated into existing models for cross-border insolvencies of single debtors.<sup>37</sup> Its own inherent difficulties of definition and application will be discussed below. Nevertheless it will be suggested that COMI (of a single debtor) may essentially refer to 'central management'. But, first let us consider the other factors (incorporation and assets/activities) as attributions for jurisdiction for single companies.

'Incorporation' as jurisdictional basis for insolvency matters seems to lose its significance, mainly because it might not represent any real connection to the debtor. However, this test still has presence in the debate over the test for jurisdiction (in the

<sup>34</sup> See DA Skeel, 'European Implication of Bankruptcy Venue Shopping in the U.S.' (2006–7) 54 *Buff L Rev* 439, 463, suggesting that if managers are permitted to make a venue choice at the last minute (anticipating insolvency) they may not face the same market discipline they may face if the filing location is determined in advance.

<sup>35</sup> The latter term is used in the EU Regulation (Article 3(1)) and in UNCITRAL Model Law (Article 16(3)).

<sup>36</sup> See n 27.  
<sup>37</sup> The concept originated in the Council of Europe: Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention 1990 Art 4(1)) that never entered into force, but it was subsequently adopted by the working party on the EC Bankruptcy Convention, and then carried through into the EU Regulation as the test for ascertaining international jurisdiction (see IF Fletcher, *Insolvency in Private International Law* (2nd edn, OUP, Oxford, 2005) 321). The UNCITRAL Model Law and the ALI Principles followed and adopted this concept. This already means a widespread use of the COMI concept, within and outside Europe, as the UNCITRAL Model Law has already been recognised and adopted by a substantial number of countries around the world (including recently the US and the UK).

national and international contexts), and in current international insolvency regimes. Perkins for instance argues that if a company's place of incorporation will determine its home country it would result in a clear rule that would avoid protracted disputes about the debtor's principle place of business and will enhance predictability *ex ante*.<sup>38</sup> Yet, though it is true that incorporation can be certain and predictable (at least if there is sufficient transparency of the information), it may lead us to a place with no real connection to the debtor, thus defeating *ex post* efficiency.<sup>39</sup> Under the EU Regulation it is presumed that the company's place of registered office is the COMI.<sup>40</sup> Similarly, the UNCITRAL Model Law adopts this presumption when designating the country of 'main proceedings'.<sup>41</sup> However, under these regimes incorporation is not a stand alone basis for jurisdiction. The presumption can be rebutted under the EU regulation if there is proof that the COMI is located in some other Member State.<sup>42</sup> That is, it is accepted under these regimes that such formalities as the place of incorporation are not determinative in ascertaining the venue for the insolvency process, but rather functional realities are key factors.<sup>43</sup> Indeed, several EU Regulation cases showed that judges tend to give lesser weight to the incorporation presumption. For instance, in the case of *Ci4net.com*<sup>44</sup> incorporation was only one of many factors that were considered. It was not regarded as a decisive or predominant factor in determining the COMI.<sup>45</sup> On the other hand, it was recently emphasized by the ECJ in the *Eurofood* case,<sup>46</sup> that substantial evidence is needed in order to rebut the presumption of incorporation.<sup>47</sup> And,

<sup>38</sup> L Perkins, 'A Defence of Pure Universalism in Cross-Border Corporate Insolvencies' (2000) 32 NYU J Intl L & Policy 787, 815. See also Skeel (n 35) 463 (arguing that a rule that will require companies to file for bankruptcy in their place of incorporation can resolve distortions that may occur as a result of the mismatch between company and insolvency law, and it will also make the venue more certain and less manipulable).

<sup>39</sup> See also Westbrook, 'Locating the Eye of the Financial Storm' (2006–2007) 32 Brook J Intl L 1019, 1032 persuasively arguing that incorporation as a strong factor for ascertaining jurisdiction may have the effect of permitting bankruptcy havens to serve as the chosen jurisdiction, which may lack sufficient transparency and acceptable outcomes.

<sup>40</sup> Article 3(1) and Article 3(2) of the EU Regulation.

<sup>41</sup> See the definitions of 'foreign main proceeding' and 'foreign non-main proceeding' in Article 2 of the UNCITRAL Model Law.

<sup>42</sup> Article 3(1) and Article 3(2) of the EU Regulation.

<sup>43</sup> Under the EU Regulation and the UNCITRAL Model Law incorporation is also not a relevant link for the purpose of opening a secondary or 'non main' proceedings. Westbrook has commented that it makes little sense to subject an insolvency process to the laws of a particular country merely because the company registered there even though the actual commercial life of the company was centred elsewhere (JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 American Bankruptcy L J 457, 486). Within the domestic arena it is interesting to note the American National Bankruptcy Review Commission recommendation to delete place of incorporation as a sufficient basis for venue in domestic bankruptcy cases (National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* (1997) 770, 783). However, the American Bankruptcy Abuse Prevention and Consumer Protection Act 2005 omitted any amendments to the bankruptcy venue statute (see CJ Tabb, 'Courting Failure—The Effects of Venue Choice on Big Bankruptcies' (2006 National Bankruptcy Review Commission 2007) 54 Buff L Rev 467, 478 indicating that the senator of Delaware 'killed' any venue amendments).

<sup>44</sup> *Ci4Net.com, Inc* [2005] BCC 277 (Ch D).

<sup>45</sup> See also R Tett and N Spence, 'COMI: PRESUMPTION, WHAT PRESUMPTION?' (2004) 17 Insolvency Int.

<sup>46</sup> *Eurofood IFSC Ltd (ECJ)* [2006] BCC 397.

<sup>47</sup> The exemplifying scenario given is that of a 'letterbox' company not carrying out any business in the country of the registered office (*ibid* paras 34–35).

as has been commented by professor LoPucki<sup>48</sup> ‘bankruptcy havens’, in which companies chose to incorporate but hold no significant business, still play a role in multinational insolvencies.<sup>49</sup>

Another alternative for determining jurisdiction is the assets-based test (or any test based on amount of activities, number of creditors etc). This test for jurisdiction is clearly flawed, mainly as it lacks robustness. Whereas in some specific circumstances it is easy to ascertain that most or all of the debtor’s assets or activities are in a particular country, in many other circumstances this would hardly be the case. Assets and activities may be spread among countries with none of them having a clear majority. In addition, some assets could be of mobile nature and even be outside the boundaries of any country.<sup>50</sup> The need to measure and weigh between quantities entails high level of complexity which makes the venue unpredictable and prone to manipulations. Basing jurisdiction on amount of assets would also be problematic as this test could only be used when insolvency breaks (that is, it has little relevance if tested beforehand as it reflects a dynamic feature in a life of a company) therefore its outcome could not be predicted *ex ante* by definition.

So far we have considered those tests in the context of a single debtor. However, when dealing with a group scenario applying either the incorporation test or the assets-based test to determine the proper venue is even less suitable than in the single debtor case. As aforesaid, the incorporation test focuses on form rather than substance, therefore may only be fiction, ‘surreal’. The test is even more dubious for corporate groups. The Incorporation test applied to groups will inevitably preclude any global consideration. The place of incorporation may be different for each entity comprising the group, since we are dealing with a multinational enterprise whose entities are spread among various countries. Keep in mind that one of our goals is to find a single focus-point of the entire group, so as to promote cost efficient results. However, MEGs are not incorporated as such in a particular country so there is no single country that can be identified as the place of incorporation of the group. One obvious improvement could have been referring to the place of incorporation of the parent company of the MEG which will no doubt improve predicatability. However, this will bring us back to the problem of the inefficiency of having the process handled in a place with no real connection to the group entities. For instance, the parent can be just a holding company

<sup>48</sup> LM LoPucki, *Courting Failure How Competition for Big Cases Is Corrupting the Bankruptcy Courts* (University of Michigan Press, Ann Arbor, MI, 2005) 193–200.

<sup>49</sup> In the case of *ICO Global Communications*, for instance, the English court recognized a US reorganization plan of an essentially English corporation although it had little presence in the US, mainly because the plan was also approved by the Cayman Islands and Bermudan courts in which several companies of the ICO group were incorporated (Ibid 197–99). In the *SphinX* case, a US chapter 15 case (chapter 15 replaced s 304 to the US Bankruptcy Code and is based on the UNCITRAL Model law), the US court recognized Cayman Islands liquidations as non-main proceedings, although there was no economic activity there (necessary in order to show there was an ‘establishment’ as the basis for identifying non main proceedings) (In re *SphinX* 351 BR 103 (Bankr SDNY. 2006)) (D (US))). But, see the decision in the case of Bear Stearns, where the court refused recognition of insolvency proceedings opened against two Cayman Islands’ hedge funds incorporated there since no operation has taken place in that jurisdiction (In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd 374 BR 122 (Bankr SDNY 2007)). The decision is under appeal.

<sup>50</sup> See LoPucki, *Cooperation* (n 5) 716 (giving the example of assets which were leases in satellites orbiting the earth).

with no significant operations, workforce or management. An insolvency process against a whole group would then be handled or supervised from a place where the group had no presence whatsoever apart from a 'letter box'.

In contrast, the assets based test has the capability to apply to the entire group. In principle, the assets of the entire group could be quantified. However, in practice this may prove a Sisyphean task. Individual group's members may each have its own principal asset or operation location with no clear mutual locus for the entire group. Furthermore, trying to identify a single place as the centre of gravity by summing up the entire group's assets or operations and the proportionate part located within the various entities (measuring quantities on a group scale) would require a costly operation which will result in debatable outcomes. As aforesaid, it will be difficult to identify the place in which most of the assets of a single debtor reside, and to predict in advance what will be the evaluation of a future court in this regard. On a group scale where, for instance, the entities comprising the group were handling a variety of different operations and accordingly owned different sorts of assets or had different kinds of activities predicting the group's centre of gravity in advance would be equivalent to guesswork. Therefore, in principle, these sorts of test at least as stand-alone standard are problematic when confronted with insolvency goals in the group context.

The concept of COMI is based on the idea that the proposed place for opening proceedings should be the one to which the debtor is substantially linked.<sup>51</sup> In this respect, as aforesaid, incorporation is only a presumption, and the mere presence of assets in a particular country is insufficient.<sup>52</sup> In essence, this suggests that courts should look for the centre of the actual main interests of the debtor; however, the exact meaning of such a centre is somewhat vague. Indeed, the EU Regulation does not define what the COMI of a company is. *Prima facie*, a COMI could be identified according to operations (or location of most assets) or otherwise it could be based on aspects of management.

Nevertheless, both the Report Virgos/Schmit and the Recitals to the EU Regulation<sup>53</sup> stress that the COMI should be at the place where the debtor conducts the administration of his business on a regular basis and that it should be ascertainable by third parties.<sup>54</sup> Interpretations of the COMI concept embedded in the UNCITRAL Model Law have also suggested that it directs courts to consider the country where the

<sup>51</sup> See IF Fletcher, 'The European Union Regulation on Insolvency Proceedings' [2003] *INSOL INTERNATIONAL*, Cross-Border Insolvency, 15, 25–26.

<sup>52</sup> It is also not enough in order to open a secondary process (see Report Virgos/Schmit (1996) [hereinafter: Report Virgos/Schmit]), which indicates that an 'establishment' requires a certain amount of organisation and stability. Hence, few assets in the country will not suffice for an international jurisdiction).

<sup>53</sup> The two main instruments for interpreting the EU Regulation.

<sup>54</sup> Report Virgos/Schmit; Recital 13 of the EU Regulation. See also Virgos, *The 1995 European Community Convention on Insolvency Proceedings: an Insider's View*, in: *Forum International*, No 25, March 1998, 13, noting with regard to the need that the place will be ascertainable to third parties that 'the place where the debtor conducts the administration of his business and centralizes the management of his affairs (eg contractual and economic activities with third parties) satisfies this requirement; not the place where the assets, whatever their value, are located, not the place where the goods are manufactured (eg the place of industrial establishment, etc)'. See also G Moss and Christoph G Paulus, 'The European insolvency regulation—the case for urgent reform' (2006) 19 *Insolvency Int 2* (suggesting optional definitions to COMI that focus on head office functions).

debtor's headquarters are located as the country of main insolvency proceedings.<sup>55</sup> The rationale underlying the incorporation presumption discussed above is also derived from the (not necessarily correct) assumption that normally the registered office of the company will accord with the actual head office.<sup>56</sup> However, as the idea is to look for actual place of main interests and not to be satisfied with a place of incorporation, if the actual headquarters are located in a different place than the registered office then the former should prevail.<sup>57</sup> Therefore, it seems that in essence, these models seek to look for the real place from which the business of the debtor was managed- an operational headquarters rather than a façade of headquarters, such that can be ascertainable by third parties. A substantial top-tier management is supposed to be in the chosen venue along with the central administration of the debtor.

#### V. GROUP COMI

Since our aim is to identify a single location and preferably place all proceedings of the group's members (which are under insolvency) there, it is suggested to use the concept of a COMI for a debtor in the MEG scenario as well. That is, to identify the COMI of the group as a whole and to use this location as the proper venue for handling (or supervising) the MEG's insolvency proceedings.

However, in order to enhance predictability and control forum shopping the concept of COMI should be further refined to make it more precise and less manipulable, particularly in the context of groups. As was evident from the above discussion central administration has a significant role in the application of COMI. I would argue that this will also prove effective for the case of groups.<sup>58</sup> Using the 'headquarters criterion' (or the main place of administration of the debtor's affairs) in the group case will enable identification of the place of command and control of the integrated centralized group (we will address the scenario of decentralized groups within the next section). That is, the place from which the business as a whole was actually controlled. Subsidiaries are generally directed and managed from headquarters of the group enterprise. The headquarters may be viewed as the brain and nerve centre, while the subsidiaries are the limbs.<sup>59</sup> Hence, the headquarters reflect the 'meeting point' for the various entities. The head office criterion should be the main 'connecting factor' for group venue, and it should be identified considering the group as a whole looking at the group as an entity for the (limited) purpose of forum identification.

<sup>55</sup> See Memorandum from Jay L Westbrook to the National Bankruptcy Review Commission (29 July 1997, in National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* (1997), app E-1 at 7.

<sup>56</sup> See Report Virgos/Schmit. <sup>57</sup> This interpretation of a 'company's place of business' (in the EC 13th Directive) has been recently used by the ECJ (Planzer Luxembourg sarl [2007] ECJ, C-73/06, para 63). The court stressed that a 'company's place of business' should mean the 'place where the essential decisions concerning its general management are taken place and where the functions of its central administration is exercised'.

<sup>58</sup> Subject to certain limitations, as will be elaborated in section VI. This concept has been also mentioned elsewhere, see eg Mevorach (n 1) 471-478; G Moss, 'Group Insolvency - Choice of Forum and Law: the European Experience under the Influence of English Pragmatism' (2007) 32 *Brook J Int'l L* 1005.

<sup>59</sup> See C Tugendhat, *The Multinationals* (Eyre and Spottiswoode, London, 1971) 22-23.

Having a decisive factor will then resolve situations where different connecting factors direct us to different countries. Thus, in a case such as *BCCI*,<sup>60</sup> where factors point out to different directions (in *BCCI* the parent company was incorporated in Luxemburg with a 'brass plate' headquarters there, the group's assets were spread around the world and operational headquarters were based in London) the country of principal proceedings should be that in which the actual headquarters were located.<sup>61</sup> It would not be accurate to assert then that the *BCCI* case demonstrates the impossibility to identify a single 'home country' for a distressed corporate group,<sup>62</sup> but rather it shows that there should be a clearer standard for an acceptable centre. In most cases, once adopting a clear criterion a single centre will be revealed.

Senior decision-takers may typically be concentrated around the parent company, though in fact they may have operated in a different location than that where the parent was incorporated or had business. The parent can be incorporated in one place or have activities in a particular country while the operational headquarters of the group are located elsewhere.<sup>63</sup> Moreover, the parent entity may actually be just a holding company with no significant operations or workforce. It could also be outside the insolvency process if it is solvent. Therefore, focusing on the parent entity as representing the group centre can be unhelpful. It should be also emphasized that the headquarters we are looking for are not necessarily those in relation to the entire group which has in its top the *ultimate* parent company. When a debtor or a group of debtors file for insolvency the first step to take is to identify the integrated collapsing MEG to which they belong (which may also have on top of it other entities not integrated with it or not under insolvency) and only then to locate the COMI of this specific group.<sup>64</sup> It should be noted that, if a consistent approach will be taken for identifying the COMI of single companies, using the head office criterion as main factor, then separate decisions about debtors' COMI will normally fit with the identification of the group COMI in those scenarios of centralized groups. Considering the group as a whole when determining the venue, will then only serve as reinforcement to the decision to locate the entities' COMIs in one place, and will reduce quarrels over jurisdiction. It should also be reminded that the approach we take here is not of the 'one-size-fits-all' type, and alternative solutions are needed to answer the demands of the particular scenario. Thus, in certain circumstances the headquarters' location might not be the place in which all

<sup>60</sup> *Re Bank of Credit & Commerce International SA (No 10)* [1997] 2 WLR 172 (Ch 1996).

<sup>61</sup> Indeed, commentators expressed the opinion that England was the actual centre of interests of the *BCCI* group although the main proceedings against the group took place in Luxembourg (see eg Fletcher (n 51) 37).

<sup>62</sup> An opinion expressed in *LoPucki, Cooperation* (n 5) 713–15.

<sup>63</sup> In the case of *Crisscross* for instance, the actual headquarters of the group were in London at the place of incorporation of one of the group's subsidiaries but not of the parent company (*Crisscross Telecommunications Group, Re* (unreported, 20 May 2003) (Ch D)). In the case of *BCCI* the parent company was incorporated in Luxemburg whereas the actual headquarters were apparently in London (see *Re Bank of Credit & Commerce International SA (No 10)* [1997] 2 WLR 172 (Ch 1996)).

<sup>64</sup> See, for instance, the case of *Brac (Re Brac Rent-A-Car Inc)* [2003] BCC 248 where the European operations were in a virtually independent cluster. See also *Collins & Aikman* corporation group [2005] EWHC 1754 (Ch D) in which after the filing of chapter 11 proceedings against the ultimate parent located in the US, the European operations were controlled via headquarters in the UK.

proceedings of all subsidiaries are to be handled, as will be elaborated in the next section.

Relevant circumstantial pieces may assist in locating the operational headquarters of the group. This includes: the location where executive meetings were taking place, and where the financial affairs were directed; whether this management had the authority to direct or coordinate the global business (the various activities of the group companies throughout the world); whether the registered office or another head office is actually the address of principal executive offices or whether it is only a 'post box', and whether the majority of the administration functions of the companies were conducted from this place; whether commercial policy was decided at this location; whether key contracts were subjected to that jurisdiction's laws. This is by no means an exhaustive list, but it presents several aspects that can usually hold in the identification of place of central control over an integrated group.

Bearing in mind possible errors in locating the COMI, and that there may be difficulties on collecting all needed evidence (when we consider a group operation that may involve numerous entities) at the onset of the proceedings; the standard venue should incorporate means of correcting error. Namely, it should be possible to transfer the jurisdiction of the principle process to the appropriate forum, though this possibility should be carefully used, as it may have implication on the legal regime that will be applied and may involve significant additional costs. Especially when proceedings are already underway such change should only involve subjecting local proceedings to the supervision of main jurisdiction rather than altering the locus of the proceedings altogether.

The merits of the 'operational headquarters' criterion as the primary manifestation of group COMI is now apparent. It enables identification of one common place for the group as a whole, which also represents a real connection to the entire enterprise. This can therefore accord with the aim of enhancing cost efficiency (avoiding multiple processes or uncoordinated ones) and reducing forum shopping. The 'head-office criterion' is not formalistic (as is the incorporation test), but rather is based on functional realities of the group business. It can therefore disregard strategic planning by looking for the place from which the business as a whole was actually managed. Conscious of being able itself to be the subject of manipulation the COMI test should be applied while ignoring cynical attempts to move this centre when anticipating insolvency<sup>65</sup> and by taking an objective point of view when ascertaining jurisdiction as will be elaborated herewith. The registered office as a key connecting factor is therefore unhelpful at least in the context of groups, and even only as a presumption (as contained in the EU Regulation and the UNCITRAL Model Law, for single debtors' COMI). It focuses on formalities and on the separate entities which may be incorporated in different countries.

Ascertainability to third parties is another component of COMI as it currently interpreted,<sup>66</sup> and it was also identified above as one of the main goals a proper venue (in the context of groups) should strive to achieve. Though, as argued this should not be a separate stand alone limb of the test as in any case not all creditors are able to foresee the location of insolvency proceedings (for example involuntary creditors) no matter how hard we try. It is suggested that the functional test that refers to central

<sup>65</sup> See also Mevorach (n 2) 484.

<sup>66</sup> See n 31 and accompanying text.



administration of the group is more likely to accord with creditors' legitimate expectations (comparing to the other alternative tests). It targets the main proceedings at the actual meeting point of the enterprise in accordance with the way it was handled in the normal course of business including the way it had dealings with creditors, and it does not involve the need to 'weigh' between amounts of operations or assets in different states, thus it is relatively clear and grounded on objective factors. However, in order to further ensure that all expectations will be focused on this single location, the functional test should be combined with a disclosure mechanism, i.e. an obligatory publication of the group COMI by the relevant companies. This information will then become available to (voluntary) creditors, ex-ante, and so will enable clear prospect of the location of proceedings (in case insolvency will occur). It may also be backed by an externally certified, systematic confirmation of the correspondence between claimed COMI and the ongoing realities, dependent upon some annually occurring process such as the audit.<sup>67</sup> Courts determining the proper venue will be able to initially rely on the COMI published by the group, unless there was convincing proof that the debtor was 'living a lie' (for instance for the purpose of enjoying the advantages of the bankruptcy haven in which the COMI had been stated to be). In such a case the court will make use of other evidence related to the organizational structure of the group (which is in any case simpler to collect and evaluate than engaging in sophisticated calculations etc.) to identify the place of command and control over the group. Most importantly, the idea of considering the group as a whole when determining venue will mean having a global look and taking an objective viewpoint when examining COMI on a group scale, considering the position of connected affiliates and their creditors. This will include having regard to interests of creditors not present in court as they may have not been able to participate in a foreign remote process. This stands in the core of the fairness goal in the context of jurisdiction of groups as identified above. It is also crucial for the goal of tackling forum shopping, as it avoids resting solely on subjective accounts of either creditors or debtors regarding jurisdiction presented to local courts and it takes into account the situation of all relevant entities even those not having filed yet for insolvency.

The ECJ judgment in *Eurofood*<sup>68</sup> implies a different approach. This was part of the Parmalat saga, and involved a 'jurisdictional quarrel' among the Italian and Irish courts over one of Parmalat's subsidiaries. The ECJ held that Ireland had jurisdiction over that subsidiary (as Eurofood was Irish in the sense that it was incorporated in Ireland and creditors viewed the companies' centre as being located in Ireland) not Italy, where the parent and the group operational headquarters were located. The ECJ was more concerned at looking at factors relating to the particular subsidiary than at locating a place common for the entire group. It seems that at the core of this decision lays an 'entity' approach (strict adherence to the notion of separation between companies comprising groups), thus the interrelations among group members receive little consideration. Though the court has not disqualified 'parental control' over a subsidiary as a relevant factor in determining the proper jurisdiction, the focus was on the whereabouts of the registered office and operations of the particular subsidiary.<sup>69</sup> This approach was

<sup>67</sup> And accompanied by suitable sanctions (aimed at compensating the creditors) in case of false representation of the COMI against those responsible for enabling the company to perpetrate such a deception.

<sup>68</sup> *Eurofood IFSC Ltd (ECJ)* [2006] BCC 397.

<sup>69</sup> *ibid* paras 26–37.

followed by the Dutch court in the case of *BenQ*.<sup>70</sup> The court took jurisdiction over the parent company of that group based on the fact that the company had its registered office in the Netherlands and it performed some activities there, knowable to third parties, notwithstanding the fact that the group was managed from Munich. Evidently, this 'Eurofood approach' may tend to put significant weight on the test of incorporation,<sup>71</sup> which is a rather obstructive element of COMI especially in the group context, as mentioned above. It also emphasizes 'ascertainability to third parties' but without taking into account the nature of the group and what creditors' expectations should mean in this respect. Perhaps not surprisingly this demonstrates the importance of the taking a global view point, as such an approach is not supplied within the Regulation.

However, a close inspection of numerous cases both within and outside the EU (pre and post *Eurofood*), involving MEGs, reveals a tendency to try and place proceedings of group members in the jurisdiction in which the management and control of the group was situated. In *Crisscross*,<sup>72</sup> for instance, the actual headquarters of the group were located in England. The English High Court placed all the companies under insolvency in England based on the finding that each of the separate companies had its COMI there, although subsidiaries were incorporated in different countries. In *Re Parmalat Hungary/Slovakia*<sup>73</sup> the Hungarian court based his decision to open main proceedings against the Slovakian subsidiary of the Hungarian parent company in Hungary mainly on the fact that the financial affairs of the subsidiary were directed from Hungary and the main decisions were taken from there.<sup>74</sup> In the case of *Bramalea*, a United States–Canadian group of companies,<sup>75</sup> Canada was the jurisdiction supervising the reorganization. Although the day-to-day operations of US affiliates were carried out and managed locally, strategic decisions were likely dealt in Toronto, where the group's head office was located.<sup>76</sup> Another example is the *Energotech* case,<sup>77</sup> where a Polish subsidiary was placed under insolvency in France where the headquarters of the parent were located and as the subsidiary was dependant on its parent (i.e. it was an integrated group).<sup>78</sup> This tendency of courts to place insolvency proceedings of related companies

<sup>70</sup> *BenQ Mobile GmbH & Co OHG* [a trading partnership] and *BenQ Mobile Holding BV*, Docket No 1503 IE 4371/05 Munich, 5 February 2007.

<sup>71</sup> The decision is somewhat mitigated in this respect by the subsequent decision of the ECJ in *Planzer Luxemburg Sarl* ([2007] ECJ, C–73/06). In interpreting the meaning of place of company's business (in the 13th EC Directive) the court explained that primary factors are the registered office but also the place of the company's central administration and other factors (and it refers by analogy to the decision in *Eurofood*). The case was not concerned though with the corporate group complications.

<sup>72</sup> *Re Crisscross Telecommunications Group* (unreported, 20 May 2003), Ch D.

<sup>73</sup> *Re Parmalat Hungary/Slovakia*, Municipality Court of Fejer, 14 June 2004.

<sup>74</sup> It also examined whether the designated forum was ascertainable by third parties.

<sup>75</sup> An unreported case in the Ontario Court of Justice (for a description and discussion of the case see R Gordon Marantz, 'The Reorganization of a Complex Corporate Entity: The Bramalea Story' in JS Ziegel (ed), *Case Studies in Recent Canadian Insolvency Reorganizations* (Carswell, Toronto, 1997)).<sup>76</sup> *ibid* 17–18.

<sup>77</sup> *Energotech SARL* [2007] BCC 123.

<sup>78</sup> Proceedings of affiliated companies were also placed at the location of main decision making in other EU Regulation cases, such as *Daisytek* (*Re Daisytek–ISA Ltd* [2003] BCC 562 (Ch D)); *Cirio Del Monte* (*Cirio del Monte* (Italian court of Rome, August, 2003) (unreported)); *Hettlage-Austraia* (*Amtsgericht* (Munich) (*Hettlage-Austria*) (unreported, 4 May 2004) (Germany)); *Collins & Aikman* corporation group [2005] EWHC 1754 (Ch); *Eurotunnel Finance Ltd* (*Tribunal de Commerce de Paris*, 2 Aug 2006) (unreported); *MPOTEC GMBH* (*Tribunal de*

at the state in which they were all managed correlates with the idea of looking for the centre of main administration of a debtor and it provides the opportunity to place all the proceedings of the group's members in one place which reflects a connection to the group as a whole.

In sum, the place from which the group affairs were managed and operationally controlled reflects most suitably the heart and core of the integrated centralized enterprise, its centre and meeting point. Hence, it can be regarded as the place of strongest connection to the group as such. It would also be the easiest to identify (and to predict) as the future jurisdiction for insolvency proceedings of the integrated group. It would also accord with the true way in which the business has been operated prior to its fall. Therefore, this is an efficacious test that can fulfil the various goals of an international insolvency system, and assist in applying an effective global approach.

#### VI. LIMITATIONS TO THE 'HEAD-OFFICE' CRITERION

As was evident from our discussion at the outset of this paper on MEG operational structures, the scene of MEG insolvency is very much diversified. Therefore, it is ill advised to treat the MEG as a single and unique scenario. Rather, it may take many forms and shapes. Hence, it is necessary to ascertain when the tools and tests proposed (particularly our 'head-office' criterion) are appropriate and when they are less so.

##### *A. 'Balance of Connections'*

There may be a particular scenario (a 'hard case') in which although the head office of an MEG is in a certain country and it is real and operational, all the subsidiaries are located in another country, together with all the creditors, assets and operations of the group. In this situation the nexus to each of the two jurisdictions may be actually equal, even when looking at the group and its stakeholders as a whole. To illustrate, if all the subsidiaries of a group are incorporated in France, the bulk of assets is there and all creditors are there, however the operational headquarters is in Germany, then there is a case to look at France as an appropriate venue for the group's insolvency as well, as the German headquarters are in fact 'isolated' (although not a façade) and as all other factors lead to France (so that it is almost a case of a (French) domestic group).

It will be sensible in such scenarios to equip courts with further discretion to defer to the proximate jurisdiction to which the group has many connections. Perhaps an even more appropriate approach to these cases is to decide on a parallel process, conducting insolvency proceedings in both countries, while considering the entire circumstances of the case. The court may take into account any agreements the parties may have reached regarding the jurisdiction to assist in the decision. It should be emphasized though, that this is a scenario very different than the cases where the constituent companies are spread in a number of countries; assets are located in various places and

Grande Instance, Nanterre [2006] BCC 681 (Fr). See also, G Moss and M Haravon, 'Building Europe — the French Case Law on COMI' (2007) *Insolvency Intelligence*; Moss (n 58) (demonstrating the wide adoption in Europe of 'English Pragmatism'), ie placing proceedings of related companies in the place of the head-office to facilitate centralization of group insolvency proceedings).

so on. Then, the headquarters, as aforesaid, are certainly the best factor connecting the group to a single venue.

The case of *Maxwell*<sup>79</sup> may demonstrate a scenario of such a 'balance of connecting factors'. The *Maxwell* group had most of its important subsidiaries located and managed in the US but on the other hand the parent company was incorporated in the UK and the UK was the financial and governance centre of the entire group. Indeed, from the point of view of the relevant courts, both the American and the UK court believed they had an interest in handling the case.<sup>80</sup> Although it can be convincingly argued that the English court should have been the designated venue as the place of central administration,<sup>81</sup> there is also a strong case in favour of the US jurisdiction where all the substance of the group business was located. The approach that was taken in this case—that is, using 'parallel' process and inter-court collaboration therefore made sense.<sup>82</sup> It can be conceptualized that it was a way to imitate the economic reality of this particular scenario (the actual strong connections the group had to these two places in a rather equal manner), therefore it was efficient and met creditors' expectations. In such instances the idea of direct communication can assist in preventing jurisdictional 'battles' and jointly agree on the suitable way to administer the case.<sup>83</sup>

### B. Decentralized Groups

It was mentioned earlier (when considering what constitutes an MEG) that in certain circumstances, although the enterprise at hand (the insolvent MEG) is integrated it may have a decentralized operational structure, with self-standing units of decision-takers. The question is whether the headquarters criterion (applied to groups) can fit with this scenario. It is suggested that it is. The headquarters criterion is suitable for such operational structures as well, only now the proper venue may assume a somewhat different role. This time, looking at the head office's location as the centre of coordination (rather than centre of control) and designating the venue as holding the principal insolvency process. However, as divisions of the group were managed as autonomic units it may mean that the relevant entities will have strong mutual connections to the local management in terms of the way creditors dealt with the entities, the applicable law, the availability of information etc. To achieve efficiency and meet reasonable expectations, local insolvency proceedings against local subsidiaries can then be opened in the place of the regional head-office or main management of the particular subsidiary (the subsidiary's separate COMIs), while still referred to one insolvency

<sup>79</sup> *Maxwell Communication Corp* 170 BR 800 (Bankruptcy SDNY 1994); *Maxwell Communication Corp* (1993) 1 WLR 1402 (Ch 1993).

<sup>80</sup> See also Ziegel (n 4) 379.

<sup>81</sup> See JL Westbrook, 'The Lessons of Maxwell Communication' (1996) 64 *Fordham L Rev* 2531, 2538.

<sup>82</sup> See Ziegel (n 4) 379.  
<sup>83</sup> See eg the use of such tool in the case of *Cenargo* (*Re Cenargo International plc* 294 BR 571 (Bankr SDNY 2003); *Cenargo* (*Re Norse Irish Ferries & Cenargo Navigation Limited* (unreported, 20 February 2003)). There, the 'battle' over jurisdiction has been solved by the respective judges (from the US and the UK) holding a conference call in which they agreed a number of key jurisdictional differences. See also court-to-court communication that took place recently 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, 5 February 2007).

venue having the supervisory role over the entire process. As explained previously, in the 'coordinated groups' the head office coordinates the entire operation (whereas in the centralized MEGs the head office is the ultimate policy-maker and directing 'brain') with the subsidiaries having significant autonomy in their management. Hence, though the role of the headquarters is operationally different it still reflects the meeting point of the various companies and the most significant connection the integrated group as a whole has to a particular place. Here as well, the headquarters test (in its specific characteristic as coordinator and supervisor) will accord with the way the business was actually operating. The same idea applies to those 'mixed' scenarios where the entire group is coordinated via a global headquarters, though there are centralized regional sub-groups. Each of these independent (to some degree) units can be handled centrally at the venue of their head office, while maintaining the linkage to the ultimate coordinator, if the latter was part of the integrated collapsing group. Of course if there is only one such sub-group (and no global operation to coordinate) then the local centralized process will suffice.

### *C. Where There Is No Single Centre of Control or Coordination*

In certain scenarios the MEG may have had more than one head office managing the group operations. The business may have been split organizationally, and controlled via two (or several) sets of managements. Or, the group may have been structured in a way that there was no single entity exercising control over subsidiaries, but rather more than one parent that actually controlled the group, via separate headquarters. We mentioned earlier trans-national mergers in which two or more parent firms integrate their business operations and jointly hold a company. This could be done for instance in an international joint venture where two or more parents from different countries cooperate to pursue a commonly commercial activity. Another example is a 'twin holding structure' where two parent companies transfer the operating activities to subsidiaries that may be jointly owned and controlled by the holding companies.<sup>84</sup>

Thus, instead of having one 'head' and 'brain' controlling or coordinating the entire group (in its ordinary course of business), there are in fact two (or more) heads for the enterprise. This may actually represent a non integrated group, however to the extent that the different headquarters coordinated the management of the group to create a single group business,<sup>85</sup> a unified approach will be beneficial and it will be advantageous to place the related companies' insolvencies in a single place or to have them all coordinated by a supervisory authority. However, in such scenarios, the headquarters criterion may not be easy to use for locating the appropriate venue to handle the insolvency proceedings against the group. The alternative tests based on location of assets and activities, whereabouts of creditors, and where the companies were incorporated (that normally should be regarded 'second best') should receive in such circumstances a greater role, for the purpose of identifying the centre of gravity. It may be possible to point to one of the 'heads' as the centre, with the major volume of assets and activities on the group level and/or incorporated entities and so forth located there.

<sup>84</sup> See Muchlinski (n 12) 59–60.

<sup>85</sup> See, for instance, the case of the Unilever group in J Keir, 'Legal Problems in the Management of a Group of Companies' in CM Schmitthoff and F Wooldridge (eds), *Groups of Companies* (Sweet and Maxwell, London, 1991).

However, those tests are difficult to apply, here too a parallel process might be adequate. That is, conducting two or more main proceedings to coordinate the group insolvency in the location of the headquarters. It may actually imitate the economic reality of the group (in its ordinary course of business) more accurately, and again will use the same standard venue (although duplicated). Indeed, if the latter is accompanied with effective means of communication as mentioned above it can still achieve a significant degree of coordination.

#### VII. CONCLUSIONS

The question of the 'appropriate venue' is essential when applying a global approach to insolvencies within MEGs which strives to fulfil insolvency goals by linking between the allegedly disjointed. This was the incentive for the search for a standard test for group venue. Although several such tests were suggested previously in consideration of a single multinational debtor it is increasingly accepted that the idea of Centre of Main Interest is the most appropriate one for the single debtor case. Implementing the concept of COMI to the MEG scenario through the use of the 'head-office' test as the embodiment of COMI we can end up with the best efficacious test for identifying the proper venue. This standard test enables to locate one common venue for a group (either common coordinator or a venue in which to place all proceedings); it is likely to accord with creditors' legitimate expectations especially if combined with disclosure mechanisms; it is relatively clear and objective and it could prove effective in handling forum manipulations. However, we must also realise its limitations and accommodate those specific cases when this test might not be practical or appropriate, at least not to its full extent. Certain MEG structures may suggest using alternative tests to locate the centre of gravity, or where this is unattainable, achieving coordination while having a parallel process.

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